

THE UNIVERSITY OF HULL

Islam, Democracy, and Human Rights: can universal human rights be
applied in our relativistic world?

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by

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Abstract

This study mainly focuses on the compatibility of the international human rights with the diverse cultural and religious values of our world, in particular, the Islamic Shari'ah, consisting of values that not only extend across different regions but even form an important factor of legitimacy for most Islamic states.

The study will extensively discuss the international conception of human rights and whether such rights are universal in character and hence applicable to all societies irrespective of their local values, or whether their local values are to a certain degree inevitable to establish real universal human rights with full realization of their essence. It will raise some religious and cultural matters that could form obstacles to the full realization of human rights, such as the complexity of the implementation of human rights under Islamic Shari'ah. It will also refer to traditional values and principles of the British common law, in which Parliament is the sovereign body accorded unrestrained power, which seems to pose the same difficulty that Islam could cause in human rights implementation. The study will demonstrate that the cultural tension with human rights is not exclusive to a certain culture but it is a result of the variety of diverse traditions of different nations that form our relativistic world. The study will suggest that although some of the local values of certain societies may raise tension with the principles and values of the current international trend of human rights, this does not mean that these local principles and values must be changed to comply. Rather, it may more appropriately be suggested that this developing notion of human rights should be reconsidered to make universal rights more universal and not relative to a certain regional part of the world.

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Chapter One

I. Introduction

I.1. Identifying the Research Question

The emergence of human rights law in the international sphere has unprecedentedly challenged the traditional international principle of state sovereignty.¹ As will be seen later, international law doctrine, in matters related to human rights protection, goes beyond the principle of non-interference articulated in Article 2 (7) of the UN Charter, to hold states accountable for not acting positively to ensure rights.² However, this does not affect states' sovereign right to apply the law they choose within their jurisdiction according to their cultural, social and religious values.³ The problem arises accordingly, of what happens if the state's national law, like the Islamic Shari'ah, contains principles raising serious tension with the international principles of human rights? Will the international human rights principles be applied irrespective of the national law of the state? Many authors stress that human rights are owed to every human being, simply because he is human, irrespective of the culture of the society he lives in and hence tend to press for the enforcement of international rights, even if they are inconsistent with the cultural, religious and moral values of the state.⁴ However, human rights are considered to be best secured by democracy, which is based on representation of the common beliefs of the members of the society concerned⁵ and, hence, cultural legitimacy seems to be required for proper human rights implementation. As stated in the expert seminar

¹ Rehman, J., *International Human Rights Law: a practical approach*, London: Pearson Education, 2003, p.1

² Michael J. Perry, *The Idea of Human Rights: Four Inquiries*, New York: Oxford University Press, 1998, p. 44

³ International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, Report of the International Commission on Intervention and State Sovereignty, December 2001, Available Online at <http://www.iciss.ca/pdf/Commission-Report.pdf>

⁴ Howard, R. E., *Human Rights and the Search for Community*, Oxford: Westview Press, 1995, p. 57

⁵ See Resolution 2003/36, see also The High Commissioner for Human Rights, Continuing dialogue on measures to promote and consolidate democracy, report submitted in accordance with Commission resolution 2001/41, E/CN.4/2003/59, 27 January 2003

held in accordance with human rights resolution 2001/41, people are only convinced by their own rich cultures, drawn from the deep roots of their own civilizations.⁶ Hence, the interdependence between democracy and human rights creates a pressing need for constructing dialogue between the international human rights principles and the state's local values to promote the realization of human rights world wide. This study, therefore, will mainly focus on the compatibility of the international human rights with the diverse cultural and religious values of our world, in particular, the Islamic Shari'ah, which seems to represent *the most powerful ideological force across the Muslim world today*.⁷ It will examine the question of whether states are allowed to exercise discretion in international rights implementation and whether the Islamic Shari'ah has the potential to accommodate human rights values. As democracy is always associated with human rights as an end in itself,⁸ the study will raise the question whether the Islamic Shari'ah recognises democracy, which includes essential elements of limited government, like judicial independence and the rule of law.

I.2. Literature Review

The studies conducted in this area are divided into two themes: universalism which tends to uphold international human rights law without giving as much regard to the

⁶ Ibid., paragraph 5

⁷ Fuller, G. E., *The Future of Political Islam*, New York: Palgrave Macmillan, 2003, p. 67. When the former president of Iran, the Shah, endeavoured to westernize the political life of Iran in a very radical way that rejected the very basic of Islamic Shari'ah, the result was the collapse of the regime through a Shiite revolution that brought about the current theocratic state. Price, D. E., *Islamic Political Culture, Democracy, and Human Rights: a comparative study*, Westport, Connecticut: Praeger, 1999, pp. 113-114. Algeria has suffered from political disorder, which was caused by its crucial decision to ban the Islamic party that had won the election in 1991. For more information about democracy in Algeria see Volpi, F., *Islam and Democracy: The Failure of Dialogue in Algeria*, London : Pluto, 2003.

⁸ The High Commissioner for Human Rights, Report of the second expert seminar "Democracy and the rule of law", report submitted in accordance with Commission resolution 2003/36, E/CN.4/2005/58, 18 March 2005

cultural differences, and relativism which seems to stress the cultural legitimacy of human rights standards as the only way for a proper application of human rights. From close examination of the universalist writings, a researcher may notice that although the universalist authors recognize the cultural differences which may conflict with international norms, they do not seem to be as much inclined to resolve the areas of conflict by way of reconciliation, in appreciating cultural differences that are of fundamental importance in a given society, as they are by the way of elimination. Donnelly, for example, although he recognizes some variation in human rights implementation, is rather unclear on the extent of such variation. For example, he completely refuses to accept the Islamic punishment of amputation, no matter how humanely carried out, while he contends that execution is a subject of debate. Moreover, he seems to imply that although the Islamic ban on pictures which show women unveiled is permissible to preserve public morals, he considers it as discrimination against women's freedom of expression.⁹ Mayer also asserted that Islamic law, as articulated by traditional Islamic *fiqh*, violates many of the international rights of women and hence must be changed in accordance with international standards.¹⁰ Bassam Tibi, although he claimed to be aware of the need for a cultural basis for the implementation of human rights, seems in his writings to be more inclined to deny any aspect of Islam that has any connection with human rights. His main concern seems to be to assert that the modern human rights are a European tradition and that Islam must be compatible with such Western human rights.¹¹

⁹ See Donnelly, J., *International Human Rights*, Oxford: Westview Press, 1998, p.133. See also Howard, R. E., *op.cit.*, p. 56

¹⁰ See Mayer, A. E., *Islam and Human Rights: Tradition and Politics*, Third Edition, Boulder: Westview Press, 1999, pp. 83- 96

¹¹ See Tibi, B., "The European Tradition of Human Rights and the Culture of Islam", In: An-Na'im, A. A., and Deng, F. M., (eds.), *Human Rights in Africa: Cross-Cultural Perspectives*, Washington, DC: The Brooking Institution, 1990, pp. 104-132

This language does not seem to be helpful to resolve the problem of implementation and non-compliance with international human rights law. It is not a question of what are the origins of rights, but whether the rights that exist are applicable. The real problem that appears to face states is how to implement such a universal concept, whatever its origin, in their constitutional settings, which are necessarily based on particular political, constitutional and cultural norms. This question seems to have been rarely tackled by the universalist authors. Rhoda Howard has argued, however, that the relativists confuse the principle with the practice in claiming that human rights are unattainable because in practice they are not protected worldwide.¹² Howard might be right in saying this; however, this does not really tackle the main difficulty in the implementation of international rights in constitutional settings where particular cultural values are fundamental, and a more receptive approach from the universalists would be required, if their values, as they call them, are to be successfully implemented. The question here is not whether human rights are attainable if they are not practised worldwide, but whether they are attainable if they do not have legitimacy when applied to particular societies and cultures.

Some authors who have written about Islam and human rights, and who support the relativist approach to human rights implementation, have exerted notable efforts in this regard; yet, they differ in their methods of reform.¹³ An-Naim, for example, although he

¹² See Howard, R. E., *op.cit.*, 1995, p.53

¹³ Baderin, M., *International Human Rights and Islamic Law*, Oxford: Oxford University Press, 2003. An-Na'im, A. A., "'Area Expressions' and the Universality of Human Rights: mediating a contingent relationship", In: Forsythe, D. and McMahon, P., (eds.), *Human Rights and Diversity: area studies revisited*, London: University of Nebraska Press, 2003. An-Na'im, A. A., "Toward a Cross-Cultural Approach to Defining International Standards of Human Rights: the meaning of cruel, inhuman, or degrading treatment or punishment", in: An-Na'im, (ed.), A., *Human Rights in Cross-Cultural Perspectives: a question for consensus*, Philadelphia: University of Pennsylvania Press, 1995. Ali, S., *Gender and Human Rights in Islam and International Law: equal before Allah unequal before man*, London: Kluwer Law International, 2000. Haider, S. M., (ed.), *Islamic Concept of Human Rights*, Lahore: The Book House, 1978. Said, A., and Nasser, J., "The Use and Abuse of Democracy in Islam", In: Nelson, J. L., and Green, V. M., (eds.), *International Human Rights: contemporary issues*, New York:

is a primary supporter of cultural legitimacy, seems to be following the same universalist approach in resolving the conflict between Islam and human rights. He has proposed a new approach of reinterpretation of the Quran and Sunna to fit the modern social, economic, and political circumstances, in which he would abolish some Islamic principles like *qawama* and *dhimma*.¹⁴ It seems to me that this position itself needs cultural legitimacy in the Muslim world; as he, himself, suggests, An-Naim's version of Islamic law would be "*appreciated by only a tiny minority of contemporary Muslims.*"¹⁵

Baderin, in contrast, has focused his work on the Islamic *fiqh*, Islamic jurisprudence, of different Islamic schools, pointing out that Islam might differ from the international standards but this does not mean it is incompatible with them. He has drawn attention to significant techniques such as *Siyasah shar'iyah* (legitimate governmental policy)¹⁶ *maqasid al-Shari'ah* (the ultimate objective of the *Shari'ah*)¹⁷ and *takhayyur* (eclectic choice)¹⁸ that can be used to reach a convergence with international norms, but rightly pointed out that a reconciliation cannot be done without a receptive approach on the part of the international human rights scholars as well.¹⁹ However, in discussing the relation of Islamic political ideology to the liberal theory of human rights that is based on the principle of limited government, it may be necessary to raise a different dimension that is of a more complex nature. Does Islam recognize the doctrine of constitutionalism and democracy, which has been internationally recognized as the basis for human rights protection? Baderin's book, *International Human Rights and Islamic Law*, did not

Human Rights Publishing Group, 1980. Malik, M. I., "The Concept of Human Rights in Islamic Jurisprudence", *Human Rights Quarterly*, 1981. Kamali, H.M., *Freedom of Expression in Islam*, Cambridge: Islamic Texts Society, 1997.

¹⁴ Cited in Steiner, H., and Alston, P., (eds.), *International Human Rights in Context*, Second Edition, Oxford: Oxford University Press, 2000, p. 396

¹⁵ *Ibid.*, p. 392

¹⁶ Baderin, M., *op.cit.*, p. 53

¹⁷ See the footnote in *Ibid.*, pp. 50-51

¹⁸ *Ibid.*, 46

¹⁹ See Baderin's conclusion in *Ibid.*, p. 219

provide a detailed examination of the concept of democracy and constitutionalism in Islam.

Many international advocates of human rights who consider the Islamic values incompatible with the modern values of democratic and constitutional states usually assert their points with reference to the unhealthy practice of the current Islamic states.²⁰ However, most of the Islamic states that are usually referred to in this regard seem to be either states that are experiencing political disorder and economic problems, like Sudan and Pakistan, or those which hold an extreme understanding of Islam, like Saudi Arabia and Iran.²¹ Moreover, many studies do not seem to take into account the fact that most governments of those Islamic states like Iran, Syria, Sudan, Iraq and Libya, which are referred to as places where the situation of human rights is grave, came to power through military upheaval. It is important to take this into account, since a government which came to power through military revolution is likely to take, especially if it is not based on democratic values, the form of a police state that is always concerned with its security rather than respect for individual rights, as it is always in fear of another revolution. So Islam is not necessarily the factor for the totalitarian attitude of governance in many Islamic states.

²⁰ See Mayer, A. E., *op.cit.*, 1999, pp.149-173. Zehra F. Kabasakal Arat also cites the Islamic states' practices and reservations on the Women's convention to illustrate the cultural obstacle to full realization of women's rights. Arat, Z. F. K., "Promoting Women's Rights against Patriarchal Cultural Claims: the women's convention and reservations by Muslim states", In: Forsythe, D. and McMahon, P., *op.cit.*, pp. 242, 243. Moreover, Emile Sahliyah in her study refers to Islamic states' practices and concludes that the Islamic conservative understanding is the reason for incompatibility with human rights. See Sahliyah, E., "The State of Human Rights in the Middle East: prospect and challenges", In: Forsythe, D. and McMahon, P., *op.cit.*, pp. 252-275.

²¹ See Sardar, A. S., *A Comparative Study of the United Nations Convention on the Elimination of all Forms of Discrimination against Women, Islamic Law and the Laws of Pakistan*, [s.l. : s.n.], 1995. See Sardar, A. S., *The United Nations Convention on the Rights of the Child, Islamic law and Pakistan legislation: a comparative study*, [s.l. : s.n.], 1994. See Uichol, K., Henriette, S., and Shirin, E., *Democracy, Human Rights, and Islam in Modern Iran: psychological, social, and cultural perspectives*, Bergen: Fagbok for Laget, 2003. See Lefebvre, A., *Islam, Human Rights and Child Labour in Pakistan*, Copenhagen: NIAS Books, 1995. See Simons, G. L., *Saudi Arabia: the shape of a client feudalism/ Geoff Simons*, Basingstoke: Palgrave Macmillan, 1998.

Another feature of many human rights studies concerned with human rights implementation in Islamic states is that they seem to be concerned solely with the comparison among the Islamic states themselves, without referring to other nations which have made notable efforts in resolving their traditional obstacles to the full realization of human rights. Mayer referred in her study to the Iranian constitution and the practices of Sudan and Saudi Arabia to show the denial of human rights in Islamic law, but she did not propose any reformative approach, other than elimination of the values of Islam recognised by the traditional Islamic *fiqh* to promote certain views about Islam, articulated by a handful of modern human rights authors.²² Zehra F. Kabasakal Arat also cites the Islamic states' practices and reservations on the Women's convention to illustrate the cultural obstacle to full realization of women's rights. However, she mixes the states, whether Islamic or secular, Arab or non-Arab, in the same group, claiming that Islamic Shari'ah still represents a barrier to the implementation of women rights, even in Islamic states that have undergone some sort of secularization, since family law has never been changed.²³ However, she does not refer to Tunisia, where family law has to a large extent been altered and where women are still being aggressively oppressed and their rights of expression and to free choice, particularly of wearing *hijab*, are being grossly violated.²⁴ She admits, though, that religion is not the main obstacle and she suggests that international economic and political inequalities, militarism, lack of development, authoritarian politics, and inadequate legal structures, play a key role in the subjection and secondary status of women.²⁵ Among these elements, Zehra does not seem to be clear to what extent Islam affects the

²² See Mayer, A. E., op.cit., 1999, pp. 98-130

²³ Arat, Z. F. K., "Promoting Women's Rights against Patriarchal Cultural Claims: the women's convention and reservations by Muslim states", In: Forsythe, D. and McMahon, P., op.cit., pp. 242-243

²⁴ Al-Hamroni, M., *Tunisian Activist to Internationalize Hijab Ban*, 19-Jan-2006, Available Online at <http://islamonline.net/English/News/2006-01/19/article03.shtml>. For more discussion about democracy and human rights in Tunisia see Price, E. D., op.cit., pp., 75-84

²⁵ Arat, Z. F. K., op.cit., pp. 231-251 see in particular p. 243.

implementation of human rights. Emile Sahliyah has also mixed states, secular and Islamic, Arab and non-Arab, together and concluded that the Islamic conservative understanding is the reason for incompatibility with human rights.²⁶ If it is claimed that Islam is responsible for the non-compliance with human rights in states where Islam is the dominant law, it cannot be claimed that Islam is also the deciding factor in states where it is considered as secondary law. So, a reference to states without taking into account their political and constitutional nature could be confusing.

On the other hand, Daniel E. Price has intensively examined eight countries- Egypt, Jordan, Syria, Tunisia, Saudi Arabia, Morocco, Algeria, and Iran as case studies that represent different relationships between Islam and politics and concluded that Islam is not a factor for the current political crisis in the Islamic states or predominantly Muslim countries. Rather, he asserted that the greater the influence of Islam in political life, the higher the level of democracy becomes, and the less the influence of Islam on government, the higher the level of oppression.²⁷ However, the study was merely concerned with the relationship between democracy and Islam. It did not tackle the potential tension that might arise from the application of democracy and human rights in the Islamic states where the Islamic Shari'ah is the dominant law. The term "Islamic state" is used in this study not just to describe states that are mostly occupied by Muslims, but to describe those states which constitutionally recognize Islamic Shari'ah as a principal source of legislation; a point which may raise not only cultural but also constitutional tension with the current international trend of human rights.²⁸

²⁶ See Sahliyah, E., "The State of Human Rights in the Middle East: prospect and challenges", In: Forsythe, D. and McMahon, P., op.cit., pp. 252-275.

²⁷ See Price, E. D., op.cit., p., 137-156

²⁸ Examples of these states are UAE, Qatar, Saudi Arabia and Iran. See Article 7 of the UAE Constitution which states "*Islam is the official religion of the Federation. The Islamic Shari'ah shall be a main source of legislation in the Federation...*" See Article 1 of Qatar constitution which states that "*Qatar is an independent Arab state. Islam is the State's religion and the Islamic Shari'ah is the main source of its legislations...*" See Article 7 of the basic law of Saudi Arabia which states that "*The regime derives its*

I.3. Research Methodology

In the light of the above- noted shortcomings of previous writings, there is a need for an Islamic reformative approach that preserves the fundamentals of Islam with a receptive position toward international norms, seeking assistance from other nations that have undergone such a process of reconciliation of their traditions with the international principles. In this study I will focus on the United Arab Emirates as a primary case study representing a moderate Islamic state.

The United Arab Emirates is a federal state established on 2nd December, 1971. As a federal state, the UAE by nature embraces a clear political identity with clear distribution of powers between its federal and local authorities. The UAE's constitution contains many rights and freedoms similar to those contained in the UN human rights instruments, like the Universal Declaration of Human Rights and the two UN Covenants on Human Rights,²⁹ and yet the Islamic Shari'ah is considered the supreme source of legislation.³⁰ The constitutional recognition of the rights and freedoms in the text of the

power from the Holy Qur'an and the Prophet's Sunna which rule over this and all other State Laws." See Article 4 of Iran constitution which states that "All civil, penal financial, economic, administrative, cultural, military, political, and other laws and regulations must be based on Islamic criteria. This principle applies absolutely and generally to all articles of the Constitution as well as to all other laws and regulations, and the fuqaha' of the Guardian Council are judges in this matter."

²⁹ Rights and freedoms have been stated in Parts Two and Three of the UAE Constitution. Although the UN Report 2002 has shown the failure of the Arab countries in securing the rights and freedoms of their own people, it indicated the advanced level that the UAE occupied within the Arab countries, in respect of the freedoms enjoyed and in relation to women's role in society. See UN Arab Human Development Report 2002, p. 25, 26. In addition, the UAE, according to the UN Human Development report 2005, has achieved a high level of human development, coming in 41st place world wide, and being the second top state in the Arab region. See UN Human Development Report 2005, p.219. In November 2004, the United Arab Emirates named its first ever woman minister. In the recent cabinet two women ministers have been appointed to serve two ministries; the Ministry of Social Affairs and the Ministry of Economy. See. Khaleej Times Online, New UAE Cabinet hailed, 11 February 2006, Available Online at http://www.khaleejtimes.com/Displayarticle.asp?section=theuae&xfile=data/theuae/2006/february/theuae_february313.xml This is a sign of the state's realization of the importance of women's involvement in the public domain.

³⁰ See Article 7 of the constitution which states that "Islam is the official religion of the Federation. The Islamic Shari'ah shall be a main source of legislation in the Federation. The official language of the Federation is Arabic." This Article will be discussed in chapter four where it will be shown that

UAE constitution was a significant step in keeping the basic law of the state in line with the international movement towards stronger protection for human rights.³¹ However, the application of the Shari'ah law as the supreme law in the land seems to raise tension, in the implementation, with some of the rights and freedoms recognised in the constitution if they were to be applied in accordance with international supervision. For example, Article 2 of the Universal Declaration of Human Rights implies that everyone is entitled to all rights and freedoms set forth in the declaration, without any kind of distinction on such grounds as sex or religion. However, the rules of Islamic Shari'ah recognised in the UAE constitution do in fact distinguish between people on the grounds of religion. That is, the principles and rules of Islamic law are entirely based on a religious criterion and, as a result, are designed to govern the conduct of relations between Muslims and non-Muslims, regardless of all other criteria which are taken into account by the relevant principles of the international doctrine of human rights.³²

However, according to the literature in this area, it appears that it is not only Islamic principles that have tension with international rights, but also some Western traditions have formed strong obstacles to the full implementation of the international human rights. The UK constitutional system, for example, has no separation of powers between

according to the Federal UAE Constitutional Court interpretation of the Article the Islamic Shari'ah is the principal source of legislation.

³¹ Although the UAE has not signed the two UN Covenants on Human Rights, it has ratified some important human rights treaties, like conventions concerning labour rights, such as the Convention Concerning Forced Labour 1930, the Convention Concerning Equal Remuneration 1951, the Convention Concerning the Abolition of Forced Labour 1957, and the Convention Concerning Minimum Age 1973. It has also ratified the International Convention on the Elimination of All Forms of Racial Discrimination 1966, and the United Nations Convention on the Rights of the Child 1989. It has very recently ratified the Convention on the Elimination of All Forms of Discrimination against Women 1979. See the UN High Commission of Human Rights website, Available Online at <http://www.unhchr.ch/tbs/doc.nsf/newhvstatusbycountry?OpenView&Start=1&Count=250&Expand=183#183>

³² Therefore, the UAE has been found by the Amnesty International to have Islamic principles in a clear tension with the international rights, in particular, flogging and the discrimination in marriage between Muslim and non-Muslim. See, for example, Imprisonment and Flogging for Marriage Across Faiths: The Case of Elie Dib Ghaleb, Amnesty International, MDE 25/003/1997, Available Online at <http://web.amnesty.org/library/index/ENGMDE250031997>

the legislature and the executive organ³³ and both powers are conferred on Parliament, whose Act is absolutely sovereign and the courts have no power but to apply it in a way that does not conflict with Parliament's intention in issuing the Act.³⁴ This British conception of majoritarian democracy, based on parliament legislative monopoly,³⁵ seems to contradict the international human rights requirement of holistic democracy which is based on the rights of majority and minority alike, as well as the abhorrence of concentration of powers.³⁶ Nothing, under the British constitution, can stop Parliament from issuing legislation contrary to the basic individual rights.³⁷ The British doctrine of the supremacy of Parliament has been described by some authors as "elected dictatorship".³⁸ Although the special legal status of the European Convention on Human Rights has pushed the British to a constitutional reform and compromise, as will be seen throughout the study, such a compromise was not at the expense of the British Parliamentary Sovereignty. The UK tried to balance between the two principles which are of fundamental importance, the sovereignty of Parliament and the protection of human rights, and the Human Rights Act 1998 was the fruit of such effort. However, the UK, as will be seen in this study, does not depart from its great traditions in tackling international principles, even those that require some sort of modification of the constitutional system. Rather, British politicians and lawyers always apply the international standards and requirements in a way that complies with the British traditions.

³³ Parpworth, N., *Constitutional and Administrative Law*, Second Edition, London: Butterworths, 2002, p. 21

³⁴ Dicey, A., *Introduction to the Study of the Law of the Constitution*, Eighth Edition, London: Macmillan, 1931, p. 60

³⁵ For more information about Parliament's legislative monopoly see Lord Lester, "Human Rights and the British Constitution", In: Jowell, J., Oliver, D., *The Changing Constitution*, Fourth Edition, New York: Oxford University Press, 2000, pp. 89-110

³⁶ Commission on Human Rights resolution 2000/47, Promoting and consolidating democracy, A/RES/2000/47

³⁷ Dicey, op.cit., pp. 46-47

³⁸ Lord Lester, op.cit., 2000, p. 90

There is a clear linkage between the doctrine of Parliamentary Sovereignty and the supremacy of the Shari'ah law in the United Arab Emirates, in that they both form an obstacle to the full realization of human rights. Dicey, himself, long ago made such a comparison between the two when he endeavoured to justify the sovereignty of the British Parliament of Westminster. In his illustration of the internal limitation, Dicey stated, "*The Sultan could not if he would change the religion of the Mahomedan world, but if he could do so it is in the very highest degree improbable that the head of Mahomedanism should wish to overthrow the religion of Mahomet.*"³⁹ Similarly, if the British legislature, Dicey argued, "*... decided that all blue-eyed babies should be murdered, the preservation of blue-eyed babies would be illegal; but legislatures must go mad before they could pass such a law, and subjects be idiotic before they could submit to it.*"⁴⁰

The study, therefore, will use the UK as an example of a state that endeavours to secure its political stability through recognizing the importance of traditions and, at the same time, accommodates the very well recognized international norms of human rights, without affecting the fundamentals of both. This mutual treatment of the state's traditional fundamentals and the international law requirements, exercised by one of the most developed countries, politically and economically, among Western nations, and one which has participated strongly in forming most parts of international law, indicates that the possibility of reconciling human rights norms and the UAE's constitutional principles, which are rooted in the teaching of Islam, is wide open.

It is worth noting that the main point of referring to the UK constitutional system, here, is not to make a comparison between the supremacy of Islamic legal rules of the

³⁹ Dicey, A., op.cit., p, 80

⁴⁰ Ibid., p, 81

Shari'ah and the supremacy of Acts of Parliament, since Acts of Parliament inconsistent with human rights in the UK can easily be amended by Parliament, while the Islamic legislature cannot change the fixed legal rules of Islamic Shari'ah. Rather, the reference, here, is mainly to the ideological and constitutional aspects of the UK constitutional principle of Parliamentary Sovereignty, with all this may imply of legal rules inconsistent with human rights, which Parliament itself cannot change. This may assist in tackling the constitutional principle of the supremacy of Islamic Shari'ah that God is the supreme lawgiver, with all this may imply of rules inconsistent with human rights, which the Islamic legislature cannot change. Hence, it is not a straight comparative work but one that derives lessons and demonstrates the wider application of the issue of values when it comes to the domestic implementation of human rights.

The different writings of international lawyers and jurists on international public law in general and on international human rights in particular will be utilised in this study. The opinions of the International Court of Justice, alongside UN resolutions and the decisions of the Human Rights Committee, will also be used as primary sources of the research. The study will also analyse other regional and national cases to help in assessing the matter from different perspectives. It will extensively use English books and journals, especially in the area of constitutional democracy.

As regards the Islamic conception of human rights, reference will be made to the principal primary sources of the *Shari'ah* (Islamic Law), the *Quran* and *Sunna*, and to the work of Muslim jurists. This study will rely extensively on the interpretations of prominent traditional Muslim scholars such as *Alshafi*, *Abu Hanefah*, *al-Mawardi*, *Ibn Taymiyah*, and others whose opinions are most respected in the Muslim world. It will also discuss the interpretations of some well known modern scholars like *al-Qaradawi*.

However, the Islamic Shari'ah may need to be examined in a broad perspective, taking into account the contribution of international law, favouring democracy and stronger protection of human rights within constitutional settings. By addressing such matters, it may be possible to identify elements which could create a constitutional environment conducive to better human rights implementation in the Islamic states.

I.4. Outline of the Research

Chapter Two: Human Rights, Constitutional Democracy and the Tension with Constitutional and Religious Principles

This chapter will consider the legal status of human rights in public international law. The chapter will also tackle the international conception of human rights and whether such rights are universal in character or culturally relative. The constitutional basis of human rights implementation in the realm of constitutional democracy will also be examined. In this chapter, a number of questions will be raised; questions as to what a constitution should do to enhance democracy, how it should protect and promote human rights and how international law contributes to improve human rights in constitutional settings. It will discuss the idea of constitutionalism in which the two most important elements of limited government will be analysed: the principle of separation of powers and the rule of law. The chapter will also discuss the developments in international law in favour of democracy and human rights protection within constitutional settings. It will raise some religious and cultural matters that could form obstacles to the full realization of human rights, such as the complexity of the implementation of human rights under Islamic Shari'ah. It will also refer to traditional values and principles of the British common law, in which Parliament is the sovereign body accorded unrestrained

power, which seems to pose the same difficulty that Islam could cause in human rights implementation.

Chapter Three: Islam, Human Rights, and Democracy

This chapter will first examine the meaning of Islam within the political context. It will also discuss the Islamic recognition of democracy and consider to what extent the doctrine of constitutionalism is recognised in Islamic teaching. This chapter will point out a legal technique recognised in the Islamic *fiqh*, called *Siyasah Shar'iyah*, which affirms the timeless nature of Islam and which can be used to accommodate some international norms of human rights. The areas of conflict between Islam and the current conception of human rights will be analysed. An attempt will be made to clarify the position of the individual within the Islamic state's system, which, I hope, will give a clear understanding about why some rights and freedoms in Islam are dealt with in a manner often considered unsatisfactory by non-Muslims.

Chapter Four: The UAE Islamic Constitution and the International Requirements of Human Rights Protection

Having discussed the theory of human rights from two perspectives, the international law perspective and the Islamic perspective, this chapter will focus on the United Arab Emirates as a primary case study of an Islamic state. The constitutional structure of the UAE will be discussed to check whether or not the basic structure of human rights protection is recognised. The UAE's strong constitutional recognition of the Shari'ah law as the supreme law in the land will also be examined and it will be shown that such recognition was not an obstacle to the UAE's embracing the modern constitutional values of a modern state. The chapter will highlight where the Islamic Shari'ah could

pose difficulty to the full realization of human rights, which do not seem to go beyond the legal perspective.

Chapter Five: Implementing International Human Rights Standards in our Relativistic World

In this chapter we will try to learn from the United Kingdom, which has greatly contributed to the formation of the current international law of human rights, even though it happens to have a constitutional tradition that raises great difficulty for the implementation of human rights. The chapter will discuss the British judicial efforts to reconcile the traditional common law values with the changing international norms. It will also give consideration to the legislative step undertaken by the British government to bring the British constitutional system into line with the requirements of the European Convention on Human Rights. This chapter will give a detailed analysis of how the British experience can be of benefit for the reconciliation between Islamic Shari'ah and the international human rights requirements. The European doctrine of margin of appreciation will be examined, along with the question of whether the doctrine can be of use to accommodate Islamic values on the world level.

Chapter Six: Conclusion: findings of the research

This chapter is the conclusion of the research, which provides a final discussion and a summary of the findings, together with some critical remarks and recommendations. The study will show that although human rights have internationally been recognized in various declarations and treaties, there is no international fixed model of right implementation. The UK experience on the implementation of European Convention rights shows that disagreement over such a contestable matter is difficult to accommodate even on the regional level, where societies are supposed to have shared

common values. So it is unsurprising to see such a controversy on human rights matter in international level. The Islamic variation in the implementation of human rights is just another difference of many that may exist in our modern world, which contains diverse social, cultural and religious principles. Islam is not necessarily an obstacle to the full realization of human rights. The basic views of the importance of human life and dignity embodied in the international human rights instruments are recognised in the Islamic Shari'ah. The study appeals, therefore, for reconsideration of the international human rights discourse, suggesting that the use of domestic values to a certain degree is inevitable to establish real universal human rights with full realization of their essence. The study also calls upon the Islamic authors to reconsider their discourse and be more receptive to the internationally recognised values of human rights. Both international human rights bodies and Islamic states, along with the Islamic scholars, should embrace a complementary approach for the promotion of human rights in the Islamic states. Such a complementary approach can be achieved internationally through making use of the doctrine of margin of appreciation and Islamically through making use of the Islamic doctrine of *Siyasah Shar'iyah*, the legitimate governmental policy. A common Islamic approach on clear standards of human rights implementation through regional arrangement would also help to eliminate the complexity that may be raised from the conflicting Islamic views on democracy and human rights, which ultimately would enhance human rights in the Islamic states.

Chapter Two

II. Human Rights, Constitutional Democracy and the Tension with Constitutional and Religious Principles

II.1. Introduction

Human rights as embodied in the Universal Declaration of Human Rights are a very broad and contestable concept. As some argue, the current functioning of international human rights has not been given official definitive theoretical foundations, justifying their existence, but rather they have been simply declared in international documents as a set of values.⁴¹ What exactly does right really mean? Does it mean natural right that is based on the law of nature and hence applicable irrespective of culture or social context? Or is it rooted in the positive law and hence a creation of the state sovereign body? The theoretical basis of rights is still a matter of debate among international human rights authors.⁴² The dominant theme in the UN human rights objective has been whether the human rights in the modern conception are group based, in the sense that

⁴¹ It has been argued that the Universal Declaration of Human Rights, the founding document of modern human rights, has not provided a theoretical basis, like other earlier declarations of rights. It does not, like the American Declaration of Independence, hold that people are "endowed by their Creator" with certain rights, or, like the French Declaration of the Rights of Man, describe human rights as "natural" and "sacred." After a prefatory reference to the "inherent dignity" of all human beings, the Universal Declaration simply declares certain values to be human rights. See Beitz, C., "What Human Rights Mean", Vol. 132.1 *Daedalus*, 2003, p. 36

⁴² Some support the argument that human rights have their origin in the philosophy of natural law. The doctrine of natural law holds that there are laws of nature beyond positive law implying certain natural and inalienable rights of men. See Robertson, A., and Merrills, J., *Human Rights in the World: an introduction to the study of the international protection of human rights*, Fourth Edition, Manchester: Manchester University Press, 1996 p. 3. However, others argue that this notion of natural right is not actually the current function of the theory of human rights. Human rights is not serving as a theory of legitimacy- the divine right of a king is not legitimate if he does not satisfy the natural rights of his citizens- but they have become *part of an effort to develop standards of achievement with respect to citizens' rights within an international community*. See Sidorsky, D., "Contemporary Reinterpretations of the Concept of Human Rights", In: Sidorsky, (ed.), *Essay on Human Rights: contemporary issues and Jewish perspectives*, Philadelphia: Jewish Publication Society of America, 1979, p. 89. As Bentham noted, "*Rights is the child of law; from real law come real rights; but from imaginary laws, from "laws of nature", come imaginary rights...*" Cited in Steiner, H., and Alston, P., *op.cit.*, p. 326

community is the basic social unit, or individualistic in nature, regardless of cultural or social context.⁴³

This generality of the human rights concept sets forth different aspirations, which subsequently confers on them different dimensions. It is a combination of rights that are associated with individuals, like rights to life, liberty, and security of the person; rights that are associated with the rule of law, like the right to a fair trial; rights that are associated with politics, like the right to take part in the government of the country and to periodic and genuine elections; rights that are associated with economic rights, including free choice of employment, and health care; and rights that are associated with the communities, like self-determination.⁴⁴ It is worth noting that while the international community has already recognised the binding nature of these rights through the international human rights instruments, states, as will be seen below, have not yet reached consensus on their substantive scope and, hence, their implementation in states' constitutional and legal systems is still uncertain.

Thus, as human rights is a broad and complex concept with different dimensions, this chapter will be extensive and will tackle human rights from different perspectives. The chapter will be divided into three sections. The first section will discuss human rights from an international law perspective. The legal status of human rights in international law will be examined, and the philosophical debate about the nature of human rights- whether it is universal or culturally relative- will be presented. The relative nature of human rights will be emphasized, as this might be the only way for their proper implementation in state constitutional settings, and may well be the prerequisite of the

⁴³ See Pollis, A., "A New Universalism", In: Pollis, A., Schwab, P., and Rienner, L.,(eds.), *Human Rights: new perspectives, new realities*, Boulder: Lynne Rienner, 2000, pp. 9-27

⁴⁴ Beitz, C., *op.cit.*, pp. 37-39

doctrine of holistic democracy that is being emphasized by the international instruments.⁴⁵

In the second section, the tension between societies' cultural values and international principles of human rights will be examined. The discussion will focus on two systems that could create great difficulty to the full implementation of international human rights which are the Islamic Shari'ah system and the UK constitutional tradition of common law. As the Islamic Shari'ah will be discussed in more detail in chapter three, at this point the main focus will be on the British constitutional system and its traditional principle which forms an obstacle to the full realization of human rights, specifically those contained in the European Convention on Human Rights. It will be shown that the cultural tension with human rights, as the British experience of human rights implementation seems to suggest, is not exclusive to the non-Western nations but is a result of the variety of diverse traditions of different nations that form our modern world.

The third section of the chapter will discuss human rights from a constitutional perspective. In this part we will examine whether constitutions really matter for the enhancement of human rights. The idea of constitutionalism will be discussed and the two most important elements of limited government will be analysed: the principle of separation of powers and the rule of law. Consideration will also be given to the role of culture in the constitution and how can that affect the implementation of international human rights.

⁴⁵ Commission on Human Rights resolution 2001/41, Continuing dialogue on measures to promote and consolidate democracy, *A/RES/2001/41*

The chapter will demonstrate the need to accommodate people's local beliefs and traditions for proper implementation of the international human rights. A relativist approach to human rights might be necessary, either because of the nature of political rights as claims curbing the state's authority which necessarily require, as will be seen, social recognition, or due to international standards which emphasise holistic democracy based on self-determination and rooted in cultural values and spiritual traditions from all parts of the world.

II.2. International Conception of Human Rights

II.2.1. International Human Rights Law

One of the most significant changes in the era of human rights is actually the very mention of the term in the United Nations' Charter, which reaffirms faith in fundamental human rights, in the dignity and worth of the human person.⁴⁶ Although the Charter has not provided a clear definition of what "human rights" constitute, the Universal Declaration of Human Rights (UDHR) has carried out the process of defining human rights, emphasising their universal character.⁴⁷ Although the UDHR was not a binding treaty, it has been acknowledged by a great number of scholars that it has become the source of inspiration and *'the basis for the United Nations in making advances in standard setting as contained in the existing international human rights instruments'* such as the two covenants of human rights, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and

⁴⁶ The preamble of the United Nations Charter reads: "*We the peoples of the United Nations determined...to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and...to promote social progress and better standards of life in larger freedom*"

⁴⁷ For more information on the binding nature of the Universal Declaration of Human Rights as part of customary law see Humphrey, J., P., "The Universal Declaration of Human Rights: its history, impact and juridical character", In: Ramcharan, B., G., (ed.), *Human Rights: thirty years after the universal declaration*, London: Martinus Nijhoff, 1979.

Cultural Rights (ICESCR).⁴⁸ The two international covenants, the ICCPR and the ICESCR, elucidate the principles of UDHR and have transformed many of the human rights principles into binding treaties, laying down legally binding rights on the state parties.⁴⁹ Some scholars have gone even further and suggested that, in spite of the fact that the two covenants on human rights are recognized as treaties which are supposed to be binding only on the state parties, because of the nature of their content which relates to all human beings, they may be regarded as codifying pre-existing customary rules and, hence, might be seen as binding treaties to states not parties to the covenants.⁵⁰

However, it has been suggested that the most transformative aspect of the human rights regime for the international system is not found in the growth of its legal instruments but in its impact on a fundamental principle of international relations, which is based on the concept of state sovereignty articulated in Article 2(7) of the UN Charter.⁵¹ Many scholars agree that the individual by virtue of being human is entitled to certain unalienable rights and freedoms, irrespective of the law of the state to which he belongs.⁵² The state is no longer sovereign in the domain of human rights and cannot claim exclusive jurisdiction over the matter.⁵³ As Thomas Jefferson asserted, his countrymen were a "*free people claiming their rights as derived from the laws of nature and not as the gift of their Chief Magistrate*".⁵⁴ Many experts seem to suggest that the

⁴⁸ Hegarty, A., and Leonardo, S., *Human Rights: an agenda for the 21st century*, London: Cavendish Publishing Limited, 1999. p. 6

⁴⁹ Coicaud, J., Doyle, M., and Gardner, A., *The Globalization of Human Rights*, New York: United Nations University Press, 2003, p.2

⁵⁰ For more discussion about extending the obligation of a treaty beyond the contracting states see Meron, T., *Human Rights and Humanitarian Norms as Customary Law*, Oxford: Clarendon Press, 1989, pp. 89-93

⁵¹ Coicaud, J., Doyle, M., and Gardner, A., *op.cit.*, p. 3

⁵² Robertson, A., and Merrills, J., *op.cit.*, p. 1

⁵³ Daes, E., *Status of the Individual and contemporary International Law: promotion, protection and restoration of human rights at national, regional and international level*, New York: United Nations, Centre for Human Rights, 1992, p. 21

⁵⁴ Quoted in Steiner, H., and Alston, P., *op.cit.*, p. 325. However, this notion of natural right, as we will see below, is not actually the current function of the theory of human rights. Human rights are now part of an effort to develop standards of achievement within an international community.

modern conception of human rights challenges the traditional concept of state sovereignty, exposing domestic human rights abuses, even those perpetrated by a government against its own people, to international scrutiny.⁵⁵ UN Secretary-General Kofi Annan declared in his comment on international interventions in Kosovo and East Timor that "*State sovereignty, in its most basic sense, is being redefined... States are now widely understood to be instruments at the service of their peoples, and not vice versa... [while] individual sovereignty – by which I mean the fundamental freedom of each individual, enshrined in the Charter of the United Nations and subsequent international treaties – has been enhanced by a renewed and spreading consciousness of individual rights.*"⁵⁶

This revolutionary step of making individuals subjects of international law, and conferring on them some direct rights, has unbalanced the traditional relationship between international law and domestic law and seems to have weakened the dualistic theory of dealing with the international norms. It is now difficult to accept, in the domain of human rights protection, the dualist argument that the state law is distinct from the international law, in that they are derived from different sources and deal with different subjects.⁵⁷ *'It is now the individual who really lies at the root of the unity of all*

⁵⁵ Coicaud, J., Doyle, M., Gardner, A., op.cit., p. 3

⁵⁶ Kofi Annan, "Two Concepts of Sovereignty," *The Economist*, 18 September 1999, cited in Coicaud, J., Doyle, M., and Gardner, A., op.cit., p. 1

⁵⁷ Starke QC, *Introduction to International Law*, Tenth Edition, London: Butterworths, 1989, p.72. Starke has reported that the two legal systems have two fundamental differences: a. the subjects of state law are individuals, while the subjects of international law are states solely and exclusively. b. the source of state law is the will of the state itself, while the source of international law is the common will (*Gemeinwill*) of states. It has been argued, however, that the monist-dualist controversy is unreal, artificial and strictly beside the point. See Malanczuk, P., op.cit., p. 64. In reality the monist-dualist theory does not seem to reflect the actual state practice and therefore fails to produce a conclusive answer on the true relationship between international law and municipal law. For example, Article 6 of the United States constitution seems to reflect the monistic approach, in that it regards treaties signed by the government as the highest law in the land; however the judicial practice gives a different impression as the US Supreme Court has classified treaties into two categories; self-executing treaties, which are regarded as part of national law and the courts must apply them without any need for further procedures of incorporation, and non self-executing treaties, which need to be incorporated by legislation to be judicially applicable. See Lillich, R. B., "The Constitution and International Human Rights", 83 *The American Journal of International Law*,

law'⁵⁸ and the protected sovereignty has become '*the people's sovereignty rather than the sovereign's sovereignty*'.⁵⁹ It has been argued that the reference in Article 2 of chapter 1 of the UN Charter to the principle of sovereign equality of states has been defined by UDHR Article 21 (3) to mean the will of the people, expressed in periodic and genuine elections, and not the *de facto* control of the seizer of power.⁶⁰

However, in the absence of clear standards, able to specify where the international law must end and where the national law starts,⁶¹ this transfer of sovereignty from states as nominal persons of international law to the inhabitants, who exist within the boundary of the states, could lead to unexpected result. Reisman, for example, used the concept of human rights protection to justify military invasion. He argued that if the removal of the external invasion of the state's sovereignty by an outside force is justified under traditional international law, then the removal of the internal invasion of the popular sovereignty by unilateral force can be justified under the modern constitutive, human

1989, p. 855. The British legal system, on the other hand, may be regarded as radical dualistic. However, the courts have decided in various cases that international customary law forms part of British common law. See Hunt, M., *Using Human Rights Law in English Law*, Oxford: Hart Publishing, 1998, p. 11

⁵⁸ Starke, Q. C, op.cit., p.74

⁵⁹ Reisman, M.W., "Sovereignty and Human Rights in Contemporary International Law", *84 American Journal of International Law*, p.866-876 In: Alston, P., (ed.), *Human Rights Law*, Aldershot: Dartmouth, 1996, p. 548

⁶⁰ Ibid., pp. 546-547

⁶¹ While it seems on the surface that state sovereignty is internationally recognized and upheld by giving states the freedom to decide the method they see best to perform the international obligations, the general principle of international law seems to limit this freedom by suggesting that the state cannot invoke provisions of its internal law as a justification for non-compliance with international obligations. This was clearly stated in the 1969 Vienna Convention on the Law of Treaties which states "*A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty...*" Consistent with this, the Permanent Court of International Justice said in the *Free Zones* case that "*It is certain that France cannot rely on her own legislation to limit the scope of her international obligations*". It continued to indicate, in the advisory opinion, February 4, 1932 concerning the treatment of Polish nationals in Danzig, that the principle is not limited to the mere legislation of the state in the narrow sense but it extends to include the provisions of the constitution itself. It stated that "*While on the one hand, according to generally accepted principles, a State cannot rely, as against another State, on the provisions of the latter's Constitution, but only on international law and international obligations duly accepted, on the other hand conversely, a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force.*" Cited in Drzemczewski, A., *European Human Rights Convention in Domestic Law*, Oxford: Clarendon Press, 1983, p., 21. See the *Free Zones of Upper Savoy and the District of Gex (France v. Switzerland)* In: Hudson, M., *World Court Reports: a collection of the judgments, orders and opinions of the Permanent Court of International Justice*, Vol. II 1927-1932, New York: Oceana, 1969, p., 490.

rights-based conception of popular sovereignty.⁶² The problem with Reisman's argument is that it does not provide a clear measurement by which to assess the size of the majority whose wishes must be respected and protected. How can we be assured that a certain number represents the majority wishes? Moreover, the concept of human rights is very broad, contestable and raises many cultural and religious issues that lie at the heart of state ideology. Reisman's argument does not provide an answer if some of the majority's wishes, according to their religious and cultural values, run against the current understanding of international human rights. Will there be any dialogue to give effect to the democratically expressed wishes of the people, or will the wishes of the people be ignored and certain understanding of human rights be enforced?⁶³ Of course, it is not appropriate to say in this context that people should have the right to violate human rights as a result of their exercise of the international right of self determination, simply because first, human rights, as shown above, are an international matter and do not lie exclusively within their state's jurisdiction; second, it is illogical that people would choose to oppress themselves. But what is meant within this context is whether the international system would tolerate differences in the interpretation of some international human rights and allow for different implementation, even if these differences run against some of the so-called internationally recognized values of

⁶² Reisman, M.W., "Sovereignty and Human Rights in Contemporary International Law", 84 *American Journal of International Law*, In: Alston, P., (ed.), op.cit., pp. 549-551. See also Falk, R., "Theoretical Foundations of Human Rights", In: Claude, R., and Weston, B., (eds.), *Human Rights in the World Community: issue and action*, Second Edition, Philadelphia: University of Pennsylvania Press, 1992, pp., 31-42. However, the International Court of Justice in 1986 declared that 'the use of force could not be the appropriate method to monitor or ensure such respect' for human rights. the Court had said that '*where human rights are protected by international conventions, that protection takes the form of such arrangements for monitoring or ensuring respect for human rights as are provided for in the conventions themselves*'. Cited in Kritsiotis, D., "Arguments Of Mass Confusion", 15, *European Journal of International Law*, April 2004, p.273

⁶³ An interesting case that was brought before the Canadian Supreme Court regarding secession might be of relevance to the current discussion. The court suggested that if the majority of people in any province sought to secede from the federation, then as a democratic nation, the expression of the will of the people could not be ignored, and both Canada and the province would have to enter into negotiations to give effect to the democratically expressed wishes of the people. Cited in Friel, R. J., "Providing A Constitutional Framework for Withdrawal from the EU: Article 59 Of The Draft European Constitution", 53.2, *International and Comparative Law Quarterly*, April 2004, p. 418

human rights? Does democracy justify differences in human rights implementation according to cultural and religious values?

II.2.2. Democracy and International Human Rights

Although the word democracy has not been mentioned in the UN Charter, the international instruments have emphasised its fundamental principles, such as participation, accountability and self-determination, as important mechanisms for the realization of international human rights and fundamental freedoms. The Secretary-General in his report to the General Assembly at its fifty-first session noted that "*the word 'democracy' does not appear in the Charter. However, with the opening words of that document 'We the Peoples of the United Nations', the founders invoked the most fundamental principle of democracy, rooting the sovereign authority of the Member States, and thus the legitimacy of the Organization which they were to compose, in the will of their peoples.*"⁶⁴ The Vienna Declaration and Programme of Action adopted by the 1993 World Conference on Human Rights also asserted in paragraph 8 of Section I, "*Democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing. . . . The international community should support the strengthening and promoting of democracy, development and respect for human rights and fundamental freedoms in the entire world.*" Moreover, the UDHR has affirmed this original commitment to democracy and suggested that "*the will of the people shall be the basis of the authority of government*", guaranteeing the right of the individual to be part of the processes that affect his life.⁶⁵ In Article 29 (2) the UDHR

⁶⁴ Cited in the website of the United Nations high Commissioner for Human Rights, Available online at <http://www.ohchr.org/english/issues/democracy/index.htm>

⁶⁵ Article 21 of UDHR states that "1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives. 2. Everyone has the right to equal access to public service in his country. 3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures."

stresses that the limitation on human rights and freedoms are permitted only by law that is acceptable in democratic society.⁶⁶ The International Covenant on Civil and Political Rights has confirmed the binding nature of the individual right to take part in the conduct of public affairs, enhancing the principles of democracy across states party.⁶⁷

The United Nations support for democratization as the way for proper implementation of international human rights and fundamental freedoms has been manifested through many UN resolutions. For example Resolution 2000/47 has reaffirmed the commitment to the process democratization of states, and recognized that democracy and human rights are interdependent and mutually reinforcing. States are called upon to consolidate democracy through the promotion of pluralism and the respect of human rights.⁶⁸ Resolution 2001/36 has also stressed the interdependence of democracy and human rights, and also added development, as meeting the basic human needs is essential for effective democracy.⁶⁹ Moreover, the Commission has adopted resolution 2001/41 on “*Continuing dialogue on measures to promote and consolidate democracy*” and called upon all governments, relevant intergovernmental organizations and interested non-governmental organizations to continue and deepen debates aimed at identifying ways and means to promote and consolidate democracy.⁷⁰

Furthermore, the most effective regional courts of human rights, the Inter-American Court of Human Rights and the European Court of Human Rights, have recognized

⁶⁶ Article 29 (2) of the UDHR states “*In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.*”

⁶⁷ See Article 25 of the International Covenant on Civil and Political Rights.

⁶⁸ Commission on Human Rights resolution 2000/47, Promoting and consolidating democracy, *A/RES/2000/47*

⁶⁹ Commission on Human Rights resolution 2001/36, Strengthening of popular participation, equity, social justice and non-discrimination as essential foundations of democracy, *A/RES/2001/36*

⁷⁰ Commission on Human Rights resolution 2001/41, Continuing dialogue on measures to promote and consolidate democracy, *A/RES/2001/41*

democracy as the basic foundation for the promotion and protection of human rights and fundamental freedoms.⁷¹

It is worth adding that in accordance with Commission on Human Rights resolution 2001/41 mentioned above, the Office of the High Commissioner for Human Rights held an expert seminar to explore the conceptual linkages between democracy and human rights and to engage in a dialogue on practical ways and means of promoting and consolidating democracy. The seminar attempted to clarify the meaning of the concept of democracy, which has continuously been emphasized in the international instruments. It called states to move beyond narrow notions of democracy to promoting and securing what they termed as "*holistic democracy*".⁷² The concept of "*holistic democracy*" has been defined as a conception grounded on universal human rights standards that gives respect to all people on an equal footing, no matter how numerous they are, whether majority or minority, and which encompasses procedural and substantive processes of justice and fairness based on the rights of self determination and the abhorrence of discrimination and the concentration of power.⁷³ The seminar concluded that international democracy is rooted in cultural values and spiritual traditions from all parts of the world and hence, while no single institution can claim democratic perfection, *the combination of domestic democratic structures with universal democratic norms is a formidable tool in strengthening both the roots and the reach of democracy, and in advancing a universal understanding of democracy.*⁷⁴ It has been suggested that people are only convinced by their own rich cultures, and hence

⁷¹ For more details about the role of democracy in promoting and protecting human rights in the European Convention on Human Rights system and the Inter-American Convention on Human Rights system see Burchill, R., "The Role of Democracy in the Protection of Human Rights: lessons from the European and Inter-American human rights systems", In: Forsythe, D. P., and McMahon, P. C., op.cit., pp. 137-152

⁷² The High Commissioner for Human Rights, Civil and Political Rights: Continuing dialogue on measures to promote and consolidate democracy, E/CN.4/2003/59, 27 January 2003, p. 4

⁷³ Ibid., p. 4

⁷⁴ Ibid., p. 17

they should be encouraged to achieve human rights on the wings of their own cultures, inspirations and teachings.⁷⁵ In the report of the second expert seminar on democracy and the rule of law, Dr. Ginwala asserts that the challenge to holistic democracy “*was not to take one model of democracy, but to stress the universal elements in concept and practice in a way that built upon and strengthened existing cultures and institutions.*”⁷⁶

Thus, such recognition of the significance of democracy, “*holistic democracy*”, as a basis for proper implementation of international human rights, seems to put more emphasis on the need for cultural legitimacy and hence work on a horizontal level through cross cultural and international dialogue than on the vertical level, which seems to be more inclined towards enforcement procedures. This correlative relationship between international human rights and democracy seems to affirm the point that whatever the world’s differences in the understanding of what could constitute rights for human beings, the use of these differing traditions is, to a certain degree, inevitable to establish real universal human rights with full realization of their essence.

II.2.3. Differences in the Understanding of the Human Rights Concept

To say that there is an international recognition of the principle of human rights is not to say that there is complete agreement about the nature of such rights or their substantive scope.⁷⁷ The international recognition is, indeed, demonstrated through various international human rights instruments, however, an agreement on precise standards of the implementation of the content of these rights has not yet been reached. The differences in the definition or interpretation of rights arose fairly early on in the

⁷⁵ See Dr. Surin Pitsuwan's view, *Ibid.*, p. 5

⁷⁶ Commission on Human Rights, Sixty-first session, Interdependence between Democracy and Human rights: report of the second expert seminar “Democracy and the rule of law”, E/CN.4/2005/58, 18 March 2005

⁷⁷ Steiner, H., and Alston, P., *op.cit.*, p. 326

foundation of the UN and indeed in the preparation of the UDHR.⁷⁸ There were differences between Western countries and the former Soviet bloc over the prioritisation of rights which reflected their different economic and political ideologies.⁷⁹ For example, Western liberal states may apply the economic, social and cultural rights; however the acceptance of their legal validity is subject to the individual's liberty. On the other hand, communist states might recognize the legality of the civil and political rights but as subject to the integrity of the society.⁸⁰ This is due to the conflicting ideologies from which both sets of rights spring. Whereas the civil and political rights spring from the philosophy of individualism, favouring maximum individual freedom of action and a minimal role to be played by the state, the economic, social and cultural rights stem from the philosophy of socialism, which gives a stronger role to state intervention.⁸¹

There was also disagreement over the matter of freedom of religion, which was opposed by many Muslim states on the basis that Islam prohibits a Muslim to change his or her religion.⁸² The justification for that might be that "*the basis of Muslim polity being religious and not ethnological or linguistic*", for a Muslim to change his or her religion might amount to a "*politico-religious rebellion*".⁸³

These differences in the understanding of human rights have been a subject of debate in the UN international human rights objective and for the greater part of the last two

⁷⁸ Banda, F., "Global Standards: local values", 17, *International Journal of Law Policy and Family*, 2003., p. 3

⁷⁹ *Ibid.*, p. 3

⁸⁰ Ibhawoh, B., "Cultural Relativism and Human Rights: reconsidering the Africanist Discourse", *Netherlands Quarterly of Human Rights*, Vol. 19/1, 2001, pp. 46-45

⁸¹ Eide, A., "Realisation of Social and Economic Rights and the Minimum Threshold Approach" 10 *Human Rights Law Journal*, 1989, p. 43.

⁸² Baderin, M., *op.cit.*, p. 119

⁸³ Hamidullah, *Muslim Conduct of State*, Revised 7th Ed., 1977, p. 174, para.330 cited in Baderin, M., *op.cit.*, p., 124

decades, the dominant theme has been whether human rights in the modern conception are of universal character and applicability or whether they are culturally relative.⁸⁴

II.2.3.1. Universalism and Cultural Relativism

Universalists argue that human rights are a supreme universal value in the sense that most people, deprived of these protections, want to have them regardless of the culture in which they live.⁸⁵ Individuals everywhere want the same essential things: to have sufficient food and shelter; to be able to speak freely without being threatened with torture or detention without charge, which are in no way dependent upon culture.⁸⁶

Relativists, on the other hand, argue that the individual realizes his personality through his culture and, hence, what are held to be human rights in one society may be regarded as anti-social by another people, or by the same people in a different period of their history.⁸⁷ Therefore, human rights can be improved through the enhancement of the cultural legitimacy of their standards.⁸⁸

To understand properly the relationship between culture and the universality of human rights it is important to understand the meaning of the term human rights and whether the meaning attached to it is flexible enough to accommodate differences in its implementation.

⁸⁴ Ibhawoh, B., *op.cit.*, p. 43

⁸⁵ Howard, R. E., *op.cit.*, 1995, p. 57

⁸⁶ Higgins, R., *Problems and Process: international law and how to use it*, Oxford: Clarendon Press, 1994, p. 97

⁸⁷ Renteln, A., *International Human Rights: universalism versus relativism*, London: Sage, 1990, p. 83

⁸⁸ An-Na'im, A. A., "Toward a Cross-Cultural Approach to Defining International Standards of Human Rights: the meaning of cruel, inhuman, or degrading treatment or punishment", in: An-Na'im, A., (ed.), *op.cit.*, 1995, p.22

II.2.3.1.1. The Meaning of Human Rights

A human right is defined as "*a universal moral right, something which all men, everywhere, at all times ought to have, something of which no one may be deprived without a grave affront to justice, something which is owing to every human being simply because he is human.*"⁸⁹ The term "universal" or "universality" can be defined as "*of, belonging to, done by, all; affecting all, and a universal rule as one with no exception.*"⁹⁰ The geographical reference, accordingly, is irrelevant, "*as the applicability of human rights to all persons without exception automatically means that they apply to all persons regardless of place.*"⁹¹ Rhoda Howard stressed that human rights are *private* as they inhere in individuals, unmediated by social relations, *individual* as an isolated human being can, in principle, exercise them, and *autonomous* as, in principle, no authority other than the individual is required to make human rights claims.⁹² Two main distinctions have been made by the universalists to assert the universality of human rights that human rights versus human dignity and human rights versus human duty.

II.2.3.1.1.1 Human Rights and Human Dignity

Universalists authors, mostly Western, differentiate, in defining human rights, between moral standards of human dignity that might be shared by all cultures and human rights versus the state authority. Bassam Tibi noted that the notion of human dignity exists in all cultures, western and non-western; in Islamic and African cultures, as well as in Buddhist and other non-monotheistic cultures. However, the modern concept of human

⁸⁹ Renteln, A., op.cit., p. 47

⁹⁰ Lindholt, L., *Questioning the Universality of Human Rights: the African charter on human and peoples' rights in Botswana, Malawi and Mozambique*, Sydney: Ashgate Dartmouth, 1997, p. 33

⁹¹ Brems, E., *Human Rights: universality and diversity*, London: Martinus Nijhoff, 2001, p. 4

⁹² Howard, R. E., "Dignity, Community, and Human Rights", In: An-Na'im, A., (ed.), op.cit., 1995, p. 82

rights that are enforceable against the state is a modern European creation.⁹³ Consistent with this view, Rhoda Howard asserted that dignity is not a claim but "*the particular cultural understandings of the inner moral worth of the human person and his or her proper political relations with society*" and hence human dignity is not private, individual, or autonomous, but public, collective, and prescribed by social norms.⁹⁴ So, any reference to cultural values and moral codes is actually a reference to the notion of human dignity, not to the modern concept of human rights.

The distinction between human rights and human dignity has been criticized by Bonny Ibhawoh as it fails to recognize the idea and the meaning of rights in a social and historical context. In most traditional African societies, he argued, there were no clear cut distinctions between religious values, moral precepts and laws; such traditional societies had their own legal institutions and law enforcement procedures which were, nonetheless, effective within their social and political context.⁹⁵ Thus, he concluded, "*the rights and obligations that derived from such religious, moral and cultural values associated with human dignity in traditional society, (which were enforced for the benefit of both the community and the individual), can validly be considered the contextual equivalent of the modern concept of legal rights.*"⁹⁶

It seems that the distinction between human rights and human dignity is put to assert the point that the current concept of human rights is, as Tibi put it, "a modern cultural achievement of Western Europe."⁹⁷ Any cultural recognition of the importance of

⁹³ Tibi, B., "The European Tradition of Human Rights and the Culture of Islam", in: An-Na'im, A. A., and Deng, F. M., (eds.), op.cit., 1990, p. 109

⁹⁴ Howard, R. E., "Dignity, Community, and Human Rights", in: An-Na'im, A., (ed.), op.cit., 1995, p. 84

⁹⁵ Ibhawoh, B., op.cit., p. 46

⁹⁶ Ibid., p. 46

⁹⁷ An-Na'im's comment on Bassam Tibi's argument presented in the introduction in: An-Na'im, A. and Deng, F. M., op.cit., 1990, p. 4

human life and dignity not of Western culture is considered moral worth of human being not human rights.⁹⁸ This assertion, however, does not seem to be helpful to the discourse of human rights implementation because the implementation process, rather than distance itself from the society concerned, always tries to find a way to assert itself in that society's culture, albeit in moral form. So human rights being recognized in moral or religious form do not seem to discredit the society; rather it forms a primary force for the overall human rights achievement.

II.2.3.1.1.2. Human Rights and Human Duty

Some universalists authors, in the process of defining human rights, have set another distinction: the concept of right versus the concept of duty. This distinction has long been debated and has now been cited to assert a Western conception of the international human rights, as a right is not dependent on a duty on the part of the person toward whom the right is held. Western authors usually cite Gray's argument which asserts that the theory of a correlative relationship between rights and duty fails to recognize that there are duties independent of rights. There may be a duty to perform an action towards a person where we cannot say that he has a right to have the action performed.⁹⁹ As Gray put it, "*It may be the duty of Jack Ketch (as a public servant) to hang Jonathan Wild, but we do not say that Wild has a right to be hanged.*"¹⁰⁰ This argument might stem from the opinion that the public institution cannot be the owner of rights- that Ketch as a public servant has the right to hang Jonathan Wild- as a right is always private and vested in some determinate individual. However, it seems to forget that there are certain rights which an individual possesses in virtue of his membership of a

⁹⁸ Howard's assertion that dignity is not private, individual, or autonomous, but public, collective, and prescribed by social norms is a clear adherence to the Western cultural understanding of the concept of human rights that largely stems of Western philosophy of individualism.

⁹⁹ Gray, J. C., *The Nature and Sources of the Law*, New York : Macmillan, 1924, p. 9

¹⁰⁰ *Ibid.*, p. 9

group which are termed as "public rights" or "group rights", like rights of way, rights of navigation and fishing, and rights of protection against nuisances.¹⁰¹

Moreover, it has been argued that there are claims of rights that do not entail any duties. The right to education, for example, is a legitimate claim that is held by a person, but against no particular individuals.¹⁰² Lyons also contends that freedom of speech does not correspond to any duty.¹⁰³

Consistent with this, Donnelly argues that although the political precepts of Islam do reflect a strong concern for human good and human dignity, the bases for these injunctions are divine commands that establish only duties, not human rights.¹⁰⁴ The right of protection of life, he illustrated, is in fact a divine injunction not to kill and to consider life as inviolable.¹⁰⁵ The right to justice, as he put it, proves to be instead a duty of rulers to establish justice.¹⁰⁶ Mayer has pointed out that women's rights in Islam, as recognised by traditional Islamic *fiqh*, are nothing more than duties to stay segregated, secluded, and veiled, that have no connection with international principles of human rights.¹⁰⁷ These human rights authors seem to assert that human rights is a synonym for total, unrestrained freedoms and entitlements and the term duty is irrelevant to the international notion of right, being "*relegated to the confines of 'underdeveloped' non-western societies such as Islamic ones.*"¹⁰⁸

¹⁰¹ Lamont, W. D., *The Principles of Moral Judgment*, Clarendon Press, 1946, p. 81

¹⁰² Cited in Rowan, J., *Conflicts of Rights: Moral Theory and Social Policy Implications*, Boulder: Westview Press, 1999, p. 21

¹⁰³ Cited in Renteln, A, *op.cit.*, p. 41.

¹⁰⁴ Donnelly, J., *Universal Human Rights in Theory and Practice*, London: Cornell University Press, 1989, pp. 50-52

¹⁰⁵ *Ibid.*, p. 51

¹⁰⁶ *Ibid.*, p. 51

¹⁰⁷ Mayer, A. E., *op.cit.*, 1999, pp. 60, 103

¹⁰⁸ Ali, S., *op.cit.*, p. 15

However, this distinction between right and duty, by close examination, is misleading. In respect of Lyons' example of freedom of speech, it can be argued, there is a duty imposed upon the judiciary to protect the right concerned.¹⁰⁹ If we submit that a right cannot be vested in the public institutions, then the public institutions are under a duty to protect the individual right, and only such a duty would give rise to the right as a legal claim.¹¹⁰ The same can be said regarding the right to education, in that the party against whom the claim is held might be the government or even society at large, which bears the duty to ensure proper education for individuals.¹¹¹

It seems that the correlative relationship between right and duty is the core element that gives rise to the legal claim. Although the functioning human rights instruments may seem, on the surface, more inclined to assert the idea of the individual's right than the individual's duty, the idea of duty still forms a substantive basis of the concept of human rights. Duty might not even be a result of an existent claim, but a basis, along with right, for its existence. That is to say, a legal claim cannot be imagined held by an isolated individual living on an isolated island, because of the absence of anyone who would respect his rights, like the other party to a certain legal contract, or who would dispute the existence or the extent of them. In this case, a right as a claim would not

¹⁰⁹ Renteln, A, *op.cit.*, p.42

¹¹⁰ Rowan gives a sophisticated analysis in this regard, asserting that the claim, if it is to be regarded as such, has to be held against some determinate person or persons. A claim that is held against no one is actually not a claim but a "privilege". Rowan argues, a privilege differs from a claim because of the absence of a correlative duty. For Rowan, it is the duty that plays the crucial role in differentiating between the right as a privilege and the right as a claim. He illustrates that the refusal of service at the ticket window because of the skin colour of a person cannot violate his privilege of going, say, to the ball game, because his privilege entails no duty on the part of others; there can be violations of his rights only if those rights are claims that entail a duty on the part of others not to differentiate according to colour. Rowan continues to argue that while a duty is essential for the claim to be held against someone, it need not necessarily be accompanied with the power to waive the claim. For example, in the United States, it is against the law for anyone to sell himself into slavery; the legal claim not to be enslaved is not accompanied by a legal power to waive this claim. This may also explain why some rights are seen as inalienable. Rowan, J., *op.cit.*, pp. 21-27

¹¹¹ *Ibid.*, p. 21

exist and the individual right would be no more than an interest.¹¹² This correlative duty with right is manifested in the international right to a fair trial and the right concerning periodic elections, which clearly impose obligations upon the states to set up of an adequate judiciary and legal aid system and to hold free and secret elections.¹¹³

However, duty, here, is a conceptual one which only exists to give rise to the right of individual as a legal claim, in the sense that it does not give any right to be exercised by whoever person against the individual, say, by the state in the name of the rights of people.¹¹⁴ The international instruments clearly give priority to the individual's right over people's right and this is evidenced by the wide range of rights, the international human rights treaties cover, which mainly serve individuals, not society or the people and which accorded precedence over national sovereignty.¹¹⁵

Although the correlative relationship between right and duty as the meaning of the concept of the individual right is recognised in international instruments, this is not necessarily the only notion of human rights. The international human rights instruments

¹¹² See the discussion of the theory of the Belgian scholar, Dabin, in Nijaidah, A. H., *Almdkhal le Derasat Alqanoon Wefqan Lquaneen Dawlat Al-Emarat Al-Arabyyah Al-Muttahedah: Alketab Athani Nadaryyat Alhaq*, (in Arabic), Dubai: Albayan Press, 1994, p. 38

¹¹³ Van Hoof, G. "The Legal Nature of Economic, Social and Cultural Rights: A Rebuttal of Some Traditional Views" In: Alston, P & Tomasevski, K, (eds.), *The Right to Food*, Netherlands: Martinus Nijhoff, 1984, p. 103

¹¹⁴ It is said that people's rights have an aspect of state sovereignty and its field of application is determined by state, while traditional human rights are addressed to individuals and have the function of limiting the free exercise of state sovereignty in the interest of justice. See Partsch, K. J., "The Enforcement of Human Rights and People's Rights: observations on their reciprocal relations", In: Bernhardt, R., Jolowicz, A. J., (eds.), *International Enforcement of Human Rights*, Report Submitted to the Colloquium of International Association of Legal Science, Heideberg, 28-30 August, 1985, p., 26

¹¹⁵ Rights like the right to life, right to freedom from torture and degrading treatment, freedom of religion, freedom of speech, etc. As a result of the international focus on individual rights, giving them precedence over the society at large, the African states, most newly independent, have tended to regard the international concern for human rights as a pretext for undermining their sovereignty. See Naldi, G. J., "Future Trends in Human Rights in Africa: the increased role of the OAU?," In: Evans, M. D., Murray, R., (eds.), *The African Charter on Human and Peoples' Rights: The System in Practice, 1986-2000*, Cambridge: Cambridge University Press, 2002, p. 2 The African regional effort, therefore, resulted in an African Charter on Human and People's Rights adopted in June 27, 1981 in which the African states clearly specify in chapter two the duties of the individual, by which state members could claim the power to intervene in individual basic rights in the name of the individual's duties towards the society at large.

sometimes, although very rarely, impose a duty upon individuals towards the state for the benefit of individuals. Article 20 of the Covenant on Civil and Political Rights is a case in point, where it requires states to prohibit any propaganda of war, and in turn puts individuals under an obligation towards the state not to commit such an act. Accordingly, individuals' duty towards the government or society at large, such as Muslim women's duty towards the society to be veiled, if the society concerned perceived it to be for the benefit of women, in particular, and the society, in general, might be acceptable.¹¹⁶

These distinctions between human right and human dignity on the one hand, and between right and duty on the other, may have been intended to undermine any justification for gross violation of human basic rights and fundamental freedoms in the name of culture and religion.¹¹⁷ However, the fact of cultural differences is both inescapable and difficult to accommodate philosophically¹¹⁸ as human nature itself is, in some measure, culturally relative.¹¹⁹ Donnelly himself admits that *the cultural variability of human nature not only permits but requires significant allowance for cross-cultural variations in human rights.*¹²⁰ The American Anthropological Association has stressed the need for sensitivity to cultural diversity in the drafting of international human rights instruments¹²¹ and warned of the danger that the Universal Declaration of Human Rights would be "*a statement of rights conceived only in terms of*

¹¹⁶ In the Saudi society, for example, the black veil is embraced by many women as a form of protection and an integral part of their religion. See Faiza Saleh Ambah, Saudi Women Rise in Defense of the Veil: Some Conservatives Fear U.S.-Led Erosion of Traditional Islamic Values, Thursday, June 1, 2006, Washington post Website, Available On line at <http://www.washingtonpost.com/wp-dyn/content/article/2006/05/31/AR2006053101994.html>

¹¹⁷ See Higgins, R., op.cit., p. 96

¹¹⁸ Nickel, J. W., "Cultural Diversity and Human Rights", in: Nelson, J. L., and Green, V. M., (eds.), *International Human Rights: contemporary issues*, New York: Human Rights Publishing Group, 1980, p. 44

¹¹⁹ Donnelly, J., op.cit., 1989, p. 111

¹²⁰ Ibid., p. 112

¹²¹ An-Na'im, A. A., Toward a Cross-Cultural Approach to Defining International Standards of Human Rights: the meaning of cruel, inhuman, or degrading treatment or punishment, in: An-Na'im, A., op.cit., 1995, p.22

the values prevalent in the countries of Western Europe and America."¹²² The organization is still insisting on equal opportunity of all cultures, societies, and persons to realize their cultural identities and social lives.¹²³ We must be cautious not to replace tyranny that governs in the name of culture or religion with a new colonialism or imperialism in the name of human rights.¹²⁴

II.2.3.2. Western Universalism as a Type of Relativism

An-Na'im has pointed out that the assumptions that non-Western countries are commonly conceived as relativist and Western European countries are commonly assumed to be fully committed to the universality of human rights are both misleading and difficult to maintain in practice.¹²⁵ Human rights in Western ideology and the cultural position of individualism are individualistic, negative in nature, and can only be secured by non-interference on the part of states. Hence, Western European states, generally speaking, resist accepting the economic, social and cultural rights as human rights because they are, by nature, collective rights, giving state authority a wider role and intervention in their implementation.¹²⁶ Western authors, in general, regard these rights of an economic, social and cultural nature as second class rights, incompatible with the civilized world and free market.¹²⁷ On this basis, Dworkin has made another

¹²² Nickel, J. W., "Cultural Diversity and Human Rights", in: Nelson, J. L., and Green, V. M., (eds.), *op.cit.*, p. 46

¹²³ See the Declaration on Anthropology and Human Rights, available on line at <http://www.aaanet.org/stmts/humanrts.htm>

¹²⁴ It has been argued that the concept of human rights come out of the West as the 'black ships' of imperialism. See Freeman, M., "Universal Rights and Particular Cultures", In: Jacobsen, M., and Bruun, O., (eds.), *Human Rights and Asian Values: Contesting National Identities and Cultural Representations in Asia*, Richmond: Curzon, 2000, p.52

¹²⁵ An-Na'im, A. A., "Area Expressions" and the Universality of Human Rights: mediating a contingent relationship", In: Forsythe, D. and McMahon, P., *op.cit.*, p. 3

¹²⁶ Van Hoof, G. "The Legal Nature of Economic, Social and Cultural Rights: A Rebuttal of Some Traditional Views" In: Alston, P & Tomasevski, K., (eds.), *op.cit.*, p.103

¹²⁷ For more details about the nature of the economic, social and culture rights see Alston, P. "Out of the Abyss: The Challenges Confronting the New U.N Committee on Economic, Social and Cultural Rights" (1987) 9 *Human Rights Quarterly*, p.332-381. Alston, P & Quinn, G. "The Nature and Scope of Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights" (1987) 9 *Human Rights Quarterly*, p.156-229. Chapman, A. "A "Violations Approach" for Monitoring the International

distinction between human rights, in that he regards rights that are concerned with contribution to the collective welfare as *goals*, not rights, while the rights that are concerned with political moralities such as freedom of speech are human rights.¹²⁸ This demonstrates that when the matter of human rights raises ideological issues, Western authors tend to uphold their own ideology and cultural position. This western stance towards international human rights causes An-Na'im to assert that "*if the ideology or culture can exempt Western countries from accepting these rights (economic social and cultural rights) as human rights, non-Western countries can claim the same regarding such human rights norms as equality for women or protecting freedom of expression.*"¹²⁹ Human rights authors who view the current universal human rights corpus as a modern cultural achievement of Europe tend to argue that Western culture should always be the universal normative model for human rights implementation worldwide.¹³⁰ However, such a stress to the exclusivity of the concept of universalism to Western culture is in itself a denial of the concept of universality of human rights.¹³¹ Baderin noted that the concept of *universality of human rights*, which refers to the universal acceptance of the human rights idea through various international human rights instruments, must not be confused with the concept of *universalism in human rights*, which relates to the interpretation and application of human rights on which a

Covenant on Economic, Social and Cultural Rights", 1996, 18 *Human Rights Quarterly*, p.23-66. Darrow, M & Alston, P. "Bill of Rights in Comparative Perspective" In: Alston, P. *Promoting Human Rights through Bills of Rights*, Oxford: Oxford University Press, 1999. Eide, A. "Realisation of Social and Economic Rights and the Minimum Threshold Approach", 1989, 10 *Human Rights Law Journal*, p.35-51. Robertson, R. "Measuring State Compliance with the Obligation to Devote the "Maximum Available Resources" to Realizing Economic, Social and Cultural Rights", 1994, 16 *Human Rights Quarterly*, p.693-714. Symposium, "Implementation of the International Covenant on Economic, Social and Cultural Rights" (Limburg Principles), 1987, 9 *Human Rights Quarterly*, p. 121-135.

¹²⁸ Dworkin, R., *Taking Rights Seriously*, London: Duckworth, 1987, p. 90

¹²⁹ An-Na'im, A. A., "'Area Expressions" and the Universality of Human Rights: mediating a contingent relationship", In: Forsythe, D. P., and McMahon, P. C., op.cit., 2003, p. 7

¹³⁰ Tibi, B., "The European Tradition of Human Rights and the Culture of Islam", In: An-Na'im, A. A., and Deng, F. M., (eds.), op.cit., 1990, pp.104-132. See also Mayer, E., "Current Muslim Thinking on Human Rights", An-Na'im, A. A., and Deng, F. M., (eds.), op.cit., 1990, pp. 133-158

¹³¹ Mutua, M., "The Ideology of Human Rights", 36 *Virginia Journal of International Law*, Spring, 1996, pp. 593-594

complete international agreement has not yet been achieved.¹³² The current functioning of human rights is more one of internationalism, which considers rights as a *product of international action, such as treaty negotiations and conference deliberations*, rather than of Western universalism, which often stems from the philosophical theory of natural right that is largely of Western culture.¹³³ This is evidenced by Article 31 (2) of the ICCPR which provides that in electing members of the Human Rights Committee, which is responsible to monitor the implementation of the ICCPR Covenant and its Protocols, *“consideration shall be given to equitable geographical distribution of membership and to the representation of the different forms of civilization and of the principal legal systems”*.¹³⁴ Giving consideration to different form of cultures and legal systems that form our modern world in the membership of the UN human rights machinery, would undoubtedly contribute to the universality of human rights. This is clearly a UN readiness towards multi-cultural approach in the interpretations of universal human rights articulated in the UN human rights instruments rather than being culturally relative to Western values.¹³⁵

II.3. Domestic Values and International Human Rights: tension and paradox

The significance of cultural legitimacy, underpinned by cultural and spiritual values, for the implementation of international human rights, as discussed earlier, highlights the need for more research for international legal standards to draw the line between permissible variation and abhorrent violation of human rights. Many states would find

¹³² Baderin, M., op.cit., p. 23

¹³³ Friedman, J. R., “Human rights Internationalism: a tentative critique”, In: Nelson, J. L., and Green, V. M., (eds.), op.cit., p. 31

¹³⁴ See also Article 8 (1) of International Convention on the Elimination of All Forms of Racial Discrimination which states that *“There shall be established a Committee on the Elimination of Racial Discrimination (hereinafter referred to as the Committee) consisting of eighteen experts of high moral standing and acknowledged impartiality elected by States Parties from among their nationals, who shall serve in their personal capacity, consideration being given to equitable geographical distribution and to the representation of the different forms of civilization as well as of the principal legal systems.”*

¹³⁵ See Baderin, M., op.cit., p. 27

in the elaboration of cultural relevance to the implementation of human rights a convincing reason to justify their violation and non-compliance with international rights.¹³⁶ Universalists' main objection to the relativists seems to be that the relativist view is very state-centred and usually seeks to justify non-compliance with international human rights obligations.¹³⁷ This criticism seems also to be a main reason for the relativists to engage in cross-cultural dialogue, within each culture as well as between cultures, to explore proper international standards able to differentiate between the permissible variation, necessarily for the implementation, and the prohibited violation.¹³⁸ It seems that tackling the theory of cultural relativity to reach common legal standards to govern the implementation of human rights might be more appropriate than leaving it for the state to justify gross violation of them. Elaborating on the theory of cultural relativity would pave the way to an objective approach, favouring human dignity, to scrutinise and critically evaluate justifications on cultural differences.

II.3.1. Islam and International Human Rights

The reconciliation of the states' local values with human rights has often been difficult since it clashes with ideological and constitutional fundamental principles. One of the most important questions that has always been debated in international instruments is how to apply secular law, the international law of human rights, in an Islamic state where the religion is the fundamental and dominant law in the land. The strong relevance of Islam to the discourse of international human rights is clear in its position as the most powerful ideological force across the Muslim world, operating in parallel to

¹³⁶ For example the representative of Islamic Republic of Iran states in defence of alleged violation of human rights by his country that the Iranian government is "*in full accordance and harmony with the deepest moral and religious conceptions of the people and therefore most representative of the traditional, cultural, moral and religious beliefs of Iranian society...*" See UN General Assembly, 39th, Sess., Third Committee, 65th Mtg, 7 December 1984, A/C.3/39/SR.65. Cited in Baderin, M., op.cit., p. 30

¹³⁷ Higgins, R., op.cit., p. 96

¹³⁸ See An-Na'im, A. A., "Toward a Cross Cultural Approach to Defining International Standards of Human Rights", In: An-Na'im, A. A., op.cit., 1995, p. 21

other globalizing forces.¹³⁹ Islam is a living religion and the faith of nearly one-fifth of the world's population.¹⁴⁰ In fact, Islam represents itself as a universal belief with values and norms sent down for the benefit of human beings and which create a common cultural continuum across Asia, Eurasia and Africa.¹⁴¹ It has even been recognized as a prominent feature of the religious landscape of some Western countries.¹⁴² Thus, giving no regard to the Islamic fundamental values in the international human rights discourse, might result in severe impacts on the constitutional systems and political orders of the Islamic states or predominantly Muslim countries and hence on the international order and stability. The upheavals in many parts of the world that followed the publication of Salman Rushdie's *Satanic Verses* could be an example of the strong impact of Islam.¹⁴³ The recent event of publication of cartoons depicting Prophet Muhammad in a degrading way in some newspapers in Denmark and some other European states is another clear demonstration of the need to explore areas of conflict and of unification between Islamic law and international human rights law.¹⁴⁴

It is worth noting that Muslims' condemnation of Salman Rushdie's *Satanic Verses* and of the publication of cartoons depicting Prophet Muhammad is seen by many in the West as putting Western freedom of speech and consequently Western democracy on

¹³⁹ Fuller, G. E., *The Future of Political Islam*, New York: Palgrave Macmillan, 2003, p. 67

¹⁴⁰ Monshipouri, M., *Islamism, Secularism and Human Rights in the Middle East*, London: L. Rienner, 1998, p. 1

¹⁴¹ Fuller, G. E., *op.cit.*, p. 67

¹⁴² Winter, T.J., *British Muslim Identity: past, problems, prospects*, Cambridge: Muslim Academic Trust, 2003, p. 1

¹⁴³ Baderin, M. A., *op.cit.*, p.128

¹⁴⁴ The images offended the sentiments of billions of Muslims in the name of freedom of the press. Saudi Arabia has recalled its ambassador from Denmark and Libya has closed its embassy in Copenhagen, the capital of Denmark. The images triggered outrage among Muslims across the Middle East, sparking protests, economic boycotts and warnings of possible retaliation against the people, companies and countries involved. See John Ward Anderson, Cartoons of Prophet Met With Outrage, Depictions of Muhammad in Scandinavian Papers Provoke Anger, Protest Across Muslim World, Washington Post, Tuesday, January 31, Available Online at, <http://www.washingtonpost.com/wp-dyn/content/article/2006/01/30/AR2006013001316.html>

trial.¹⁴⁵ Freedom of speech is considered valued and essential in Western Europe, even in the realm of religion, and as this study considers the necessity to take a relativistic approach to human rights to be applicable to all peoples with different cultures and traditions, it indeed appreciates the Western differences in the implementation of the right to freedom of speech in much the same way as it encourages the international human rights bodies to appreciate, to a certain extent, the variation of others, like Muslims, in their application of human rights. However, this does not mean that both Western and Islamic states should also have the right to implement human rights in a way that greatly offends what might constitute fundamentals in both beliefs. If the Western states, for example, claim the right to vary in rights implementation irrespective of Islamic fundamentals, even if their way of implementation constitutes a violation which is extremely provocative in nature to Muslims, and Muslims claim the same right to vary in rights implementation irrespective of what the Western states would consider it, then we might fall into a trap of the so called “clash of civilizations”, which is definitely not in the interest of the promotion of human rights worldwide.¹⁴⁶ The relativistic approach to human rights should not be perceived as a claim to differ, but rather, as mentioned earlier, as an engagement in cross-cultural dialogue between different cultures, to explore proper international standards for drawing the line between permissible variation, necessarily for implementation, and prohibited violation. Human rights, after all, are a common standard of achievement for all peoples and all nations,

¹⁴⁵John Ward Anderson, Cartoons of Prophet Met With Outrage, Depictions of Muhammad in Scandinavian Papers Provoke Anger, Protest Across Muslim World, Washington Post, Tuesday, January 31, Available Online at, <http://www.washingtonpost.com/wp-dyn/content/article/2006/01/30/AR2006013001316.html>

¹⁴⁶Huntington in his work, titled “The clash of civilizations” argued that clashes between conflicting value and belief systems, particularly the incompatibility of Islam and the West, might form a potential cause of great wars. See Huntington, S., “The Clash of Civilizations?”, *72 Foreign Affairs*, Summer, pp. 22-49. The publication of cartoons depicting the Prophet Muhammad has triggered the anger of Muslims in Muslim communities across Europe and the wider world, raising a fear in Europe that the clash of civilizations could explode at any minute if some Muslim extremists, for example, decided, in retaliation against the publication of the cartoons, to blow up a church. See David Rennie, Day of Anger Threatened over Cartoons of Prophet, Telegraph Newspaper Website, 04/02/2006, Available Online at <http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2006/02/03/wcart03.xml>

for the promotion of freedom, justice and peace in the world.¹⁴⁷ However, this may not be possible without international cooperation, acting in a spirit of brotherhood that respects others' cultural and religious differences. Hence, with regard to the Western exercise of freedom of speech, although it is valued, it carries with it an inherent responsibility, and should not be used to degrade, humiliate or insult any group or individual.¹⁴⁸ Moreover, Muslims should also clearly identify and show the extent to which freedom of speech and human rights in general are respected in Islamic Shari'ah. Islamic Shari'ah has, indeed, as will be seen in the next chapter, many aspects of human rights values and Muslims, therefore, are encouraged to explore areas where Islamic law and human rights can work together for the enhancement of human rights values worldwide.

However, it has been argued that the conflict between Islamic Shari'ah and international law of human rights can never be fully resolved because Islamic Shari'ah addresses the individual's relation to his ruler within the context of his relation to God. Hence, there is a fear that the state may well interpret the individual's duties to God as duties to the state and as a result, the state intervention will be justified as applying God's commands.¹⁴⁹ It has also been suggested that the Caliph in an Islamic state enjoys universal and final judicial and legislative powers in addition to his executive authority, and with such an authoritarian regime, no right can be implemented.¹⁵⁰

¹⁴⁷ See the introduction of the Universal Declaration of Human Rights

¹⁴⁸ See Kofi Annan's statement over the cartoons at the opening session of the second meeting of the high-level group for the alliance of civilization, Doha, 26-February-2006, in Islamic Culture Foundation Website, Available on line at <http://www.funci.org/en/2006/issues/kofi-annans-statement-doha-2006/>

¹⁴⁹ Brems, E., op.cit., p. 207-208

¹⁵⁰ An-Na'im, A. A., "A Modern Approach to Human Rights in Islam: Foundations and Implications for Africa", In: Claude E. Welch, Jr. and Ronald I. Meltzer, (eds.), *Human Rights and Development in Africa*, Albany : State University of New York Press, 1984, 81

Although these views might be true to some degree in the traditional schools of Islamic thought, they do not seem to represent, as will be seen in the next chapter, the common view in modern Islamic jurisprudence. Indeed, Islam has to some extent some tension with the international human rights norms, but this does not necessarily mean that they can never be compatible.¹⁵¹

In fact, not only Islam contains principles that may raise tension with the current conception of human rights but also some Western traditional understandings of democracy and human rights create complexity in the international human rights discourse. The UK political and constitutional tradition, for example, has been an obstacle to the full realization of the European convention rights. The UK human rights experience shows how domestic values inevitably influence to a large degree the process of implementation. Since the tension between the Islamic Shari'ah and human rights will be discussed in more detail in chapter three, the following section will be devoted to discussion of the tension between British constitutional traditions and human rights principles.

II.3.2. British Constitution and Human Rights

Lord Scarman has reported that UK's violation of the European Convention of Human Rights accounted for approximately one fifth of the total making UK the most likely to violate the convention rights within the contracting states.¹⁵² Lord Lester has also

¹⁵¹A deeper discussion and analysis about the substance of Islamic Shari'ah and human rights will be made in the next chapter.

¹⁵² Lord Scarman, *Human Rights: can they be protected without a written constitution?*, Swansea: University College of Swansea, 1986, p.7

admitted in his recent work that some sixty judgments of the European Court have found breaches by the UK in wide areas of state regulations.¹⁵³

The reason for so many findings of British violations could be traced to the absence of effective domestic remedies in the British legal system.¹⁵⁴ Human rights are not enshrined in any basic law in Britain.¹⁵⁵ In the UK there is no written constitution specifying the power of the state authorities and the rights of individuals. The principles of the British constitution can be found in some specific Westminster statutes and judge-made common law.¹⁵⁶ This British legal tradition led the UN Human Rights Committee in 1995 to criticize the legal system of the United Kingdom. It suggested that the British constitutional system "*does not ensure fully that an effective remedy is provided for all victims of violations of the rights contained in the Covenant*" and called on Britain to examine the need for human rights incorporation into the British legal system or the introduction of a Bill of Rights.¹⁵⁷

The UK's objection to introducing a constitutional Bill of Rights was founded on its social political belief and perception of the concept of the constitution, which is different from that recognized in the civil law realm. The provisions of the constitution have no special status in the British political and constitutional belief and hence parliament can change whatever rules and whenever it likes.¹⁵⁸ There is no separation of

¹⁵³ Lord Lester, "Human Rights and the British Constitution", In: Jowell, J., and Oliver, D., (eds.), *The Changing Constitution*, Fourth Edition, New York: Oxford University Press, 2000, pp. 95-96. See also Lord Lester, "A Human Rights Bill", Vol. 145 No 6681, *New Law Journal*, 3 February 1995, p. 141

¹⁵⁴ Lord Lester, "Human Rights and the British Constitution", In: Jowell, J., and Oliver, D., op.cit., p., 96

¹⁵⁵ There were no justiciable rights entrenched in the British constitution until the Human Rights Act 1998 was adopted in 2 Oct. 2000. However, the Act does not entrust to the courts the power to strike down an Act of Parliament. Parliament's sovereignty is still in full operation. For more details see Bradley. A.W., "The Sovereignty of Parliament – Form or Substance?", In: Jowell, J., and Oliver, D., op.cit., p. 56. In chapter six we will discuss in more detail the effect of the UK Human Rights Act 1998 in the UK legal system.

¹⁵⁶ Barendt, E., *An Introduction to Constitutional Law*, New York: Oxford University Press, 1998, p.26-27

¹⁵⁷ Zander, M., *A Bill of Rights?*, Forth Edition, London: Sweet & Maxwell, 1997, p., 51

¹⁵⁸ Barendt, E., op.cit., p. 27

powers between the legislature and the executive organ.¹⁵⁹ Both powers are conferred on Parliament, whose Act is absolutely sovereign, and the courts have no power but to apply it in a way that does not conflict with Parliament's intention in issuing such an Act.¹⁶⁰ This is recognized as the principle of the sovereign parliament, the most fundamental principle in the United Kingdom. Thus, the entrenchment of the Bill of Rights in such a constitutional system is seen as an attack on their fundamental constitutional principle of Parliamentary Sovereignty, since such bills always seek to impose restraints on the power of the government as well as the legislature. The common British view is that Parliament (elected officials) is the institution which must have the unrestrained power to legislate and repeal whatever it likes by simple majority and that constitutional principle is fundamental in a way that Parliament itself cannot change.¹⁶¹ One of the arguments put against the introduction of a Bill of Rights is that the entrenchment of the international rights would necessarily empower the judges, the guardians of law, to decide issues traditionally conceived to fall within the capacity of elected officials.¹⁶² This codification, as British politicians believe, would undermine democracy on the ground that it would shift the power to decide very broad and contestable matters such as human rights to the appointed judges.¹⁶³

Whatever the basis of the argument that is made against the entrenchment of the international rights in the British legal system, this British constitutional principle of Parliamentary Sovereignty is seen as a principle of majoritarian tyranny, since Parliament can change whatever it likes even against basic human rights by simple

¹⁵⁹ Parpworth, N., op.cit., p. 21

¹⁶⁰ Dicey, A., op.cit., p. 60

¹⁶¹ Ibid., p., 38. Dicey asserted that parliament can even interfere with far more important rights of individuals to the benefit of the community. see pp. 46-47

¹⁶² Darrow, M., and Alston, P., "Bills of Rights in Comparative Perspective", In: Alston, P., op.cit., 1999, p. 498

¹⁶³ Campbell. T., "Democratizing Human Rights", In: Leiser. B & Campbell, (eds.), *Human Rights in Philosophy and Practice*, Aldershot : Ashgate, 2001, p.183

majority.¹⁶⁴ The most frightening element of the principle does not lie in its procedural aspect but it actually lies in its substantive constitutional feature of unrestrained legislature. It is the British political belief in the supreme Parliament that can change whatever it likes without any legal accountability. The constitutional principle of the supremacy of the Islamic Shari'ah, which implies that God is the supreme lawgiver in many Islamic states,¹⁶⁵ and which cannot be changed by the legislature seems to equate to the supremacy of the constitutional principle of Parliamentary Sovereignty in the UK, which even Parliament itself, as will be seen below, cannot change. So, Islamic religion and British tradition seem to come to a point of convergence, particularly in its constitutional aspects, in respect of the foreign values represented by the international norms of human rights.

It is worth adding, here, that the main point of comparing the UK constitutional principle of Parliamentary Sovereignty with the Islamic states' constitutional principle of the supremacy of the Islamic Shari'ah is not to make a comparison between the supremacy of the legal rules of the Shari'ah and the supremacy of Acts of Parliament, since Acts of Parliament inconsistent with human rights in the UK can easily be amended by Parliament, while the Islamic legislature cannot change the fixed rules of Islamic Shari'ah. Rather, the reference, here, is mainly to the ideological and constitutional aspects of the UK constitutional principle of Parliamentary Sovereignty, with all this may imply of legal rules inconsistent with human rights, which Parliament

¹⁶⁴ Lord Lester of Herne Hill QC, "Human Rights and the British Constitution", in: Jowell, J., and Oliver, D., op.cit., p. 90-91

¹⁶⁵ See Article 7 of the basic law of Saudi Arabia which states that "*The regime derives its power from the Holy Qur'an and the Prophet's Sunna which rule over this and all other State Laws.*" Article 4 of Iran constitution also states that "*All civil, penal financial, economic, administrative, cultural, military, political, and other laws and regulations must be based on Islamic criteria. This principle applies absolutely and generally to all articles of the Constitution as well as to all other laws and regulations, and the fuqaha' of the Guardian Council are judges in this matter.*" See also the UAE court interpretation of Article 7 of the UAE Constitution, discussed in Chapter Four, which asserts the supremacy of the Islamic Shari'ah in the UAE constitutional system. See also Article 1 of Qatar constitution which states that "... *Islam is the State's religion and the Islamic Shari'ah is the main source of its legislations...*"

itself cannot change. This may assist in tackling the constitutional principle of the supremacy of Islamic Shari'ah that God is the supreme lawgiver, with all this may imply of rules inconsistent with human rights, which the Islamic legislature cannot change. Indeed, in certain areas, where the legal principles of Islamic Shari'ah are fixed, Muslims also cannot make changes, except as required by the Shari'ah law; the Islamic *hudud* and some aspects involving relations between Muslims and non-Muslims are examples. However, they can react to potential inconsistency in other wider areas, such as freedom of speech, equality between men and women, freedom of religion, and the rights of minorities. Muslim scholars and jurists can use, in their interpretations of what is revealed by God, techniques that exist in the Islamic teaching, confirming the flexibility of Islamic Shari'ah in the implementation, and its timeless nature that is adaptable to the present-day conditions and circumstances, as we will see later, to incorporate international human rights and reconcile, to a certain extent, the potential inconsistency between them. In this respect, the example of the UK reaction to inconsistency between its sacred constitutional principle of Parliamentary Sovereignty and the requirement of human rights, as we will see in Chapter Five, could be of benefit. In fact, the potential inconsistency of Islamic rules can be clearly defined, in the sense that such rules cannot be more than already exist, as the revelation of God ended with the death of His last Prophet. The UK legal system, however, as a result of the continuing nature of the UK constitutional principle of Parliamentary Sovereignty, is evolving and hence the inconsistency is unpredictable. The UK constitutional principle of Parliamentary Sovereignty implies, as will be seen below, that Parliament can, at any time, if it chooses, violate the basic human rights and fundamental freedoms without any legal accountability whatsoever.¹⁶⁶ However, the main point, here, is not how the inconsistency arises but how a lesson can be drawn from the UK reaction to the

¹⁶⁶ See *R v Secretary of State for the Home Department, ex parte Simms and another*, House of Lords, [2000] 2 AC 115, [1999] 3 All ER 400, [1999] 3 WLR 328, [1999] EMLR 689.

potential inconsistency between its constitutional system and the requirements of human rights. Thus, it is not a legal issue of implementation but the idea of values that determines how the legal system operates.

It is also worth noting that the reference to the UK, here, should not be taken as pointing a finger at the UK constitutional system as having constitutional principles inconsistent with the requirements of international human rights in order to justify violations of human rights elsewhere in the world. Rather it should be taken as first, a demonstration that cultural and traditional tension with human rights is not necessarily exclusive to a certain culture or certain nation but it is actually a result of the variety of diverse traditions of different nations that form this modern world. Second, it is a demonstration, as mentioned above, of how the UK constitutional system reacts to resolve the constitutional inconsistency between human rights and its principle of Parliamentary Sovereignty; an experience from which Muslims can benefit to strike the balance between the constitutional principle of the Islamic Shari'ah that God is the supreme lawgiver and the requirements of international human rights instruments. Thus, it is not a straight comparative work but one that derives lessons and demonstrates the wider application of the issue of values when it comes to the domestic implementation of human rights. In the following section, therefore, we will examine the fundamental constitutional principle of the British Parliamentary Sovereignty, which raises complexity in human rights implementation in the UK constitutional system.

II.3.2.1. The Doctrine of Parliamentary Sovereignty

Parliamentary Sovereignty is the main fundamental constitutional principle in the UK legal and political system. Dicey, one of the most celebrated constitutional scholars in the UK, defined the principle of Parliamentary Sovereignty as the "*right to make or unmake*

*any law whatever; and, further, that no person or body is recognized by the law of England as having the right to override or set aside the legislation of Parliament".*¹⁶⁷

Dicey further explained his definition by saying that the principle of Parliamentary Sovereignty may then have two sides. The positive side is that: "*any Act of Parliament, or any part of an Act of Parliament, which makes a new law, or repeals or modifies an existing law, will be obeyed by the Courts.*" The negative side is that: "*there is no person or body of persons who can, under the English constitution, make rules which override or derogate from an Act of Parliament, or which (to express the same thing in other words) will be enforced by the Court in contravention of an Act of Parliament.*"¹⁶⁸

For Dicey, the unrestrained legislative power of Parliament is a legal fact, in the sense that no institution whatsoever can challenge the validity of its enactments, even if it was to override the rule of law.¹⁶⁹ There is no sacred area that Parliament cannot touch. It can easily intervene in public or even private rights of individuals. The Septennial Act of 1716 was a striking example of Parliament's interference with public rights. The Septennial Act was introduced to extend the legal duration of Parliament from three to seven years, prolonging the powers of the existing House of Commons for four years beyond the time for which the House was elected.¹⁷⁰ This Act was a surprise for many lawyers, who regarded such an enactment as a violation of the trust of the people. Although Parliament in the Septennial Act of 1716 made unprecedented use of its power, the Act proves that Parliament, from a legal point of view, is neither the agent of the electors nor a trustee for its constituents.¹⁷¹ It is legally the sovereign legislative power in

¹⁶⁷ Dicey, A., *op.cit.*, p., 38

¹⁶⁸ *Ibid.*, p., 38

¹⁶⁹ Jowell, J., "The Rule of Law Today", In: Jowell, J., and Oliver, D., *op.cit.*, p. 17

¹⁷⁰ Jenkins, D., "From Unwritten to Written: Transformation in the British Common-Law Constitution", Vol. 36, *Vanderbilt Journal of Transnational Law*, 2003, p. 870

¹⁷¹ Dicey, A., *op.cit.*, p., 45

the state. Dicey asserted that parliament can even interfere with far more important rights of individuals to the benefit of the community.¹⁷²

Undoubtedly, for Dicey, the arrangements of the constitution are to assure that the will of electors is, by the means of constitution, enforced in the political and constitutional life. But this is a political, not a legal fact, in the sense that the Courts will take no notice of the will of electors.¹⁷³ The electors can always enforce their will in the long run only through their representatives in Parliament. They cannot, for example, invalidate an Act of Parliament on the ground that it is against their wish. That is simply because such an Act is an expression of the wish of their representatives. As Dicey suggests, the common view of the British constitutional authors is that the members of the House of Commons are not merely trustees and their acts are not subject to electors.¹⁷⁴ It is worthwhile mentioning that in Dicey's time, the independence of judiciary was seen as "*the sole security for the maintenance of the common law which was nothing else but the rule of established customs modified only by Acts of Parliament.*"¹⁷⁵

Almost all of the well known British authors, like Austin¹⁷⁶, Hart¹⁷⁷, Heuston¹⁷⁸ and Wade¹⁷⁹, seem to agree with the Dicean theory of Parliamentary Sovereignty in that the Parliament of Westminster is the sovereign body in the United Kingdom, holding unrestrained legislative power. Although there are some disagreements over the nature of

¹⁷² Ibid., pp., 46-47

¹⁷³ Ibid., p., 71

¹⁷⁴ Ibid., p., 73 Austin agrees with Dicey that Parliament is the sovereign body in the United Kingdom which has the ultimate legislative power, but Austin differs from Dicey in that he considers members of the House of Commons as merely trustees, implying that sovereignty lies in the monarch, peers and electors, instead of the members of the House of Common. See Austin, J., *The Province of Jurisprudence Determined*, London: Low & Brydone (Printers)Ltd, 1965, pp. 230-231

¹⁷⁵ Harden, I., and Lewis, N., *The Noble Lie: The British Constitution and the Rule of Law*, London: Hutchinson, 1986, p. 38

¹⁷⁶ Austin, J., *opcit.*, Lecture vi, 1954, pp. 191-361

¹⁷⁷ Hart, H.L.A., *The Concept of Law*, Oxford University Press, 1965, pp. 50-78

¹⁷⁸ Heuston, R., *Essays in Constitutional Law*, Second Edition, London: Stevens & Sons, 1964, pp. 1-31

¹⁷⁹ Wade, W., *The Basis of Legal Sovereignty*, 1955, pp. 171-197

sovereignty and over whether Parliament has the power to bind its successor, the British common view is that Parliament cannot be bound even by its own enactments, in the sense that the current Parliament cannot withdraw a topic from the legislative scope of future Parliament, despite the disagreement on whether Parliament can bind its successor as to the form and manner in which a statute can be passed.¹⁸⁰

Recent cases show that the courts are hampered by the principle of Parliamentary Sovereignty and not willing to compromise. In *Raymond v. Honey* 1983, Lord Wilberforce admitted that access to a court was a right protected by Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. However, he asserted that under English law, constitutional rights such as access to court can be taken away from a convicted person expressly or by necessary implication.¹⁸¹ Lord Bridge added that even a citizen's right to unimpeded access to the courts can also be taken away by express enactment.¹⁸² In a recent judgment, Laws J has noted that the English common law provides no lesser protection of the right of access to the Queen's courts than might be vindicated in Strasbourg. However, he

¹⁸⁰ Hart in justifying the continuity of the legislator differentiates between two schools: the *continuing* and the *self-embracing* school and admits that the rule is one of continuing theory, so that Parliament cannot protect its statutes from repeal, but Parliament, he added, can extend its enactments to bind its successor as to the manner and form in which legislation can be passed. Hart, H.L.A, op.cit., p., 147. Parliament could determine the manner and form by which the statutes can be identified and how its will was to be ascertained. Barber, N., "Sovereignty Re-examined: The Courts, Parliament, and Statutes", Vol.20, No.1., *Oxford Journal of Legal Studies*, 2000, P. 133. However, Heuston re-emphasised that the courts have jurisdiction to question the validity of an Act only on the grounds that it does not satisfy the conditions and procedures set out in the introduction to such kind of statute, but when it comes to the area of what may be done by a law, the courts have no jurisdiction. Heuston believes that the rule identifying statutes is not a matter of limitation but identification. Heuston, R., *Essays in Constitutional Law*, Second Edition, London: Stevens & Sons, 1964, p. 15. On the other hand, Wade, although he seems to be in line with Heuston's argument which suggests that sovereignty is rule-based, differs in approaching the question of statute identification. Wade argues that the rule identifying statutes is beyond the reach of parliament. It is the common law, which is the source for such a rule and it is above Parliament, logically prior to it, and Parliament cannot alter it. Barber, N., op.cit., p. 133. Wade suggests that the relationship between the courts and Parliament stands on a political fact and therefore he concludes that Parliament cannot bind its successor in any way and the courts must give effect to Parliament's most recently expressed intention. Wade, W., *The Basis of Legal Sovereignty*, 1955

¹⁸¹ *Raymond v. Honey* [1983] 1AC1

¹⁸² See Lord Bridge's opinion, Judgment-5, in *Raymond v. Honey* [1983] 1AC1

refused to accept the counsel's argument that citizens' right to access to the courts is a fundamental right that Parliament cannot override.¹⁸³

Simon Brown in *R v. Ministry of Defence* 1995 declined to grant relief for applicants, discharged from the military service under a decision of 18 March 1994 because they had committed homosexual acts whilst serving in the armed forces. Although it was admitted that such a ministerial decision was in breach of Article 8 and 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms, Simon Brown found himself not in a position to declare the decision unlawful. He clearly expressed his sympathy for the applicants; however, he suggested that their claims must fail, since the decision had been affirmed by Parliament.¹⁸⁴ Lord Irvin of Lairg L.C has made it clear that any suggestion of the limitation of Parliament's legislative power is "*contrary to established laws and constitution of the United Kingdom.*"¹⁸⁵ Lord Bingham has also suggested that judges should not embark on an "*exercise of dis-applying Acts of Parliament*" because this is "*not part of our constitutional tradition*"¹⁸⁶ This sacred recognition of Parliamentary Sovereignty, therefore, leads to a question as to how such unlimited authority can guarantee that Parliament would not act as a despotic or tyrannical government in which the rights of individuals would be at stake.

Some opinions have recently emerged suggesting that Parliament is not at liberty to infringe some basic rights of individuals.¹⁸⁷ Lord Woolf affirmed that both institutions, Parliament and the courts, were ultimately subject to the rule of law and therefore if Parliament were to embark on the unthinkable by legislating law that undermined in a

¹⁸³ *R. v. Lord Chancellor, ex parte Witham*[1998] QB 575, [1997] 2 All ER 779, [1998] 2 WLR 849

¹⁸⁴ *R v Ministry of Defence, ex p Smith* [1996] QB 517

¹⁸⁵ Elliott, M., "The Demise of Parliamentary Sovereignty? The Implications for Justifying Judicial Review", 115 *Human Rights Law Review*, 1999, p. 125

¹⁸⁶ Bingham rejects new privacy law, *The Daily Telegraph*, Thursday 9 October 1997, Issue 868

¹⁸⁷ *Taylor v. New Zealand Poultry Board*, 1984 1 NZLR 394, 398 (Sir Robin Cooke)

fundamental way the rule of law, the courts would not be obliged to give effect to such arbitrary legislation.¹⁸⁸ However, judicial applications in this respect have not gone that far. Lord Hoffmann in the case of *R. v. Secretary of State for the Home Department, ex parte Simms* has expressed the view embraced by the House of Lords that "*Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights*" and the constraints on the power of Parliament, he added, are '*ultimately political, not legal*', which means that such constraints are beyond the power of the court.¹⁸⁹ Thus, the fundamental principle of the British constitution is that Parliament has an unrestrained legislative power, such that no institution can override its enactments, even if they are, by clear expression, in breach of the individual's fundamental rights.¹⁹⁰

¹⁸⁸ Lord Woolf, "Droit Public-English Style", *Pub. L.*, 1995, pp. 67-69

¹⁸⁹ But, Lord Hoffmann also underlined that 'Fundamental rights cannot be overridden by general or ambiguous words' and suggested "In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual." See *R v Secretary of State for the Home Department, ex parte Simms and another*, House of Lords, [2000] 2 AC 115, [1999] 3 All ER 400, [1999] 3 WLR 328, [1999] EMLR 689.

¹⁹⁰ The doctrine of Parliamentary Sovereignty indeed caused great internal constitutional difficulties when the British government decided to join the European Community. That is because membership of the European Community requires a state to surrender some of its sovereignty for the benefit of establishing a new European legal order. In doing so the state members must give certain provisions of Community law a direct effect in the state domestic legal system, whereby individuals can rely on them before national courts without further implementation. See Hunt, M., *op.cit.*, p., 47. National courts have no power, whatsoever, to invalidate Community acts. See Andens, M., and Jacobs, F., (eds.), *European Community Law in the English Courts*, Oxford: Oxford University Press, 1998, p. 13. The European Court of Justice held in *Costa v. ENEL* that '*it followed from the very nature of the new legal order that national courts are bound to give primacy to Community law over any inconsistent national law, including subsequent legislation*'. See Hunt, M., *op.cit.*, p., 47. Giving supremacy to the provisions of Community law over the Act of Parliament would indeed raise a constitutional difficulty in the British legal system. It is inconsistent with, at least, the continuing theory of Parliamentary Sovereignty which suggests that Parliament cannot bind its successor. However, by legislating the European Community Act 1972, the British Parliament has accepted the direct effect of the European Community law in the British legal system without further enactment. Accordingly, it might be true to say that by this Act Parliament, in certain areas, has transferred its sovereignty to the European Community law, meaning that future statutes of Parliament must be consistent with the Community law requirements. In accepting directly effective community law, Parliament seems to be abandoning the continuing theory of Parliamentary Sovereignty and moving more towards the self embracing view which indicates that Parliament could bind its successor. In the *Factortame* case, Lord Bridge gave an earlier statute, *1972 Act*, precedence over a later one, *Merchant Shipping Act 1988*, undermining the common view, supported by the case law, that suggests that an earlier parliament could not bind a later parliament. Barber, N., *op.cit.*, p. 145 see the opinion of Lord Bridge in the case of *Factortame Ltd and others v Secretary of State for Transport*, House of Lords, [1991] 1 All ER 70, [1990] 3 WLR 818, [1990] Lloyd's Rep 10. However, many lawyers have emphasized that Parliamentary Sovereignty in effect has remained intact, in that it can always retain its sovereignty by repealing the Act of 1972. For more discussion about the supremacy of the European Community law see Hunt, M., *op.cit.*, chapter 2, pp., 44-86

Accordingly, British experience of human rights implementation suggests that the tension resulted from domestic values with human rights is not exclusive to the non-Western states but Western states also have some traditions that are not in full compliance with the current notion of human rights. The tension with human rights, in practice, seems to be a result of the variety of diverse traditions of different nations that form our modern world, seeking to preserve their cultural and political identities before foreign values even if they were in the name of human rights. The potential threat that could result from the British traditional principle of Parliamentary Sovereignty is that it would damage, in addition to the rights and freedoms, in general, the core element of the international human rights movement, which is minority rights.¹⁹¹ The international standard of human rights is that every single person must be secured fundamental and political rights, no matter what the origin of that person or the religion in which he or she believes and no matter the size of that community.¹⁹² The British parliament, however, is accorded such an ultimate power that it could even result in the deprivation of important rights of a minority by a simple majority. The High Commissioner of Human Rights has warned the international community of the danger of majoritarian tyranny and suggests a conception of democracy that encompasses majorities and minorities alike, participating on an equal footing in decision making.¹⁹³

Dicey, in his attempt to defend the unlimited sovereignty of the UK's parliament, has argued that the ruler, by nature, and without any formal procedures, will not embark on something which he regards as highly improbable and also the governed obviously will

¹⁹¹ Minority rights are perceived to be the original source of the growth of the current human rights movements. See Henrard, K., *Minority Protection in Post-Apartheid South Africa: Human Rights, Minority Rights, and Self-Determination*, Westport, Connecticut : Praeger, 2002, p. 2. See Steiner, H., and Alston, P., (eds.), op.cit., p. 93

¹⁹² Darrow, M and Alston, P., "Bills of Rights in Comparative Perspective", In. Alston, P, op.cit., 1999, p. 500

¹⁹³ Commission on Human Rights resolution 2001/41, Continuing dialogue on measures to promote and consolidate democracy, *A/RES/2001/41*, p. 4

not submit to such arbitrary rules. However, Dicey failed to explain how this limitation can really happen on the ground, since he denied the power of any kind of legal machinery. Instead, he left the issue to be resolved by the sovereign members of that sovereign parliament.¹⁹⁴ Dicey shows that the parliamentary power is not even subject to the people that elected the House of Commons, as he asserts, the House of Commons is not an agent of its electors.

This British understanding of democracy has brought a new dimension to human rights and attracts attention to a more complex aspect in the domain of right implementation in the state constitutional system. The British constitutional dilemma, which seems to hold the UK back from full realization of human rights, is of significance, and it illustrates the need to take constitutional principles seriously in tackling the implementation of human rights. Therefore, in the following part of this chapter I will discuss the concept of constitution and whether or not it really matters for the application of human rights.

II.4. Constitutional Conception of Human Rights

II.4.1. Human Rights in the Constitutional Settings

Most legal systems have always identified the concept of constitution as a special document with an extraordinarily high legal status, which contains fundamental rules that characterize the identity of the state. Besides this, the constitution, in most countries, tends to be the source of powers of the state's institutions. Every institution must function within its capacity, which is clearly designated in such a special document. The rules of the constitution have always been given precedence over the ordinary rules and legislations must be issued in the light of the constitutional orders,

¹⁹⁴ Loveland, I., "The War Against the Judges", 68 *Political Quarterly*, 1997, p. 163

otherwise, they would be regarded as unconstitutional.¹⁹⁵ The amendment of the constitutional rules is usually more difficult than those at the ordinary level. For example, if the majority vote to approve the amendment of ordinary legislation is a third of the members of the legislature, the majority vote to approve the amendment of the rules of constitution would be two thirds of the members.¹⁹⁶ Moreover, some fundamental rules may not even be subject to any kind of modification. Such inviolable nature of the fundamental rules may be expressly stated in the constitution, such as Art. 79, paragraph. 3 of the Federal Republic of Germany's Fundamental Law, which prohibits any modification of any rules that might touch the federal structure of the state.¹⁹⁷ In other cases, it may be identified by means of interpretation, as is the case in Switzerland.¹⁹⁸

The machinery applying such a hierarchy of the constitutional rules takes two forms of control; the first one, which is widespread in Europe, is called *a posteriori* review, in which the power of deciding the constitutional validity of legislation is conferred on the judiciary. The second one, which is recognized in France, is called *a priori* review, which requires a special council to be established to look at the constitutional compatibility of the Bill before it is passed as a valid law. The first form of control is the common one and takes different forms in its implementation. Some countries, such

¹⁹⁵ Allan, R., Brewer, Carias, *Judicial Review in Comparative Law*, Cambridge: Cambridge University Press, 1989, p. 137

¹⁹⁶ In the USA, amendments require a special majority in Congress followed by ratification by three-quarters of the states. See Finer, S. E., Bogdanor, V., and Rudden, B., *Comparing Constitutions*, Oxford: Clarendon Press, 1995, 13. See also Article 144,2,(C) of the UAE Constitution.

¹⁹⁷ Haefliger, A., "The Hierarchy of Constitutional Norms and its function in protecting human rights", *Human Rights Law Journal*, Vol.13, No.3, 1992, p.84

¹⁹⁸ In Swiss constitutional law, there is no norm corresponding to Art. 79, para. 3 of Germany's fundamental law, no is there any indication suggesting that certain norms take precedence over others. However, the constitutional right to launch an initiative to show the people's will for such a constitutional amendment is said to be limited. The recent doctrine suggests that even though the amendment of the constitution is purely democratic, there are certain barriers preventing any radical change that could touch the structure of the state. The Federal Assembly (Parliament) would have to invalidate any constitutional initiative threatening the foundations of the federalism or the essential core of the democratic order or personal freedoms. See Haefliger, A., *op.cit.*, p. 84

as Germany, Italy and Spain, set up a specialized constitutional court to review the constitutionality of legislation as a means of protecting the constitution from any potential danger of infringement by the legislature.¹⁹⁹ This system is known as a centralized system, and it is very common in Europe.²⁰⁰ The matter of constitutional validity of legislation may be brought either directly by an individual before the constitutional court or indirectly through the ordinary courts, where the litigant pleads that a piece of legislation is unconstitutional.²⁰¹ Others adopt a decentralized system of judicial review that lets the ordinary court decide the constitutionality of legislation, as is the case in America. The character of this codified constitution is always seen as rigid, since its amendment is through unusual procedures.

States tend to differ in securing human rights within their constitutional settings. Some states prefer to specify the rights in the preamble of the constitution than to state them in the constitutional body.²⁰² Others protect human rights through a bill of rights, either as a separate document used as an aid to guide the judges to apply and interpret the law in accordance with the bill as well as the legislature in passing the national laws, or as a legislated bill of rights which takes the form of a piece of legislation or a package of different statutes which when brought together, may be treated as a bill of rights.²⁰³ But all these different approaches are subject to serious criticisms. The main criticism of such approaches is that in respect to the bill of rights, whether as a separate document or even entrenched in the preamble of the constitution, it does not seem to bind the courts

¹⁹⁹ Robert, J., "Constitutional and International Protection of Human Rights: Competing of Complementary Systems?", General Report to the IXth Conference of European Constitutional Courts, 15 *Human Rights Law Journal*, No. 1-2, 1994, p. 4.

²⁰⁰ See Al-Ghufli, S. M., *A Reconsideration of Constitutional Review in the United Arab Emirates: "A Posteriori" or "A Priori" Review?*, PhD, University of Wales, Aberystwyth, 2000, p. 76-90

²⁰¹ Robert, J., *op.cit.*, pp. 4-5

²⁰² France, for example, entrenched the rights contained in the French Declaration of the Right of Man 1789 in the preamble of the French constitution of 1946.

²⁰³ Darrow.M and Alston.P, "Bills of Rights in Comparative Perspective", In: Alston.P, *op.cit.*, 1999, p.482

in using its norms in their interpretation, nor does it bind the legislature in passing laws in accordance with its inspiration.²⁰⁴ With regard to the legislated bill of rights, it cannot override inconsistent legislation, and it is subject to being repealed by ordinary legislation.²⁰⁵ It can easily be repealed whenever the legislature likes, which is believed to be a very crucial point. Therefore, it is traditionally believed that in order to have a high status of protection for human rights, they should be stipulated in the text of the constitution with such a high status of legality, so the rights of individuals will be secured from any intervention by the legislature or other governmental institutions. Although this latter solution might be a reasonable conclusion in terms of the above description, it is not always as simple as it first seems. If we look at the issue from a practical point of view, the conclusion may become different. In practice, there are countries, such as the UK, which have better human rights situations without having entrenched rights and freedoms or even without having a written constitution, than others who do not seem to pay attention to the respect of human rights and dignity, although their constitutions do contain individual rights and freedoms and have such a character of rigidity.²⁰⁶ The question, then, may not be whether a state has a written constitution. Rather, does the state believe in such constitutional norms as the principle of limited government, the fundamental rights and freedoms of individual and the rule of law? So, the idea is not the constitution itself, the idea is actually the principle of

²⁰⁴ French inclusion of the Declaration of the Rights of Man and of the Citizen in the preamble of French constitution raised a question of whether such inclusion in the preamble and not in the main body of the constitution is enough for them to be regarded as constitutionally binding rights. The French Constitutional Council resolved this question in 1971 by giving the Declaration of the Rights of Man and of the Citizen the constitutional value, whereby the council was able to rule unconstitutional some provisions of law on the basis they infringed principles given in the Declaration of the Rights of Man and of the Citizen stated in the preamble. See Constitutional Council Decision 71-44DC 1971 Available Online in French language at <http://www.conseil-constitutionnel.fr/decision/1971/7144dc.htm>. See also Sroor, A., *Alhimayyah Addustooryyah lel Huqooq wa Alhuryyat*, (in Arabic) Cairo: Dar Ash'orooq, 1999, p. 65

²⁰⁵ Darrow, M., and Alston, "Bills of Rights in Comparative Perspective", In: Alston.P, op.cit., 1999, p. 482

²⁰⁶ The UN Arab Human Development Report 2002 has shown that the Arab states, although they all have written constitutions and most of them state individual rights in the text of their constitutions, were proven to be the world's lowest scoring region, in both Average value of freedom scores, 1998-99 and Average value of "voice and accountability" indicators, 1998.

constitutionalism, which is more concerned with constitutional norms and values than a written document. The adoption of a constitution does not necessarily indicate that the state concerned is committed to the principle of constitutionalism.²⁰⁷

II.4.2. The Idea of Constitutionalism

Constitutionalism is the doctrine of restricted government. It requires imposition of limits on the powers of government, adherence to the rule of law, and the protection of fundamental rights and it is not dependent on the existence of a written constitution.²⁰⁸

It is more than 'a power map' or merely formal procedures; it is working arrangements which take control over the political authority, so it cannot be used oppressively or arbitrarily.²⁰⁹ Its main function is not to create the state's powers (legislative, executive and judicial powers) or to spell out a set of laws, but to limit those powers in a principled way.²¹⁰

The limitations could take a variety of forms. A federal system, for example, could limit the state's powers in their scope of authority; the federal government could have the authority over matters pertaining to the security of the nation, while the provincial governments would be concerned with matters pertaining to health services and education. The legislative power of the federal government could also be limited to certain elements by exclusively specifying them, while allowing provincial

²⁰⁷Darrow, M., and Alston, P., "Bills of Rights in Comparative Perspective", In: Alston.P, op.cit., 1999, p.465

²⁰⁸ Rosenfeld, M., "Modern Constitutionalism as Interplay between Identity and Diversity", In: Rosenfeld, M., *Constitutionalism, Identity, Difference, and Legitimacy: Theoretical Perspectives*, London: Duke University Press, 1994, p. 3

²⁰⁹Barendt, E., op.cit., p.14. See also Baun, M. J., and Franklin, D. P.,(eds.), *Political Culture and Constitutionalism: A Comparative Approach*, London: M. E. Sharpe, 1995, p. 5

²¹⁰ Baun, M. J., and Franklin, D. P., op.cit., p. 2

governments wider legislative authority in all matters not assigned to the Federation.²¹¹

This kind of limitation can also be defined as vertical separation of powers.²¹²

Another form of limitation is the separation of the powers of the state's three authorities, the legislature, the executive and the judiciary. This separation of powers could take different forms; the Montesquieuan form is a strict separation of persons and powers, in the sense that all organs of government must be separate and act exclusively, so there is no overlap whatsoever (pure separation of powers).²¹³ The American version takes the form of rigid separation of persons but with some degree of power overlap to secure the functionality of check and balance; it has been defined as a check and balance principle.²¹⁴ The third form might be the British check and balance principle which seems to be more flexible than the American one. The British check and balance version seems to leave broad overlap of authorities between the legislative organ and the executive one. However, it assigns great independence to the judiciary.²¹⁵

The aim of constitutionalists has been to arrange political institutions and influence the conduct of both citizens and governors by just legal rules providing for the common interest and civil liberty.²¹⁶ Their main concern is to establish the government of law

²¹¹ See the constitution of the United Arab Emirates

²¹² Baun, M. J., and Franklin, D. P., op.cit., p. 43

²¹³ Parpworth, N., op.cit., p. 20-21

²¹⁴ Barendt, E., op.cit., p. 15

²¹⁵ Although the British principle of separation of judicial power is rather vague, British authors maintain that the principle has been constitutionally guaranteed in several places of British constitutional practices; first, a full time judge cannot sit in the House of Commons; second, MPs are significantly limited in ability to criticize the judiciary or to discuss cases pending before the courts, to save the judiciary from any political pressure; third, senior judges hold their position 'during good behaviour, subject to a power of removal by the Crown on an address ... presented by both Houses of Parliament', which makes the removal of judges significantly difficult. See Barendt, E., op.cit., p. 129-130. However, it has been argued that this independence of the judiciary in British constitution is primarily political rather than legal and recognized in the light of the independence of individual judges rather than collective the judiciary. See Stevens, R., "A Loss of Innocence?: judicial independence and the separation of powers", 19 *Oxford Journal of Legal Studies*, 1999. p., 375

²¹⁶ Gwyn, W. B., "The Separation of powers and Modern Forms of Democratic Government", In: Goldwin, R. A., *Separation of Powers--Does it Still Work?*, Washington, D.C: Enterprise Institute, 1986, p. 67

and not of men, where the governors and the governed are ruled by one fundamental law.

The individual rights have often been considered as a fundamental element of the notion of constitutionalism.²¹⁷ It has even been argued that "*constitutionalism has come to mean nothing more than a system of legally entrenched rights that can override, where necessary, the ordinary political process.*"²¹⁸ Micheal Reisman has also pointed out that the international human rights contained in UDHR and the two international Covenants necessarily imply a right to an appropriate constitution.²¹⁹ Sir John Laws has distinguished between good constitutions and bad constitutions and referred to the good constitutions as recognising equal rights.²²⁰ He perceives the rule of law as the substantive one, not formal.²²¹

This distinction between the rule of law in the formal sense and the rule of law in the substantive sense has further stressed the significance of adhering to individual rights in the constitutional system. Rosenfeld has argued that the rule of law in the formal sense is insufficient to satisfy the minimum requirements of legitimate constitutional democracy.²²² The rule of law in this sense, he argues, could regard unjust laws such as slavery, apartheid and even inhuman practice as legitimate, as long as they satisfy the procedural requirements of the formal version of the rule of law.²²³ It is commonly

²¹⁷ Darrow, M and Alston, P., op.cit., p. 465

²¹⁸ Cited in *ibid.*, p. 467

²¹⁹ Reisman, M., "Introductory Remarks", *19 Yale Journal of International Law*, 1994, pp. 189-190

²²⁰ Laws, J., "The Constitution: Moral and Rights", *Public Law*, 1996, p. 622-623

²²¹ *Ibid.*, p. 631

²²² Rosenfeld, M., "The Rule of Law and the Legitimacy of Constitutional Democracy", 74:1307, *South California Law Review*, 2001, p.1314

²²³ *Ibid.*, p.1314. The minimum requirements of the rule of law in the formal sense are that law be general, adequately publicized, clear, prospective, and relatively stable. Goldsworthy argues that nothing can guarantee that the procedural requirements of the rule of law in the formal sense will be satisfied. He states that '*legislator cannot be required to ensure that every detail of every new law is brought to the attention of every citizen*'. He maintains that '*the rule of law would suffer if citizens were immune from any law not specifically brought to their attention*'. See Goldsworthy, J., "Legislative Sovereignty and the

suggested, therefore, that the legitimacy of the rule of law needs more than the rule of law in the formal sense.²²⁴ It may need to be based, in addition to the formal procedures, on justice and fairness, in the sense that the rule of law will be better served if it is grounded on procedural and substantive norms of fairness. Dworkin argues that a substantive conception of the rule of law is the conception of rights, in the sense that individuals have moral rights and duties in relation to one another, and political rights against the state as a whole and these rights are recognized in positive law and enforced through courts.²²⁵ Dworkin maintains that

*"The rule of law in this conception is the ideal of rule by an accurate public conception of individual rights. It does not distinguish, as the rule book conception (the formal conception) does, between the rule of law and substantive justice; on the contrary it requires, as part of the ideal of law, that the rules in the book capture and enforce moral rights."*²²⁶

Allan has also based his conception of the content of the rule of law on certain substantive rights of individuals, such as speech, conscience and association.²²⁷ Allan argues that judges must, in the application of the rule of law, give appropriate weight in their decisions to personal liberty.²²⁸

It is worth noting, here, that individual rights within this context are not only recognised as a set of rights that must be protected from the infringement of the state's authorities, but also as another form of limitation that curbs the authority of government through

Rule of Law", In: Campbell, T., Ewing, K., and Tomkins, (eds.) *Sceptical Essays on Human Rights*, New York: Oxford University Press, 2001, P.66-67

²²⁴ Rosenfeld, M., op.cit., p., 1314

²²⁵ Dworkin, R., *A Matter of Principle*, Cambridge: Harvard University Press, 1985, pp., 11-12

²²⁶ Ibid., pp., 11-12

²²⁷ Craig, P., "Constitutional Foundation, the Rule of Law and Supremacy", *Public Law*, 2003, p., 97

²²⁸ Allan, T.R.S., *Law, Liberty, and Justice the Legal Foundation of British Constitutionalism*, Oxford: Clarendon Press, 1993, p., 39

justiciable rights to things like free expression, association, equality and due process of law.²²⁹

II.4.3. The Cultural Legitimacy of Constitutional Rights

Human rights as a form of limitation, according to the constitutional conception discussed above, may fail to function if they were formulated in isolation from the culture and belief of the society they were supposed to serve. Human rights without cultural legitimacy, instead of being designed for curbing the state authority, may legitimize more state authority and intervention.²³⁰ Indeed, human rights implementation requires enforcement procedures against the government, but the exercise of these procedures mainly depends on the holders of these rights. As Donnelly asserts, human rights is in fact a set of social practices.²³¹ As a result, human rights should be seen as a *product of process* rather than an established, predetermined normative proclaimed through international instruments.²³² As An-Na'im noted, the proper implementation of human rights requires mobilization of the political will at the local, national, and international levels and that political will can in no way be

²²⁹ Mayer, A. E., op.cit., 1999, p. 40

²³⁰ For example, women's rights are widely perceived, especially in the West, as a means of liberating women from the oppression that they might encounter in their society, liberating women from their subordination to men, making them equal to men, giving them *self-esteem and esteem in the eyes of their society*. See Cherie Blair's statement in: Catherine Bennett, *Why should we defend the veil?*, See The Guardian, Thursday January 22, 2004, Available online at <http://www.guardian.co.uk/gender/story/0,11812,1128472,00.html>. This kind of right, the right of women to uncover, it may be called, was aggressively enforced in some Islamic countries like Iran at the time of *Shah* who saw in the wearing of the veil a symbol of political resistance against his secular system of governance. See Arkoun, M., *Rethinking Islam: common questions, uncommon answers*, translated and edited by Lee, R. D, Boulder : Westview Press, 1994, p. 26. The Tunisian government took a similar step in 1981 when the Tunisian government ratified law no. 108 banning Tunisian women from wearing *hijab* in state offices. See Al-Hamroni, M., *Tunisian Activist to Internationalize Hijab Ban*, Available Online at <http://islamonline.net/English/News/2006-01/19/article03.shtml>. Those governments found it convenient to eliminate any behaviour that could help the return of political Islam, and to dominate the political scene through their totalitarian attitude of governance. See Price, D., op.cit., p.,76, 130. So, the real holder of this kind of right, which is not socially and culturally accepted, is not the individual but actually the government, which seems inclined to use it to legitimize its oppression.

²³¹ Donnelly, J., op.cit., 1989, p. 17

²³² An-Na'im, A. A., "'Area Expressions' and the Universality of Human Rights: mediating a contingent relationship", In: Forsythe, D. P., and McMahon, P. C., op.cit., 2003, p. 2

guaranteed if human rights lack cultural legitimacy.²³³ The High Commissioner for Human Rights has affirmed the importance of the common political values of society at large that is heavily affected by culture, and suggested that the state institutions need to be *strengthened through broad outreach to and access by people to counter the threat of political elitism.*²³⁴ For some authors, the state institutions with little societal support would end up operating in a social and cultural vacuum that is opposed to the true liberal democratic system.²³⁵ As Apter has observed, "*Modernity was not the property of the few, or a scientific elite, but rather a fact of culture.*"²³⁶ On this basis, the human rights Commissioner's report looks beyond the formal institutions of democracy, i.e. the executive, the judiciary and the legislature, and draws the attention to the principle of representativeness underpinned by civil society where *electoral systems deliver results close to what the people aspire.*²³⁷

As far as international human rights law is concerned states are, indeed, legally required to refrain from violation of the international rights and to adopt measures of reform in their constitutional systems in order to comply with the international human rights requirements.²³⁸ Also states, especially parties to the human rights treaties, are

²³³ Ibid., p. 6. See also *Solesbee v. Balkcom*, 339 U.S. 9, 16 (1950). See also *Trop v. Dulles*, 356 U.S. 86, 101 (1958). The US Supreme Court asserted in this case that the application of the constitutional principle of the due process of law heavily depends on social values and beliefs of American people. It states that "*Due Process Clause embodies a system of rights based on moral principles so deeply embedded in the traditions and feelings of our people as to be deemed fundamental to a civilized society as conceived by our whole history.*" Also it pointed out that in the enforcement of such a broad technical concept as due process, the court would ensure that the court does not translate personal views into constitutional limitations. It stated "*the Court enforces those permanent and pervasive feelings of our society as to which there is compelling evidence of the kind relevant to judgments on social institutions.*"

²³⁴ The High Commissioner for Human Rights, Civil and Political Rights: Continuing dialogue on measures to promote and consolidate democracy, submitted in accordance with Commission resolution 2001/41, 27 January 2003, p. 11

²³⁵ Kamrava, M., *Democracy in the Balance: Culture and Society in the Middle East*, New York: Chatham House Publishers, 1998, p. 3. See also Verba, S., "Comparative Political Culture", In: Pye, W., and Virba, S., (eds.), *Political Culture and Political Development*, New Jersey: Princeton University Press, 1965., p. 525

²³⁶ Apter, D., *The Politics of Modernization*, Chicago and London: The University of Chicago Press, 1965, p. 10

²³⁷ The High Commissioner for Human Rights., 2001/41, 27 January 2003, op.cit., p. 11

²³⁸ See Article 2(1) of the International Covenant on Civil and Political Rights.

prohibited from invoking their constitutional principles, which are mainly social and cultural norms, to justify a failure to perform or give effect to obligations under the human rights treaties.²³⁹ However, the international human rights principles do not have direct horizontal effect as a matter of international law and the Covenants on human rights cannot be viewed as a substitute for domestic criminal or civil law.²⁴⁰ So the domestic legal principles that are heavily affected by the constitutional norms and structures of the states are in fact the principles that are always applied and hence the cultural legitimacy of the rights concerned will always be invoked. Restrictions on international rights are also permitted under international human rights standards, in so far as it is necessary in a democratic society²⁴¹ and does not impair the essence of the international rights.²⁴² Those state restrictions seem to be allowed mainly for the interest of public security and stability, which are themselves heavily dependent on the political culture and public norms of each society.²⁴³ This also indicates that variations in the implementation of human rights are permissible as long as they are conducted according to the international human rights standards, which require the variation to be acceptable in a democratic society and not to impair the essence of international rights.²⁴⁴

It can be argued, however, that the determination of compatibility between rights and certain societal traditions and customs may be not so difficult to achieve, but if religion is involved which upholds imitation over logic and reason, the difficulty becomes much greater and may not even leave any glance of hope of reconciliation. The complexity

²³⁹See Article 27 of the Vienna Convention on the Law of Treaties. See also Advisory opinion of the permanent court of international justice, February 4, 1932 concerning the treatment of Polish nationals in Danzig.

²⁴⁰ General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant: 26/05/2004., CCPR/C/21/Rev.1/Add.13. Available online at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/c92ce711179ccab1c1256c480038394a?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/c92ce711179ccab1c1256c480038394a?Opendocument)

²⁴¹ Robertson, A. H., and Merrills, J. G., op.cit., p. 126.

²⁴²General Comment No. 31 [80], Nature of the General Legal Obligation Imposed on States Parties to the Covenant: 26/05/2004., CCPR/C/21/Rev.1/Add.13

²⁴³ Robertson, A. H., and Merrills, J. G., op.cit., 1996, p. 126

²⁴⁴ In Chapter Five we will discuss these human rights standards in more details.

that has arisen from the involvement of religion, particularly Islam, in rights discourse might be the inner belief, not mere custom, that God and God alone is the ultimate right giver, from which necessarily follows the idea that freedom can only be achieved through submission to God and His divine law.²⁴⁵ Within this context, it has been argued that in Islam God, not the individual, is always the focal point and the individual, rather than having rights against the state, has religious duties toward the state, which is, according to many authors, against the core substantive feature of human rights.²⁴⁶ As a result, the divine law of the Shari'ah is found to be, in the Islamic states, the dominant law in the land consisting of principles, some of which are absolutely fixed and incompatible with the current understanding of human rights. Examples of these principles are the prevention of Muslim women from marrying unbelievers, which is said to amount to discrimination on the basis of religion, the differentiation between men and women in inheritance, which is said to be a discrimination on the basis of sex, and the Islamic *hudud* punishments which are according to the current trend of international human rights against the individual fundamental rights not to be subject to torture or to cruel, inhuman or degrading treatment or punishment.²⁴⁷

It appears that the main difficulty that is facing the application of human rights in the Islamic context is the secular basis of the concept of human rights.²⁴⁸ However, secular principles, by reflection, do not always enhance democracy and human rights but sometimes form a factor of repression and dictatorship, as in the case of Tunisia.²⁴⁹

²⁴⁵ Brems, E., op.cit., p. 207

²⁴⁶ Tibi, B., "The European Tradition of Human Rights and the Culture of Islam", In: An-Na'im, A. A., and Deng, F. M., op.cit., 1990, p. 116

²⁴⁷ Deeper discussion and analysis about the principles of Islam and human rights will be made in the next chapter.

²⁴⁸ Ali, S., op.cit., pp. 25-28

²⁴⁹ Sieglinde Granzer in his comparative study concluded that in the more secular state, Tunisia, the human rights are less implemented than in the more traditional Islamic state of Morocco. He has called

Generally speaking, the defenders of human rights, instead of defending human rights and democracy, appear sometimes to be arguing to defend the principles of secularism, not human rights. Therefore, it is appropriate, here, to discuss the relations of secularism and Islam to democracy before we endeavour to examine, in greater details, the compatibility of Islamic Shari'ah with the requirements of international human rights in the next chapter.

II.5. Secularism and Islam: their relations to democracy

It has been argued, from a secularist perspective, that religion is in general an obstacle to modernization.²⁵⁰ If religion enters the public sphere, it inevitably leads to the kind of irresolvable clash that is the collapse of a democratic political order.²⁵¹ It has been argued that secularism is the only way to guarantee international rights protection, since it rejects discrimination on the basis of religion, race and colour.²⁵² This rejection of the role of religion in public life might be due to the Western experience with religion, whereby the Pope and Emperor were able to claim to be the viceroys of God on earth with their authority and power coming directly from Him.²⁵³ Popes and priests were the only people who could read what the will of God might be, to the extent that even if people were accorded free and equal access to the Bible, they tended to dominate

foreign governments, Western NGOs, and researchers to reconsider the view that Tunisia, which endeavored to implement a strong secularization in all aspects of public life, is a model for the Arab states in how to organize their Islamic culture into a political form. See Granzer, S., "Changing discourse: transnational advocacy networks in Tunisia and Morocco", In: Risse, T., Ropp, S., and Sikkink, K., (eds.), *The Power of Human Rights : international norms and domestic change*, Cambridge: Cambridge University Press, 1999, pp., 109-133

²⁵⁰ Donald Eugene Smith's statement cited in Saeed, J., *Islam and Modernization: a comparative analysis of Pakistan, Egypt, and Turkey*, London: Praeger Publishers, 1994, p. 25

²⁵¹ Thiemann, R. F., *Religion in Public Life: A Dilemma for Democracy*, Washington, DC: Georgetown University Press, 1996, p.75

²⁵² Tabi. B., "The European Tradition of Human Rights and the Culture of Islam", In An-Na'im, A. A., Deng, F. M., op.cit., 1990, p. 104

²⁵³ Kallen, H. M., *Secularism is the Will of God: an essay in the social philosophy of democracy and religion*, New York : Twayne Publishers, 1954, p. 43

interpretations of the Bible to preserve their exclusive authority over the divine law.²⁵⁴

Thus, if democracy is to be properly established, religion must be confined in the private realm, without disturbing the public life. Citizens cannot be free and equal in the exercise of religion, if a particular faith or creed is the preferred religion of the state.²⁵⁵

With regard to Islam, it has been considered to have a weak democratic tradition, since it lacks legal recognition of corporate persons and legislative bodies.²⁵⁶

However, some secularists did not seem to realize the significant impact of personal beliefs and convictions in shaping individual understanding of the good and bad, which ultimately will affect the public life through his views and opinions on controversial moral and political matters like abortion or pornography.²⁵⁷ Secularists' stance towards religion seems to be affected by the western conception of religion, which is perceived to cover only the relation of the individual to God. This does not necessarily represent the meaning of Islam.

There are two points that must be made in discussing the relation of secularism and Islam to democracy:

First, the failure to distinguish between the source and the method of Islamic law has resulted in a misconception about Islamic law being wholly divine and immutable.²⁵⁸ It is very important to distinguish between the revelations, the *Quran* and the *Sunna*, from which the divine law is derived and the understanding of the divine law which can be

²⁵⁴ Ibid., 44

²⁵⁵ Thiemann, R. F., op.cit., p.74

²⁵⁶ Bernard Lewis's opinion cited in Monshipouri, M., op.cit., p. 216

²⁵⁷ Ibid., p. 77

²⁵⁸ Baderin., M., op.cit., p. 33

found in the books of medieval scholars and their successors.²⁵⁹ The latter is called *fiqh*, which refers to the method of understanding of the divine law and which was developed by Islamic intellectual effort called *Ijtihad*. Hence, while the divine law as a revelation from God is immutable, the *fiqh*, the understanding of the divine law is subject to human errors and may change according to time and circumstances.²⁶⁰

Accordingly, Islam does not seem to give people like priests or other religious people chance to claim special access to the will of God, since every judicial-political decision takes its justification and finality from the written book, the Quran, and the clear practices of the Prophet Muhammad, Peace be upon him, which are intensively debated in the books of *fiqh*.²⁶¹ Accordingly, it might be right to say that the so called religious authorities in Islam, are the specialists who can elaborate on matters that might not have been properly discussed before or might not have come into being, and in accordance with certain techniques, known by those concerned with this discipline, give their opinion on them, in much the same way that lawyers perform their work. The involvement of Islam does not seem to give any authority to anyone in the name of religion, by virtue of being a scholar. As far as *fiqh* is concerned, the politicians may be able by themselves to derive the rules that govern the political situation from the Islamic *fiqh*, without resorting to any Muslim scholars. Where an unprecedented situation comes into existence that has no direct verdict in the Islamic *fiqh*, the scholars then may be consulted in the same way that other experts in other fields may be cited if the issue concerned the field of their specialization.

²⁵⁹ Vogel, F. E., "The Rule of Law in Saudi Arabia: exploring contradictions and traditions", In: Cotran, E., and Yamani, M., *The Rule of Law in the Middle East and the Islamic World: Human Rights and Judicial Process*, London: I.B. Tauris Publishers, 2000, p. 128

²⁶⁰ Ramadan, S., *Islamic Law: its scope and equity*, Geneva: [s.n.], 1970, p. 36

²⁶¹ Arkoun, M., op.cit., p. 22

Second, a distinction must be made between the meaning of Islam and religion. That is, the meaning of Islam is not only confined to the spiritual sense, although this is fundamental, but it extends to cover all aspects of life. The Islamic scholars have made religion, the field that tackles the relationship with God, only one necessity of five that Islam is based on, which are: religion, soul, mind, offspring and money.²⁶² Therefore, Islam cannot be reduced to a mere field of ethics, tackling the rituals of worship and the relation of the individual to God, but is a living religion that strongly interacts with other social, political and economic aspects of life. The Islamic imperative is both personal and societal, individual and corporate and the Muslim community, "the state", is seen as the essential factor for the realization of God's will.²⁶³ Muslims' perceptions, as a result, are shaped by Islamic codes, ethics and values concerning the individual, whether in terms of his individuality or his position in the community. Hence, it is difficult for Muslim politicians to act in isolation from the Islamic ethics and values.

Drawing upon these distinctions, Islam may better serve in the formulation of democracy and the rule of law in a predominantly Islamic society than secularism. That is to say, the worldview, secularism emphasizes separation between the religious and political spheres and since, in Islam, the religious and other aspects of people's lives are not distinct,²⁶⁴ this partition between religion and politics in Islamic society would become arbitrary. The decline of Islam in Muslims' public life would result in a decline of popularity and representativeness, since the people's religious values would not be present in the political sphere. The Turkish experience, for example, has shown that secularization imposed from above by the ruling elites cannot create a mass secular

²⁶² Al-Qaradawi, Y., *Min Fiqh Addavlah fi Alislam*, (in Arabic), Cairo: Dar Ash'rooq, 1997, p., 58

²⁶³ Esposito, J. L., *Islam and Politics*, Syracuse, NY: Syracuse University Press, 1987, p.2

²⁶⁴ Monshipouri, M., op.cit., p. 11

culture.²⁶⁵ Secularization that ignores the Islamic values has not been successful in the Islamic states and has resulted in reversed effects. John Esposito has observed that "*the secularization of processes and institutions did not easily translate into the secularization of minds and culture. While a minority accepted and implemented a Western secular worldview, the majority of most Muslim populations did not internalize a secular outlook and values.*"²⁶⁶

Moreover, the view that religion is an obstacle to modernization and inevitably leads to the collapse of democratic order is not necessarily applicable to Islam.²⁶⁷ Islam has never been an obstacle to the process of reform based on democratic values in Islamic world.²⁶⁸ All modernizers who raised their voices in the nineteenth century against despotic governments were actually Islamic scholars. Rifa'ah al-Tahtawi (1801-1873), Khairuddin Al-Tunisi (1810-1899), Jamal Al-Din Al-Afghani (1838-1897), Abdel Rahman Al-Kawakibi (1854-1902), and Muhammad Abduh (1849-1905) all called for an end to absolutist rule and an establishment of the rule of law and popular participation through Islamic *Shura*, consultation, and election.²⁶⁹

Furthermore, the presumption that secularism eliminates every religious aspect in politics, on reflection, seems to be mistaken. That is to say, from a constitutional perspective, secularism stresses that the government is a creation of men and not of

²⁶⁵ Ibid., p. 13

²⁶⁶ Esposito, J. L., *The Islamic Threat: Myth or Reality?* New York: Oxford University Press, 1992, p. 9

²⁶⁷ Donald Eugene Smith's statement cited in Said, J., op.cit., p. 25, see also Thiemann, R. F., op.cit., p.75

²⁶⁸ Daniel E. Price conducted a study in which he intensively examined eight countries- Egypt, Jordan, Syria, Tunisia, Saudi Arabia, Morocco, Algeria, and Iran , and concluded that the greater the influence of Islam in political life of Islamic countries, the higher the level of democracy becomes, and the less the influence of Islam on government, the higher the level of oppression. See Price, E. D., *Islamic Political Culture, Democracy, and Human Rights: a comparative study*, London: Praeger, 1999.

²⁶⁹ But in the later years of nineteenth century different people with Christian background had taken the position to elaborate on the matter on the basis of a completely westernised conception of reform. People like Shibli Shumayyil (1850-1917), Farah Antun (1874-1922), Georgie Zaidan (1861-1914), Ya'qub Suruf (1852-1917), Salama Musa (1887-1958), and Nicola Haddad (1878-1954) who claimed that the real problem with the Arab world was its culture--and, specifically, its dominant religion. See Tamimi, A., "The Renaissance of Islam," 132 *Daedalus*, 2003.

God, which most Muslims would agree with. But it also stresses that, in order to limit human greed and tendency to control, the government recognized in a secular state is the government of law and not of men. The difficulty, here, is that law is still affected by men's desires and perceptions of the good and bad. Although laws, in Western society, are known through reason, natural law will always be a source of that reason and the context within which laws are to be shaped. It is not clear so far where natural law leaves off and positive law begins.²⁷⁰ However, in both cases the last say on what constitutes natural law or positive law is actually held by human beings themselves, which seems to indicate that some people, who claim to have exclusive understanding of what is natural and what is not, or who claim the authority to produce law that they consider appropriate for the community, will rule, and not law by itself, since it is a product of men. Therefore, it is not a departure from the government of men but it is a government of men in accordance with law. Good law may be shaped by spiritual elements which are mostly shaped in their turn by religious ethics.²⁷¹ In the Western system, for example, civil society ruled by law was initially reinforced by Christianity, in the sense that the right conduct is guided by Christian ethics and individual freedom is tempered by representative government.²⁷² These complementary reinforcing elements have resulted in a high degree of self-restraint in behaviour which is now the essence of the liberal democratic polity.²⁷³ Accordingly, religion is a source of faith that shapes men's perception of what is right and wrong, while representative government is

²⁷⁰Apter, D., *Some Conceptual Approaches to the Study of Modernization*, Englewood Cliffs (N.J.): Prentice-Hall., 1968, p., 207

²⁷¹ It has been suggested that the substantive values enshrined in the Western basic laws are rooted in the three main currents one of which is the Christian 'natural law' tradition. See Finer, S. E., Bogdanor, V., and Rudden, B., *op.cit.*, p. 37

²⁷² Apter, D., *op.cit.*, 1968, p., 209.

²⁷³ *Ibid.*, 209. Consistently, US Supreme Justice William O. Douglas stated in 1952 "We are a religious people whose institutions presuppose a Supreme Being." This means that religious beliefs always influence decisions. Cited in Thiemann, R. F., *op.cit.*, pp. 2-3

the machinery that enables men to implement their values.²⁷⁴ So long as men who are the ultimate founders of secular states are heavily influenced by God in one way or another, the religious values will somehow affect the government, even if that government stems from secular grounds.²⁷⁵ As a result, religion, whether Christianity or Islam, will always have role in deciding what is good for the community.

II.6. Conclusion

It might be right to conclude that the relativity of human rights is inevitable for their implementation, either by their nature, as claims curbing the state's authority and the implementation of the rule of law as discussed above, or by international standards which emphasise holistic democracy based on self-determination and rooted in cultural values and spiritual traditions from all parts of the world. Although the relation of Islam or other constitutional traditions to human rights must be tackled within the context of the international norms recognized by the international community, the international human rights instruments do not seem to suggest eliminating any cultural or religious

²⁷⁴ Voll has argued that secularism might be an inherent part of the process of modernization but this does not mean that religion has no vital force in the political and social life of modernized people. See Voll, J. O., *Islam, Continuity and Change in the Modern World*, Syracuse: Syracuse University Press, 1994, p. 289

²⁷⁵ A case of Pledge of Allegiance, *Elk Grove Independent School District v. Newdow*, is being heard by the US Supreme Court, where an atheist, Michael Newdow, claims that his child is being led to say "one nation under God" on a daily basis in the school and this makes him feel disenfranchised. The Pledge, which touts "liberty for all," is being used to inculcate in his daughter a religious world view that he, as an atheist, cannot accept. In other words, the state is displacing his role in educating his daughter on religion, and therefore "under God" is unconstitutional. Cited in Hamilton, M. A., *The Supreme Court's Pledge of Allegiance case: Why the Department of Justice is wrong to support 'Under God'*, CNN website, Law Center, Friday, March 26, 2004, Available online at <http://www.cnn.com/2004/LAW/03/26/hamilton.pledge/index.html>. Although the U.S. Court of Appeals for the 9th Circuit ruled that the phrase "under God" in the Pledge of Allegiance that is recited by schoolchildren is unconstitutional, the Supreme Court dismissed, on a technicality, the court decision. A step was taken by Congress to protect affirmation of religion as part of the national heritage of the American nation and approved a bill which would prohibit federal courts, including the Supreme Court, from hearing cases involving the pledge and its recitation and would prevent federal courts from striking the words "under God" from the pledge. See *House bill would block Supreme Court on Pledge: Measure stirs up religion, separation of powers*, CNN website, Politics, Thursday, September 23, 2004, Available online at <http://www.cnn.com/2004/ALLPOLITICS/09/23/pledge.undergod.ap/index.html>. Thus, the religious impact on the secular state becomes much clearer when dealing with non-believers in matters concerning public affairs.

values that are seen in conflict with the international rights. Rather, they seem inclined to resolve the areas of conflict in a way of reconciliation. The differentiation between the notion of right and other concepts like the notion of duty, put forward by the universalists, might be useful to undermine any claim seeking an alternative concept based in a particular culture. However, the universality of human rights has already been recognized by the international community through many declarations, covenants and conventions, as mentioned at the very beginning of this chapter. The problem facing states appears to be more one of how to implement such a universal concept through their constitutional settings, which are necessarily based on political constitutional cultural norms, than the mere definition of the concept.

The experience of human rights implementation in the UK, as a Western state, has shown that the cultural tension with human rights is not exclusive to the non-Western nations but it is a result of the variety of diverse traditions of different nations that form this modern world, seeking to preserve their cultural and political identities in the face of foreign values, even if they were in the name of human rights. Although the discussion throughout this chapter has tried to demonstrate the need to accommodate people's local beliefs for proper implementation of the international human rights, it did not consider how this can be done in the era of international globalization. Islam, for example, is seen as the most powerful ideological force across the Muslim world, with values that not only extend across different regions but even form an important factor of legitimacy for most Islamic states. Thus, the question arises: can a state with an Islamic ideology cope with the requirements of the international human rights principles? There are serious tensions between Islamic law and some international rights of individuals, like the right to non-discrimination, the rights of women, and the right of religious freedom, which must not be underestimated. Also, the previous Taliban regime in

Afghanistan and perhaps the regime of Saudi Arabia and Iran gave a negative impression in this regard, although their commitment to embrace Islam in their legal systems was noticeable. Therefore, the attempt to reconcile Islamic values and international norms of human rights might raise many complex questions that are more relevant to Islam. How should we view Islam in the modern world? Should we view it in a very traditional way so any change must not affect the traditions of the past? Or in a receptive way that could accommodate changes in conditions and circumstances but without affecting the main fundamentals? Or should we view Islam as a purely religious phenomenon without political dimension or force? What appears at present, on the face of it, as will be seen in the next chapter, is either the first version, whose main concern is not to change but to uphold the traditions through changing circumstances, as in the cases of Iran and Saudi Arabia, or the third version, which does not seem to recognize the political aspect of Islam and hence does not allow it in the political sphere, as recognized, in various degrees, by most Islamic states. The second version seems to be the victim of these two extreme views, and I believe it must now be allowed to take its turn after the others have failed. Therefore, the next chapter will be devoted to discussing the concept of human rights in Islam. It will examine the Islamic recognition of democracy and raise the question, to what extent the doctrine of constitutionalism is recognized in the Islamic teaching.

Chapter Three

III. Islam, Human Rights, and Democracy

III.1. Introduction

This chapter tackles the concept of human rights in Islam. It begins by defining Islam within the political context and examining the relation of religion to the realm of politics. It explores whether Islam is conceived to be purely a religion or whether it has a more comprehensive meaning of which religion may only form one part. It moves, then, to discuss the theory of human rights in Islam and whether the concept of right is understood in Islam to be a mere duty or a legal claim that an individual can hold against the state. The chapter also discusses the approach used in the application of Islamic Shari'ah, in particular the application of *hudud*, the Islamic punishments, which seems to affirm, as will be explained below, the flexible nature of Islam, which is able to respond to different times and places without violating its essence. The discussion shows that Islam, through the technique of *Siyasah Shar'iyah* (legitimate governmental policy), can even disable some elements that are considered as fundamentals, for the sake of preservation of the most essential ones. In other words, if it was proved that the chief fundamentals of Islam could not function unless other less fundamental elements were disabled, then disabling the less fundamental ones would be obligatory. This doctrine of legitimate governmental policy seems to be based more on the knowledge of rulers about their realities and compelling necessities, than their knowledge of the technicalities of the Islamic *fiqh*.

However, the doctrine of *Siyasah Shar'iyah*, as will be seen below, gives the political will of the state wider discretion to apply Islamic principles in the way that seems, to the state itself, best to preserve the interest of Islam. Such a wide discretion without

accountability and without popular participation in the process that would affect people lives and destiny is dangerous and may justify the governance of tyranny and dictatorship. Hence, *Siyasah Shar'iyah*, can best be served if it is based on democratic values that ensure that the political decision is a reflection of what instilled in people's sentiment. Therefore, the chapter will discuss the idea of democracy in Islam. In this connection it will tackle the question of whether the three components of democracy, representativeness, accountability and the respect of individual rights are understood in Islam, or whether Islam has its own meaning and understanding of the word democracy and its functionality. Finally, some of the Islamic states' practices will also be examined.

III.2. The Meaning of Islam within the Political Context

In the West, religion is usually perceived as that which can only be experienced in a heavenly, rather than earthly mode of existence.²⁷⁶ Biblical thought considers the world to be "*man's sphere of action and pre-eminence*"²⁷⁷, while religion is merely a matter that citizens may deal with in their personal affairs.²⁷⁸ So, religion, generally speaking, is only one among many matters that the state is responsible for, and on which the government must be neutral.²⁷⁹ Many Westerners seem unwilling to tackle the role of religion as the predominant element of man's action and this might be due to the Western historical experience with the concept of religion, whereby the Pope and Emperor in general were able to claim to be the viceroys of God on earth with their authority and power coming directly from Him.²⁸⁰ Hence, it is unsurprising that

²⁷⁶ Safi, L. M., "The Intellectual Challenge Facing Contemporary Islamic Scholarship", 19 *American Journal of Islamic Social Sciences*, Spring 2002 Number 2, p. iv

²⁷⁷ Vahanian, G., *The Death of God: the culture of our post-Christian era*, New York: George Braziller, 1961, p. 61

²⁷⁸ Thiemann, R. F., *op.cit.*, p.75

²⁷⁹ *Ibid.*, p. 76

²⁸⁰ Kallen, H. M., *op.cit.*, p. 43

Western authors and politicians seem uncomfortable with the involvement of Islam in political affairs of Muslim states, as they fear that it could form a strong obstacle to any progress and political development, since it would empower the religious leaders to impose a certain political vision that serves their own interests in the name of religion. The Western view is that such a thrust of religion in the political life is dangerous as it often leads to theocracy and unchecked fanaticism.²⁸¹ A question arises, however, as to whether this Western conception of religion applies to Islam. In other words is Islam only a religion or does it imply a more comprehensive sense of which religion forms only one part?

Islam, in fact, does not very much differ from the other monotheistic religions such as Judaism and Christianity in terms of the general idea that God alone is the ultimate Creator who has sent His messengers to show people the right path that leads to heaven. These two religions even share with Islam the direct spiritual lineage of the Prophet Abraham.²⁸² However, the meaning of Islam is not confined to this spiritual meaning, important though this is, but it extends to cover all different aspects of life. Life in Islam is the gate to heaven or, as Al-Ghazali put it, "*Life is the farm of the hereafter without which religion cannot be established*".²⁸³ Therefore, the Islamic scholars have made

²⁸¹ Allen, D., Bowden, H. W., *Religion and Political Conflict in South Asia: India, Pakistan, and Sri Lanka*, Westport, Conn.: Greenwood Press, 1992, p. 3

²⁸² Al-Hageel, S., *Human Rights in Islam and their Applications in the Kingdom of Saudi Arabia*, First Edition, Riyadh: Matabi'a Alhamedi, 2001, p. 12. Islam not only respects these monotheistic religions but it also believes that they were the revelations of God, but in incomplete form, sent down to respond to certain groups in certain circumstances. See Al-Marzouqi, I. A., *Human Rights in Islamic Law*, First Edition, Abu Dhabi: Cultural Foundation, 2000, p.88. From this perspective, Islam is the religion which was given to Adam, the first man, and it was the religion of all the prophets sent by Allah to mankind, but Allah has selected this version of Islam to be the final, complete and only acceptable religion for mankind today. The word Islam was even chosen by God Himself and clearly mentioned in His final revelation to man, which did not happen in the other religions. God says in the Holy Quran "This day have I perfected your religion for you, completed My favour upon you, and have chosen for you Islam as your religion." (Al-Maa'idah 5:3) "If anyone desires a religion other than Islam never will It be accepted of Him." (Aal'imraan 3:58) "Abraham was not a Jew nor Christian; but an upright Muslim." (Aal'imraan 3:67) See Philips, B., *The True Religion of God*, Jeddah: Dar al-Khair, 1992, pp. 4-6

²⁸³ Al-Ghazali, *Ihya Ulum Ad'Deen*, Kitab Alelm, (in Arabic), p., 71, cited in Al-Qaradawi, Y., op.cit., 1997, p. 19

religion, the field that tackles the relationship with God, only one necessity of five on which Islam is based, which are: religion, soul, mind, offspring and money.²⁸⁴

Assanhoori asserted in his study that Islam even extends to the science of law, private and public law, the rules of conduct, moral codes and health instructions.²⁸⁵ Islam, just as it provides rules of worship to achieve God's satisfaction, also provides rules to protect life, thoughts, family, and fortune. The concept of the state through which human life can be protected and promoted is conceived to be one of the most fundamental fields in Islamic science.²⁸⁶

Islam contains two important inseparable dimensions; a vertical dimension which deals with the relationship of individual to God and a horizontal dimension which deals with the community.²⁸⁷ Any attempt to denounce either of these dimensions would undermine the essential religious nature of Islam. Some scholars have even condemned the use of the term, 'political Islam', as it gives the impression that politics was not originally part of Islam.²⁸⁸ Thus, when we deal with Islam, we must understand that Islam is not a mere religion, but a system of life.

The strong connection of Islam with politics and Muslims' political life may become clearer in the Quranic requirements for Muslims to submit to Allah's will and refer all of their disputes, whatever their nature, political, economic or even societal, to Allah's sayings and his Messenger. Allah says, "*If any do fail to judge by (the light of) what*

²⁸⁴ Al-Qaradawi, Y., op.cit, 1997, p., 58

²⁸⁵ Assanhoori, A., *Fiqh Al-Khilafah wa Tataworha*, (in Arabic), Second Edition, Cairo: Alhaya'h Almasryya Al'aammah Lelketab, 1993, p., 45

²⁸⁶ However, this important field, because of the corruption of governors in the later centuries, has not been elaborated enough to provide a firm political machinery. It was well known to jurists that any emphasis on the subject of state would encourage warfare and conflicts. See Yosry, A., *Huqoq Alensan wa Asbab Al'aunfi Almujtam'a Al-Islami*, (in Arabic), Alexandria: Alm'aaref, 1993, p., 47-48

²⁸⁷ See Vogel, F., "The Rule of Law in Saudi Arabia: exploring contradictions and traditions", in: Cotran, E., and Yamani, M., (eds.), op.cit., p. 133. See also Al-Qaradawi, op., cit., p., 23

²⁸⁸ Al-Qaradawi, op. cit., p., 23

*Allah hath revealed, they are (no better than) Unbelievers".*²⁸⁹ It was well established by this verse and others²⁹⁰ that whoever refers legislation to sources other than what Allah revealed to His Messenger is an unbeliever.²⁹¹

The sayings and practices of the Prophet Muhammad, peace be upon him, also indicate such a strong connection between Islam and politics. Muslims are even required by Islamic rules to participate in political issues through the concept of *bay'ah* (voting). It was reported that the Prophet said that anyone who died without having performed his duty to vote (*bay'ah*) for a president is a hypocrite.²⁹²

Ibn Taymiyah, one of the most celebrated Islamic scholars, asserted that anything without which a duty cannot be performed is itself a duty.²⁹³ And it is very well understood by all Muslims that Islamic rules and principles cannot be applied without a government able to implement them on the ground and hence all Muslims seem to agree that the establishment of the Islamic state is a fundamental duty in Islam.²⁹⁴ The establishment of the Prophetic state in Madinah immediately after the emigration from Makkah illustrates this point.

²⁸⁹ Q5:44

²⁹⁰ Allah says in another verse, "O ye who believe! obey Allah, and obey the Messenger, and those charged with authority among you. If ye differ in anything among yourselves, refer it to Allah and His Messenger, if ye do believe in Allah and the Last Day: that is best, and most suitable for final determination." (Q 4:59)

²⁹¹ Al-'Asqalani, A., *Fath Albari Sharh Sahih Al-Bukhary*, (in Arabic), Part, 13, Beirut: Dar Alm'arefah, 1379 (Islamic calendar), p. 147, See also Abdulwahhab, S., *Tyseer Alazez Alhameed fi Sharh Kitab Attawheed*, (in Arabic), Riyadh: Maktabat Arriyadh Al-Hadeethah, pp. 493-494

²⁹² Ibn Taymiyah, A., *Alfatawa*, Part 35, (in Arabic), Maktabat Ibn Taymiyah, 1403 (Islamic calendar), p. 12

²⁹³ Ibn Taymiyah, *Al'asyan Almusalah aw Qetal Ahl Albaghi fi Dawlat Al-Islam wa Mawqef Alhakem Menha*, (in Arabic), Beirut: Dar Al-Jeel Press, 1992, pp. 36-37

²⁹⁴ Assanhoori suggested in his study, *Fiqh Al-Khilafah*, that the main Islamic Madhabs, Sunni and Shiite, including the Mu'atazelah agree that the establishment of the Islamic state, the Caliphate, is a religious duty but they differ over the basis of this duty. While the Sunni Madhab establish their view on the basis of Ijma, the consensus of the companions, the Shiites refer the duty to sacred text. The Mu'atazelah, on the other hand, assert their view on the basis of human logic. Assanhoori, A., op.cit., p., 67

The Madinah Charter is considered the first written constitution followed by any state authorities.²⁹⁵ The Charter presents itself as the source of power and law and has clearly affirmed that the Islamic state is one for all nations, even if they differ in religion.²⁹⁶ It demonstrates the connection of Islam with politics, since it was put by the Prophet Muhammad, himself, peace be upon him. It is worth noting that the Charter of Madinah recognized rights and freedoms for Muslims and non-Muslims alike. For example, it recognized in Article 18 the right of non-Muslims to practice their religion and live at the same time with Muslims under one basic law, which is the Charter.²⁹⁷ However, since the Charter was issued before the revelation of Quranic verses in Madinah which tackle many of these worldly matters and which accordingly replace them with Quranic provisions, Muslim scholars do not recognize it as a proper source for Islamic *Fiqh* and hence not strong enough to be used as a basis for interpreting Islamic Shari'ah.²⁹⁸ Thus, the question arises, what is the concept of human rights and freedoms in the Islamic Shari'ah?

III.3. The Concept of Right in Islam

Rights and freedoms declared in the UDHR clearly aim at assuring freedom and dignity of the individual, and achieving justice and equality between all people. These basic views of the importance of human life and dignity are also shared by the Islamic Shari'ah. Human beings, according to a number of the Quranic provisions, are highly respected in Islam and accorded rights that have never been given to others of God's creatures. Allah says in chapter 17 verse 70, "*We have honoured the sons of Adam;*

²⁹⁵ Khan, M., *Human Rights in Muslim World: fundamentalism, constitutionalism, and international politics*, North Carolina: Carolina Academic Press, 2003, p. 146

²⁹⁶ Nuwayhid, W., "Qeraa'h fi Dstoor Almadanah", In: Al-Jeosi, S., (ed.), *Huqoq Alensan fi Alfikr Al-Arabi: derasat fi annusos*, (in Arabic), Beirut: Derasat Alwehdah Alarabyyah, 2002, p. 144 see also p. 164

²⁹⁷ See the Madinah Charter attached to the study of Nuwayhid in *Ibid.*, p. 168

²⁹⁸ *Ibid.*, p. 153

provided them with transport on land and sea; given them for sustenance things good and pure; and conferred on them special favours, above a great part of Our Creation."

The meaning of human nature itself has even been given a different dimension, in that God has considered human beings as His deputies on earth. Allah says in chapter 2 verse 30, "*Behold, thy Lord said to the angels: "I will create a vicegerent on earth."* Therefore, Muslim jurists have been in dispute, as a result of the verse 70 of chapter 17 which says at the end "*... and conferred on them special favours, above a great part of Our Creation"*, over who is superior, humans or the angels of God.²⁹⁹ The majority of Sunni jurists seem to suggest that human beings are superior to the angels because God clearly stated in verse 34 of chapter 2, "*And behold, We said to the angels: "Bow down to Adam:" and they bowed down: not so Iblis: he refused and was haughty: he was of those who reject Faith."*³⁰⁰

El-Berry noted that according the verse 107 of chapter 21 the objective of the Islamic mission is achieving mercy for all people that can be achieved through the inner belief of human brotherhood.³⁰¹ El-Berry contends that this makes the feeling that human rights are addressed in the Quran as a common factor between all members of the human family based on their origin (as all are human beings), the unity of fatherhood (as all are sons of Adam) and the unity of motherhood (Eve) and therefore, their offspring should be regarded equal in all rights and privileges at all times and through

²⁹⁹ Al-Jabery, M., "Mafaheem Alhuqoq wa Al-Adl fi Annusos Alarabyyah wa Al-Islamyyah", In: Al-Jeosi, S., op.cit., p. 59

³⁰⁰ See the debate of the traditional Muslim jurists over this subject in Al-Qurtubi, *Aljame'a LeAhkam Al-Quran*, (in Arabic), Part 1, Second Edition, Cairo: Dar Ash'ab, 1372 (Islamic calendar), p. 289, See Ibn Taymiyah, A., op.cit., Part 4, 1403 (Islamic calendar), p. 350

³⁰⁰ Ibn Katheer, *Tafseer Al-Quran Al-Azeem*, (in Arabic), Part 1, Beirut: Dar Al-Fikr, 1401 (Islamic calendar), p. 80

³⁰¹ EL-Berry, Z., *Man's Rights in Islam*, Heliopolis, 1981. Available Online at http://www.witness-pioneer.org/vil/Books/ZB_MRI/human_rights.htm. The verse 107 of chapter 21 reads "*And we have sent you (O Muhammad) not but as a mercy for the worlds."*

all generations.³⁰² This is evidenced by the fact that the Quran frequently addresses mankind by the phrase, "*O You children of Adam*".³⁰³ Human beings are all equal before Allah no matter what racial or colour or linguistic differences might exist. Nothing counts except the noble deeds and honourable achievements. Allah says, "*Verily, the most honourable of you with Allah is that (believer) who is most pious.*"³⁰⁴ This has also been illustrated by the Prophet in one of his sayings which reads: "*No Arab has any superiority over a non-Arab, nor does a non-Arab have any superiority over an Arab. Nor does a white man have any superiority over a black man, or the black man any superiority over the white man. You are all the children of Adam, and Adam was created from clay.*"³⁰⁵

Al-Mawdudi also noted that Islam lays down some rights for man simply because he is a human being regardless of race, colour, sex, or religion.³⁰⁶ The Holy Quran refers to this fact in asserting some basic rights like the rights to life. Allah says, "*If anyone slew a person - unless it be for murder or for spreading mischief in the land- it would be as if he slew the whole people: and if any one saved a life, it would be as if he saved the life of the whole people...*"³⁰⁷ In another verse Allah says, "*Whether open or secret; take not life, which Allah hath made sacred, except by way of justice and law: thus doth He command you, that ye may learn wisdom.*"³⁰⁸ Another clear example is the right to justice. According to this right Muslims have to be just not only with ordinary human beings but even with their enemies. Allah says, "*O ye who believe! stand out firmly for Allah, as witnesses to fair dealing, and let not the hatred of others to you make you*

³⁰² Ibid., Available Online at http://www.witness-pioneer.org/vil/Books/ZB_MRI/human_rights.htm

³⁰³ Q7:26

³⁰⁴ Q49:13

³⁰⁵ Cited in Al-Mawdudi, A., *Human Rights in Islam*, Chapter Two, Islamic Foundation, 1981. Available Online at http://www.witness-pioneer.org/vil/Books/M_hri/index.htm#The_Islamic_Approach

³⁰⁶ Ibid., Available Online at http://www.witness-pioneer.org/vil/Books/M_hri/index.htm#The_Islamic_Approach

³⁰⁷ Q5:32

³⁰⁸ Q6:151

swerve to wrong and depart from justice. Be just: that is next to Piety: and fear Allah. For Allah is well-acquainted with all that ye do."³⁰⁹

Al-Mawdudi added that the rights in Islam have been sanctioned by God not by legislative assembly and hence are permanent, perpetual and eternal. As a result, they are not subject to any alterations or modifications, and there is no scope for any change or abrogation.³¹⁰ Thus, as human beings in Islam are so sacred, having permanent and non-abrogative rights, then it is necessary to see how human rights are defined and treated by the Islamic *fiqh*, to which we will now turn.

III.3.1. Definition of Right in Islam

The definition of right as human rights has been discussed in chapter two of this study where it has been shown that the meaning of right recognized in the international instruments is not a mere duty or dignity but also a legal claim of an individual against the state and not vice versa. Here we will discuss the concept of right in Islam, as to whether it is perceived as a claim of an individual against a person or persons or a mere duty of an individual toward the community. It is important to note here, as it has been discussed in the second chapter, that right as a claim is not a mere privilege but that which has a correlative relationship with duty entailed on the part of others.³¹¹ In the abstract, the question under discussion is what concept of right does Islam recognize? Does it recognize right as a *claim*, a *privilege* or mere *duty*? Some authors claim that there is no such term as 'right' in the Islamic tradition, only duty, and hence the

³⁰⁹ Q5:8

³¹⁰ Al-Mawdudi, A., op.cit., Chapter one

³¹¹ Although many authors differentiate between rights and duty, we are inclined to support Rowan's view as it is closer to the current function of human rights manifested in the current international instruments. See our discussion in chapter two, pp. 34-37, See Rowan, J., op.cit., pp. 21-22. For information about the difference between right and duty see Gray, J. C., op.cit., p. 9, see Ross, D., op.cit., p. 50, see Donnelly, J., op.cit., 1989, pp. 50-52

international conception of human rights has no root in Islam.³¹² In the following section, therefore, we will explore the concept of right in Islam according to the Islamic *fiqh* to assess whether duty is the only notion of right in Islam or Islam understands right in more comprehensive meaning in which duty represents only one sense.

Muslim jurists, in defining the notion of right, do not seem to differentiate between these three terms, claim, privilege and duty. They sometimes define right as every interest permitted and protected by Islamic law.³¹³ People are at liberty to choose from among permissible things their desired interests, according to their needs, and their exercise of this choice is consequently safeguarded by the law.³¹⁴ It has also been recognized as *Ibahah*, meaning that people are at liberty to exercise it or not.³¹⁵ This kind of right does not seem to be held against some determinate person or persons. An individual, for example, is permitted to go hunting or fishing, but no one has a correlative duty to ensure that he gets to go hunting or fishing. This definition of right seems to be more akin to a privilege.

Sometimes rights are defined as those which are granted by God to all human beings on an equal footing. Human beings are obliged to respect these rights and not to disturb or violate them.³¹⁶ Individuals are under an obligation in Islamic law not to transgress others' right of freedom, life, and property. Such transgression is called *Tahrim*, which

³¹² See Ali, S., op.cit., p. 15. See also Hodgson, D., *Individual Duty within a Human Rights Discourse*, Aldershot: Ashgate, 2004, pp. 50-51. See also Nasser, S., "The Concept and Reality of Freedom in Islamic Civilisation", In: Rosenbaum, A., (ed.), *The Philosophy of Human Rights: international perspectives*, Westport, Conn. : Greenwood Press, 1980, pp. 95-97

³¹³ Ashamsi, J. A., *Nadaryyat Alhaq: derasah muqaranah be alfiqh al-Islami*, (in Arabic), Al-Ain: The University of the United Arab Emirates Press, 2000, p. 18

³¹⁴ Al-Marzouqi, I. A., op.cit., p. 138

³¹⁵ Attantawi, M. M., *Osool Alfiqh Al-Islami*, (in Arabic), First Edition, Dubai: Albayan, 1990, p. 87

³¹⁶ Ashamsi, J. A., op.cit., p. 18

includes all that Allah has forbidden.³¹⁷ This definition, accordingly, seems to fall within the notion of duty, rather than right.

Muslim jurists also define right as that which has a correlative relationship with duty. If an individual has a freedom to do what he wishes, others have a duty not to interfere and this duty also extends to the individual himself in respect of others' rights.³¹⁸ This definition of right seems to extend to most of the rights recognized in Islamic law. For example, the freedom of belief is recognized in Islam as one of the fundamental rights of individuals, derived from an explicit text of the Holy Quran,³¹⁹ and hence guaranteed by two methods; first, people are obliged to respect the right of the other to believe in what he wishes; second, the individual concerned is encouraged to protect his belief in accordance with the Islamic rules.³²⁰ As a result, the individual here can use his right to freedom of belief as a claim against a transgressor who broke his obligation to respect his right.

Thus, the Islamic *fiqh* seems to recognize the notion of right in a more comprehensive sense that includes privilege, duty, and claim. Islamic scholars have summarized these different meanings of the term right as everything that a human being is entitled to and which is not prohibited by Islamic law.³²¹ According to the Islamic *fiqh*, rights are divided into three categories: Allah's rights (public rights), the individual's rights, and

³¹⁷ Almansoor, M. A. S., *Political Rights of Women in Islamic Law, International Law and United Arab Emirates Law*, PhD, Glasgow: Glasgow Caledonian University, 2002, p. 25

³¹⁸ Alhaj, S. S., *Almafaheem Alqanonyyah le Huqoq Alensan 'Abra Azzaman wa Almakan*, (in Arabic), Alexandria: Aljame'ah Almaftohah, 1995, p. 124

³¹⁹ God says, " Let there be no compulsion in religion: Truth stands out clear from Error ..." (Q2: 256) in another verse God says "If it had been thy Lord's Will, they would all have believed, all who are on earth! Wilt thou then compel mankind, against their will, to believe!" (Q10:99)

³²⁰ Raslan, A. A., *Alhuqoq wa Alhuryyat Al'aammah fi 'Aalam Mutaghyyer*, (in Arabic) Curio: Dar Annahdah Al-Arabyyah, 1997, p. 44-45

³²¹ See Ashamsi, J. A., *op.cit.*, p. 17

rights shared between Allah and the individual.³²² This recognition of different types of right may justify the difference in the meanings given to the term. Accordingly, Islamic *fiqh* seems to differentiate between these types of rights not according to the nature of right whether claim or duty but according to the subject of the right, whether an individual or Allah (the public). These different types of rights will be explained further below; however it must be pointed out that a transformation of pure Islamic ideas into an international law context is a rather complex task, since Islamic Shari'ah sometimes uses different technical language and terms. For example, in Islamic teaching the Islamic *hadd*, which is a state legal punishment, is considered as the right of Allah and termed by many authors as a public or people's right because it protects the public interest, while in international human rights law people's right does not seem to be recognized in such a manner in which a state could claim a right against an individual. Although the international instruments recognize the concept of duty as discussed in chapter two, they mainly focus on the right of the individual rather than the right of people and as far as the individual is the supreme, which seems to be true in the current trend of human rights, the state cannot in the name of people claim right against him.³²³ Hence, this Islamic difference in viewing human rights is not only a linguistic one but also a substantial, since Islam, as will be seen below, seems to pay noticeable attention to the concept of duty in the name of Allah's rights (public rights).

³²² See Almansoor, M. A. S., op.cit., p. 23, Al-Marzouqi, I. A., op.cit., p. 139, Attantawi, M. M., op.cit, p. 112, Ashamsi, J. A., op.cit., p. 21-22, Alhaj, S. S., op.cit., pp. 125-126

³²³ As a result of the international focus on the right of individual more than the right of people, the African regional effort has resulted in an African Charter on Human and People's Rights adopted in June 27, 1981. The African states clearly specify in chapter two of the Charter the duties of individual which the individual is obliged to fulfil if he or she is to enjoy certain rights and freedoms specified in the Charter.

III.3.2. The Types of Right in Islam

III.3.2.1. Allah's Right

Allah's right is meant to be that which is related to the public interest without being peculiar to a particular individual.³²⁴ It is not, in its actual sense, referred to Allah (God) but to individuals in the collective form.³²⁵ The reference to Allah here is to emphasise the significance of this kind of right and its strong connection with the integrity of the community as a whole.³²⁶ The forbidding of adultery, for example, serves the public interest in maintaining the integrity of lineage intact. This forbidding of adultery and the punishment resulting from breaking this sacred rule is deemed by Muslim scholars as a public or people's right since it serves the public interest in protecting people. An individual cannot relinquish this kind of right or exercise discretion in the process of its implementation.³²⁷ People are under an obligation to fulfil the requirements of this public or people's right. It has been considered as an obligatory matter on individuals, for the public welfare.³²⁸ Other examples of Allah's right are: all kinds of *Ibadat* (worship matters), *Ma'onah* (the tax that brings relief to the needy persons in the community like *zakat* and *Sadaqa* (charity))³²⁹ and *hudud* (Islamic punishments) except the punishments for slander and murder.³³⁰ Ibn Taymiyah has asserted that *hudud* under no circumstances can be relinquished, either fully or partially, to the extent that people cannot make payment to the state in return for not having the *hadd* (the punishment)

³²⁴ Almansoor, M. A. S., op.cit., p. 23

³²⁵ Ashamsi, J. A., op.cit., p. 24

³²⁶ Ibid., p. 24

³²⁷ Attantawi, M. M., op.cit, p. 112

³²⁸ Al-Marzouqi, I. A., op.cit., p. 140

³²⁹ God says " Alms are for the poor and the needy, and those employed to administer the (funds); for those whose hearts have been (recently) reconciled (to the truth); for those in bondage and in debt; in the cause of Allah; and for the wayfarer: (thus is it) ordained by Allah, and Allah is full of knowledge and wisdom" (Q9: 60). See Ashamsi, J. A., op.cit., p. 25

³³⁰ Attantawi, M. M., op.cit, p. 112

applied in a particular case.³³¹ Moreover, one who attempts even to speak before those responsible for *hadd's* application, like the court, to save or liberate the accused from the punishment in the sense of relinquishing the *hadd*, if he does so despite indisputable proof that the person under punishment has committed the crime concerned, is deemed to be, by this act, challenging God.³³²

III.3.2.2. Individual's Right

This kind of right is related to everything that presents a worldly interest for the individual alone, without relevance to the community.³³³ It is a purely private right, unmediated by social relations. Therefore, it has been recognized in the Islamic *fiqh* as a pure right of the servant (individual) irrespective of the colour, sex or nationality of the individual. Examples of this right are: the owner's right to take back goods that have been stolen from him, the right of the purchaser to own the purchased goods and the right of the seller to own the money, the right of a wife to have a dower, and to receive good companionship and economic support from her husband,³³⁴ and all other aspects of enjoyment in life that are not prohibited by Islamic law, such as eating, drinking, driving a car, owning property, travelling, etc.

This kind of right is fundamental in Islam and the breach of it is forbidden by Shari'ah law. This right is strongly emphasised in the Islamic *fiqh*, to the extent that scholars have asserted that repentance will not save the violator from punishment, unless the

³³¹In the sense that people cannot purchase the *hadd*, because it is a bribe. See Ibn Taymiyah, *Assiyasah Ashar'iyyah fi Islah Arra'ay wa Arra'ayyah*, (in Arabic) Beirut: Dar Al-Jeel, 1993, p. 87

³³² Ibid., p. 82 it must be noted here that the person who pledges himself to endeavour in a process of relinquishing the *hadd* is not meant to be the solicitor who discusses whether the *hadd* is applicable to a certain event, without asking for relinquishing it if it has been perceived as applicable, but one who asks for the relinquishing of the *hadd*, although the conditions of its application are perfectly satisfied.

³³³ Attantawi, M. M., op.cit, pp. 117-118

³³⁴ Ibid., p. 117-118

victim of the breach has forgiven him.³³⁵ For example, the state cannot relinquish the owner's right to get back his belongings from the thief because this right is the individual's own right and the individual is autonomous in making his claim.

III.3.2.3. Shared Right

This kind of right is shared between Allah (the public) and the individual, and accordingly consists of a mutual relationship between right and duty. This right is divided into two categories: first, the right which is common between Allah (the public) and the individual whereby Allah's right (public interest) prevails; second, the right which is also joint between Allah and the individual, but the individual right prevails. These two categories of the shared right will be further discussed.

III.3.2.3.1. Shared Right where Allah's Right Prevails

This right is termed as a right because it serves the interest of the victim as well as the community. An example of such a right is *hadd alqadhif* (the punishment for slander) which is eighty lashes.³³⁶ So it is the right of the victim not to be defamed by others. The punishment of slander clearly presents an interest for the victim since it proves that the accusation is nothing but a false allegation, which is in itself a declaration of his or her innocence. Preventing people from slandering also constitutes an interest for the community as a whole, as it keeps society clean from defamation and untrustworthiness. It is clear that both public and individual interests are present in this right. However, some Islamic authors have asserted that the public interest prevails and hence the

³³⁵ Ibid., p. 118

³³⁶ Al-Mawardi, *Alahkam Assultanyah wa Alwelayat Addenyah*, (in Arabic) Beirut: Amaktabah Alasriyyah, 2000, p. 249

individual cannot implement this right by himself, nor can he surrender the right by forgiving the one who commits such an act.³³⁷

Consistent with this, some scholars went on to suggest that the human body is a subject of two rights: Allah's right since it is a creature of Allah almighty and individual right, since the individual is the beneficiary of the functions of his body. However, they have asserted that Allah's right in this case prevails, from which it follows that an individual cannot sell or surrender any organ of his body, as to do so would constitute a violation of the stronger right that belongs to Allah.³³⁸

III.3.2.3.2. Shared Right where the Individual's Right Prevails

An example of this right is the individual right to life. This right has been realized in Islamic Shari'ah through the punishment of premeditated homicide, which is the death penalty as a deterrent punishment to save other innocent lives. In this crime, there is a clear violation of the individual's right of life and also a violation of the right of the victim's relatives to have their loved one alive. It also constitutes an interest for the public security in deterring people from committing such a crime.³³⁹ However, the individual right prevails here, because the subject of homicide crime is the individual alone, not the society.³⁴⁰ Therefore the punishment of this crime constitutes an interest of the victim's relatives alone in claiming retaliation or compensation (blood money), or offering forgiveness. It is worth noting that once the relatives decided to claim blood money, the choice of retaliation would be inoperative, and once the relatives decided to

³³⁷ Attantawi, M. M., op.cit, p. 118, Al-Marzouqi, I. A., op.cit., p. 141, Almansoor, M. A. S., op.cit., p. 23

³³⁸ Cited in Ashamsi, J. A., op.cit., p. 24

³³⁹ Almansoor, M. A. S., op.cit., p. 24

³⁴⁰ Attantawi, M. M., op.cit, p. 119

forgive the criminal, the whole *hadd* (the punishment) would drop.³⁴¹ This is clearly different from the positive law, where the punishment of homicide is a public right and the victims (the relatives) have no chance to relinquish the penalty if they decide to forgive the killer.³⁴²

III.3.2.3.3. Tension between Allah's Right and Individual's Right

It may be true to say that the concept of right in Islam, as discussed above, generally speaking, recognizes both individual rights and people's rights (termed as Allah's rights) and seems to pay noticeable attention to the concept of duty. However, the Islamic categories of right, discussed above, although they may explain the theory of right in Islamic teaching, do not tackle the possibility of tension between Allah's right, which is public, and the individual right, which is private. The shared type of right may give insight into the kind of right that has a double nature, public and private, but we have not discussed the question of conflict between rights. Arkoun suggests that Islamic thought has always been in favour of Allah's rights over individual's rights. He states that "*Islamic thought has always included a discourse on the rights of God and the rights of man (huqoq Allah / huqoq adam), with the former having primacy and priority over the latter.*"³⁴³ In asserting his view, that Allah's rights have primacy over individual rights, Arkoun refers to the five canonical obligations, as he calls them, that Muslims must submit to even if they are at the expense of their basic rights, which are "profession of faith (shahada), prayer, almsgiving, fasting at Ramadan, and the

³⁴¹ However, Imam Malik, the founder of Maliki School of Islamic jurisprudence, takes the opinion that even if the relatives decided to claim blood money, the state still has discretion of imposing *tazeer* punishment, which could reach one year imprisonment, to serve as deterrence to other offenders. Ibn Qudama, A., *Al-Mughni fi Fiqh Alemam Ahmed bin Hanbal Ashibani*, (in Arabic), Part 8, First Edition, Beirut: Dar Al-Fikr, 1405 (Islamic calendar), p. 280

³⁴² Ibid., p. 119

³⁴³ Arkoun, M., *Rethinking Islam: Common Questions, Uncommon Answers*, Boulder Co: Westview Press, 1994, p. 108

pilgrimage to Mecca."³⁴⁴ However, Arkoun seems to forget that these five elements represent not only rights of God, but the cornerstones of Islamic belief against which no right can be claimed. The subject of these elements is not actually right in its strict sense but a complete submission of the individual's will to the will of God; the core principle of Islamic faith. Therefore, Arkoun seems to be mistaken in referring to these elements to suggest that Allah's rights are prioritized in Islam over individual rights. It is not appropriate for a Muslim, for example, to question whether he has the right not to pray or not to fast during Ramadan, since denying any of these fundamentals would amount to apostasy. The question that is more relevant, in the discourse of right, is actually whether Allah's right as a public right related to the public interest and public order, has precedence over an individual right that is of a private nature. For example, what is the position of Islamic law if Allah's right, say, the adultery *hadd*, which is 100 lashes for an unmarried man, conflicts with the individual's right not to be tortured?

The traditional Islamic *fiqh* seems not to have dealt explicitly with this question; however, it has underlined some rules that might assist the discussion. It seems that although the right of Allah, in particular that concerning the Islamic punishments, *hudud*, is so fundamental that Muslim people cannot withhold the *hadd* application if the conditions have been perfectly satisfied, Islamic teaching seems to be flexible regarding the process of collecting and interpreting evidence in *hadd* cases. One of the important conditions for the application of *hadd* is being free from any doubt.³⁴⁵ It is universally agreed in Islamic teaching that if the evidence raises any *shubhah* (doubt), the Muslims responsible for the application of punishment should try their best to avoid applying it, even if the evidence is very strong, like a confession.³⁴⁶ If a man, for

³⁴⁴ Ibid., p.,108

³⁴⁵ Albahoti, M., *Kashaf Alqena'a 'an Matn Aleqna'a*, (in Arabic), part 6, Beirut: Dar Alfikr, 1402 (Islamic calendar), p. 96

³⁴⁶ Al-Mawardi, op.cit., p. 244

example, has had sexual intercourse with a women in the belief that she was his wife and for some reason she appeared not to be, this raises a legitimate doubt that prevents the application of *hadd*.³⁴⁷ It has even been argued by some scholars that *hadd* cannot be applied on the basis of analogy, because the analogy process is more about guessing, not fact and this is enough to constitute the doubt that invalidates the *hadd*.³⁴⁸

According to some Muslim jurists, the evidence that denies the application of *hadd* should have precedence over the evidence that supports the *hadd*, because *hadd* is damage and the denial of damage is the nature of things.³⁴⁹ They contend that if the denial evidence is not firmly established it would, at least, constitute doubt, which itself is a firm reason to deny the application of *hadd*.³⁵⁰

The Islamic rule in the application of *hadd*, whether for adultery or theft, is that even if there has been a confession, it is preferable to instruct the criminal to reconsider his or her confession and that it would be acceptable if he or she denies the crime.³⁵¹ That is because if the right of Allah was put before the right of the individual, the application must be accommodative toward the preservation of the individual right, in the sense that the violation of the latter cannot be tolerated for the sake of the preservation of Allah's right.³⁵²

³⁴⁷Albahoti, M., op.cit., p. 96

³⁴⁸ Cited in Alamdy, A., *Alehkam fi Osool A-Ahkam*, (in Arabic), part 4, First Edition, Beirut: Dar Al-Ketab Al-Arabi Press, 1404 (Islamic calendar), p. 65

³⁴⁹ Ar-Razi, M., *Al-Mahsool fi Elm Al-Osool*, (in Arabic) Part 5, First Edition, Riyadh: Aleman Muhammad bin Saud University, 1400 (Islamic calendar), p. 590

³⁵⁰ Ibid., p. 590

³⁵¹ An-Nawawy, A., *Saheeh Muslim Sharh An-Nawawy*, (in Arabic), part 11, Second Edition, Beirut: Dar Ihya Atturath Al-Arabi, 1392 (Islamic calendar), p. 195

³⁵² Consistent with this, Alamdy has suggested that the right of the master over his servant has preference over the right of Allah because first, the master is able under the Islamic rules to prevent his servant from performing the *Nwafel* pray, which is supererogatory prayer, although it is Allah's right; second, Allah's right is based on tolerance, because Allah does not lose if his right is not implemented or benefit if it is implemented, but the individual loses and benefits. See Alamdy, A., op.cit., Part 2, p. 290

Accordingly, it has been conceived, unlike the situation with respect to Allah's right (*hadd*), that a confession, once it has been made in matters concerning private right, cannot then be denied.³⁵³ If evidence is found to indicate that a seller, for example, has not received the money from the buyer, the latter will be under an obligation to give the money to the seller, even if he or she denies the allegation, unless he or she brings strong evidence to the contrary, whereas with the application of *hadd* a denial may be enough for the accused to discharge himself, even if the evidence was very strong, like a confession.

Ashaf'ay, the founder of the Ashaf'ay school, one of the four main schools in the *Sunni Madhab*, has asserted that if an unbeliever entered Islam and had not yet become aware of the rules of Islam and hence married a woman according to the rules of the unbelievers and entered accordingly into sexual intercourse with her without knowing that such an act is forbidden, the *hadd* of adultery would not be applicable. Hence Allah's right would be relinquished, because the perpetrator was unaware of the rules. However, the private rights that might have resulted from such an act would be maintained and the accused would be liable accordingly to give the woman the dower and any child born of the union would be regarded as his and he would be responsible for it, although the marriage contract was invalid.³⁵⁴ In this example, the individual's right seems to have prevailed twice. That is to say, first, the individual right not to be tortured has taken preference over Allah's right (the adultery *hadd*); second, the individual rights of those who were affected by the act are upheld, although the marriage contract was invalid and the *hadd* was relinquished.

³⁵³ An-Nawawy, A., *op.cit.*, 1392 (Islamic calendar), p. 195

³⁵⁴ Ashaf'ay, M., *Al-Um*, (in Arabic), Second Edition, Beirut: Dar Alm'arefah, 1393, (Islamic calendar), pp. 245-246

It is worth noting that *hudud* (Islamic punishments) are in fact designed to safeguard human beings, either as autonomous individuals, in particular the individual's right as a victim, represented in *qisas* (the right to retaliate) or *diyyah* (the right to demand blood money) or as a member of the community, represented in the punishments that save the integrity of the community from fragmentation and instability. By reflection, the individual, as a victim, seems to be able to dispense with *hadd* application by forgiving the violator, and he also seems to be able, as violator, according to many scholars, to avert the *hadd* application if he repents before being captured.³⁵⁵ As a result, the application of *hadd* appears not to be in the hands of the state authorities but in the hands of the individual himself, either by being unforgiving, if he was a victim, which will support the *hadd* application or by being obdurate, if he was the violator, with no intention to repent.³⁵⁶

A question arises, however, if the individual's right in Islam is very powerful to the extent that is even prioritised over Allah's right, does it have the power to constrain the state authority?

It seems that the individual's right in Islam is also a powerful instrument against the state authority. Ashaf'ay asserted that if a *wali* (one of the state authorities in the

³⁵⁵It has been argued that the one who turns from sin as if he has not committed a sin and who has no sin deserves no *hadd* (punishment). Ibn Qudama, A., op.cit., Part 9, p. 130 see also Ashaf'ay, M., op.cit., part 4, p. 291

³⁵⁶In the UAE there are cases in which the accused tried to resort to the application of the Islamic *hadd* in order to avoid the punishment. In these cases the defendants tried to benefit from the rules of the Islamic Shari'ah that gives the ultimate say of the application of *hadd*, particularly the death penalty, *qisas*, to the victim's relatives. In the cassation number 43 of the year 1997 the defendant argued that the application of the death penalty in this case was wrong because the victim's relatives had forgiven the accused and hence, according to the Islamic Shari'ah, the *qisas hadd* is dropped. However, the court ruled that the Shari'ah *hadd* was not applicable to this case because the conditions of *hadd* application were not met and therefore the death penalty was not applied as Islamic *hadd* but as *ta'zir*, allowed by the Islamic Shari'ah where the conditions of the application of *hadd* were not satisfied, according to the state law. See Dubai Supreme Court, Cassation number 43 of the year 1997. If the rules of the Shari'ah had been applied in this case the accused, according to many Islamic scholars, would have been set free even if he was the one who committed the homicide crime. See also Dubai Supreme Court, Cassation number 398 of the year 2004.

Islamic state) had forgiven the criminals who had committed an armed robbery and this forgiveness was intended to cover the stolen property of the victims, this forgiveness would be null and void in respect of the victims' right and the *wali* would be responsible to implement the individual's right to restoration of the victims' money and property.³⁵⁷

Ashaf'ay also went on to suggest that if the *sultan* had killed an apostate without following the Islamic rule in this respect, which is to invite the apostate back to Islam and make an effort to convince him through reasoning, the *sultan* would be under an obligation to pay the victim's relatives the *diyyah* (blood money). Moreover, it has been asserted by many Islamic authors that if the *sultan* applied *hadd* punishment to a person in matters that were not *hadd*, or if in a *hadd* matter but he applied a harsher punishment than stipulated, which resulted in the death of the punished person, the *sultan* would be under an obligation to pay compensation for the death of the person under punishment.³⁵⁸ So, the Islamic government here seems to be constrained not to arbitrarily punish individuals and any penalty prescribed by the Islamic Shari'ah must be applied in accordance with the Islamic Shari'ah rules and procedures.

Nevertheless, Islamic teaching is very broad and Islamic scholars seem to differ in interpreting the sacred Quranic texts and the prophetic sayings and practices. As a result, different conclusions are reached on the same matter. The views reported above are general ones that, with some development, might be consistent with human rights principles (as they are rights, not only mere duties, and of the individual not only of the

³⁵⁷ Ashaf'ay, M., op.cit., part 4, p. 291

³⁵⁸ Ibid., part 6, pp. 175-176. The punishment for alcohol drinking is conceived to be 40 lashes and what exceeds that amount is not *hadd*. Hence, if the accused died as a result of a punishment that exceeded the *hadd* requirements, the *sultan* would be obliged to pay compensation. See Al-Mawardi, op.cit., p. 248. See also Ibn Hazem, *Alehkam fi Osool Alahkam*, Part 7, First Edition, Curio: Dar Alhadith, 1404 (Islamic calendar), pp. 456-457

community and imply the possibility of curbing the state authority). However, there are also contrary views which may raise difficulty in tackling the relationship between right in Islam and the right recognised in the international instruments. For example, some scholars take the view that *hudud* cannot be dispensed with, even if the accused has repented before being captured, or that the denial retraction of a confession cannot constitute doubt that leads to withholding the *hadd*.³⁵⁹ Moreover, many Muslim jurists seem to suggest that analogy could form a legitimate factor to increase the punishment of *hadd* and may even contribute to establish a new *hadd*, even if it was not clearly stated in the Quranic texts and the prophetic traditions.³⁶⁰ For example, there appears to be doubt whether drinking alcohol is a *hadd* or *ta'zir* offence. Some scholars have contended that the punishment of drunken persons at the time of the Prophet was a disciplinary punishment carried by the Prophet according to his own opinion and not a *hadd* conveyed by God.³⁶¹ They support their view by citing the statement of Ali bin Abitalib which indicates that the Prophet did not enact such punishment during his life³⁶², but his companions, after the time of the Prophet, created it in its current form, which is 80 lashes, by analogy with the *hadd* of slander, on the basis that anyone who drinks alcohol gets drunk and one who gets drunk slanders.³⁶³ According to this view, the state authority seems to be able to punish with the *hadd* punishment even in matters that do not constitute *hadd* crimes, by using the analogy process, without being held accountable if the punishment inflicts serious injury on the accused under punishment or he dies as a result of such a harsh punishment.³⁶⁴ Although the use of analogy may give indication of such a dangerous conclusion, the majority of Muslim jurists seem to

³⁵⁹ Cited in Ibn Qudama, op.cit., part 9, p. 130

³⁶⁰ See more discussion about the use of analogy in the application of *hadd* in Alamdy, A., op.cit., part 4, pp. 66-65

³⁶¹ Cited in Al-'Asqalani, A., op.cit., Part, 12, p. 74

³⁶² See the statement of Ali bin Abitalib in: Muslim, *Sahih Muslim*, Part 3, (in Arabic) Beirut: Dar Ihya Atturath Al-Arabi, p. 1332

³⁶³ See Abu Dawod, *Sunan Abi Dawod*, Part 4, (in: Arabic), Dar Alfikr, p. 166

³⁶⁴ Ibn Qudama, op.cit., part 9, p. 149

reject this conclusion on the basis of the prophetic saying that anyone who inflicts the *hadd* punishment in matters that do not constitute *hadd*, is a transgressor.³⁶⁵ However, they seem to have agreed that the ruler could increase the punishment of *hadd* on the basis that alcohol drinking was conceived unanimously by the companions as a *hadd*, but the original penalty was 40 lashes, and through the use of the technique of analogy, it was increased to 80 lashes.³⁶⁶ Ali's statement was related to the added 40 lashes, and not to the *hadd* as a whole.³⁶⁷

In looking at the various views of Muslim traditional scholars particularly those relating to the application of *hadd*, we can easily conclude that the traditional Islamic *fiqh* considers the state as a discipliner and hence accords a significant role to enacting laws (*ta'zir*) that may establish a disciplined society that does not break the state orders and rules shaped in the name of preserving Islam.³⁶⁸ This process might be directed against the basic rights of individuals, or towards promoting them, according to what concerns the Islamic state the most. If the main goal of the Islamic state is to create a disciplined society, regardless of any other disadvantages, the state would be more inclined to interfere in even basic individual rights and it would find in the traditional Islamic *fiqh* what would legitimise the interference. If the state, however, decided to uphold the individual's rights and freedoms in the belief that a disciplined society could not be established unless human rights and dignity were respected in the first place, the state would be more inclined to choose the opinions of the Islamic *fiqh* that could help to

³⁶⁵ Cited in Ibid., p. 149. See also Alkasani, 'A., *Bade'a Assane'a fiTarteeb Ashare'a*, (in: Arabic), Part 7, Second Edition, Beirut: Dar Al-Ketab Al-Arabi, 1982, p. 64

³⁶⁶ Ibn Hazem, op.cit., part 7, p. 454

³⁶⁷ Al-Mawardi, op.cit., p. 248

³⁶⁸ A disciplined society according to Islamic principles seems to be a significant objective in the Islamic *fiqh* for the preservation of Islam. The traditional Islamic *fiqh* does not only give the Imam (Sultan) the right to punish to establish a disciplined society but it also gives the husband the right to punish his disobedient wife to make her obedient according to the Islamic rules. Consistent with this, it has been asserted by some traditional jurists that if a husband beat his disobedient wife and, as a result of the punishment, she died, the husband cannot be held responsible, since it was done to discipline her according to legitimate Islamic principles. See Ibn Qudama, op.cit., part 9, p. 150

achieve its main goal of a disciplined society through the promotion of individual rights and freedoms. Thus, the preference between different opinions in the Islamic *fiqh* seems to depend on the political will of Islamic state, according to the objective it pledges itself to promote.

A question arises, however, as to what technique could help the Islamic government to choose the right opinion. Does the Islamic *fiqh* recognize standards that may help to balance between the two competing Islamic objectives; the promotion of individual rights and the establishment of a disciplined society? The Islamic *fiqh* seems to have recognised very important technique in this regard, useful for the promotion of human welfare and the realization of state stability, called *Siyasah Shar'iyah* (legitimate governmental policy) which needs to be discussed properly.

III.4. *Siyasah Shar'iyah* (The Legitimate Governmental Policy)

The doctrine of *Siyasah Shar'iyah* has no explicit mention in the Holy Quran or in the sayings of the prophet. It has been designed and developed solely by the Islamic scholars, according to *maslahat al-'ibad* (the interest of Muslims) in order to assist jurists and political leaders in managing Muslims' political and legal affairs, particularly in new matters that have not been explicitly tackled by the Quran or the traditions of the prophet.³⁶⁹ *Siyasah Shar'iyah* is defined by the Islamic *fiqh* as a doctrine allowing actions that are closer to the people's interest and further away from corruption, even if the actions instituted neither by the prophet nor by God.³⁷⁰ Ibn Al-Qayyem has suggested that *Siyasah Shar'iyah* does not concern whether a particular action was in

³⁶⁹ Al-Qadi, A., *Assiyasah Ashar'iyah Masdar Attaqneen bayn Annadaryyah wa Attatbeeq*, (in Arabic), First Edition, Tanta: Matb'aat Dar Alkutob Aljam'ayyah Alhadeethah, 1989, pp. 35-36

³⁷⁰ Al-Qaradawi, Y., *Shari'at Al-Islam: khludeha wa salaheha fi kul zaman wa makan*, (in Arabic), Third Edition, Beirut: Al-Maktab Al-Islami, 1983, p. 25

conformity with the Islamic Shari'ah in its strict sense, but rather, whether it was not in contradiction with the main fixed principles of Islam in its general sense.³⁷¹ It is based on the traditional Islamic *fiqh's* rule that the avoidance of harm is more important and prioritised than bringing benefit.³⁷² In other words, *Siyasah Shar'iyah* implies the technique that balances competing Islamic interests and prioritises the most useful interests by sacrificing a less useful one, or avoids the most evil action by accepting a less evil one.³⁷³

Ibn Taymiyah has pointed out that the Islamic interest is that which prioritises the preservation of the Islamic religion over state interests.³⁷⁴ For Ibn Taymiyah, for a state to be qualified to use the doctrine of *Siyasah Shar'iyah*, it is not enough to be Islamic in name but it has to be at least founded on four factors; applying Islamic *hudud*, securing the state's routes, confronting enemies through *Jihad*, and distributing the state revenue.³⁷⁵ Therefore, as long as these factors are recognised, it has been conceived that in the state of war, Muslims must prefer the strongest person as leader, even if he was dissolute, rather than a pious but weak one. That is because the strong dissolute one would serve Islam, in the state of war, more than the weak pious one, in the sense that his strength is for the strength of Islam and his sin is for himself, while piety would not, in a state of war, benefit Islam, while weakness would certainly undermine the continuity of the Islamic state.³⁷⁶ Therefore, the less beneficial interests, represented by piety, which may be a factor in the establishment of justice, is sacrificed, in a state of war, to serve the greater interest, which is the existence of the Islamic state itself.

³⁷¹ Ibn Al-Qayyim, *Atturoq Alhukmyyah fi Assiyasah Ashar'iyah*, (in Arabic), Beirut: Dar Alfikr Allubnani, 1991, p. 22. See also Vogel, F., "The Rule of Law in Saudi Arabia: exploring contradictions and traditions", in: Cotran, E., and Yamani, M., (eds.), *op.cit.*, p., 128

³⁷² It is also based on the Islamic rules, such as *maqasid ashari'ah* (the ultimate objective of the Shari'ah), *dara' almadar* (preventing harm), and *Darora* (necessity). See Al-Qadi, A., *op.cit.*, pp. 135-189

³⁷³ Ibn Taymiyah, *op.cit.*, 1993, p. 67

³⁷⁴ *Ibid.*, p. 37

³⁷⁵ See the statement of Ali bin Abitalib cited in *Ibid.*, p. 81

³⁷⁶ *Ibid.*, p. 27

Siyasah Shar'iyah does not seem to serve the partial or short-term Islamic interest, but that which can be gained in the long term and which represents the genuine interest of Islam in its totality. It might be seen at times to conflict with the formal rules of the Islamic Shari'ah, but in reality it is what the Islamic Shari'ah is supposed to serve. For example, the prophetic practice of giving the leaders of the tribes whose Islam was still not properly established more money from the state revenue than other, poor, people may appear from the surface to be contrary to the Islamic principles of justice and equality, whereby the rich and the poor must be treated on an equal footing. However, it was perceived by the Prophet, at that time while the Islamic state was still weak, more beneficial for Islam, in that it would attract very important people with their followers to Islam, which would significantly contribute to the strength of the Islamic state.³⁷⁷ Jurists have suggested, therefore, that after Islam has been firmly established, there must be no differentiation in the distribution of wealth.³⁷⁸

The use of the doctrine of *Siyasah Shar'iyah* according to the circumstances may intensify or relax the Islamic rule, as will be explained below.

Umar, the second caliph, used the doctrine of *Siyasah Shar'iyah* to intensify the Islamic rule on many occasions and in ways which sometimes contradicted clear prophetic judgments, without objection from the companions. For example, in the rule of divorce, the Prophet's practice was that the divorce happens when the husband pronounces it verbally once, such as saying, "I am divorcing my wife".³⁷⁹ The Islamic

³⁷⁷ Attabary, *Jme'a Albayan 'an Ta'weel Aiy Al-Quran*, (in Arabic), Part 10, Beirut: Dar Al-Fikr, 1405 (Islamic calendar), p. 161. See also An-Nsaa'y, *Al-Mujtaba min Assunan*, (in Arabic), Part 5, Second Edition, Halab: Maktabat Al-Matbu'at Al-Islamyyah, 1986, p. 87

³⁷⁸ Attabary, op.cit., Part 10, p. 163

³⁷⁹ The Islamic divorce is even valid by the mere announcement of it even if the wife did not hear it. See Abdulrahim, A., *Fatawa Sheik Muhammad bin Saleh Al-Othaimen*, (in Arabic), Part two, Riyadh: Dar Aalam Alkutob, 1994, p. 804

divorce has three stages. After the first two pronouncements of divorce, both the spouses have the opportunity of reviewing what has happened and of being reunited. However, if the third pronouncement takes place it would constitute a clear sign that the relationship is beyond repair, and it cannot be revoked, until the wife married a different person, had sexual relations with her new husband and subsequently got divorced.³⁸⁰

Although Islamic divorce has three stages, it is forbidden for the husband to pronounce the divorce three times at once, and if, despite this prohibition, it happened, at the time of the Prophet, it was counted as only one attempt, so the spouses still had the chance to be reunited, without a new marriage.³⁸¹ However, during Umar's caliphate, the sin of pronouncing the divorce three times in one attempt significantly increased, causing corruption in people's religious values. Umar, therefore, changed this rule and treated the three pronouncements made at once as if they were three separate divorces, in an attempt to deter people from playing with strict Islamic rules.³⁸² Since the rule in this case is that the divorced wife must have entered a new marriage with a different person and then must have been divorced, before being reunited with her previous husband, the Islamic society, according to the new rule established by Umar, entered into a new sin, which was false marriage carried out to enable the divorced wife to be returned to the original husband. This formed a reason for some scholars, at a later time, to return to the original rule established by the Prophet.³⁸³

Accordingly, it is clear that the Islamic rule of divorce was clearly changed by Umar to become stricter and it was universally accepted for the sake of the interest in deterring people from making light of Islamic rules. Later, and also according to the Islamic

³⁸⁰ Attabary, *op.cit.*, Part 2, 458

³⁸¹ Assyoti, *Addur Al-Manthoor*, (in Arabic), Part 1, Beirut: Dar Al-Fikr, 1993, p. 668

³⁸² *Ibid.*, p. 668. See also Alkurtubi, *Aljame'a Le Ahkam Al-Quran*, (in Arabic), Part 3, Second Edition, Cairo: Dar Asha'ab, 1372 (Islamic calendar), p. 130

³⁸³ Ibn Al-Qayyem, *op.cit.*, p. 26

interest which was changed according to the new circumstances created by the new rule of Umar, the rule was again returned to its original form. This clearly indicates that Islamic rules do change according to circumstances on the basis of one criterion, which is the preservation of the interest of Islam.

Umar also used the doctrine of *Siyasah Shar'iyah* to increase the *hadd* for alcohol drinking from 40 lashes to 80.³⁸⁴ Moreover, the Islamic *fiqh* has allowed the ruler of the Islamic state to kill someone guilty of religious heresy, if there is clear Islamic interest in the killing, even if the accused was not considered apostate.³⁸⁵

The use of the doctrine of *Siyasah Shar'iyah* may further help to dispense with an Islamic rule to preserve a proper Islamic interest. For example, the Prophet, peace be upon him, did not kill hypocrites who reverted inwardly from faith to disbelief and who caused much damage to the Islamic community.³⁸⁶ The reason for that, some scholars explain, is that the prophet feared that Arab tribes would say that Muhammad killed his companions and would therefore become reluctant to enter Islam.³⁸⁷ Consistent with this, the Prophet also dispensed with the *hadd* for one who repented before being captured.³⁸⁸ The Prophet also dispensed with the *hadd* for people who committed *hadd* crimes on enemy territory during war, so as not to encourage the accused to join the enemy as an escape from the *hadd*.³⁸⁹ Moreover, the fourth caliph, Ali bin Abitalib, suspended the application of *qisas* (the death penalty) of the killer of the third caliph

³⁸⁴ Al-Qaradawi, Y., op.cit., 1983, p. 27

³⁸⁵ Ibn Taymiyah, op.cit., 1993, p. 139

³⁸⁶ Al-Qaradawi, Y., op.cit., 1983, pp. 35-36

³⁸⁷ See details on why the prophet did not kill the hypocrite in Alkurtubi, op.cit., Part 1, pp. 198-200, and Ibn Katheer, op.cit., 1401 (Islamic calendar), p. 49 See also Al-Asqalani, A., op.cit., Part 10, p. 231

³⁸⁸ Al-Qaradawi, Y., op.cit., 1983, p. 36

³⁸⁹ Ibid., p. 36-37

Othman bin Affan, in order to avoid rousing the tribes to claim retaliation, which could have caused another war.³⁹⁰

Thus, the doctrine of *Siyasah Shar'iyah* suggests that the governmental policy should not be applied exactly as pronounced by the *Shari'ah*, but rather it should be applied not in consistence with the universal principles of Islam.³⁹¹ This gives the political will of the state wider discretion to apply Islamic principles in the way that seems, to the state itself, best to preserve the interest of Islam. This can change according to circumstances. Accordingly, the Islamic state accorded a wide discretion to choose the right opinion that may best fit the prevailing circumstances and which serve the Islamic interest. Al-Qaradawi has pointed out, however, that the ruler cannot make a judgement on the basis of his own wish, but must show proper justification that it would serve the interest of Islam.³⁹² Al-Qaradawi has demonstrated how the Islamic interest can be defined by citing the example of prisoners of war and suggested that the ruler may release prisoners if the Islamic state was strong and taking the lead in the war, in order to attract unbelievers to enter Islam. In contrast, if the Islamic state was weak and some of its soldiers had been captured by the enemy, the interest may rest in the exchange of the prisoners. Al-Qaradawi went further and suggested that the Islamic interest may even rest in the killing of the prisoners, if those prisoners were involved in mutilating and torturing Muslims, and may therefore be termed as war criminals.³⁹³

Nevertheless, the Islamic interest seems not to have been properly defined by the Islamic *fiqh*. Rather, it seems to be left for the ruler's own understanding of what the Islamic interest may be in particular circumstances. Al-Qaradawi's illustration may help

³⁹⁰ Alkurtubi, *op.cit.*, Part 16, p. 318

³⁹¹ Ibn Al-Qayyem, *op.cit.*, 1991, p. 22.

³⁹² Al-Qaradawi, Y., *op.cit.*, 1983, p. 24

³⁹³ *Ibid.*, p. 43

to identify how the Islamic interest can vary according to the circumstances, but it does not limit or constrain the ruler if he decides to the contrary, especially if the decision was against the popular will. The doctrine of *Siyasah Shar'iyah*, although it may in some degree give relief for the state to free itself from rigid application of the Islamic Shari'ah, it seems to allow for more state intervention in individual rights through such a wide discretion. It has been shown above that, as although the doctrine of *Siyasah Shar'iyah* may be seen as loosening the application of *hadd*, it has also played an important role to strengthen it, making it strict and difficult, at the same time. A wide discretion without accountability and without popular participation in the process that would affect people lives and destiny is dangerous and may justify the governance of tyranny and dictatorship. Thus, the doctrine of *Siyasah Shar'iyah* can only be helpful if based on three elements: representativeness, accountability, and the respect of individual rights, which are the core concepts of the doctrine of constitutional democracy.³⁹⁴ A question arises, however, as to whether Islam recognises democracy that is based on these three elements.

III.5. Democracy and Islam

Democracy is a term that may be used to describe the state of representative assembly with the role of enacting rules for the general welfare and which itself is governed by these rules and accountable to the people who elected its members in the first place.³⁹⁵ It also seems to be based on the respect of human rights and fundamental freedoms, in the sense that political participation cannot be guaranteed without being expressed in the

³⁹⁴ See The High Commissioner for Human Rights, Civil and Political Rights: Continuing dialogue on measures to promote and consolidate democracy, submitted in accordance with Commission resolution 2001/41, 27 January 2003, p. 7-12

³⁹⁵ Loughlin, M., "Rights, Democracy, and Law", In: Campbell, T., Ewing, K, and Tomkins, A., (eds.), *op.cit.*, p.42

language of rights.³⁹⁶ Some authors assert, therefore, that the Islamic concept of politics contradicts the liberal theory of democracy, since the governmental legitimacy and policy appears to stem from religious doctrine and not from the people.³⁹⁷

However, the discussion over the source of the state sovereignty, whether the people or God, seem to fall more in the field of religious and philosophical debate than in the formation of the constitutional machinery for securing the three mentioned elements of democracy, namely, representativeness, accountability, and the respect of human rights and fundamental freedoms. Indeed, in primitive society where there are no political principles or the principles are rather vague, the philosophical aspects can be of importance, but where the political principles are clear and present in the people's belief, investigation of the nature and the source of sovereignty would not be as important as the political machinery responsible for the application. In other words, if the political values of the three components of democracy, representativeness, accountability, and the respect of individual rights and liberties, are already present in the social belief of the community, then the question that should be tackled is not the origin of those values, whether they come from human logic or from God, but how to apply them. Therefore, the conception, concerning the assumptions and beliefs of democracy, which suggests that the people are the source of sovereignty, should not be the criterion for judging whether or not the Islamic state is democratic. The criterion should rather be, as the Human Rights Resolution 2005/68 seems to suggest, whether or not the Islamic state recognizes the three component elements of democracy, representativeness, accountability, and the respect of individual rights and freedoms.³⁹⁸

³⁹⁶ Ibid., p. 43

³⁹⁷ Kamrava, M., *op.cit.*, p. 11. See also Khan, M., *op.cit.*, 2003, pp. 12-13

³⁹⁸ In resolution 2005/68 it has been recognized that good governance practices vary according to circumstances and needs of different societies but that variation must be based on transparency and accountability along with maintaining environment conducive to the enjoyment of all human rights. See

The majority of Muslim jurists have differentiated, however, between the source of sovereignty on the one hand, and the source of power and legitimacy on the other.³⁹⁹ They have contended that in Islam, God is the sovereign who possesses the ultimate legislative power that designs the very broad and general political and legal structures of the state. However, God is not the ruler on earth, nor is He the source of political power and legitimacy for governance. The governor is one of the mass, elected by the Muslim people on the understanding that he will run the community according to the Islamic values that shape the public political belief of the Islamic community.⁴⁰⁰ Consistent with this, it has been suggested by the Islamic *Fiqh* that the death or removal of the Caliph (the governor) does not affect the position of the judges he chose. That is because the selection of those judges was not made on behalf of the ruler himself, but on behalf of the people, who are the continuing source of the legitimacy.⁴⁰¹ In the following paragraph, I will provide further discussion of the Islamic recognition of the principle of representative and accountable government, and the extent to which the individual rights and fundamental freedoms are respected in Islam.

Human Rights Resolution 2005/68, paragraph 7. Moreover, human rights resolution 2005/32 does not say that God should have no relevance to democracy but rather declares elements that democracy must include which are "*respect for all human rights and fundamental freedoms, inter alia freedom of association and of peaceful assembly, freedom of expression and opinion, and the right to take part in the conduct of public affairs, directly or through freely chosen representatives, and to vote and to be elected at genuine periodic free elections by universal and equal suffrage and by secret ballot guaranteeing the free expression of the will of the people, as well as a pluralistic system of political parties and organizations, respect for the rule of law, the separation of powers, the independence of the judiciary, transparency and accountability in public administration, and free, independent and pluralistic media.*" See Human Rights Resolution 2005/32, Article 1.

³⁹⁹ AlKhayyad, A., *Annedam Assiyasy fi Al-Islam: annadaryyah assiyasyah nedam alhukm*, (in Arabic), First Edition, Cairo: Dar Assalam, 1999, p. 72, See Assanhoori, A., op.cit., pp. 56-57. See Al-Qaradawi, Y., op.cit., 1997, p. 39. See Howaydi, F., *Al-Islam wa Addemoqradyyah*, (in Arabic), Cairo: Markaz Al-Ahram, 1993, pp. 185-186

⁴⁰⁰ Assanhoori, A., op.cit., pp. 93-119

⁴⁰¹ AlKhayyad, A., op.cit., p., 73, See also An-Nadi, F., *Turuq Ikhtiyar Al-Kalifah*, (in Arabic), San'aa: Jame'at San'aa, 1980, pp. 285-286

III.5.1. The Principle of Representative Government

A careful examination of the text of the Quran reveals that Allah clearly assigns the authority to enjoin good and forbid evil which is, basically the establishment of public order, not to any particular person of high social or religious status, but to all Muslims.

Allah says:

*"Let there arise out of you a band of people inviting to all that is good, enjoining what is right, and forbidding what is wrong: they are the ones to attain felicity."*⁴⁰²

The word "you" in Arabic is "*minkum*" in plural form. Thus it directs to all Muslims the order to choose a band of people to establish the public order of the Islamic state. The Quran, intentionally, did not mention in this verse, nor did it mention in others, how to choose those people, but it clearly underlined the principle of representativeness and left the manner of application to be decided by the people according to the circumstances.⁴⁰³

The vast majority of Muslim jurists seem to have agreed that the Islamic government cannot be legitimate if it is not based on the choice of Muslims; however, they differ on the number of people whose votes are enough to establish a legitimate government.⁴⁰⁴

Some medieval jurists suggested that the proposed ruler must have gained the majority vote of *Ihl Al-Hal wa Al-'Aqd* (the electoral college) of each region of the Islamic state in order to ensure the mass acceptance of the new ruler. Others cited the practice of the Prophet's companions in the formation of the first Islamic state after the death of the Prophet. They asserted their acceptance of the establishment of the new government

⁴⁰² Al-Imran, 3:104. There are many other verses emphasising the principle of representative government and giving to the Muslim community the power to choose their leader. See Al-Imran 3:110, At-Touba, 9:71,112, Al-Hajj, 22:41

⁴⁰³ An-Nadi, F., op.cit., p. 153

⁴⁰⁴ Al-Mawardi, op.cit., p. 15

even if it was elected by a very small number, for example four of the five members of *Ihl Al-Hal wa Al-'Aqd*.⁴⁰⁵

This Islamic recognition of the establishment of the Islamic government on the basis of a very small number, represented by the members of *Ihl Al-Hal wa Al-'Aqd*, could constitute a failure, rather than success, in implementation of the principle of representativeness. However, as was asserted by An-Nadi, the simplicity in the application of such an important principle might have been considered by the companions suitable for the circumstances prevailing in their time. This should not discredit the principle in any way and should not affect the underlying principle of representativeness, which emphasises the right of the Islamic nation to choose its leader.⁴⁰⁶ If the application, which is merely a human effort, sometimes falls short of completeness, this failure in the application should not discredit the recognised values of the principle underlined by God. As Atturabi implies in his book, *Assiyasah wa Alhukm* (Politics and Governance) the Shari'ah rules and general principles of state derive from God and the Muslim community is under an obligation to set detailed rules for applying God's orders.⁴⁰⁷ It is worth noting that this Quranic principle of enjoining good and forbidding evil is conceived to be the cornerstone of the Islamic state, which serves to preserve the main principles of Islam, even if it sometimes requires disabling some Islamic principles that are less fundamental in order to preserve the most fundamental ones.⁴⁰⁸ So, Muslim scholars are encouraged to develop the concept of *Ihl Al-Hal wa Al-'Aqd* to be compatible with the international recognition of universal suffrage. In the following paragraphs we will cite the traditions of the Prophet and his

⁴⁰⁵ Ibid., p. 15

⁴⁰⁶ An-Nadi, F., op.cit., p. 151

⁴⁰⁷ Atturabi, H., *Assiyasah wa Alhukm: annuzum Assultaniyyah bayn alosol wa sunan alwaqi'a*, (in Arabic), First Edition, Beirut: Dar Assaqi, 2003, p.121

⁴⁰⁸ Ibn Taymiyah, op.cit., 1992, pp. 33-37

companions to illustrate the Islamic recognition of the principle of representativeness in practice.

The first Islamic application of the principle of representativeness was conducted by the Prophet when he died without appointing any of his companions to take his role in governing the society. The Prophet seems to have left the leadership position empty to indicate the principle that no one can decide who should govern the Islamic community, except the governed.⁴⁰⁹ It may be correct to say that the Prophet was conscious of the political vacuum that would arise out of his death, but he was also aware of God's order as indicated in the above Quranic verse and in his silence he confirmed the governance of representativeness.⁴¹⁰

The companions of the Prophet were aware of the intention of the Prophet to establish this political principle of representativeness and as a result of the new religious order deduced from the prophet's silence, they met immediately after the Prophet's death in *Saqeefat bani Sa'aedah* to discuss who should lead the community after the Prophet. After keen debate on who should rule the society, they chose Abu Bakr, the first Caliph of the Islamic state.⁴¹¹

It is very important to note, here, that this process of electing the Caliph was new to the world of that time, which was governed by the principle of dictatorship of theocratic governance, underpinned by the two most powerful regimes in the world; the Caesar in

⁴⁰⁹ Albyati, M., *Addawlah Alqanonyyah wa Annizam Assiyasy Al-Islami*, (in Arabic), PhD, Cairo: The University of Cairo, 1978, p. 243

⁴¹⁰ Allah clearly describes the prophet's knowledge as follows: "*By the Star when it goes down, Your Companion (the prophet) is neither astray nor being misled, Nor does he say (aught) of (his own) Desire. It is no less than inspiration sent down to him: He was taught by one Mighty in Power, Endued with Wisdom: for he appeared (in stately form)*" See An-Najm, 53:1,2,3,4,5,6

⁴¹¹ Hassan, H., and Hassan, A., *Annuzom Al-Islamyah*, (In Arabic) Cairo: Maktabat Annahzah Almasryya, 2001, pp. 36-38

Rome and Cyrus in Persia. Therefore, in the absence of experience and effective machinery to apply the principle, the Islamic state was about to collapse when *Al-Ansar*, who were the inhabitants of *Madinah*, wanted to share the governance with *Al-Muhajreen*, who migrated with Prophet Mohammad; the tribes of *Koriysh*. It was only after strong debate that *Al-Ansar* accepted Abu Bakr's suggestion, which implied that the prince was from *Al-Muhajreen* and the ministers were from them, and elected (*Bay'ah*) Abu Bakr as President.

Nevertheless, Abu Bakr, because of the absence of machinery that could secure the application of the principle of representativeness feared, towards the end of his rule, that if he died without choosing a successor, the same dispute over the leadership could again occur, which might lead to warfare. Hence, Abu Bakr chose Umar to take his position if he died. However, Abu Bakr did not select Umar according to his own will. Rather, it was done in a long consultation with the most influential people in the community and after assurances that the community would accept his decision. Moreover, Abu Bakr based his decision not only on the approval of those influential people, but also on the approval of Muslims after he declared his decision to the public and they accepted it.⁴¹²

It is worth mentioning here that Umar was not related to Abu Bakr in any way, and hence the decision was merely based on Umar's powerful personality and popularity. Hereditary rule was not recognized in Islam according to Islam's original sources, the Quran and the tradition of the prophet and his companions.⁴¹³ Umar asserted this point when he rejected the people who proposed that his son, Abdullah, should rule after him,

⁴¹² Assanhoori, A., op.cit., p. 122

⁴¹³ It has even been suggested by some scholars that hereditary rule is forbidden in Islam. See Al-Mawardi, op.cit., p. 19

and responded with harsh words.⁴¹⁴ Umar initially even refused to suggest anyone for the presidency, on the basis that the Prophet did not do so, but after the influential people insisted that it was necessary in order to avoid division and warfare, Umar suggested seven people who had been very close to the Prophet, but left the Muslim people to decide the most appropriate one among them.⁴¹⁵

It is clear that it was only the lack of machinery that led Abu Bakr and Umar to suggest successors, to avoid instability, and perhaps the same reason was also behind the crisis between the fourth Caliph, Ali, and Mu'aawya, the fifth Caliph. We must not forget that the predominance in the world at that time of dictatorship, represented by Rome and Persia, affected the process of the application of the principle on the ground. Those two dominant nations were always in the minds of Muslims in managing the state affairs⁴¹⁶ and hence, the political values of those nations might have been a reason that urged *Mu'aawya* to divert from the Islamic principle of representativeness to the principle of hereditary rule, which was internationally the common political principle.⁴¹⁷

III.5.2. The Principle of Government Accountability

III.5.2.1. Political Accountability

Although the principle of representativeness, generally speaking, is recognized in its basic form in Islamic jurisprudence (*Fiqh*), the principle of accountability has long been a controversial subject. The controversy, however, does not seem to be over the nature of the government, whether or not it is a deputy of God and hence above the law, but

⁴¹⁴ Hassan, H., and Hassan, A., *op.cit.*, p. 41

⁴¹⁵ *Ibid.*, p., 41

⁴¹⁶ For example, Umar, during his period in office, created, for the first time, a financial system in accordance with the financial system of Persia Empire to manage and control the state finance. See Falah, A., *Addawlah fi Al-Islam*, Cairo: Dar Assalam, 2000, p. 56

⁴¹⁷ Atturabi, *op.*, *cit.*, pp. 129-130

over the way that the government should respond to the public and the way the public should scrutinize the conduct of the government. Does Islam recognize the right for the people to oppose the government through means, like opposition party or the media? This is the kind of question we will endeavour to discuss in the following paragraphs.

Government accountability is very closely associated with government transparency. In Human Rights Resolution 2005/32 the importance has been stressed of an effective, *transparent* and *accountable* functioning of parliaments to the promotion and protection of democracy and the rule of law.⁴¹⁸ In Human Rights Resolution 2005/68 states have also been urged to “*provide transparent, responsible, accountable and participatory government, responsive to the needs and aspirations of the people.*”⁴¹⁹ The resolution has attracted the attention to deepening democracy beyond free and fair elections, to achieve truly *transparent*, *responsible*, *accountable* and *participatory* government.⁴²⁰ Moreover, in the Report of the High Commissioner for Human Rights submitted in accordance with Commission resolution 2001/41, the group arrived at some principles considered to be important to institutions of democracy; one of these principles was the *accountability* and *transparency* of institutions run by public officials.⁴²¹

While transparency is associated with accountability as an important component of good government, civil society has been recognized as essential agent to monitoring the actions of the State and central to a successful democratization process.⁴²² It has been

⁴¹⁸ Democracy and the rule of law, Human Rights Resolution 2005/32, Article 15, available online at http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN_4-RES-2005-32.doc

⁴¹⁹ The role of good governance in the promotion and protection of human rights, Human Rights Resolution 2005/68, Article 1, available online at http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN_4-RES-2005-68.doc

⁴²⁰ *Ibid.*, paragraph 4, C

⁴²¹ Commission on Human Rights, Fifty-ninth session, Continuing dialogue on measures to promote and consolidate democracy, Report of the High Commissioner for Human Rights submitted in accordance with Commission resolution 2001/41, E/CN.4/2003/59 27 January 2003, Paragraph 19

⁴²² *Ibid.*, paragraph 16

considered a *crucial vehicle for ensuring that people participate in important debates and decisions that shape their lives* in which free media could play an important role.⁴²³

The significance of independent and pluralistic media in promoting democracy has been realized in Human Rights Resolution 2005/32 and considered to be one important component of democracy.⁴²⁴ Some advocates stress on the importance of the role of the media in promoting human rights as human rights may only be promoted by disclosing the facts.⁴²⁵

Thus, while transparency is essential like accountability for democratic government and may even be a cause for the principle of accountability itself, since citizens cannot participate in self-rule without having, before all, access to government information,⁴²⁶ free media seem to be also essential since without free media underpinned by freedom of speech, the public may not be able to publicly scrutinize the government's conduct. So, in discussing the principle of accountability in Islam, it is necessary to discuss whether or not Islam recognizes the principle of transparent government and free media underpinned by freedom of speech.

III.5.2.1.1. The Principle of Accountable and Transparent Government

In looking at the text of the Quran, we find verse 159 of chapter 3 (*Al-Imran*) and verse 38 of chapter 42 (*Ashura*) giving clear orders to the Prophet to consult Muslims in

⁴²³ Ibid., paragraph 16, the report has pointed out that since the free media play an important role in promoting democracy, strict regulations should be adopted to counter misuse of the media. See paragraph 20

⁴²⁴ Democracy and the rule of law, Human Rights Resolution 2005/32, Article 1

⁴²⁵ Commission on Human Rights, Fifty-ninth session, Continuing dialogue on measures to promote and consolidate democracy, op.cit., paragraph 15

⁴²⁶ Hoefges, M., Halstuk, M., and Chamberlin, B., "Privacy Rights Versus FOIA Discloser Policy: The "uses and effects" Double Standard in Access to personally- identifiable information in government records", 12 *William & Mary Bill of Rights Journal*, December 2003. p. 3

matters concerning their worldly affairs.⁴²⁷ Muslim jurists in the application of this verse seem to have agreed that it establishes a clear political principle of *Shura* (consultation) that Muslim leaders are obliged by the Islamic Shari'ah to implement. However, the jurists are in dispute over the kind of subject that requires consultation. Some jurists say that the leader is obliged to consult Muslims only on matters of war, since the verse was describing the battle of *Uhud*, which is of a military nature; however, the majority, especially modern jurists, take the view that except in matters that concern the fundamentals of the Shari'ah, the leader seems to be obliged⁴²⁸ to consult Muslims in all matters that affect their life, regardless whether they are political, economic or social.⁴²⁹

Accordingly, the leader is under the Islamic Shari'ah obligation to make full information on government business accessible to all Muslims, especially those trustworthy representatives who are well recognised by the masses, since no consultation can be done without, first, providing information about the matter concerned.

Consistent with this view, the Prophet, peace be upon him, not only consulted his companions on public matters but also consulted them about matters that concerned him

⁴²⁷ Allah says: "... and ask for (Allah's) forgiveness for them; and consult them in affairs (of moment). Then, when thou hast taken a decision, put thy trust in Allah. For Allah loves those who put their trust (in Him)" See Q3:159, Allah also says in chapter 42 verse 38 that "...who (conduct) their affairs by mutual Consultation..."

⁴²⁸ Some traditional scholars, however, do not seem inclined to accept that the ruler is obliged to conduct a consultation and suggested that it is not binding in the strict sense but it is most preferable. Cited in Ibn Katheer, op.cit., Part 1, p. 421 However, Abdulkhaliq, a modern scholar, has suggested that those scholars who do not support the view that the ruler is under obligation to conduct a consultation seem to confuse the question of the obligatory nature of consultation, which is very clear in the holy text of the Quran as it comes in the form of command, with the question of whether the opinion that results from that consultation is binding, which has not yet been resolved. See Abdulkhaliq, F., *Fi Al-Fiqh Assiyasy Al-Islami: mabadea' destoryyah, ashshura, aladl, almusawah*, (in Arabic) Cairo: Dar Ashuroq, 1998, pp. 59-60. See Mutwalli, A., *Mabadea' Nezam Alhukm fi Al-Islam*, (in Arabic), Alexandria: Munsha't Alm'aaref, 1978, p. 243, See also Ashawi, T., *Fiqh Ashura wa Alestisharah*, (in Arabic), Al Mansurah: Dar Alwafa, 1992, p. 108

⁴²⁹ Alkurtubi, op.cit., Part 4, pp. 250-251, See also Attabary, op.cit., Part 4, p. 152

personally, like the case of the people who slandered his wife 'Aa'eshah, may Allah be pleased with her, in *Hadith Alefk*.⁴³⁰ It is reported that Ibu Hurayrah, one of the companions of the prophet, said, "*I have not seen anyone more than the prophet in consulting his companions*".⁴³¹ The companions also followed the same path and consulted Muslims on all matters of public concern, like the war against the tribes who refused to pay *Zakat* at the time of Abu Bakr, the consultation of Umar in the matter of increasing the punishment for the crime of drinking alcohol (*hadd Alkhamr*), and the consultation of Othman, the third Caliph, on codifying the holy Quran in one particular reading.⁴³² Those are examples of matters that arose at the time of the Prophet and his companions, which were resolved through consultation.

This obligation on the part of government to conduct a consultation before it embarks on taking a decision is an important sign, underlining the attitude of Islam towards the government and its functions. Islam, in obliging the government to conduct a consultation in decision making, requires, in the implementation of the principle, that all information it possesses be made accessible to the public. This, in turn, may indicate the Islamic recognition of the political principle of transparent government.

It is worthwhile to mention, here, that the mandatory nature of the consultation, in the sense that the government is obliged to conduct a *Shura* (consultation), is different from the binding nature of the opinion that results from the consultation. It seems that the question whether the opinion reached after the consultation is binding or not is akin to

⁴³⁰ Al-Bukhary, M., *Aljame'a Assahih Almukhtasar*, Part 6, (in Arabic), Third Edition, Beirut: Dar Ibn Katheer, Alyamamah, 1987, p. 2682

⁴³¹ Assyoti, op.cit., Part 2, p. 358

⁴³² Alkurtubi, op.cit., Part 1, p. 52

that of whether or not the government is limited by the public opinion, which although as significant as the principle of transparency, is a different question.

There seem to be two arguments with regard to the binding nature of the opinion resulting from consultation. The first argument, backed by the traditional *fiqh*, rejects the binding nature of the opinion resulting from the consultation and holds the view that the ruler is at liberty to uphold or reject the opinion, even if the opinion was agreed on unanimously. One of the arguments on which the proponents of this argument depend is that Allah's command in verse 159 of chapter 3 orders the Prophet, after consulting his companions, "*When you have taken a decision, put your trust in Allah*", which means carry out the decision you have chosen, not necessarily that which has risen from the consultation.⁴³³ Consistent with this, they argue, the caliph Abu Bakr initiated a war against the *Murtaddeen*, the people who became apostates after the death of the prophet, although most of the companions opposed the war.⁴³⁴

The counter argument is that the ruler cannot escape the decision made by the majority of the consultants and hence the ruler must implement the decision, even if it is contrary to his own view. This argument seems to be based on the prophet's sayings and traditions, which form the main guide to the true meaning of the holy text of the Quran. The prophet reportedly said to his companions, Abu Bakr and Umar, "*If you reached a consensus on a decision I will not oppose you*".⁴³⁵ It is also been reported that the Prophet, in response to the question put by the companions asking about the meaning of determination, said it means "*consult the people of opinion and follow them*".⁴³⁶

⁴³³ Cited in Alhulu, M. R., *Addawlah fi Mezan Ashari'a, Annuzom Assiyasyyah*, (in Arabic), Alexandria: Dar Al-Matbu'at Aljam'ayyah, 1996, p. 381

⁴³⁴ *Ibid.*, 383

⁴³⁵ Ibn Katheer, *op.cit.*, Part 1, p. 421

⁴³⁶ Ibn Hazem, *op.cit.*, Part 6, p. 200

Moreover, the Prophet consulted his people on the battle of *Uhud* and followed the companions' advice to go to war, although he was inclined to avoid it.⁴³⁷

It might be suggested that if the government is universally recognized in Islamic jurisprudence to be under a Shari'ah obligation to conduct a consultation with wise representatives, on all political, economic and social matters that are closely connected with individuals' life and the continuity of the community, then it is unreasonable to think that the result of that consultation is different and hence might be, in certain or even all cases, non-binding. That is because the obligation to conduct a consultation would be meaningless, if the result of it is non-binding. This might be the time to reconsider the Islamic discourse, especially on this vital matter which has significant implications for the continuity of the Islamic community. The sacred text must be read within the context of the necessities of the reality, in a manner that ultimately serves the purposes of Islam. As Sheikh Al-Qaradawi suggests, if there are two opinions on this matter, one that the government is obliged to implement the outcome of consultation, the other that entitles the leader to disregard it, the injustice of our time strongly suggests the need to uphold the former view. Hence, the government must implement the result of the consultation, just as it is obliged to conduct the consultation.⁴³⁸

Whatever the differences of opinions in Islamic jurisprudence over this matter, if the people one day decide to form a government in accordance with the opinion that suggests that consultation is binding, then these differences must be resolved according to the people's will and the government must keep the promise.⁴³⁹

⁴³⁷ Ashawi, T., op.cit., p. 52, See also Alkurtubi, op.cit., Part 4, p. 253

⁴³⁸ Al-Qaradawi, Y., op.cit., 1997, p., 146

⁴³⁹ Ibid., p. 146, See also Abdulkhaliq, F., op.cit., p. 69

III.5.2.1.2. Free Media and Freedom of Speech

The principle of consultation in this latter meaning seems to approach the core element of the concept of democracy, which is based on limited and accountable government. The democratic system seems to require a transparency that allows the public to have access to information in order to regulate the government's conduct. In the same way, Islamic *Shura* (consultation) scrutinizes the functions of the government through public opinion. So, the Islamic *Shura* (consultation) itself then may function as the basis of freedom of speech, since the consultation is all about public opinion. However, it is not necessarily as simple as it first seems.

According to Muslim jurists, Islamic consultation seems to be confined to those who are chosen, whether by the government itself, the current practice of the current Islamic states, or by the people, as Muslims are currently calling for.⁴⁴⁰ The principle of *Shura* seems to give only a group of people the right to debate government conduct and does not seem to consider the ordinary people.⁴⁴¹ The Prophet and his companions only consulted a group of people who were known for their knowledge and wisdom and who were recognized as *Ihl Al-Hal wa Al-'Aqd*.⁴⁴² The principle of consultation does not confer on all individuals any right whatsoever. Rather, it is a procedure of decision-making, specifying the way that the Islamic government must conduct its business. It is a part of the state's machinery that governs the people, not something to be used by the latter against the state. Although it may assert the principle of accountable and transparent government, it is not necessarily good enough to be the basis of the freedom

⁴⁴⁰ See Al'alkeem, H., "Al-Islam wa Addemoqradyyah Mut'aadedan am Mutnaqidan", In: Tamimi, A.,(ed.), *Musharakat Al-Islamyyeen fi Assultah*, (In Arabic), London: Liberty for the Muslim World, 1994, pp. 37-51, See also Al-Mutwakkel, M., "Al-Islam wa Huqoq Alensan", In: Markaz Derasat Alwehdah Alarabyyah, *Huqoq Alensan Al-Arabi*, (in Arabic), Beirut: Markaz Derasat Alwehdah Alarabyyah, 1999, pp.123-125

⁴⁴¹ See Mutwalli, A., op.cit., p.256

⁴⁴² See Ibn Katheer, op.cit., Part 1, p. 421, See Attabary, op.cit., Part 4, p. 152

of speech as some might suggest.⁴⁴³ Freedom of speech concerns not only whether the people can convey their opinion to the state, which maybe satisfied through consultation with appointed officials or the people's representatives, but whether the ordinary people can, themselves, participate in the political debate. Can the media, for example, embark on public affairs and scrutinize the state decision?

When Islamic authors try to assert the existence of freedom of speech in Islam, they usually cite the Islamic principle of enjoining good and forbidding evil, in the sense that every Muslim, through the concept of *Hisbah*,⁴⁴⁴ is not only permitted but required to put an end to evil by deed if he is able to do so, or by words if he has not the power to change it by deed.⁴⁴⁵

However, close examination reveals that this principle cannot be relied on to justify a freedom of speech that would enable citizens to debate and even object to government decisions. That is, if we agree that the government itself was established in accordance with this principle, as indicated above, and since that government is of an Islamic nature, then the evil that the citizens are able to denounce is what the government considers as evil, and the good is what the government considers as good. Citizens, in

⁴⁴³ See Al-Hageel, S., op.cit., p.,137 Al-Hageel in his book discusses freedom of speech in the form of consultation and most of his justification seems to depend on the ability of Muslims to give advice, whether to the government or to the other Muslims.

⁴⁴⁴ For more details about the Islamic concept of *hisbah* see Saeed, S., *Shar'ayyat Assultah wa Annizam fi Hukm Al-Islam*, (in Arabic), Cairo: Dar Annahzah Alarabyyah, 1999, pp. 163-165

⁴⁴⁵ The Prophet reportedly said that "*Whosoever sees an evil [in the Islamic society] must change it [correct it] by his own hand [by action]. If he could not do so, then let him use his tongue [deny the practice verbally]. [Finally] if he could not do so, then let him use heart [despise the practice by heart and declare that he/she hates to see such a wrong practice in the Islamic society]. That is the least [level of] faith.*" See Alkurtubi, op.cit., Part 4, p. 49, see also An-Namry, Y., *Attamhees lema fi Almunvatta'a min Alm'aani wa Alasaneed*, Part 10, (in Arabic), Morocco: Wazarat 'Aumom Alawqaf wa Asha'on Al-Islamyyah, 1967, p. 259

exercising this principle, are in fact supporting the government and backing its decision, not scrutinizing it.⁴⁴⁶

Moreover, it must be borne in mind that the application of a principle is not always as successful as the principle is in theory. The reality is different, as it raises details in the process which are undoubtedly subject to human error. Such error must be corrected and the officials who caused it must accept the responsibility, no matter what is their nature, elected or appointed. So, the state's application of the principle of enjoining good and forbidding evil might itself be subject to public scrutiny. Hence, it is unclear how the public will judge the state's application of a principle that is itself the basis for the power of judgment. For example, is the public able to criticize the state's application of the principle of enjoining good and forbidding evil, which itself is deemed to be the basis for the legitimacy of public intervention in the state affairs? If the public can say the state's application of the principle is wrong, then this judgment itself is wrong, since it is founded on the same application of the same principle. Therefore, the principle of enjoining good and forbidding evil might support freedom of speech, but does not seem to be strong enough to found it. Freedom of speech is more than mere advice. It is about scrutiny and, sometimes, objection.

⁴⁴⁶ The Saudi system, for example, has established an institution called the institution of ordering good and preventing evil, *haya't al-amr belma'arof wa annahy 'an almunkar*, which is considered by some commentators a religious police. Through this institution the Saudi government interferes fundamentally in matters that are mainly concerned with the individual's personal life in the name of the Islamic principle of ordering good and forbidding evil. In the name of this principle, they forbid different media forms and arts and impose restriction on women's work, especially in places where men work. See the electronic news E-laph, a Saudi journalist complaining about the way the Saudi institution of ordering good and forbidding evil conduct their work, available online at <http://www.elaph.com/ElaphWeb/Politics/2006/1/124140.htm> For more information about this institution. See Al-'Autaibi, A., *haya't al-amr belma'arof fi Assaudiyyah bayn Naqd Al-mabda' wa Naqd Al-mua'ssasa*, E-laph1 electronic news, January 2006 Available online at <http://www.elaph.com/ElaphWeb/NewsPapers/2006/1/117254.htm>

In fact, some Islamic scholars reject the right of the public to scrutinize government decisions. In their view, Islam can never give the ordinary people the right to debate or even oppose the government's political decision in a public forum.⁴⁴⁷ If anything happens to the community, touching the public interests, the ordinary people must not debate it in public, even if their aim in doing so is to understand the complexity of the matter. Rather, they must privately discuss it with those charged with authority among them.⁴⁴⁸ The proponents of this argument seem to fear that such a public debate on matters that concerned with public order would encourage division, which could ultimately lead to disorder and instability. Verse 83 of chapter 4 of the Holy Quran may, at first glance, serve in support of this view. It says that

*"When there comes to them some matter touching (public) safety or fear, they divulge it. If they had only referred it to the Messenger or to those charged with authority among them, the proper investigators would have tested it from them (direct). Were it not for the Grace and Mercy of Allah unto you, all but a few of you would have followed Satan."*⁴⁴⁹

Nevertheless, if we carefully examine this verse, we may find in it one of the important elements that establish freedom of speech in Islam rather than demolish it. One of the most credible Islamic scholars, *Ibn Katheer*, has asserted that this verse is merely talking about the prohibition of disclosing sensitive information that might endanger the community without proper investigation.⁴⁵⁰ *Assyoti* has further suggested that, according to this verse, all Muslims are required to investigate any unclear issue, especially ones of public concern, and discuss it with the responsible people who are able to tackle such matters. Those people, *Assyoti* argued, need not only be state

⁴⁴⁷ See the opinion of Sheik Ibn Baz in: Al-Jeraisy, K., and Al-Buraik, S., (eds.), *Fatava Ulama' Albait Alharam*, (in Arabic), Riyadh: Al- Al-Jeraisy Lttawzee'a, 1999, p. 316

⁴⁴⁸ *Ibid.*, p. 316

⁴⁴⁹ Q4:83

⁴⁵⁰ *Ibn Katheer*, *op.cit.*, Part 1, pp. 390, and 530-531

officials, but could also include Islamic scholars and intellectuals.⁴⁵¹ This verse seems to be revealed to prevent the spread of lies and rumours by urging Muslims to scrutinize any matter that may arouse suspicion and discuss it with the people concerned, who are able to give clarification.⁴⁵² Accordingly, this verse refers to proper investigation or extraction of matters from their proper resources, it does not forbid investigation. In other words, this verse seems to urge people to investigate public matters in a free environment with the people concerned. This, in turn, requires channels like political forums where people can reach the relevant officials, for the purpose of inquiry. Only this will really implement the purpose of this verse, which is to close the door against those who spread lies and rumours to bring unrest to the community.

Consistent with this view, Umar bin Alkhattab, when he was informed that the Messenger of Allah had divorced his wives, left his house, entered the Mosque and found the people talking about this news. He immediately went to the Prophet to ask him what had truly happened, asking him, "*Have you divorced your wives?*" The Prophet said, "*No.*" Then he stood by the door of the Mosque and shouted with the loudest voice, "*The Messenger of Allah did not divorce his wives*"⁴⁵³

Thus, this verse seems to urge both the people to express their concerns and discuss them with the responsible persons, and the officials charged with authority to facilitate this by guaranteeing that no harm will be inflicted on anyone because of his words. Moreover, as the issues are of public nature, then the debate must be in public to inform the investigators, as Umar did when he shouted with his loudest voice to inform the

⁴⁵¹ Assyoti, op.cit., Part 2, p. 601

⁴⁵² Al-Asgalani, A., op.cit., Part 9, 285

⁴⁵³ Cited in Muslim, op.cit., part 2, p. 1107, See also Ibn Habban, *Saheeh Ibn Habban Bitarteeb Ibn Balban*, Part 9, (in Arabic), Second Edition, Beirut: Mua'ssat Arresalah, 1993, p. 498

people, whether those who were party to the discussion or those who needed to understand the matter.

In addition, many examples can be extracted from the traditions of the prophet and his companions to assert the freedom of speech in Islam. I will refer below to some events that occurred at the time of the Prophet and his companions that strongly suggest that this particular kind of freedom is actually an inseparable part of Muslims' culture.

It is reported by Alkurtubi that in the battle of *Badr*, when the Prophet, peace be upon him, camped with the Muslim army at a well among the wells of *Badr* and they were about to settle down, Alhabbab bin Almundhir, one of the companions asked: "*O Messenger of Allah, this place we settled in, is it a place Allah commanded us to camp in whereby we cannot leave it? Or is it your idea of war strategy and tactics?*" The Messenger replied, "*It is my own idea of war strategy and tactics.*" He replied, "*O Messenger of Allah, this is not a suitable place. Let us move to the well nearest to our enemy and settle down there while we cover up all the wells behind us with sand and palm trunks. We then should build on it a trough and fill it with our drinking water and they will not have any to drink.*" The Messenger liked the idea; he moved to the lower side with the city of *Madinah*, according to the suggestion of the companion.⁴⁵⁴

The interesting point we can make from this event is that the companion expressed his opinion or, even, his objection to the decision taken by the Prophet without even being asked or consulted. This indicates that Muslims can indeed raise their voices against a decision of the government if they think it is inappropriate, especially in a matter that is not of a religious nature. If freedom of speech was not guaranteed in Islam, this

⁴⁵⁴Alkurtubi, op.cit., Part, 7, pp. 374-375

companion would not have had the courage to question publicly the Prophet's decision and suggest a contradictory one. Consistent with this, Abu Bakr said on his installation as the first Caliph,

*"... Now, it is beyond doubt that I have been elected your Amir, although I am no better than you. Help me if I am in the right; set me right if I am in the wrong. Truth is a trust; falsehood is a treason. The weak among you shall be strong with me till God willing his rights have been vindicated, and the strong among you shall be weak with me till, if the Lord will, I have taken what is due from him. Obey me as long as I obey Allah and His Prophet. When I disobey Him and His Prophet, then obey me not."*⁴⁵⁵

This was a clear declaration of the Islamic values of justice and fairness that were revealed to mankind through the prophet Muhammad, peace be upon him, centuries ago. Abu Bakr was the man closest to the Prophet and the best able to implement the rules of Islam after the prophet. Therefore, in this declaration, he asserted the Islamic recognition of the significant role of public opinion in correcting the misconduct of government, urging people to raise their voice against wrongdoing. Umar also confirmed this point when he took over the responsibility and suggested, in the course of addressing the Muslims that *"If I follow the right path, follow me. If I deviate from the right path, correct me so that we are not led astray."* Thereupon a man rose up and said, *"When you willfully deviate from the truth, we will withdraw our allegiance to you and I for one would feel it my duty to correct you with my sword."*⁴⁵⁶

⁴⁵⁵ Cited in Ibn Hesham, A., *Asseerah Annabawiyah le Ibn Hesham*, Part 6, (in Arabic), Beirut: Dar Al-Jeel, 1411 (Islamic calendar), p. 82. See Al-Halabi, A., *Asseerah Alhalabiyyah fi Seerat Al-Ameen Al-Ma'moon*, Part 3, (in Arabic), Beirut: Dar Alm'arefah, 1400 (Islamic calendar), p. 483, See Attabary, M., *Tareekh Alumam wa Almulok*, Part 2, (in Arabic), Beirut: Dar Alkutob Al'almiyyah, 1407 (Islamic calendar), p. 238, See Ibn Katheer, A., *Albedayah wa Annehayah*, Part 5, (in Arabic), Beirut: Maktabat Alm'aaref, p. 248

⁴⁵⁶ Al-Qaradawi, Y., op.cit., 1983, p. 62

III.5.2.2. Judicial Accountability

While the discussion above may demonstrate the accountability of the Islamic government before the people, this section will be devoted to showing the accountability of the Islamic government before the court and hence the subjection of the Islamic state's authorities to the rule of law. According to the Islamic judicial practices in the early age of the Islamic state, Islam seems to recognize no judicial tribunals, no assembly of judges and no juries.⁴⁵⁷ A single judge, chosen by the Caliph, usually sits to resolve the dispute.⁴⁵⁸ However, the judge in Islam was accorded a powerful authority to the extent he was able to question the Caliph himself. In the following paragraphs, some events that occurred at the time of the companions' governance will be cited to demonstrate the accountability of the leader before the judiciary.

In a striking event, Ali bin Abitalib, after he had been installed as the third Caliph of the Islamic state, found in the market his lost war shield in the possession of a Jew who was trying to sell it. Ali said to the Jew, "*This is my shield*". The Jew denied Ali's claim and as a result the issue was referred to the justice Shuraih, one of the well known judges in Islamic history, who requested Ali to prove his claim. Ali brought his son Hassan and

⁴⁵⁷ Zubaida, S., *Law and Power in the Islamic World*, London: I.B.Tauris, 2003, p. 44

⁴⁵⁸ Al-Mawardi reported that some jurists even reject the jurisdiction of two judges in the same places over same matters. See Al-Mawardi, op.cit., p. 90 According to Al-Mawardi book (*Alahkam Assultanyyah*) there are different types of court have been recognized in the Islamic history. The Islamic judicial authority can be subcategorized into six types according to the subject of the case and the place in which the case was brought. The first type of court is a court that has unlimited jurisdiction over all kinds of subject, like all types of criminal cases and of commercial cases, but limited in certain place or region in the Islamic state. Second, a court that is not limited in place but limited in the type of subject it is able to examine. This court have the jurisdiction over the whole regions and places of Islamic state that is governed by the Caliph but limited to some cases that may be related to the application of *hudud* or contract law or inheritance or family law... etc. Third, a court that has unlimited jurisdiction over the whole places and regions in the Islamic state and has also unlimited jurisdiction over all types of matters. Fourth, a court that is limited to certain matters and also limited to certain place or region of the Islamic state. Fifth, a court that is related to a certain dispute and this court finish ones the dispute is settled, and a court which can be formed for a certain time in response to certain circumstances. See Al-Mawardi, op.cit., pp. 81-93. See for details of these categories Al Sheik, A., *Lamahat Houl Alqadaa' fi Almamlakah Alarabiyah Assaudiyyah*, (in Arabic), Second Edition, 1421 (Islamic calendar), pp. 54-59

his servant Qambar because they were the only witnesses who knew about Ali's belongings. However, Justice Shuraih rejected Ali's claim because in Islam, the son cannot be relied on as a proper witness for his father and he judged accordingly in favour of the Jew's claim.⁴⁵⁹

One might suggest that Ali, in acting in this manner, was not acting on behalf of the government and the subject of dispute was not of public concern, rather was of interpersonal relationship, which is irrelevant to the subject under discussion. However, it must be borne in mind that the government at that time was not as sophisticated as it is in the present, and therefore it might be true to say that the acceptance of the idea that the head of the Islamic state was sued before the court and judged guilty is itself an indication of the Islamic inclination to recognise the modern principle of the government judicial accountability, even if the matter examined in the court was not of a public or administrative nature. The system of government judicial accountability may have not been created to monitor the leader's personal conduct, but rather to monitor the authority of the state institutions, since the state is now structured by institutions and not individuals. However, as the concept of the state itself was under development at that time and the state of institutions was not properly recognised, then bringing suit against the leader, the most powerful individual (the sovereign institution in the current term), is a powerful sign of the independence of the judiciary and the implementation of the principle of the rule of law. If that was recognised in Islamic jurisprudence at that time, then, if the same concept is applied in the present Islamic political system, the government of the day, which is the institution, will undoubtedly be accountable to the court.

⁴⁵⁹ Aljodi, S., *Madameen Alqadaa' Albadawi Qabl Al'ahd Assaudi*, (in Arabic), Attaif: Dar Alharithy Le-itteba'ah wa Annashr, 1991, p. 213

There are, however, events that can be cited here, not to assert the scope of the governors' interpersonal relationship but the scope of their political authority and their subjection to the rule of law. It might suffice to take just one event for the purpose of illustration.

It is reported that an Egyptian man had been beaten and imprisoned without trial under the authority of 'Amr bin Al-'Aas, the governor of Egypt. The Egyptian man came to the Caliph Umar to raise his complaint and enquire whether a Governor could, on his own account, beat a Muslim. Umar called upon the governor 'Amr to inquire into the truth behind this. 'Amr said that he had beaten the man to enforce discipline. Umar replied with anger that unless the man had been judicially tried and found guilty, no punishment could be inflicted on him. Umar told the complainant that as 'Amr had beaten him without authority, he could strike him with a similar number of lashes, to vindicate himself.⁴⁶⁰

Although this does seem to indicate the subjection of the Islamic state authorities to the rule of law, it can be argued that this also indicates the concentration of the powers in the hand of the Caliph. Islam does not seem to recognise divisions between the state's authorities. The Caliph is the head of the government as well as the head of the judicial system and hence he possesses final judicial and legislative powers in addition to his executive authority. According to the Islamic concentration of powers, Judges in Islam do not seem to be occupying a normal public office but rather they seem to be sharing with the Caliph the state powers. Judges possess their position, according to the Islamic *fiqh*, through delegation not through appointment and hence Judges are practising their job as a deputy of the Caliph.⁴⁶¹ However, the death or removal of the Caliph (the governor), as mentioned earlier, does not affect the position of the judges. That is

⁴⁶⁰ Ibid., p. 213

⁴⁶¹ See Al-Mawardi, *op.cit.*, pp. 81-93

because; the removal of judges as a result of the removal or death of the Caliph would disturb the people's interests in the disputes that were brought before the judges under the governance of the previous Caliph.⁴⁶² In addition, although the judges are chosen by the Caliph, the powers they both share, the Caliph and the judges, originally come, as mentioned earlier, from the people; the actual continuing source of powers.⁴⁶³

However, this Islamic recognition of concentration of powers would give the Caliph unrestrained power and in such an authoritarian regime, it has been argued, no human rights can be implemented.⁴⁶⁴ It is indeed a valid argument and there is, indeed, no clear recognition of the principle of separation of powers in the traditional Islamic jurisprudence. However, the majority of modern scholars seem to be inclined to take the principle of separation of powers as the basis for the modern Islamic state.⁴⁶⁵ Their assertion is that although the traditional *fiqh* did not recognise the principle, it did not seem to reject it.⁴⁶⁶ The companions' genuine piety and sincerity enabled them to manage their people justly, but the injustice of the present time seems to press the need for division between the state authorities.

We must realize, however, that Umar and Ali were not merely political leaders, but they have been widely recognised as the founders of Islamic jurisprudence. Their role at that time was not only to declare the law, but also to establish principles of inference and construction. They formulated rules accordingly, explaining to Muslims how the principles of Islam must be implemented. Hence, it might be true to say that Umar and

⁴⁶² see Al Sheik, A., op.cit., pp. 33-34

⁴⁶³ AlKhayyad, A., op.cit., p., 73, See also An-Nadi, F., op.cit., pp. 285-286

⁴⁶⁴ An-Na'im, A. A., "A Modern Approach to Human Rights in Islam: Foundations and Implications for Africa", In: Claude E. Welch, Jr. and Ronald I. Meltzer, op.cit., p. 81

⁴⁶⁵ See Ashawi, T., op.cit., pp. 620-622, See Mutwalli, A., op.cit., p.238, See Al-Qadi, A., op.cit., pp. 636-640, See Alghamdi, N., *Aliqtesas Alqada'y fi Alfiqh Al-Islami*, (in Arabic), Riyadh: Maktabat Ar-Rushd, 2000, pp. 79-101,

⁴⁶⁶ Mutwalli, A., op.cit., p.238

Ali were teaching Muslims how the public body in Islam is politically and judicially responsible for their conduct. They were not showing their righteous personality; rather, they were laying down Islamic rules that bind all Islamic leaders, no matter what their personality might be, righteous or unrighteous. Consistent with this view, Umar reportedly said to a man, in examining the judicial decision made by some judges in his case, "*If I was the judge, I would make a different judgment.*" The man wondered why Umar did not apply his opinion, since he was the one who was in charge as a ruler. Umar replied that this was only his own opinion and he was not able to refer it to the *Quran* and *Sunna*, implying that the ruler cannot interfere with the freedom of the judge's reasoning without a clear basis in the Islamic divine sources, the *Quran* and *Sunna*.⁴⁶⁷ Moreover, Umar's letter to his judge Abu Musa Al-Ash'aary, the judge of *Al-Basra*, has been considered by Muslim jurists as establishing the main principles of the judicial system in Islamic *fiqh*, which all judges must bear in mind in the judicial exercise.⁴⁶⁸ Thus, Umar and also Ali were considered by Muslim jurists not only as leaders but also as founders of the Islamic *Fiqh* and hence the concentration of powers in the hand of the companions should not be taken as a principle that must be followed by the leaders of a later age, as the leaders of the later age are not considered in the position of the companions.

III.5.3. The Extent of the Islamic Respect for the Individual Rights

It might be right to say that in demonstrating the Islamic system's recognition of the principle of representativeness and government accountability to the public and to the court, we might indicate, at the same time, the Islamic recognition of the political individual rights. It might represent the Islamic recognition of the right to vote, the right

⁴⁶⁷ Ibn Al-Qayyem, *A-'alam Almuvaqqi'aeen*, (in Arabic), Part 1, p. 65

⁴⁶⁸ *Ibid.*, p. 85, for the English summary of the content of the *Umar's* letter See Al-Marzouqi, I. A., *op cit.*, p. 358

to participate in public affairs, the right to form a political party, freedom of speech, the right to free association, and above all, the subjection of the state authorities to the rule of law. However, a question arises, to what extent are human rights respected in Islam if they were put before religion? It has been argued that Islam is in clear violation of the international right of equality and non-discrimination, and may even be in conflict with the freedom of belief.⁴⁶⁹ In the following paragraphs, therefore, we will deal with these issues separately in more details.

III.5.3.1. Islam and the Right to Equality and Non-Discrimination

The rights to equality and non-discrimination are heavily emphasized in the international human rights discourse and have been regarded by some authors as *the starting point of all other liberties*.⁴⁷⁰ The ICCPR has clearly stressed this point in Article 2 (1) which prohibits any discrimination on ground of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. In effect, the wording of this Article is read into each of the ICCPR Articles, in the sense that the state must not discriminate in the implementation of the covenant rights on grounds prohibited in the Article 2 (1).⁴⁷¹ Article 26 has also confirmed that all persons are equal before the law and are entitled without any discrimination on a ground prohibited by Article 2(1) to the equal protection of the law.

The principle of equality and non-discrimination has also been emphasised in Article 2 (2) of the ICESCR, which guarantees the enjoyment of the rights recognized in the

⁴⁶⁹ Mayer, A. E., op.cit., 1999, pp. 85, 149

⁴⁷⁰ Cited in Baderin, M., op.cit., p. 58

⁴⁷¹ Harris, D., "The International Covenant on Civil and Political Rights and the United Kingdom Law: An Introduction", In: Harris, D., Joseph, S., (eds.), *The International Covenant on Civil and Political Rights and United Kingdom Law*, Oxford: Oxford University Press, 1995, p. 4

covenant without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The core element of human rights discourse is that human rights inhere in every human being by virtue of their humanity and hence they must be enjoyed by every individual to an equal extent.⁴⁷² As a result, many other important legal instruments have evolved to eliminate certain types of discrimination, such as the UN Convention on the Elimination of all Forms of Racial Discrimination (ICERD) and the UN Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW).

Islam is seen in conflict with such a substantial principle of Non-Discrimination since it differentiates on the ground of religion between Muslims and non-Muslims. It also distinguishes between men and women in the enjoyment of some of the international rights. It has been said that a person's rights and obligations, in Islamic law, depend on his or her status and, as a result, women do not have the same rights as men, nor do non-Muslims have the same rights as Muslims.⁴⁷³ The Islamic rules of inheritance are also seen as incompatible with the international principle of equality and non-discrimination. Muslim doctrine does not allow a non-Muslim to inherit from a Muslim and even between Muslims themselves, the rules are different, since a woman inherits half as much as a man.⁴⁷⁴

⁴⁷² Craven, M. C. R., *The International Covenant on Economic, Social, and Cultural Rights: A Perspective on Its Development*, Oxford: Oxford University Press, 1998, p. 153

⁴⁷³ Brems, E., *op.cit.*, p. 213

⁴⁷⁴ Mayer, A. E., *op.cit.*, 1999, p. 111

III.5.3.1.1. Islam and Non-Muslims' Rights

It has been argued that Muslims in the Islamic state are the only full citizens, enjoying the full rights guaranteed by the Islamic Shari'ah, subject to some limitations to some degree in respect of Muslim women. For non-Muslims, although they are inhabitants of the Islamic state, their rights are confined to the practice of their religion and conducting their private affairs according to their own custom.⁴⁷⁵ In exchange for providing security of persons and property, non-Muslims must pay *jizyah* (tax) and submit to Muslim sovereignty in public affairs.⁴⁷⁶ Moreover, it has been argued that marriage between a Muslim man and a non-Muslim woman, in particular "people of the Book" (Christians and Jews) is permitted, while marriage between a Muslim woman and a non-Muslim man is prohibited, even if he is a Christian or Jew.

Muslim jurists, however, argue that the claim that Islamic rules are contrary to the principle of equality and non-discrimination is, for the most part, based on confusion between the concept of the nation state and the concept of the Islamic state. Al-Qaradawi observes, in respect of the burden on non-Muslims to pay *jizyah*, that the state in Islam is a state of belief, in the sense that it is established to preserve the belief and principles of Islam, and therefore it cannot be assumed that non-Muslim people will defend principles to which they do not subscribe.⁴⁷⁷ As a result, those non-Muslims are given the chance to participate in the defence of the state they live in through financial support, which is called *jizyah*, instead of with their blood. However, if any of the non-Muslims is willing to participate physically in a war to defend the Islamic state and its

⁴⁷⁵ An-Naim's view cited in Steiner, H., and Alston, P., op.cit., 2000, p. 392

⁴⁷⁶ Ibid., p. 392

⁴⁷⁷ Al-Qaradawi, Y., *Ghair Almuslimeen fi Almujtam'a Al-Islami*, (in Arabic), Beirut: Mua'ssasat Arresalah, 1983, p. 33

principles, he will not be liable to pay the *jizyah*.⁴⁷⁸ Al-Qaradawi also asserts that the enforcement of *jizyah* on non-Muslims is in itself adherence to the principle of equality, in that it gives to non-Muslims the chance to participate in founding the public service and state facilities side by side with Muslims who have been required to do so through *zakat* (Islamic tax).⁴⁷⁹

Umarah has also observed that in the permission of marriage between a Muslim man and a non-Muslim woman, there is a clear Islamic recognition of the other's faith. That is to say, instead of being reluctant to accept the existence of the other's faith and values, Islam preserves the right for others to differ and obliges Muslims to respect that, to the extent that it even allows those of the other belief to be mothers and grandmothers of Muslims.⁴⁸⁰ The Islamic rule that a Muslim woman is not permitted to marry a non-Muslim, such as a Christian or Jew, while a Muslim man, by contrast, can marry a non-Muslim, is not because she is a woman and he is a man, but it is believed to be another way of preserving the religion, which is the main objective of the Islamic state ideology. That is to say, Islam does not only prevent women from marrying non-Muslim men but also prevents men from marrying pagan women, and if this was discrimination as to sex, then it would make no difference whether a man marries a woman who believes in God or one who does not.⁴⁸¹ Moreover, It has been argued that the woman is the weaker person in the marriage relationship and because of her sentimental character that always admires her husband and his attitude, her religion and belief might be affected, which

⁴⁷⁸ See Umarah, M., *Al-Islam wa Al-Aqalliyat: Almady, Alhader wa Al-Mustaqbal*, (in Arabic), Cairo: Maktabat Ashuroq Addawliyyah, 2003, p. 15

⁴⁷⁹ This connection between *jizyah* and *zakat* has long been recognised by the Islamic *fiqh*, especially *Maliky* school in their method of teaching that teaches the rules of *jizyah* (tax on non-Muslim) in the book that teaches the rules of *zakat* (tax on Muslims). See Al-Qaradawi, Y, op.cit., 1983, p. 34

⁴⁸⁰ Umarah, M., op.cit., p. 18

⁴⁸¹ Mawlana Jamal Al-Lail, T., *Huqoq Alensan fi Al-Islam*, (in Arabic), the Thirteenthth session of the Islamic Organization Conference, p. 53

would ultimately affect their children too.⁴⁸² This would likely increase division rather than unity in the Islamic society that is governed by Islamic rules.

It may not also be a discrimination against non-Muslims as to religion because if there was discrimination on the basis of religion, a Muslim man would not be able to marry a non-Muslim woman (Christian or Jewish).

This differentiation in the treatment between Muslims and non-Muslims seems to be due to the Islamic concept of state, which is based on the preservation of the religion of Islam and not on ethnological or linguistic grounds. The principles and rules of Islamic law are entirely based on a religious criterion and, as a result, are designed to govern relations between Muslims and non-Muslims, regardless of all other criteria which are taken into account by the relevant principles of the international doctrine of human rights. In other words, whereas the international conception of human rights is based upon the concept that human rights inhere in the human being by virtue of being human and hence he or she must not be discriminated against on the grounds of religion, race, sex, or colour, the Islamic conception of human rights is entirely based on the belief that God and God alone is a law giver and the source of human rights, conferring them on all mankind through the religion of Islam. Therefore, Islamic law divides people into Muslims and non-Muslims, treating the former differently than the latter. The different treatment does not necessarily mean that Islam treats non-Muslims in a degrading way.⁴⁸³ The relationship in Islamic states between Muslims and non-Muslim inhabitants is similar to the relationship in secular states between nationals and foreigners who live in Islamic territories. So, the distinction between Muslims and non-Muslims is merely one of political administration, and not of human rights. Muslims and non-Muslims are

⁴⁸² Ibid., pp. 52-53

⁴⁸³ See Al-Qaradawi, Y., *op.cit.*, 1983, pp. 43-54

equal before the law. Indeed, a number of Quranic verses⁴⁸⁴ and Sunna warn Muslims against any high handedness towards *Dhimmis* (non-Muslims). The Prophet is reported to have said, among other *Hadiths* conveying the same message: "*Whoever hurts a Dhimmi, I shall be his complainant and whosoever I am a complainant, I shall ask for his right on the Day of Resurrection*".⁴⁸⁵

Thus, the non-Muslims were permitted in the traditional Islamic *fiqh* to join public office and participate in managing political polity of the Islamic state. The majority of Islamic *fiqh* have permitted non-Muslims to hold political responsibility, to the extent that non-Muslims at the time of the Caliph Haroon Arrasheed were even allowed to be Ministers in the executive affairs.⁴⁸⁶ The restriction on non-Muslims in respect of their participation in the public life of the Islamic community may be confined in that they cannot take the presidency. That is because, first they are in the minority in the Islamic societies and second, as the Islamic state is based on the Islamic belief, it is inappropriate for Muslims to give the presidency of the Islamic state to people who may believe that Islam is wrong. It might be inappropriate for the non-Muslims themselves to be put in a position where they must defend a principle they may believe is wrong. The same applies to whether non-Muslims can be judges in affairs exclusive to Muslims. How can Islamic rules in Islamic disputes be applied by a non-Muslim Judge who does not believe in them, especially where qualified Muslims are available?⁴⁸⁷

⁴⁸⁴ Q60: 8-9 and Q29:46.

⁴⁸⁵ Cited in Al-Qaradawi's opinion in his response to the question of the treatment of non-Muslims, Available online at http://islamonline.net/servlet/Satellite?pagename=IslamOnline-Arabic-Ask_Scholar/FatwaA/FatwaA&cid=1122528601326

⁴⁸⁶ Mutwalli, A., *Ashareea'h Al-Islamyyah ka Masdar Asasi Leddustoor*, (in Arabic), Third Edition, Alexandria: Alm'aaref, 1990, pp. 92-93

⁴⁸⁷ See Al-Qaradawi, Y., op.cit., 1983, p. 23

In fact, these matters are not conceived by most Islamic scholars, especially Sunni scholars, to be matters of belief and worship, *Ibadat*, but mainly concerned with the management of life, which is called '*Adat*. Hence, they fall in the realm of human logic and are governed by the necessities of the realities that change from time to time.⁴⁸⁸ Therefore, the application of these rules seems to fall in the realm of the doctrine of *Siyasah Shar'iyah*, which is based, as discussed above, on the criterion of preserving Islam and which forms a legitimate way to change. Although the Islamic military, for example, could not be led by non-Muslims at the time when the main principle governing international relations was power and war, it might be acceptable in the present day, when openness and solidarity between cultures is the dominant theme.

III.5.3.1.2. Islam and Women's Rights

Women's status has been heavily emphasised in the human rights discourse and given special attention by states, to the extent of adoption of a separate and independent convention on the rights of women. The adoption of The Convention on the Elimination of All Forms of Discrimination against Women in 1979 clearly indicates the state's recognition of the necessity to set up an agenda for national action to end any kind of discrimination against woman.⁴⁸⁹ Traditional Islamic approach to human rights has been accused by some authors, like Meyer for example, of being one of the main obstacles to the full realization of the international rights of women.⁴⁹⁰

However, Islam, by close examination, has many values that liberate women from men's repression and has given them clear social and economic independence. In fact, at the time when the world was debating whether or not women are human beings, the

⁴⁸⁸Abdulkhalik, F., op.cit., p. 162

⁴⁸⁹ See the website of the division for the advancement of women in <http://www.un.org/womenwatch/daw/cedaw/>

⁴⁹⁰ See Mayer, A. E., op.cit., 1999, pp. 97-130

traditional Muslim jurists in the Muslim world were discussing who are better, humans (both men and women) or the angels of God.⁴⁹¹ Ibn Katheer even reported that Adam, the father of mankind, was created from clay, before entering paradise, while Eve, the mother of mankind, was created from a living thing, from Adam, and inside paradise, in order to house Adam and to bring ease to him.⁴⁹² If this does not indicate a preferable position of woman to man, it would, surely, not indicate the reverse. Muslim jurists suggest that man and woman were created from a single soul⁴⁹³ to enjoy the pleasures of life on an equal footing, and have been described in the Holy Quran as God's deputies who are given power over all kinds of God's creatures, to build life on earth.⁴⁹⁴ All of this seems to have been put aside by many human rights authors. Mayer, for example, sees in the traditional Islamic approach an absence of any willingness to recognize women as fully equal human beings who deserve the same rights and freedoms as men.⁴⁹⁵ Many parts of Mayer's writings seem to have shifted the attention to work on some narrow domain that is more connected with anthropological, cultural and social issues, like polygamy, divorce, and the way women should look, and which does not seem to be relevant to curbing government power, a point that she refers to in discrediting some Islamic rights.⁴⁹⁶ Mayer refuses to recognize women's right to chastity as a human right and asserts that human rights are concerned with curbing

⁴⁹¹ See the debate of the medieval Muslim jurists over this subject in Alkurtubi, op.cit., Part, 1, p. 289. See Ibn Taymiyah, A., op.cit., 1403 (Islamic calendar), p. 350

⁴⁹² Ibn Katheer, op.cit., Part 1, p. 80

⁴⁹³ "He it is *Who created you from a single being, and of the same (kind) did He make his mate, that he might incline to her; so when he covers her she bears a light burden, then moves about with it; but when it grows heavy, they both call upon Allah, their Lord: If Thou givest us a good one, we shall certainly be of the grateful ones.*" Al-Araf 7: 189

⁴⁹⁴ "And when your Lord said to the angels, *I am going to place in the earth a khalif, they said: What! wilt Thou place in it such as shall make mischief in it and shed blood, and we celebrate Thy praise and extol Thy holiness? He said: Surely I know what you do not know.*" Al-Baqara 2:30 and in another verse God says "And when We said to the angels: *Make obeisance to Adam they did obeisance, but Iblis (did it not). He refused and he was proud, and he was one of the unbelievers.*" Al-Baqara 2:34

⁴⁹⁵ Mayer, A. E., op.cit., 1999, p. 123

⁴⁹⁶ Mayer asserts that "*The Islamic "right" does not appear to be directed against state policy, only against the criminal.*" See Ibid., p. 61

government authority, not women's chastity,⁴⁹⁷ while she seems to be inclined to recognize nude pictures, emotionally erotic dances, and the use of contraceptives as human rights.⁴⁹⁸

However, there are some serious issues that are of clear relevance to human rights that need to be tackled and the Islamic stance on them made clear, such as the inheritance right and the right of woman to participate in political affairs.

III.5.3.1.2.1. The Inheritance Right

The HRC general comment No. 18 on non-discrimination has defined the term discrimination as to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.⁴⁹⁹ However, the committee has observed in paragraph 13 that not all differentiation of treatment will constitute discrimination, and affirmed that if the differentiation is reasonable and objective, it might not be considered illegitimate under the Covenant of Civil and Political Rights.⁵⁰⁰ The question that will be tackled here is whether Islamic rules of inheritance are justified as reasonably objective or they are based on discriminatory element that requires the abhorrent distinction in treatment according to sex.

The principles of Islamic teachings show that the double share of the male does not seem to apply to all cases. Sometimes a woman's share in the inheritance is equal to that of a man. For example, when two parents inherit from their children, the Islamic rules

⁴⁹⁷ Ibid., p. 61

⁴⁹⁸ Ibid., p. 104

⁴⁹⁹ Human Rights Committee, General Comment No. 18: Non-discrimination : . 10/11/89, Paragraph 7, Available Online at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/3888b0541f8501c9c12563ed004b8d0e?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/3888b0541f8501c9c12563ed004b8d0e?Opendocument)

⁵⁰⁰ Ibid., paragraph 13

assign a sixth share of inheritance to each, if the deceased left children.⁵⁰¹ The reason in this case is that the parents' needs are often similar.⁵⁰² Another example can be found in the case of siblings. The Quran establishes clearly that "*If the man or woman whose inheritance is in question, has left neither ascendants nor descendants, but has left a brother or a sister, each one of the two gets a sixth; but if more than two, they share in a third; after payment of legacies and debts; so that no loss is caused (to anyone)*".⁵⁰³ Thus, the sister gets a sixth, which is the same as the brother by the same mother. If there are more than two siblings, they inherit a third, to be distributed equally among them.⁵⁰⁴

Moreover, Sheikh Al-Qaradawi asserts that there are cases in which the female gets a bigger share than the male. For example, if a woman dies leaving a husband, mother and two brothers and one sister by her mother, the sister alone gets a sixth; whereas only one sixth is given to the two brothers. He also gives another example by saying that 'if a woman dies leaving a husband, a full sister and a brother by her father, the husband gets half the inheritance and the sister the other half, whereas the half-brother gets nothing, being merely an agnate. But if the half sibling is a sister and not a brother, she gets a sixth, as sustenance'.⁵⁰⁵

This clearly indicates that the Islamic differentiation in inheritance is not based on sex.

⁵⁰¹ Allah says that "*For parents, a sixth share of the inheritance to each, if the deceased left children...*" An-Nessa 4:11

⁵⁰² See Al-Qaradawi, *The Status Of Women In Islam*, Available Online at http://www.witness-pioneer.org/vil/Books/Q_WI/misconception.htm#Inheritance

⁵⁰³ An-Nessa 4:12

⁵⁰⁴ Al-Qaradawi, Y., op.cit., http://www.witness-pioneer.org/vil/Books/Q_WI/misconception.htm#Inheritance

⁵⁰⁵ Ibid., Available Online at http://www.witness-pioneer.org/vil/Books/Q_WI/misconception.htm#Inheritance. See also Al-Hassan, y., "Alhewar Alwatani houl Huqoq Alensan fi Dawlat Al-Emarat: tumooh mashroo'a fi waqe'a wa'aed, In: *Al-Emarat Alarabyyah Almuttahedah wa Huqoq Alensan*, (in Arabic), First Edition, Sharjah: Markaz Al-Emarat Le-Albehooth Al-Enmai'yah wa Al-Estrateejyah, 1999, p. 164

If it was so, the male would always be the superior and the female would never have an equal or bigger share. The criteria on which the Islamic differentiation is based seem to be divided into three reasons. The first is the level of relationship between the heir and the legator. The rule governing the distribution of the inheritance is that the closer relative to the deceased has priority over the more distant. This is illustrated by the fact that if a grandfather died, his children are the only inheritors and the deceased's grandchildren are excluded, because the former are deemed to be first degree relatives to the deceased, while the latter are believed to be second degree relatives.⁵⁰⁶ Second, age seems to be another important element, that is to say, aging people take smaller shares than younger ones. That is illustrated by the fact that a daughter's share in her father's inheritance is more than that of her grandfather, although both are deemed to be relatives of same degree. Third, the differentiation of Islamic inheritance rules seems to take the overall structure of the family into consideration, in that the male in Islam is always the bearer of the financial responsibility and hence he is awarded the bigger share in certain cases. The claim that the family structure has now changed and women have now become breadwinners of the new type of nuclear family⁵⁰⁷ does not change the Islamic rules that the husband is the one who must always bear the family's expenses and, hence, within this context, the male is deemed to have bigger share in the inheritance than that awarded to a female.⁵⁰⁸ Accordingly, the Islamic differentiation between men and women in inheritance does not seem to be based on discriminatory element but rather seems to be reasonably objective and hence not in inconsistency with the international rights of non-discrimination against women. In fact, the Prophet himself, peace be upon him, warned parents, regarding spending on their children,

⁵⁰⁶ Al-Qaradawi, Y., *Fatava Mu'aaserah*, (in Arabic), First Part, Available Online at http://www.qaradawi.net/site/topics/article.asp?cu_no=2&item_no=358&version=1&template_id=8&parent_id=12

⁵⁰⁷ Cited in Baderin, M., op.cit., p. 147

⁵⁰⁸ Maseekah, F., *Huqoq Almara'h bayn Ashar'a Al-Islami wa Ashir'ah Al-'Aalamyyah le Huqoq Alensan*, (in Arabic), Beirut: Mua'ssasat Alm'aaref, 1992, pp. 144-150

against differentiating between them according to sex and said, "*Equalize between your children in your spending. If I was to prefer between male and female I would prefer female.*"⁵⁰⁹

III.5.3.1.2.2. Women's Participation in Public Affairs

Women's rights to participate in political affairs, particularly the right to vote, and to hold public office, have long been debated in the Islamic *fiqh* and two arguments have resulted. While a number of medieval scholars, and some modern ones, seem to deny any such rights for women, most modern Muslim jurists seem to uphold almost all women's political rights recognized in the international instruments. These two arguments will be discussed in more details in the following paragraphs.

III.5.3.1.2.2.1. The Opponents of Women's Political Rights

The opponents of women's political rights cite, to support their argument, verses of the Holy Quran and the Prophet's traditions. They cite verse 34 of chapter 4 of the Holy Quran which says, "*Men are the protectors and maintainers of women...*" and also chapter 2 verse 228 which suggests that men have a degree (of advantage) over them.⁵¹⁰ They claim that if God differentiated between men and women in many private issues that relate to family affairs, like divorce for example, which seems to be exclusive to men, why is it not the case in respect of public affairs? They further argue that it might be more pressing to prevent women from participation in matters of a public nature since they are not recognized to be as qualified as men, even in managing issues of a

⁵⁰⁹Al-Asgalani, A., op.cit., Part 5, p. 214, See also Assan'aani, M., *Subul Assalam Sharh Bulugh Almaram min Adellat Alahkam*, (in Arabic), Part 3, Fourth Edition, Beirut: Dar Ihya Atturath Al-Arabi, 1379 (Islamic calendar), p. 89

⁵¹⁰Allah says "*And women shall have rights similar to the rights against them, according to what is equitable; but men have a degree (of advantage) over them.*" Chapter 2: 228

family nature.⁵¹¹ They also cite verse 33 of chapter 33, which was targeting the Prophet's wives, and states, "*And stays quietly in your houses, and make not a dazzling display...*" They suggest that if the wives of the Prophet were ordered to stay at home, then ordinary women should have no better position.⁵¹² They further suggest that the Prophet himself reportedly said that there is "*No good in a nation that is governed by a woman*"⁵¹³, which clearly denies any right of women to hold a public office, particularly the presidency.

III.5.3.1.2.2.2. The Proponents of Women's Political Rights

Nevertheless, modern jurists oppose such a reading of the holy text of the Quran and the sayings of the Prophet and suggest that there is no evidence as clear as that which underlines the equality between men and women.⁵¹⁴ They argue that Allah states in the verse 71 of chapter 9 that "*The Believers, men and women, are protectors, one of another: they enjoin what is just, and forbid what is evil...*" In this verse, Allah has clearly called upon both men and women to enjoin what is just and forbid what is evil, which is mainly a political task, mostly concerned with the legislative process.⁵¹⁵ The differentiation between men and women is an exception from the general rule of equality and that exception, they suggest, is solely designed for family affairs. The general rule in Islam is that in the case of exception, the process of analogy does not work, in the sense that the exceptional case does not extend to any other case that differs in nature.⁵¹⁶ Verse 34 of chapter 4 and verse 228 of chapter 2 which seem to give

⁵¹¹ Cited in Mutwalli, A., op.cit., 1978, pp. 418-419

⁵¹² Cited in Ibid., p. 419

⁵¹³ Al-Bukhary, M., op.cit., Part 4, 1987, p. 1610

⁵¹⁴ Mutwalli, A., op.cit., 1978, pp.422-463, See Al-Qaradawi, Y., op.cit., 1997, pp. 161-176, See Al-Qaradawi, Y., op.cit., 1983, pp. 47-49, See Al-Abdulkhaliq, F., op.cit., 1998, pp. 213-237, See Almansoor, M. A. S., op.cit., p. 121, See Assaleh, S., *Annuzom Al-Islamyyah Nasha'teha wa Tadaworeha*, (in Arabic), Beirut: Dar Al'alm Llmalayeen, 1982, pp. 441-462

⁵¹⁵ Al-Qaradawi, Y., op.cit., 1983, 49

⁵¹⁶ Mutwalli, A., op.cit., 1978, p. 427

preference to men over women are actually related only to the management of family affairs and this rule cannot extend to other issues, especially if there is no other evidence to support it. The advantage of men over women with regard to family affairs is only because the husband under the Islamic rules is obliged to spend on his wife and children, even if his wife is much wealthier, and as a result, the husband is accorded some control in return for this responsibility.⁵¹⁷ In other words, apart from the family realm, there is no evidence that prohibits women from having control over men.⁵¹⁸ In Islamic *fiqh*, women can be financial trustees of underage and disabled people, and can also be procurators in the financial management of any group of people.⁵¹⁹ Therefore, as the political rights are mainly concerned with either entrusting somebody or being a trustee to represent somebody, then there does not seem to be any valid objection to women's right to vote and to nominate themselves for public office, since women are eligible to enter into any kind of contract.⁵²⁰

In respect of verse 33 of chapter 33, this verse was talking about the wives of the Prophet and it is well known to the Muslim jurists that the rules that governed the wives of the Prophet are of a special nature and hence cannot be taken to govern ordinary women without the support of other evidence.⁵²¹ Allah clearly says, "*O Consorts of the Prophet! ye are not like any of the (other) women...*"⁵²²

The question of whether a woman can be a judge has, in particular, been a matter of strong debate between Muslim jurists. Although the majority of traditional Muslim scholars seem to consider women ineligible to take such a position, there have always

⁵¹⁷ Ibid., p. 424

⁵¹⁸ Al-Qaradawi, Y., op.cit., 1997, 165

⁵¹⁹ Mutwalli, A., op.cit., 1978, p. 425

⁵²⁰ Ibid., p. 425

⁵²¹ Al-Qaradawi, Y., op.cit., 1997, 163

⁵²² Al-Ahzab, 33:32

been views to the contrary, suggesting the ability of women to be judges, especially in matters on which they are entitled to give testimony.⁵²³ However, the proponents of women's political rights seem in dispute over whether or not woman can be a president of the whole Islamic state.

III.5.3.2. Islam and the Freedom of Thought, Conscience, and Religion

The freedom of thought, conscience, and religion has been stated in Article 18 of the UDHR which says that "*Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community...*" The wording of this article has not been without dispute, especially by Muslim countries, and although the matter was resolved during the drafting of the article in favour of the western views, it was raised again by almost the same Muslim countries in the drafting of Article 18 of ICCPR.⁵²⁴

The issue under debate was the freedom to change one's religion or belief, as this is believed to be in contrary to the Islamic principle that a Muslim cannot change his religion. As a result of the Islamic objection to the wording of the freedom to change one's religion or belief, a compromise was achieved and the states agreed on the change of the language to "*This right shall include freedom to have or to adopt a religion or belief of his choice*" without mentioning the freedom to change one's religion.⁵²⁵ However, the UN General Comment No. 22 has observed that the freedom to "have or to adopt" a religion or belief *necessarily entails the freedom to choose a religion or belief, including the right to replace one's current religion or belief with another or to*

⁵²³ Alkurtubi, op.cit., Part, 1, p. 270, some of the modern Muslim jurists seem to be more inclined to accept women as judges without restriction. See Al-Qaradawi, Y., op.cit., 1997, 176, see Mutwalli, A., op.cit., 1978, p. 427

⁵²⁴ Baderin, M., op.cit., p. 118-119

⁵²⁵ Ibid., p. 119, See also Article 18 (1) of the International Covenant on Civil and Political Rights

*adopt atheistic views.*⁵²⁶ This clearly indicates that although Article 18 (1) of ICCPR differs in language, it must be read within the context of Article 18 of UDHR which suggests that the freedom of thought, conscience, and religion include the freedom to change one's religion or belief.

There seems to be a consensus in Islamic jurisprudence that Islam recognized the freedom of belief long before Article 18 of the UDHR was drawn. Almost all Islamic scholars have considered the verse 256 of chapter 2⁵²⁷ of the Holy Quran one of the most fundamental principles of Islam and the basis of other freedoms.⁵²⁸ Muslim jurists believe that God has created mankind with wisdom that enables human beings to differentiate between right and wrong and hence they have free will whether to follow the right path and be grateful to Allah or to deny the religion of Allah altogether and follow their own desires. God clearly suggests so in chapter 76 verse 2 which says, "*Verily We created Man from a drop of mingled sperm, in order to try him: so We gave him (the gifts), of Hearing and Sight.*"⁵²⁹ And in the following verse He says, "*We showed him the Way: whether he be grateful or ungrateful (rests on his will).*"⁵³⁰ In another verse Allah says, "*If it had been thy Lord's Will, they would all have believed, all who are on earth! Wilt thou then compel mankind, against their will, to believe!*"⁵³¹ Therefore, the Islamic authors unanimously believe that the concept of belief in Islam is based on the individual's choice and not on compulsion; however, they differ in the extent of that choice, if the individual concerned was a Muslim. It is the question of apostasy; can a Muslim individual change his religion?

⁵²⁶ UN General Comment No. 22, *The right to freedom of thought, conscience and religion (Art. 18)*, 30/07/93, CCPR/C/21/Rev.1/Add.4, Paragraph 5. Available Online at <http://www.unhchr.ch/tbs/doc.nsf>

⁵²⁷ God says in the verse "*Let there be no compulsion in religion: Truth stands out clear from Error*" See Q2:256

⁵²⁸ Al-Mutawakkel, M., "Al-Islam wa Huqoq Alensan", In: Ghalyon, B., and others, *Huqoq Alensan Al-Arabi*, (in Arabic), Beirut: Markaz Derasat Alwehdah Alarabyah, 1999, p. 99

⁵²⁹ Q76:2

⁵³⁰ Q76:3

⁵³¹ Q10:99

Most medieval scholars took the view that a Muslim individual cannot change his religion. If he did change his religion, however, the state authority concerned must hold a debate with him in an attempt to convince him through reasons. This could be repeated three times. However, if he insisted in his denial, then he must be killed.⁵³² The Prophet's saying seems to be the basis for the death penalty for the apostate. The Prophet reportedly said, "*Whoever changes his religion, kill him*"⁵³³ and this was applied during the governorship of the first Caliph, Abu Baker, who insisted on initiating a war to kill those who decided not to pay *zakat* (Islamic tax) and also applied during the rule of the fourth Caliph, Ali bin Abitalib, who reportedly burnt apostates alive.⁵³⁴

However, the modern Muslim jurists seem to be more inclined to reinterpret the saying of the Prophet and the practice of his companions in light of the Quranic texts. It has been argued that there is no indication in the Holy Quran of any worldly punishment for the apostate, although apostasy has been mentioned many times in different verses.⁵³⁵ Allah says, "*And if any of you turn back from their faith and die in unbelief, their works will bear no fruit in this life and in the Hereafter; they will be Companions of the Fire and will abide therein.*"⁵³⁶ And in another verse, Allah says, "*O ye who believe! if any from among you turn back from his Faith, soon will Allah produce a people whom He will love as they will love Him, lowly with the Believers, mighty against the Rejecters...*"⁵³⁷ Allah also says in verse 86 chapter 3, "*How shall Allah guide those who reject Faith after they accepted it and bore witness that the Messenger was true and*

⁵³² See Alkurtubi, op.cit., Part, 6, p. 150 and Attabary, op.cit., Part 5, p. 328

⁵³³ Al-Bukhary, M., op.cit., Part 6, 1987, p. 2537

⁵³⁴ Ibid., p.2537 see also Ibn Hanbal, A., *Misnad Alemam bin Hanbal*, (in Arabic), Part 1, Egypt: Mua'ssasat Qurtobah, p. 282

⁵³⁵ Al-Mutawakkel, M., "Al-Islam wa Huqoq Alensan", In: Ghalyon, B., and others, op.cit., pp. 101-102, See also Al-Jabry, M., "Mafaheem Alhuqoq wa Al-Adl fi Annusos Alarabyyah wa Al-Islamyyah, in: Al-Jusi, S., op.cit., p. 63

⁵³⁶ Q2:217

⁵³⁷ Q5:54

that Clear Signs had come unto them? But Allah guides not a people unjust."⁵³⁸ All these Quranic verses only stress the punishment in the hereafter, which is enough for Muslims to hate and dislike the act, but not enough to deduce from it the worldly punishment of the death penalty.

Even if the sayings of the Prophet and the practice of the companions indicated the worldly punishment of the crime of apostasy, it does not necessarily mean it is a *hadd*, a sacred punishment revealed by God, which men cannot repeal or change. That is because, if it was a *hadd*, Allah would have mentioned it in the Holy Quran as He did with regard to all kinds of *hadd* punishments. Therefore, the punishment, rather than being against the belief, might be against the political crime of treason, since the basis of Muslim polity is religious and not ethnological or linguistic⁵³⁹ and since treason does not only mean an act of working for the enemies of the State but also means betrayal of trust and disloyalty.⁵⁴⁰ It might be a political rather than a religious punishment, which is necessary to avoid upheaval and political disorder.⁵⁴¹ Abu Bakr's war against those who refused to pay *zakat* might have been a response to the tribal rebellion against Islamic rules, which is more in the nature of politics than belief.

There is an undeniable difference between a person who entered Islam because, say, he wanted to marry a Muslim woman, then after divorce he returns back to his original religion, and one who entered Islam to destroy the Islamic state.⁵⁴² The punishment for apostasy may not apply to the former, while in the case of the latter it is definitely

⁵³⁸ Q3:86

⁵³⁹ Baderin, M., op.cit., p. 124

⁵⁴⁰ Merriam-Webster Dictionary, available online at <http://www.m-w.com/cgi-bin/dictionary?book=Dictionary&va=treason&x=20&y=14>

⁵⁴¹ Ali, H., *Attayarat Al-Islamyyah wa Qadiyyat Addemogradyah*, (in Arabic), Beirut: Markaz Derasat Alwehdah Alarabyyah, 1999, p. 181

⁵⁴² Al-Mutawakkel, M., "Al-Islam wa Huqoq Alensan", In: Ghalyon, B., and others, op.cit., p. 102

applicable. The Prophet himself ordered that apostate women and children should not be punished, which clearly indicates that the punishment was only intended for warriors. Also, no one has reported that the Prophet killed any apostate, although he was surrounded by betrayers who became apostate. Hence, it might be true to say that the Prophet's saying that instructs the killing of whoever changes his religion is meant to point at the one who betrays the Islamic state, and not to be a restriction on the freedom of belief. Accordingly, if the crime of apostasy is conceived to be a matter of a political nature, then it falls in the realm of the doctrine of legitimate governmental policy and therefore its implementation is subject to change according to circumstances and the necessities of the current reality.

III.5.4. Concluding Points

The discussion above has attempted to clarify the position of Islam in respect of the individual rights recognized in the international instruments, focusing mainly on areas in which Islam has frequently been criticized. Although these areas are of significance, they seem not to have been clearly defined by the international instruments, especially with regard to what might constitute unlawful discrimination. It is not clear on what basis, for example, one can suggest a type of discrimination was reasonable and objective.⁵⁴³

From the Islamic perspective, discrimination between Muslims and non-Muslims in an Islamic state is seen to be as justifiable as discrimination between nationals and foreigners in the nation state. Moreover, there does not seem to be any kind of

⁵⁴³ In paragraph 13 of the General Comment No. 18, the Human Rights Committee states that "*the Committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.*" Available Online at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/3888b0541f8501c9c12563ed004b8d0e?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/3888b0541f8501c9c12563ed004b8d0e?Opendocument)

discrimination between male and female on an arbitrary and unjustified basis that is prohibited by the international instruments. The differentiation in inheritance between male and female is, as discussed above, clearly not discriminatory. Rather, it was designed for the benefit of the heirs, in that it prefers needier people like youngsters who face an uncertain future, over aging people who are leaving life.

Therefore, we may conclude that the three components of democracy, representativeness, accountability, and the respect of individual rights, are recognized in Islamic jurisprudence. Hence, there may be room for dialogue between the international instruments of human rights and the Islamic jurisprudence of human rights values, in an attempt to reach a better understanding that could facilitate coexistence.

III.6. Observation on Islamic States Practices

An important question arises here that if the discussion above demonstrates a possibility for dialogue between the international conception of human rights and the Islamic one, then, why are violations of human rights so prevalent?⁵⁴⁴ Many Islamic states, particularly Iran and Saudi Arabia, have been accused of gross violations of fundamental human rights, in particular, those concerned with religious intolerance and minorities' rights.⁵⁴⁵ Although Islam may not be the only reason for the violations of other Islamic states or predominantly Muslims societies because some of them have secular political systems, as in the case of Tunisia, and others are suffering disorder and instability with poor economic development, as in Sudan and Pakistan, the violations of the two states that are most Islamic, Iran and Saudi Arabia, may not be justified by any

⁵⁴⁴ See the two UN Arab Human Development Reports, 2002, 2003

⁵⁴⁵ See The Commission on Human Rights Report on Civil and Political Rights, Including the Question of Religious Intolerance, Sixtieth session, E/CN.4/2004/NGO/72
26 February 2004

other factors except Islam because they are economically wealthy and politically stable states. Although this may be a valid argument, it is not necessarily the case that Islam is the cause. Close examination of the political systems of these two Islamic states may reveal that their practice is irrelevant to the universal principles of Islam discussed above and hence Islam should not be judged by such state practice.

In the case of Iran, the current political regime seems to represent only one vision of the Shiite sect, which is the *Twelver Ja'fari*, and not the cult itself. Similarly, the vision that is predominant in the Saudi political system seems also to be a vision of one Sunni school, which is the *Wahabist* vision of the *Hanbal* school, and not all Sunni schools or even the school of *Imam Hanbal* itself. The problem here might not be Islam and its way of governance, but the politicization of one particular school or vision of Islam. That is to say, politicizing a particular vision of Islam necessarily leads to the values of that vision or school being forced on people who belong to other schools that may have different values. This will be discussed below in more details.

However, before embarking on the discussion of the state practices of Iran and Saudi Arabia, it is worth noting that this study is not intended to discredit any Islamic school's values, nor is it trying to promote another image of Islam to which the researcher may subscribe. Rather, this part of the study is intended to elaborate and explore how Islamic political principles can work in practice with the general international principles of human rights that are based on democracy and the rule of law. Indeed, the relativistic approach to human rights, just as it seeks a margin for Islamic states to accommodate their fundamental principles in their implementation of human rights, should also give a margin to each recognized group of Muslims that belong to different sects and schools within the Muslim world, to exercise their values, which may differ from one Islamic

sect or school to another in the Islamic state political system. However, the subject of discussion, here, is not the legal values of different Islamic sects and schools that emerge from different interpretations of the holy sources of Islam, but the ideology behind this; the idea of values that determine how the legal system operates. The different Islamic sects and schools might not be able to have the right to exercise their own values without a political system that is willing to give such a right in the first place and this political system is determined by the political values, the subject of this discussion. We should not confuse the political values that constitute the political ideology and which are supposed to be underpinned by the general common values of the Islamic community, with the legal values of different Islamic sects and schools that may differ from one sect or school to another. Iran and Saudi Arabia, as will be seen below, seem to define their political ideology in accordance with their own views of their schools, whereas the political ideology should consist of more general principles with the capacity to accommodate the different Islamic sects and schools in determining the legal or even the political system of the state. That is, if the state ideology was established on the general political principles of Islam, which recognize, as seen throughout this chapter, the three component elements of democracy, representativeness, accountability, and the respect of human life and dignity, then the legal and political values that would govern the legal and political system of the Islamic state would most likely be chosen by Muslims themselves, through elected institutions that are accountable to the public. However, if the state political ideology was based on a certain conception of a certain school by making its values the state ideology and constitutional principles, then the state ideology may be to impose the officially recognized school on the Muslim people, especially those who belong to different schools and this may not give margin for the other schools to exercise their own values. Thus, as it is important to develop an international approach to human rights

implementation that takes into account the differences among all nations that form our relativistic world in order to make human rights more universal in their applicability, it is equally important to discuss and evaluate the current practices of Islamic states in order to ensure the right of all Muslims of different sects and schools, including *Twelver Ja'fari* sect and *Wahhabi* school, to participate in determining the values that will affect their lives. The relativistic approach to human rights should encourage not only cross-cultural dialogue between different cultures of different nations but also within one culture of the same nation, such as the Islamic one, to reach common values applicable to all the different groups of that nation. However, it is worth bearing in mind that the relativistic approach to human rights is also limited by the international principles of human rights protection and hence the variation in human rights implementation should fall within the boundaries of the universally accepted human rights standards. Therefore, the common Islamic principles that are supposed to be applicable to all Muslims may be permissible to decide how international rights can be implemented only if they are prescribed by law, necessary in a democratic society⁵⁴⁶ and do not impair the essence of international rights.⁵⁴⁷ Accordingly, our discussion in this part of the study is not intended to discredit any sect's or school's values, but rather it is intended to open the political door for all groups of Muslims to get involved in assessing how Islamic political and legal system should operate under the general principles of human rights which are underpinned by democracy and the rule of law.

⁵⁴⁶ Limitation clauses that must be necessary in a democratic society see Article 14, Article 21 and Article 22 of the International Covenant on Civil and Political Rights and Articles 4 and 8 of International Covenant on Economic, Social and Cultural Rights.

⁵⁴⁷ See UN General Comment No. 27, Freedom of movement (Art.12) 2 November 1999, CCPR/C/21/Rev.1/Add.9. Paragraph 13. In Chapter Five we will discuss these human rights standards in more details

III.6.1. The Islamic Republic of Iran

In looking into the Iranian constitution, we find Article 12 gives clear indication that the political ideology of the state is not Islamic in the universal sense but the ideology of the *Twelver Ja'fari* school; a particular vision of Islam that has many principles, contrary to the principles recognized in the Sunna, followed by the majority of Muslims. It might even contradict some Shiite schools such as Zaydi. The Article states, "*The official religion of Iran is Islam and the Twelver Ja'fari school [in usual al-Din and fiqh], and this principle will remain eternally immutable*"⁵⁴⁸ Indeed, the article does give some official recognition of certain Islamic schools.⁵⁴⁹ However, this recognition is only concerned with certain matters, namely, religious education, affairs of personal status (marriage, divorce, inheritance, and wills) and related litigation in courts of law, which means that the political domain is exclusively dominated by the *Twelver Ja'fari* school. Hence the political principles of that school will be forced on those who do not subscribe to this version of Islam, especially in matters not specified in the Article. Iran in this sense is far from democratic. It is, rather, a theocratic state, as this particular school, as will be seen below, seems to suggest.

The Shiite school of *Twelver Ja'fari* believes that *Imamah*, the leadership, is a matter of belief, and that only God chooses the *Imam* (the leader).⁵⁵⁰ Moreover, this *Imamah* is only confined to the Prophet and his offspring.⁵⁵¹ Therefore, the governor, from their

⁵⁴⁸ Article 12 of the Iran's Constitution

⁵⁴⁹ After mentioning the official religion of the state, Article 12 of Iran's Constitution states in respect of other schools that "*Other Islamic schools, including the Hanafi, Shafi'i, Maliki, Hanbali, and Zaydi, are to be accorded full respect, and their followers are free to act in accordance with their own jurisprudence in performing their religious rites. These schools enjoy official status in matters pertaining to religious education, affairs of personal status (marriage, divorce, inheritance, and wills) and related litigation in courts of law*"

⁵⁵⁰ Saeed, S., op.cit., p.43

⁵⁵¹ Mutwalli, A., op.cit., 1990, p. 37, See also Alhulu, M. R., op.cit., p. 165 footnote

perspective, is infallible and perpetual.⁵⁵² However, this infallibility applied only to the 12 imams of the Prophet's offspring, who are believed to have disappeared 12 centuries ago. For the current time and until the last Imam, called *Al-Mahdi*, comes, the religious scholar (*Faqih*) is the one who must take the responsibility, not as a representative of the people but as a deputy of the absent Imam (*Al-emam Alqa'eb*).⁵⁵³ Therefore, we find the main cornerstone of the Iranian political system is the doctrine of *Walayat Alfaqeeh* (the rule of religious scholar). Consistent with this, Article 2 paragraph 5 refers to: "*continuous leadership (Imamah) and perpetual guidance, and its fundamental role in ensuring the uninterrupted process of the revolution of Islam*". It must be noted, however, that although the political reality of Iran might not indicate such a doctrine of the imam's infallibility, since the Iranian president seems to be a representative of the people and might even be responsible before them; the overall constitutional structures of Iran seem to indicate that the political ideology is heavily influenced by this belief. For example, the real leader in Iran does not seem to be the president, but the religious scholar (*Faqih*) who is appointed by the expert in the light of Article 5 which says, "*During the Occultation of the Wali al-'Asr (may God hasten his reappearance), the wilayah and leadership of the Ummah devolve upon the just ('adl] and pious [muttaqi] faqih*". The authority of the *Faqih* in accordance with Article 57 seems to be absolute. It says that "*The powers of government in the Islamic Republic are vested in the legislature, the judiciary, and the executive powers, functioning under the supervision of the absolute wilayah al-'amr and the leadership of the Ummah*". On the other hand, the president's role is confined to the executive branch and even in this narrow role, the

⁵⁵² Al-Qaradawi, op.cit., 1997, p., 71 See also Tablyyah, A., *Alwaseed fi Annuzom Al-Islamyyah: Al-Islam wa Addawlah*, (in Arabic), Dar Alitthead Al-Arabi, 1982, p. 208

⁵⁵³ Al-Qaradawi, op.cit., p., 71 See also Saeed, S., op.cit., p. 44

president is not free, but is limited by the interpretation of the Guardian Council.⁵⁵⁴ So the Shiite's belief in the infallibility and the perpetuity of the Imam is present in the constitutional framework of Iran, since no institution, it seems, is able to scrutinise the Imam's decision and there is no limitation on the period of the Imam's power. However, the situation in Iran does not represent the view of the majority of Muslims and it may not even represent many schools of the Shiite cult.

III.6.2. The Kingdom of Saudi Arabia

In respect of the Saudi political system, the overall result appears to be the same, although the belief is different. The Saudi political system belongs to the Sunni *Madhab*, which represents the vast majority of Muslims and which contains different political principles than those recognised in the Shiite school of *Twelver Ja'fari*. The Sunni schools do not regard the leadership as a subject of belief (*I'ateqad*) but as a worldly issue, resolved by the people.⁵⁵⁵ In other words, the Shiite *Twelver Ja'fari* base the leadership on the sacred text, while the Sunni doctrine base it on the people's choice.⁵⁵⁶ The leader in the *Twelver Ja'fari* doctrine is infallible and perpetual, while the leader in the Sunni doctrine is a human being who does right and wrong and hence he is accountable to the people and can be removed if he is found to be no longer fit for the task.⁵⁵⁷ However, the Saudi political system seems to have diverted from these general principles and started to engage in specificities that are more concerned with the individual's daily life. It does not seem to differentiate between the general political principles that define the ideology of the state, which is a core matter of the state identity, and the legal rules and regulations. The latter are very contestable in Islam and

⁵⁵⁴ Karveh, M., *An Independent Constitutional Court: Essential Prerequisite for peaceful Resolution of Vast Majority of Current Crises in Iran*, First World Congress for Middle Eastern Studies (WOCMES), Mainz, Germany, 8-14 September 2002, p., 7

⁵⁵⁵ Tablyyah, A., *op.cit.*, p. 211

⁵⁵⁶ Al-Qaradawi, *op.cit.*, 1997, p. 70

⁵⁵⁷ See the discussion above of government accountability in Islam.

are viewed by different Islamic schools from different perspectives, depending on the standards of each school. They may therefore be more appropriately left to a specified elected institution that is more capable of accommodating the variety of principles for the good of the community.⁵⁵⁸ Instead of implementing the universal principles of Islam, the Saudi political and religious system has implemented, as will be seen below, its own vision of Islam and enforced it on other Muslims who belong to different schools, let alone non-Muslims.

This Saudi system of governance can be traced to the doctrine of *wahhabism* that the Saudis have for long promoted and advocated. This kind of Islamic doctrine does not seem to recognize political Islam.⁵⁵⁹ Islamic rules, according to this doctrine, are very much confined to the private sphere. The government, in this doctrine, is reduced to the person of the leader, who seems to have been assigned unrestrained power. In this doctrine, the term *Ijtihad*, as Vogel defined it, means '*vertical law-making*', in the sense that it deals with individual action for every fresh act, with no general applicability.⁵⁶⁰ Horizontal law-making, which is concerned with designing general rules applicable to the community as a whole, by contrast, is confined to a worldly institution or collectivity such as the state. In principle, this is exactly what the Sunni doctrine would

⁵⁵⁸The Saudi government interferes fundamentally in matters that are mainly concerned with the individual's personal life in the name of the Islamic principle of ordering good and forbidding evil. In the name of this principle, they forbid different media forms and arts and impose restriction on women's work, especially in places where men work. The Saudi system sees that the woman's sphere of activity in the home, and they are restricted in going out except with their *Muhrem*, such as father or brother. See Al-Jeraisy, K., (ed.), *Fatawa Ulama Albalad Alharam*, (in Arabic), Riyadh: Mua'ssasat Al- Jeraisy, 1999, p. 455

⁵⁵⁹ However, from the perspectives of the vast majority of Muslim schools, since these Islamic values that are connected with the individual's daily life are for the most part disputable, it is not for the state to forbid them under the name of forbidding evil. The matters that the state is obliged to forbid are those which are universally recognized by all Muslim schools as evil. See Al-Qaradawi, op.cit., 1997, p. 122

⁵⁵⁹ A clear example of the Saudi rejection of political Islam is the denouncement by the Saudi Minister of Interior, Amir Naief, of the politicization of Islam and the Islamic movement of Islamic brotherhood, See analysis of the Saudi stance on the political Islam and the movement of Islamic brotherhood in Fuller, G., *Amir Naief and the Movement of Islamic Brotherhood*, (in Arabic: Amir Naief wa Alekhwan Al-Muslimeen), Aljazeera news network, special files, 2002, Available Online at <http://www.aljazeera.net/NR/exeres/4939E393-4F67-41C8-9112-46CDC1B04BFA.htm>

⁵⁶⁰ Vogel, F., "The Rule of Law in Saudi Arabia: exploring contradictions and traditions", In: Cotran, E., and Yamani, M., (eds.), op.cit., p, 132

agree with in general; however, the *Wahhabists* emphasize the principle to empower the ruler alone, with no participation of the public, to decide what is good for the community. *Wahhabists* argue that Islam gives no right to the governed to publicly oppose the governor.⁵⁶¹ In this doctrine, unless the governor becomes an apostate, the governed has a religious obligation to follow his orders. The crucial point here is that the governor cannot be considered an apostate, even if he breaks the very basic rules of Islam, if it is felt that he did not intend by his actions to deny Islamic principles.⁵⁶² *Wahhabi* scholars assert this by saying that faith cannot be destroyed by mere action and conclude that a Muslim can only be considered apostate only if he intends by his action to legitimize the illegitimate.⁵⁶³ As a result, if a ruler governs his people according to his own arbitrary rules that fundamentally contradict the teaching of Islam, but without giving sign that he believes in them as legitimate, this would not be enough to confer any right on individuals to oppose the ruler, since mere action is not enough to consider the ruler apostate. Faksh's insightful comment on the Saudi political system is worth quoting here

Orthodox Wahhabi Islam has become the raison d'etre of the Saudi state, serving as a unifying force in the social and political cohesion of tribal Arabia and providing the basis of the royal family's legitimacy. As the official ideology, it has been utilized to support the monarchy's authority. Thus, Wahhabism has always been kept, in form at least, in the service of the status quo and has been undergirded by the power and

⁵⁶¹ If anyone has an issue with the government he must privately discuss it with the leader, See the opinion of Sheik Ibn Baz in: Al-Jeraisy, K., and Al-Buraik, S., (eds.), op.cit., p. 316

⁵⁶² See Al-Jeraisy, K., (ed.), op.cit., pp. 66-67

⁵⁶³ This principle, however, seems to be only applicable to the ruler, because Saudi scholars regard the ordinary individual who makes a joke about the main values of Islam as an apostate without looking at his intention, i.e. whether he intends from this joke to deny those values or not. See the opinion of the well known Saudi scholar, Ibn Othaimen, about the one who makes a joke about the values of Islam in Al-Jeraisy, K., (ed.), op.cit., pp. 248-249. They also seem to regard the one who does not pray at all as an apostate without looking into his intention, while the ruler is not, even if he disables the application of the public Islamic rules altogether. See the opinion of the same scholar Ibn Othaimen in Al-Jeraisy, K., (ed.), op.cit., p. 146

wealth of the state. The symbiosis between Wahhabi ideology and Saudi power remains the basis of state identity and national unity. ⁵⁶⁴

This vision of Islam, as Daniel E. Price suggests, was actually a result of an old agreement between the regime and the *Ulama* (the Islamic scholars) that was conducted at the early stage of the establishment of the Saudi Arabia. The agreement implies that the *Ulama* would take the authority of social government agencies and religious police, to ensure that proper Islamic conduct is followed. Meanwhile, the Saudi regime would hold authority over important political matters, such as foreign policy, modernization, the economy, and most areas of public administration.⁵⁶⁵ Any interference from the *Ulama* in these matters would be ignored.⁵⁶⁶

Thus, although the Kingdom of Saudi Arabia is not a secular state in its legal system, it does not seem to be guided by the universal political principles of Islamic Shari'ah in its political system and hence Islam should not be judged by its political practice. The political culture of Saudi Arabia, as well as many other Arab states, is dominated by tribal values that regard the ruler as the traditional father and the people as his children who have no choice but to obey their ruler without questioning what is being decided for them.⁵⁶⁷ The government is seen in the person of the ruler, who is assigned great authority over all state powers, the legislative, the executive and the judiciary. The Saudi Islamic scholars seem also to be affected by this tribal culture, since they always cite the person of the leader in resolving any matter of a political nature. This is clear in

⁵⁶⁴ Faksh, M., *The Future of Islam in the Middle East: Fundamentalism in Egypt, Algeria, and Saudi Arabia*, Westport, CT: Praeger Publishers, 1997, p., 90.

⁵⁶⁵ Price, D., op.cit., pp. 90-91

⁵⁶⁶ It is not surprising, therefore, that the well known Saudi Islamic scholar, Sheik Safar Alhawali, after he finished his Master's study on the subject of secularism, the separation between the religion and the state, focused in his PhD study on the separation between faith and action as if he to imply that such separation is just another kind of secularism. See Alhawali, S., *Al-Ilmaniyyah*, (In Arabic) Hawalli: Dar Alsalamia, 1987. See also Alhawali, S., *Zaherat Al-Erjaa' fi Alfikr Al-Islami*, (in: Arabic), PhD Study, Jame'at Umm Alqura, Rosmalen: Dar Alkalemah, 1999

⁵⁶⁷ Muhammad, T., Sadik and William P., Snavely, *Bahrain, Qatar, and United Arab Emirates; colonial past, present problems and future prospects*, London: D.C.Heath and Company, 1972, p., 143.

their discourse that considers the objection to the leader's political vision as a sin. Anyone who expresses such objection is considered as *Khawarij* and may deserve the death penalty. As one commentator noted, the Saudis “*forge an ideological bond between Islamic ideology and hereditary monopoly, suggesting to citizens that obedience to the Saudi King is not simply a legal duty; it is rather an act of faith under Shari a.*”⁵⁶⁸ This vision of governance is an expression of primitive tribal values of governance. The constitutional modern values of governance do not confine the government in a certain man, whoever this man might be, political leader or religious leader, but rather the government is considered as the machinery that processes the people's demands and brings about the outputs that meet popular expectations. Objection to the government's decision does not necessarily mean an objection to the rule of the leader, but may be to the way that the officials in the government perform their work. So, the popular objection in this sense does not mean revolution and hence does not require having an apostate leader in order for his work to meet with objection.

Accordingly, the practices of Iran and Saudi Arabia may indicate that the politicization of a certain school of Islam, by making its values the state ideology and constitutional principles, is an important reason for Muslims' failure to establish a state that meets the universal Islamic standards, let alone the international principles of human rights based on democracy and the rule of law. An important factor for state compliance with human rights is embracing political values of democracy that let all groups of people, which form the state's society, irrespective of their differences, participate in determining their political destiny. This is not achievable in an Islamic state without taking Islam on the basis of general principles that are universally accepted by all Islamic schools and sects. That is to say, if all Muslims agree on the validity of the variety of different Islamic

⁵⁶⁸ Khan, A., *A Theory of Universal Democracy: beyond the end of history*, The Hague ; London: Kluwer Law International, 2003, p. 63

schools and sects that represent different interpretations of Islam, then, on what basis, if it is not democratically chosen, should one particular school govern and oblige the others to obey its principles? The relativistic approach to human rights should not give the right for a certain unelected group to decide what interpretation must be upheld, since enforcing one interpretation may well lead to marginalization of other opinions. The differences should, rather, be resolved by all Muslims in a free discussion where the argument that is supported by the most convincing reasons prevails.

III.7. Conclusion

This politicization of a certain understanding about Islam is the reason, I believe, behind the so called non-compliance of the values of Islam with the international standards of democracy and human rights. The political principles of Islam do not seem to be, as discussed above, in fundamental conflict with the international conception of democracy and human rights. It has been demonstrated in this chapter that Islam, in accordance with the Islamic *fiqh*, does not seem to perceive the concept of human rights as a mere duty, nor does it view human rights as mere privileges. Rather, human rights in Islam seems to have been taken as a comprehensive term that includes the concept of duty as well as the concept of privilege, to end up with legal right that has the force of the law of Shari'ah. The Islamic technique of *Siyasah Shar'iyah* has demonstrated the flexible and timeless nature of Islam which seems to be capable of accommodating different circumstances in different realities, so long as the universal and fixed principles of Islam are preserved. Even the *hadd* punishments, like amputation of the hand and stoning can be temporarily repealed, if sometimes they form a cause of injustice. This was clearly demonstrated by Umar, the second Caliph, who repealed the *hadd* of theft in the year of poverty, when all the people were starving.

Democracy and the doctrine of limited government are recognized in the Islamic *fiqh* and are considered as of fundamental importance. As was discussed above, the three fundamentals of democracy; representativeness, accountability and the respect of human rights were the dominant theme in the political culture of Islamic society at the time of the prophet and his companions. However, there was a lack in the political machineries of implementation that left a gap to be filled, in the later stage of Islamic history, with tribal values. This forms a main cause of the current situation of Islamic states. Some Islamic scholars are influenced by this tribal culture and still advocate such values, sometimes in the name of religion and sometimes in the name of *Darora* (necessity). Such scholars focus on the particularities of their school within the Islamic *fiqh* and tend to politicize their own vision of Islam regardless of the other schools' values. It might be fair to say that if Muslim scholars avoid focusing on the differences between Islamic schools and unite themselves under the general principles of Islam; this would pave the way for compliance with international standards of democracy and human rights.

It is, indeed, necessary for Muslims to reach common political principles of an Islamic state that is able to accommodate Muslims' differences. Muslim's failure to establish a state that meets Islamic standards, let alone the international ones, is due to the fact that Muslims' efforts have been focused, as seen above, either on upholding certain views about Islam, as in the case of Iran and Saudi Arabia, or, as in the case of Saudi Arabia, on establishing the Shari'ah law, which is the subject of Islamic schools, irrespective of political ideology. Therefore, there seems to be a need for broadening the discussion in this field to include states that are politically and economically stable and do not politicize any particular vision of Islam. Thus, in the next chapter we will examine the United Arab Emirates as a case study that does not politicize a certain vision of Islam and where secular and religious cultural values seem to co-exist.

Chapter Four

IV. The UAE Islamic Constitution and the International Requirements of Human Rights Protection

IV.1. Introduction

Generally speaking, some western authors seem to view the rise of Islam in the political and constitutional life of the Islamic states as undermining the principle of the rule of law and the independence of judiciary.⁵⁶⁹ The general impression is that Islamization did much to eliminate due process and modern independent state institutions, to place legal proceedings and important decisions under the control of clerics and religious leaders.⁵⁷⁰ This might be true, to some extent, in states which engaged in the process of Islamization through revolution, like Iran. However, it is not necessarily the case in Islamic states where Islamization was not a reaction but part of progressive modernization that adopted modern values in line with the main fundamental principles of Islam. The United Arab Emirates is one of these states that possess modern constitutional structures, away from the domination of clerics and religious leaders. The nature of the United Arab Emirates as a federal state has been established on constitutional institutions like the Federal Supreme Council, of which the main job is to elect the ruler of the federal state from the members of the Council. Although it is not a democratic state, since the election is limited to those members of the Council, it is not a one family state where the ruling position of the federal state is obtained through heredity.

⁵⁶⁹ Mayer, A. E., *op.cit.*, 1999, p. 28

⁵⁷⁰ *Ibid.*, p. 28

Therefore, in examining the issue of human rights in the United Arab Emirates, I will examine the question of whether the United Arab Emirates has in fact a constitutional foundation for protecting human rights and fundamental freedoms in line with international law. In considering this question, I will discuss first the historical formation of the UAE Federation, with an analysis of the main features of its constitution. Such a historical background will help in assessing the role of the constitution in terms of the overall structure of the state.

Having discussed the historical foundation and main features of the UAE constitution, I will move to examine the constitutional system of the United Arab Emirates and whether there is any constitutional machinery, guaranteeing the implementation of human rights. I will give an analysis of the constitutional recognition of the principle of separation of powers in the UAE. I will also examine Islam as the principal source of legislation in the UAE Constitution and how it can affect the implementation of the international human rights and fundamental freedoms.

IV.2. The UAE Constitution: Its Historical Foundation and Main Features

Since this study considers the way the Islamic government was established as an important factor in determining the relationship of Islamic values to international norms, this historical background of the UAE formation will help to give a clear picture of how, in a region that is mostly based on tribal values, such a Federation of the UAE came into existence. The tracing of the UAE's formation will show that although each of the Emirates was founded on certain family rulers, the Federation, on the other hand, is founded on constitutional and political institutions based on a modern constitution

which was designed not by clerics but by recognised law professors, on the basis of long discussion with the state politicians.

IV.2.1. The Historical Formation of the UAE Federation and its Constitution

The idea of unity is not a new phenomenon to the tribes in the eastern Gulf region. The Trucial States⁵⁷¹ had witnessed very distinct tribal groupings since 1624.⁵⁷² Two major alliances appeared in the Trucial States after many years of serious tribal conflicts; the *Baniyas* tribe on the one hand and *Al-Qawasim* on the other. *Baniyas* consisted of a group of around fourteen families, among whom were *Albufalah* and *Albufalasa*.⁵⁷³ It was governed by *Al-Nahayan*, part of the *Albufalah* family, for about two hundred years, gaining control over the whole of the southern region. The *Al-Qawasim* alliance, on the other hand, consisted of about seven main families and was centred in *Ras Al-Khaimah* in the northern area of the Trucial States under the governance of the *Al-Qawasim* family.⁵⁷⁴ Later, these two alliances formed a tribal Confederation, conferring on them the power to control what are now known as the northern emirates and the emirate of Abu Dhabi.⁵⁷⁵ One of the most important reasons behind such tribal groupings was to protect the region from any external dangers represented by the competition between European states, namely, the UK, France and Holland.⁵⁷⁶

⁵⁷¹ In 1971 it became the Federation of the United Arab Emirates.

⁵⁷² The time when the Portuguese dominance over the eastern Gulf region ended

⁵⁷³ Al'aidarous, M., *Attataworat Assiyasyah fi Dawlat Al-Emarat Alarabyyah Almuttahedah*, (in Arabic), Kuwait: Manshorate That-Assalasel, 1983, p.18

⁵⁷⁴ *Ibid.*, p.18

⁵⁷⁵ Peck, M., "Formation and Evolution of the Federation and its Institutions", In : Ghareeb, E. & AL Abed, I., *Perspective on the United Arab Emirates*, London: Trident Press Ltd., 1997, p. 123

⁵⁷⁶ In addition to this reason, there are other factors facilitating such groupings. First, the unity of religion and origin; the tribes all believe in one religion, which is Islam, and come from one origin (Arab). Second, the unity of traditions; the tribes all share the same traditions and values, which govern their relationships. Third, the political structures of these tribes are the same, since they all share the same system of governance, the governance of the tribe. For more information regarding these factors see Group of Professors of the United Arab Emirates University, *Derasat fi Mujtama'a Al-Emarat*, (in Arabic), Al Ain: Jame'aat Al-Emarat Alarabyyah Almuttahedah, 1999, pp. 8-9

Moreover, close examination of the system of tribe leads to suggest that the idea of unity is actually in its very nature since the tribe itself initially consists of a group of families. For more information about the

However, these tribal groupings did not last very long as they became involved in territorial disputes.

The area was of great strategic importance to European states. It was the only way by which they could control international commercial approaches to India and South Africa. In 1820 the UK occupied the region through various treaties intended to give recognition to the British existence in the region. The UK also meant by these treaties to disassemble the alliances mentioned above, in order to maintain its control over the Trucial States. For example, the UK included the *Albufalasa* family in the treaty of 1835, indicating British recognition for the family, separate from the alliance with the *Baniyas*.⁵⁷⁷ Besides this, the UK exceeded its authority to question infringements of these treaties, to intervening in the internal conflicts between the families themselves, which raised serious disagreements between the tribes.

One of the most important treaties was the Exclusive Agreements of 1892, which represented the direct occupation of the UK in the region.⁵⁷⁸ This agreement gave the UK the right to take responsibility over foreign affairs and made the region a protectorate of the UK. This was mainly meant to prevent any involvement of other European states such as France and Holland in the lower Gulf. From that time, the Trucial States were separated from the world, confined by the British policy that served the interest of the UK in keeping its control over the area.⁵⁷⁹ The British attitude towards the Trucial States was described as 'benign neglect' for the long period of

governance of the tribe, see Ashamsi, R., *Alhayat Assiyasah wa Al-Amniyyah fi Mujtama'a Al-Emarat*, (in Arabic), Dubai: Albayan. 2000, pp. 17-69

⁵⁷⁷ See Group of Professors of the United Arab Emirates University, op.cit. p. 45

⁵⁷⁸ Al'aidaroos, M., op.cit., p.80

⁵⁷⁹ It is worthwhile to point out, however, that the Trucial States' sovereignty over their national affairs was not altered by the Exclusive Agreements of 1892, in the sense that the states maintained their sovereignty over their internal matters. So, the states had special status in international law. They were not recognized by Britain as *Protectorates* but *Independent Petty States* as it was mentioned in the British documentation. See Al'aidaroos, M., op.cit., p. 80

British protection.⁵⁸⁰ However, after the discovery of oil, a new British policy towards the Trucial States was initiated. This involved providing financial support for some rulers to develop their own states.⁵⁸¹ Another remarkable aspect of the new British policy towards the region was the creation of the Trucial States Council in 1952.⁵⁸² The Trucial States Council was composed of seven rulers of the Trucial States and chaired by the British Political Agent, resident in Dubai.⁵⁸³ The council was designed as an informal consultative institution, with no charter.⁵⁸⁴ It was intended to establish closer political and economic relationships between the states in the future.⁵⁸⁵

In 1968, the UK declared its intention to withdraw from the region by 1971. The announcement of the British withdrawal was made in a very critical situation. The rulers at that time were in deep disputes over their territorial borders. A precise territorial definition of authorities was very much needed, especially after the discovery of oil.⁵⁸⁶ There was a significant disagreement between Abu Dhabi and Dubai over their boundary lines, which led to warfare in 1948. Qatar and Bahrain were also engaged in another disagreement over their boundaries. Sharjah and its neighbours were also in conflicts over their borders. For this reason, the region was not prepared for the British withdrawal. In addition to these internal disputes, there were some external dangers threatening the rulers after the British announcement. Iran renewed its claim over the island of Bahrain. Iran also claimed the islands of *Abu Musa* and the *Tunbs*. Moreover,

⁵⁸⁰ Peck, M., "Formation and Evolution of the Federation and its Institutions", In : Ghareeb, E. & Al Abed, I., op. cit., p. 124

⁵⁸¹ Al-Ghufli, S., op.cit., p. 6

⁵⁸² Peck, M., "Formation and Evolution of the Federation and its Institutions", In : Ghareeb, E. & Al Abed, I., op.cit., p. 124

⁵⁸³ Al Abed, I., "The Historical Background and Constitutional Basis to the Federation", In: Ghareeb, E. & Al Abed, I., op.cit., p.104

⁵⁸⁴ Ibid., p. 104

⁵⁸⁵ Al-Ghufli, S., op. cit., p.6

⁵⁸⁶ Before the discovery of oil, the people in the Trucial States, including the rulers, were not concerned about where the boundary line lay. There were no clear definitions of their borders. People could live wherever they wished without any worry. Thus, the concept of exact territorial borders was alien to a tribal society. See Peck, M., "Formation and Evolution of the Federation and its Institutions", In: Ghareeb, E. & Al Abed, I., op. cit., p. 124

Saudi Arabia saw the British withdrawal as an opportunity to reassert its claim over large part of Abu Dhabi territory.⁵⁸⁷ Furthermore, radical revolutionary movements such as the Marxist leadership established in Yemen formed another threat to the rulers of lower Gulf.⁵⁸⁸ In this situation, action by the rulers was indeed needed.

The first attempt to settle these issues was in 1968. The two rulers of Abu Dhabi and Dubai met at *Assameeh* to resolve their border dispute, as well as discussing the possibility of reaching an agreement on prospects for the region if the British withdrawal took place. The meeting was very positive and the rulers overcame all the obstacles. The meeting resulted in a very significant event. On 18 February, 1968 the ruler of Abu Dhabi, Sheikh Zayid bin Sultan Al-Nahayan and the ruler of Dubai, Sheikh Rashid bin Said Al-Maktum, declared the first Federation between the two states, and invited the rulers of other Trucial States, as well as Qatar and Bahrain, to join the Union.⁵⁸⁹ Seven days later, the rest of the Trucial states as well as Qatar and Bahrain indicated their willingness to join the Union.⁵⁹⁰ They met in Dubai on 25 February. The meeting resulted in the Dubai Agreement of 1968, declaring Federation between nine emirates, namely Qatar, Bahrain, Abu Dhabi, Dubai, Sharjah, Ajman, Umm al-Qwain, Ras al-Khaimah and Fujairah.⁵⁹¹ The Union was called the 'Federation of Arab Emirates'.

The Agreement established, in Chapter two, Article 4, the Supreme Council of the Federation. It specifies its authorities as to set a *permanent and comprehensive Charter* for the Federation and to issue the necessary federal laws. The Council was also

⁵⁸⁷ Ibid., p.125

⁵⁸⁸ Ibid., p.125

⁵⁸⁹ Al Rayyes, R., *Watha'eq Alkhaleej Al Arabi [1968-1971] Tumohat Alwehdah wa Humom Almustaqbal*, (in Arabic), Third Edition, Beirut: Riad El Rayyes Books S.A.R.L, 2002, p. 21

⁵⁹⁰ Al-Ghufli, S., op. cit., p.7

⁵⁹¹ Al Rayyes, R., op. cit., p.21

described by Article 4 as the supreme reference of all authority of states' institutions. It was provided that decisions must be taken by unanimous vote and the Chairmanship of the Council must be rotated annually among its members.⁵⁹² Moreover, the agreement established in Article 8 a Federal Council to assist the Supreme Council, mentioned above, in exercising its authorities. Furthermore, Chapter three Article 13 (A) of the agreement called for the establishment of a Supreme Court of the Federation, the formation and function of which were to be defined by law.

Article 17 of the Agreement suggested that the Agreement should come into application on 30 March 1968. It was to be applied only until the *Permanent and Comprehensive Charter* for the Federation was set.

These articles of the Dubai Agreement 1968 were subject to very serious debates among the rulers. Article 17, for example, was the subject of disagreement in the subsequent meeting conducted in Abu Dhabi on 25 May 1968. While Abu Dhabi saw the meeting as a preparatory meeting to study steps required to establish the *Permanent and Comprehensive Charter* for the Federation stated in Article 17, Qatar considered the meeting the first summit to give the Federation its actual meaning.⁵⁹³ This disagreement was due to the differences between the rulers in their understanding and interpretation of the Dubai Agreement. Qatar and Dubai understood the Agreement of 1968 as a temporary charter for the Federation and therefore considered that its provisions must be implemented immediately, whereas Abu Dhabi and Bahrain preferred to postpone any decision on any fundamental issue until the *Permanent and Comprehensive Charter* was

⁵⁹² Ibid., p.33

⁵⁹³ Qatar provided a detailed programme in respect of the election of the President of the Federation, the permanent location of the Federation, the formation of the Federal Council with the specification of its authorities and some other issues concerned with giving the Federation real effect on the ground. See Al Rayyes, R., op. cit., p.22

brought about.⁵⁹⁴ This disagreement on the agenda of the first meeting in fact undermined the meeting as a whole and revealed how divergent the rulers were, even on procedural matters. However, Kuwait played an important role in reducing the degree of divergence, leading the nine rulers to conduct their second session in Abu Dhabi on 6 July 1986.⁵⁹⁵

Despite the disagreement among the rulers, the meeting resulted in significant resolutions in its second session. Resolution no. 1 committed the preparation of the *Permanent Comprehensive Charter* for the Federation to an Egyptian expert, Dr. Abdulrazzaq Assanhoori, who was required to complete and submit the Charter within 6 months. Resolution no.2 established a Communication committee to conduct communications between the states and the expert. Resolution no. 3 suggested that the chairmanship of the Supreme Council was to rotate every session. Resolution no.4 indicated that the location of the Federal Council and the Supreme Council was to be chosen periodically. Resolution no. 5 established a Temporary Federal Council composed of the rulers' deputies.⁵⁹⁶

On 10 May 1969 the third session was conducted in Qatar, chaired by the President of Qatar, Sheikh Ahmed bin Ali Al-Thani. In this session, the rulers agreed on the main constitutional principles of the union. They also formed a committee consisting of lawyers and advisers to set a provisional constitution for the union. Clause 4 of the constitutional principles announced by the Supreme Council in 1969 suggested that the committee should finish the proposal in two months and refer its work to the Egyptian

⁵⁹⁴ Ibid., p. 23

⁵⁹⁵ Ibid., p.27

⁵⁹⁶ See resolutions 1,2,3,4,5 of 1968 of the Supreme Council of the Federation in: Ibid., p.28

expert (Dr. Abdulrazzaq Assanhoori). The expert would review the proposal in one month and submit his recommendations to the Supreme Council.⁵⁹⁷

One of the most important issues that really concerned the rulers, even in the first session, was to reach an agreement on the main principles of the federation, the infrastructure of the proposed state. During the meeting of the first and even second session there were two views on the Union. One attempted to preserve the sovereignty of each state and suggested a Confederation type of Union; the other was more federalist and keen on establishing a federal government.⁵⁹⁸ However, the use of the word *Constitution* instead of the *Permanent and Comprehensive Charter* in the third session clearly indicated the intention of the rulers to establish a new state under one federal government.⁵⁹⁹

On 21 June 1969, the draft constitution, after it had been prepared by the expert and studied by the rulers, was submitted to the expert again by the chairman of the third session of the Supreme Council.⁶⁰⁰ Except for Dubai and Qatar, the draft was not reviewed by the states. Dubai sent its adviser to discuss the draft with the expert, while Qatar prepared another full proposal of a provisional constitution for the union.⁶⁰¹ The Egyptian expert reconsidered the draft constitution in accordance with Dubai's remarks

⁵⁹⁷ The Supreme Council's announcement of 1969, in: Al Rayyes, R., op. cit., pp.512-513. However, Dr. Abdulrazzaq Assanhoori was replaced by another Egyptian expert Dr. Wahid Raa'fat after the former fell ill. See Al-Ghufli, S., op. cit., p.9

⁵⁹⁸ Abulmajd, A., "Annizam Addustoori li Dawlat Al-Emarat Alarabyyah Almuttahedah", in: *Dawlat Al-Emarat Alarabyyah Almuttahedah: Derasah Mashdiyyah Shamelah*, (in Arabic), Ma'ahad Albuhoth wa Adderasat Alarabyyah, 1978, p.14

⁵⁹⁹ Ibid., p. 14. See also the Supreme Council's announcement of 1969 in: Al Rayyes, R., op. cit., p.512, 513

⁶⁰⁰ Abulmajd, A., "Annizam Addustoori li Dawlat Al-Emarat Alarabyyah Almuttahedah", in: *Dawlat Al-Emarat Alarabyyah Almuttahedah: Derasah Mashdiyyah Shamelah*, op.cit., p.14

⁶⁰¹ Ibid., p.14

and Qatar's proposal and submitted it to the Supreme Council in its fourth session.⁶⁰²

However, the fourth session resulted in a failure of the Federation of Arab Emirates.

The failure of the union was due to several reasons: First, the process of decision making in the Supreme Council was to be on the basis of unanimity. This made serious difficulty in reaching an agreement; because a single ruler could, and often did, prevent the required unanimity being reached.⁶⁰³ Second, the level of representation in the proposed National Council (Parliament) was a subject of disagreement. While some states, such as Bahrain, insisted that the method of determining the composition of the Council should be a ratio based on the population of each state, others such as Qatar refused, and put more emphasis on equal representation.⁶⁰⁴ Third, the contribution of each state to the federal budget was also another matter of disagreement. Some states suggested that the proportion of contribution to the federal budget should be 10 % of each state's revenue. Others suggested that the contribution must take account of the level of each state's income and the size of each state's population.⁶⁰⁵ Besides this, some other external reasons played an important role in defeating the union of nine states. For example, the territorial conflict between Saudi Arabia and Abu Dhabi made the former unwilling to recognise any federation between the nine states until its boundary dispute with Abu Dhabi was resolved. The Iranian claim on Bahrain was another barrier. Some rulers were hesitant in accepting Bahrain because of the fear of Iran. It is said that one state explicitly tried to exclude Bahrain from the union.⁶⁰⁶ In addition, the UK favoured

⁶⁰² Ibid., p.41

⁶⁰³ Al Abed, I., "The Historical Background and Constitutional Basis to the Federation", In: Ghareeb, E. & Al Abed, I., op.cit., p.108

⁶⁰⁴ Ibid., p. 109

⁶⁰⁵ Alshaheen, A., *Nezam Al Hukm wa Al-Edarah fi Dawlat Al-Emarat Alarabyyah Almuttahedah*, (in Arabic), Ras al Khaimah: Jelfar, 1997, p.56

⁶⁰⁶ Abulmajd, A., "Annizam Addustoori li Dawlat Al-Emarat Alarabyyah Almuttahedah", in: *Dawlat Al-Emarat Alarabyyah Almuttahedah: Derasah Mashhiyyah Shamelah*, op.cit., p.15

a union between the seven Trucial States, rather than the union of the nine emirates.⁶⁰⁷ Accordingly, Qatar started to distance itself from the union and finally chose to follow an independent course in 1 September 1971. Bahrain also declared its independence in 31 August 1971, just before the Qatar declaration, after having been assured that Iran was no longer interested in its traditional claim, as a consequence of the UN Security Council resolution on 12 May 1970.⁶⁰⁸

Once Qatar and Bahrain made it clear that they were no longer interested in the union, the union process went in another direction. The Trucial States were left alone to decide their destiny, realizing that while time had been wasted in the negotiation process, they were approaching the deadline for the British withdrawal. The rulers of the Trucial States found themselves obliged to proceed to union without relying on Qatar and Bahrain, especially after the UK made it clear that it would not give the Trucial States their independence unless they formed a kind of federation.⁶⁰⁹ They continued the process of unification and adopted the provisional constitution prepared by the Egyptian expert with some minor amendments.⁶¹⁰ Ras al-Khaimah rejected the proposed constitution on the basis that it favoured both Abu Dhabi and Dubai.⁶¹¹ However, the rulers of six states, Abu Dhabi, Dubai, Sharjah, Ajman, Umm al Qwain, and Fujairah declared on 18 July 1971 a federation between the six Emirates, with an open door for Ras al-Khaimah if she decided to join the union in the future. As a consequence of the Iranian occupation of the Tunbs islands belonging to Ras al-Khaimah, the latter asked to join the Federation on 10 February 1972 without preconditions.⁶¹² The Federation of the

⁶⁰⁷ Alshaheen, A., op. cit., p.56

⁶⁰⁸ Abulmajd, A., "Annizam Addustoori li Dawlat Al-Emarat Alarabyyah Almuttahedah", in: *Dawlat Al-Emarat Alarabyyah Almuttahedah: Derasah Mashdiyyah Shamelah*, op.cit., p.15

⁶⁰⁹ Ibid., p. 16

⁶¹⁰ Al-Ghufli, S., op. cit., p.11

⁶¹¹ Ibid., p. 11

⁶¹² Al Abed, I., "The Historical Background and Constitutional Basis to the Federation", In: Ghareeb, E. & Al Abed, I., op. cit., p.111

seven Emirates, under the name of the United Arab Emirates, came into existence on 2 December 1971.

IV.2.2. The Features of the UAE Constitution

IV.2.2.1. The UAE Constitution is a Grant

It was well understood by the rulers of the lower Gulf that to establish the new state an agreement on the constitutional basis, like the form of the state and the extent of powers that its national institutions would enjoy, must first be reached. However, such an agreement was not an easy task. The Trucial States themselves may have not been convinced by the union either, but because of the compelling circumstances they were confronting, they agreed on a provisional constitution. One of the reasons for such failure, in addition to the above mentioned, may have been the absence of popular participation in decision making for the proposed state. The rulers had no restraints whatsoever upon their choice. They were free to decide on whether to join the union or to sit aside. If the federation had been a reflection of popular will, then there would have been some accountability, in the sense that the rulers would have had to satisfy either such popular demands or to give convincing reasons for not doing so.

Indeed, discussing the reasons for the failure of the Federation of Arab Emirates is beyond this chapter. However, it might be useful to provide an answer to the question on whether the constitution was granted by the rulers so they could suspend it or even nullify it whenever they wished, or as a contract between the rulers on the one hand and the people on the other.

It is traditionally believed that a written constitution can either be made by a democratic process, such as by an elected council or being approved by a referendum, or made by bureaucratic means, such as being granted by the ruler or taking the form of a contract between the ruler and the people.⁶¹³ There is no doubt that the people of the Trucial States were not involved in the process of making the original constitution. So, our focus will be on the bureaucratic means; whether the constitution is a grant or contract.

Some scholars have suggested that the UAE constitution is a grant.⁶¹⁴ They argued that the preamble of the constitution clearly indicates such a nature when it states that

*"We the Rulers of the Emirates of Abu Dhabi, Dubai, Ajman, Umm Al Qwain and Fujairah...whereas it is our desire...We proclaim before the Supreme and Omnipotent Creator, and before all the people, our agreement to this constitution."*⁶¹⁵

So, since the constitution was agreed by the rulers alone, with no popular participation, then the constitution is a grant and hence as it was granted by the rulers to the people, they can take it away whenever they wish or change any of its principles without popular participation.⁶¹⁶

⁶¹³ Alshrqawi, S. & Nasif, A., *Alqanon Addustoori wa Annizam Assiyasy Almasry: tahreer aleqtisad wa dstoor sanat 1971*, (in Arabic), Cairo: Jame'at Al-Qaherah, 1994, p.91 see also Attabtaba'i, A., *Annizam Addustoori fi Al-Kuwait*, (in Arabic), 1998, p.96

⁶¹⁴ For more about this view, see Ibrahim, M., *Usos Attanzeem Assiyasy wa Addustoori le Dawlat Al-Emarat Alarabyyah Almuttahedah*, (in Arabic), Abu Dhabi: Markaz Al Watha'eq wa Adderasat, 1975, p.154. See also Attabtaba'i, A., *Annizam Al-Ittihadi fi Dawlat Al-Emarat Alarabyyah*, (in Arabic), Ph.D. Thesis, Al-Qaherah: Jame'at Ain Shams, 1978, pp. 82-83. Moreover, see Alhulu, M., *Anzimat Al Hukm wa Dstoor Dawlat Al-Emarat*, (in Arabic), Al Ain: Maktabat Al Ain Alwataniyyah, pp.158-159

⁶¹⁵ Note that Ras al-Khaimah joined the union on the 11th of February 1972.

⁶¹⁶ Alshrqawi, S. & Nasif, A., *op.cit.*, p., 92 This is evidenced by the fact that Article 144(2) (a) gives the ultimate say on the constitutional amendment, as we will see below, to the Federal Supreme Council, which consists of the rulers of the states, in that the definition of the topmost interest of the federation that requires constitutional amendment has been left to the members of the Federal Supreme Council to decide.

Other scholars reject this view, suggesting that the constitution is not a grant. They assert their view on the ground that the grant constitution requires a ruler to act according to his own free will in establishing the constitution of a given state. They believe that in the case of the constitution of the UAE, the rulers did not act according to their own free will; rather, they were under pressure of certain international and domestic circumstances which inevitably rendered this the only option open to them.⁶¹⁷ Those authors do not believe, either, that the constitution is a contract between the rulers and the people. Their view is that the constitution is neither a grant nor a contract between the rulers and the people, but a special type of contract conducted among the rulers themselves.⁶¹⁸ They argue that the federation, which was desperately needed for the sake of security and complete independence, could not have been established without the constitution. So, the constitution was merely a step in the process of federation, rather than a permanent charter and the rulers agreed on a provisional constitution to assure that the basis of the federation was settled. Thus, they conclude that the UAE constitution is, in fact, an agreement among the rulers themselves and nothing else.

Although this argument seems to be more convincing, it does not provide a proper answer to the main question. It focuses solely on the relationship among the rulers themselves, whereas the question is about the relationship between the rulers of the Emirates and their people.

⁶¹⁷ Al-Ghufli, S., op. cit., p.13

⁶¹⁸ Supporters of this view are Abulmajd, A., "Annizam Addustoori li Dawlat Al-Emarat Alarabyyah Almuttachedah", in: *Dawlat Al-Emarat Alarabyyah Almuttachedah: Derasah Mashiiyyah Shamelah*, op.cit., p.23, and Khaleel, M., *Annizam Addustoori li Al-Emarat Alarabyyah Almuttachedah*, (in Arabic), Al-Ain: Jame'at Al-Emarat Alarabyyah Almuttachedah, 1999, pp.130-133, Al-Ghufli, S., op. cit., p.13

It is true that the circumstances surrounding the formation of the UAE federation were compelling and the rulers were under pressure to establish some kind of cooperation, but this does not mean that the rulers were obliged to form this particular type of federation. The rulers actually had a choice among several types of cooperation to defend themselves against any external dangers. However they chose to establish this particular type of federation.

Moreover, the UK did not seem to have compelled the rulers to establish one federal government with one constitution, so long as they were agreed on a reasonable type of cooperation that would assure their security. Furthermore, Qatar and Bahrain were originally in the union and they finally decided to withdraw, which indicates that the main motivator was their own free will, and the same is also true in the case of Ras al-Khaimah. So, it might be true to say, as a result, that the rulers in the formation of the UAE constitution were acting according to their own free will and hence the constitution that resulted from this process is a grant, since there was no popular participation. The argument that suggests that the constitution is a special type seems to be an escape from the real question of the legal justification of the relationship between the rulers of the Emirates and their people. Even if we submit that the constitution is a special type of contract, this does not change that fact that the rulers alone, in both cases, can change its main principles without popular participation. Again, the question is not about the relationship among the rulers themselves but actually about the relationship between the rulers of the Emirates and their people.

IV.2.2.2. The UAE Constitution is a Written and Inflexible Constitution

Constitutions in general can be classified into written and unwritten constitutions and can also be classified into flexible and inflexible constitutions.⁶¹⁹ The written constitution provides clear indications of what should happen and what is required to put its provisions into action. It is far from any ambiguity in respect of its implementation, in contrast with the unwritten type which is rather ambiguous in this regard. Flexible constitutions can be defined as those which can be amended or altered with comparative ease, while inflexible constitutions are those where amendment is more difficult.⁶²⁰

There is no doubt that the UAE constitution is a written constitution. The circumstances surrounding the formation of the UAE and its constitution required a written constitution to establish the union on strong constitutional grounds.

Moreover, since the amendment of the provisions of the UAE constitution requires going through different procedures from those recognized for the issue or amendment of ordinary laws, it might be considered as having a rigid or inflexible character. The Articles 110, 2, (a) and 144, 2, (a) of the UAE Constitution have expressed that the amendment of the constitution's provisions must first be proposed by the Federal Supreme Council to be submitted to the Federal National Council, whereas, in making federal laws, a Bill must first be prepared by the Council of Ministries to be forwarded to the Federal National Council (parliament).⁶²¹ In addition, the majority vote required

⁶¹⁹ Arnheim, M., *The Handbook of Human Rights Law: An Accessible Approach for the Workplace*, London: Kogan Page, 2004, p. 65. See also Abulmajd, A., "Annizam Addustoori li Dawlat Al-Emarat Alarabyyah Almuttahedah", in: *Dawlat Al-Emarat Alarabyyah Almuttahedah: Derasah Mashdiyyah Shamelah*, op.cit., p. 19

⁶²⁰ Parpworth, N., op.cit., p.7

⁶²¹ See articles 110, 2, (a) and 144, 2, (a) of the UAE Constitution.

in the Federal National Council to approve an amendment to the constitution is higher than the majority required to approve federal laws.⁶²²

It has been argued that the inflexible character of the constitution demonstrates the sanctity of its provisions, in the sense that no one can ever touch such provisions, even the Federal Supreme Council, the highest body in the land, except in the event of the utmost danger to the interest of the Federation.⁶²³ Article 144 (2) (a) of the constitution suggests that the Supreme Council cannot amend the constitution unless there is a compelling interest of the federation requiring such an amendment, which may confirm the supremacy of the constitution.⁶²⁴

Nevertheless, it is important to note that the preservation of the supremacy of the constitutional provisions requires more than different amendment procedures from those designed to amend the ordinary laws. The amendment must go through more difficult, not only different, constitutional procedures.

Close examination of the constitutional provisions in respect of the amendment of the constitution does not provide a clear answer to the question of whether these amendment procedures constitute any difficulty in any way. Although Article 144(2) (a) allows the Supreme Council to amend the constitution under the condition of its being required by the topmost interests of the Federation, it has not provided any definition of such topmost interests. So, any interest decided by the Supreme Council to be a topmost

⁶²² Article 144, 2, (c) states that "*the approval of the Federal National Council for a draft constitutional amendment shall require the agreement of two thirds of the votes of members present*", while article 89 does not specify any majority for the Federal National Council approval of federal laws. A simple majority of "*half of the members plus one*" of members present seem to be adequate.

⁶²³ Alshaheen, A., op.cit., p.78

⁶²⁴ Article 144 (2) (a) states that "*If the Supreme Council considers that the topmost interests require the amendment of this Constitution, it shall submit a draft constitutional amendment to Federal National Council.*"

interest, would indeed be treated as such, since it seems no other institution can review any of the Supreme Council's resolutions, especially in this regard. It is rightly said, therefore, that the condition of the "topmost interests" of the Federation is not a restriction upon the Council; rather it is a directive principle confirming the special status of the constitution.⁶²⁵

Moreover, there are, indeed, differences between the amendment of the ordinary laws and the amendment of the constitution, but these differences do not necessarily suggest any difficulty in the process. That is, in accordance with the Articles 47, 54, 60, the legislative and the executive powers seem to be centred in the president of the Federation and the Federal Supreme Council. The Federal Council of Ministers seems to be an institution branched from the Supreme Council to help the latter in its legislative and executive power by proposing laws and implementing them on the ground. There does not seem to be a constitutional recognition of the principle of strict separation of powers, in the sense that legislative and executive powers in the UAE constitution are not assigned to different institutions. Therefore, it might be true to say that assigning the preparation for issuing or amending federal laws to the Council of Ministers and the preparation of the constitutional laws to the Supreme Council does not seem to indicate a substantive difference, since the latter has the last word on the overall legislative matters. Furthermore, Article 110 (3) (a) seems to indicate that the Federal National Council is merely a consultative committee issuing recommendations on the law-making process to help the Federal Supreme Council in exercising its legislative authority. It states that

⁶²⁵ Abulmajd, A., "Annizam Addustoori li Dawlat Al-Emarat Alarabiyah Almuttachedah", in: *Dawlat Al-Emarat Alarabiyah Almuttachedah: Derasah Mashhiyyah Shamelah*, op.cit., p.21

"If the Federal National Council inserts any amendment to the bill and this amendment is not acceptable to the President of the Federation or the Supreme Council, or if the Federal National Council rejects the bill, the President of the Federation or the Supreme Council may refer it back to the National Council. If the Federal National Council introduces any amendment on that occasion which is not acceptable to the President of the Federation or the Supreme Council, or if the Federal National Council decides to reject the bill, the President of the Federation may promulgate the law after ratification by the Supreme Council."⁶²⁶

Although this Article is concerned with the issue of ordinary laws, it is also applicable to the process of the constitutional amendment, since Article 144 (2) (b) states that *"The procedure for providing the constitutional amendment shall be the same as the procedure for approving laws."*⁶²⁷ Thus, the special majority vote required in the Federal National Council for amending the constitution does not make any substantive difference at all, since the Council's opinion is not binding. Thus, the rigidity of the UAE constitution is in fact uncertain in this respect.

It is worthwhile to be mentioned, however, that the constitution established by Article 95 the Federal Supreme Court to examine the constitutionality of legislation, being the ultimate source of the interpretation of the constitutional provisions.⁶²⁸ This is, indeed,

⁶²⁶ Article 110 (3) (a) of the UAE Constitution.

⁶²⁷ The only valid interpretation for this clause is that the processes of discussion and the stages that must be fulfilled for the amendment of the constitution are to be the same as those required for approving federal laws. This means that the procedures contained in Article 110 (3) (a) concerning the amendment of federal laws will also be the procedures for amending the constitution. Otherwise, Article 144 would be in contradiction. That is, while Article 144 (2) (a) and (c) underline different procedures for constitutional amendment from those recognized for issuing and amending ordinary laws, paragraph (b) suggests that the procedures for approving the constitutional amendment shall be the same as the procedures for approving laws. See the footnote in Abulmajd, A., "Annizam Addustoori li Dawlat Al-Emarat Alarabyyah Almuttahedah", in: *Dawlat Al-Emarat Alarabyyah Almuttahedah: Derasah Mashyyah Shamelah*, op.cit., p.21

⁶²⁸ See Article 99 of the UAE Constitution

another dimension that secures the supremacy of the constitution in that it has been put under the Federal Supreme Court protection. The Federal Supreme Court clearly underlined the superiority of the constitution in its interpretation no.1 of 14 April 1974, suggesting that legislation in general cannot contradict any provision of the constitution.⁶²⁹

IV.3. The Distribution of the Jurisdictions and Powers between Federal and Local Institutions in the UAE Constitution

Some Western authors, as seen in Chapter Two, claim that the application of Islam in the state political sphere is to eliminate due process and modern independent state institutions, to place legal proceedings and important decisions under the control of clerics and religious leaders.⁶³⁰ In this section we will challenge this view by demonstrating the various constitutional institutions the UAE recognises with an analysis of their effect in the UAE constitutional system. As discussed in Chapter Two the federal system of governance could play an important role in limiting the state's political power in its scope of authority. Some authors describe this type of limitation as vertical separation of powers.⁶³¹ The UAE, as a federal state, embraces a clear political identity with clear distribution of powers between its federal and local authorities, which could help in forming a foundation for limited and responsible government. We will discuss this further below by examining the articles of the UAE constitution.

Articles 120 and 121 of the UAE constitution stipulate the matters which exclusively fall within the jurisdiction of the federal government, being silent on what falls within the jurisdiction of the local institutions. In stipulating the powers and jurisdictions of

⁶²⁹ See Application for Constitutional Interpretation no.1 of the year no. 3, 14 April 1974

⁶³⁰ Mayer, A. E., *op.cit.*, 1999, p. 28. See also Bernard Lewis's opinion cited in Monshipouri, M., *op.cit.*, p. 216

⁶³¹ Baun, M. J., and Franklin, D. P., *op.cit.*, p. 43

the Federation, leaving the local institutions with unspecified general powers and jurisdictions, the UAE constitution gives the local institutions a stronger presence in the state public life, with all powers that are outside the lists of the federal jurisdiction. This readiness of the UAE constitution to give preference to the local governments of the Emirates may have been due to the rulers' concern about losing their authority to the Federal government. The exceptions stated in Articles 123, 124, and 149 of the constitution to the jurisdiction of the federal government in favour of the individual emirates indicate that point. It is said that the rulers of the Emirates seek, by the insertion of these articles, to preserve as much as possible of their power.⁶³² However, Abulmajd has remarked that the two lists in Article 120 and 121 are virtually comprehensive and contain the essential matters, leaving little within the jurisdiction of Emirates.⁶³³ Moreover, these exceptions, particularly those which concern paragraph 1 of Article 120, according to Article 123 are limited to the approval of the Federal Supreme Council, whose decision on the matter is of immediate effect. Below we will discuss the federal institutions recognised by the UAE constitution to have a clear picture of the UAE constitutional structures.

IV.3.1. The Federal Institutions in the UAE Constitution

The UAE is an Islamic state and yet the main formal structures of the modern state, as will be shown in this section, are also recognised. In fact, Muslims recognised the concept of constitution a long time ago when establishing the first Islamic state in Madinah. The Madinah Charter is considered the basis of Islamic constitutionalism in

⁶³² Taryam, A., *The Trucial States*, London: Allen and Unwin, 1970, p. 234

⁶³³ Abulmajd, A., "Annizam Addustoori li Dawlat Al-Emarat Alarabyyah Almuttachedah", in: *Dawlat Al-Emarat Alarabyyah Almuttachedah: Derasah Mashhiyyah Shamelah*, op.cit., p. 46.

Islamic history, serving as the source of political power and law for state authorities.⁶³⁴ The Prophet Muhammad, peace be upon him, could have established the first Islamic state by his religious power as revealed by Allah and this would have been enough to serve as a basis for the new community, with this revelation forced upon Muslims and non-Muslims alike. However, he did not rely on his religious legitimacy but chose to draw up a specific constitution based on the consent of all who would be affected by its implementation. This clearly demonstrates the constitutional character of the Islamic state, where the political leader ruled on the basis of the explicit written consent of all citizens of the state.⁶³⁵ Thus, being an Islamic state is not an obstacle to the endorsement of the modern values of a constitutional state. The UAE Islamic constitution demonstrates this point by recognising the main formal structures of the modern state. We will examine below various constitutional institutions recognised by the UAE constitution, with an assessment of their roles in the UAE constitutional system, showing that the Islamic character of the UAE constitution did not raise any difficulty in the exercise of the constitutional functions of the UAE institutions.

Article 45 specifies the federal authorities of the UAE which consist of:

1. The Federal Supreme Council.
2. The President of the Federation and his Deputy.
3. The Federal Council of Ministers.
4. The Federal National Council.
5. The Judiciary of the Federation.⁶³⁶

Each of these authorities will be discussed as follows:

⁶³⁴ Berween, M., Al-Wathiqah: The First Islamic Constitution, 23 *Journal of Muslim Minority Affairs*, No. 1, 2003, p. 105

⁶³⁵ *Ibid.*, p. 115

⁶³⁶ See Part Four, Article 45 of the UAE constitution

IV.3.1.1. The Federal Supreme Council

Article 46 states that the Federal Supreme Council is the highest authority in the Federation consisting of the rulers of the Emirates. Each of the seven Emirates has a single vote in the deliberations of the Federal Supreme Council. Although Article 46 seems to indicate that the Constitution has adopted the equal votes rule in the Supreme Council in decision making, Article 49 shows that the voting requirements vary according to whether substantive or procedural matters are being decided upon. On substantive matters, Article 49 seem to favour Abu Dhabi and Dubai in requiring for the validity of a decision a majority of five of the Supreme Council members, provided that this majority includes the votes of the Emirates of Abu Dhabi and Dubai. On the other hand, decisions of the Supreme Council on procedural matters shall be by a majority vote of the Council members, without mentioning that such majority should include any of the Emirates composing the Federation.

The constitution, however, does not define what may constitute a ‘substantive matter’. Although the Supreme Council bye-law of 17 July 1972 laid down procedural matters, this does not mean that other matters which do not fall under the Council bye-law are necessarily substantive, because defining what is substantive and procedural is itself a substantive matter, which the Supreme Council has to define.⁶³⁷ The Emirates of Abu Dhabi and Dubai, therefore, seem to have a veto in any decision that the Federal Supreme Council has to make. Thus, the ultimate players of the UAE Federation seem to be these two biggest Emirates, Abu Dhabi and Dubai, which play a key role in deciding all essential matters that require a majority vote. The only case in which the constitution requires the unanimous agreement of the Supreme Council is when they are

⁶³⁷ Obaid, M., *Nuzum Alhukm wa Dstoor Al-Emarat*, (in Arabic), First Edition, Dubai: Albayan, 1994, p. 415

deciding whether any other independent Arab country may join the Federation of the UAE.⁶³⁸

IV.3.1.2. The President of the Federation and his Deputy

Article 51 states that" *The Federal Supreme Council shall elect from among its members a President, and a Vice-President of the Federation* ". This article of the constitution clearly states that the President of the Union and the Vice-President are both members of the Federal Supreme Council in which they both would hold two offices: as ruler of an Emirate, and as President or Vice-President of the Federation. The combination of ruling an Emirate and holding at the same time the federal office may lead to a conflict of interest between the local government and the federal institution and this is worrying, particularly in the UAE, which has only limited experience of the federation system.⁶³⁹ Article 51 states that a President and Vice President of the Federation shall be elected by the Federal Supreme Council from among its members. Article 52 states that the term of office of the President and the Vice-President shall be five Gregorian years and indicates that they are eligible to be re-elected to the same office. It is important to note that the constitution does not limit the number of times that the President and Vice-President can be re-elected.⁶⁴⁰

Article 51 of the UAE Constitution makes it clear that no one can hold the presidency or vice presidency of the UAE unless he was elected by the Supreme Council of the Federation. Although the election is confined in the members of the council, it is still a step toward more comprehensive democratic government, particularly when we compare the situation in the UAE with other neighbouring states, where the presidency

⁶³⁸ See Article 1 of the UAE Constitution

⁶³⁹ Khaleel, M., *op.cit.*, p. 206.

⁶⁴⁰ See Articles 51 and 52 of the UAE Constitution

is occupied only through heredity.⁶⁴¹ It is worthwhile to mention, however, that although the presidency and vice presidency are open to all members of the Council, these two positions seem to be more likely to go to Abu Dhabi and Dubai, because of their importance in the Federation and their right of veto in the Supreme Council.⁶⁴² Sheikh Zayid, the Ruler of Abu Dhabi, for example was elected President of the UAE in 1971 and has been re-elected a further five times. Sheikh Rashid Al Maktom, the Ruler of Dubai, was also elected Vice-President in 1971, and was re-elected three subsequent times before his death in 1991. After his death his son Sheikh Maktom became ruler of Dubai, and was elected Vice-President of the Federation in 1991, and then re-elected in 1996. After the death of Sheikh Zayid, his son Sheikh Khalifah was recently elected to the presidency in 2004.

IV.3.1.3. The Federal Council of Ministers

The Federal Council of Minister consists of the Prime Minister, his Deputy and a number of Ministers chosen from among the citizens of the Federation.⁶⁴³ The Prime Minister and his Deputy are both appointed by the president of the Federation. The Council of Ministers is only empowered to carry out general policy as formulated by

⁶⁴¹ See Article 8 of Qatar constitution, for example, which states “*The Rule of the State shall be hereditary within the Al Thani family and by the male successors of Hamad bin Khalifa bin Hamad bin Abdullah bin Jassim. The inheritance of the Rule shall go to the son to be named by the Emir as Heir Apparent. If there is no male offspring, the Rule shall be transferred to the one from the family whom the Emir names as Heir Apparent and, in this case, the Rule would then be inherited by his male successors. A special law shall organise all provisions related to the ruling of the State and its inheritance, to be issued within one year of the date of this Constitution coming into force, and should have a Constitutional validity.*” Moreover, In the Saudi Arabia, the Saudi basic law of government adopted in 1992 declared that Saudi Arabia is a monarchy ruled by the sons and grandsons of the first king, Abd Al Aziz Al Saud. The current head of the Al-Saud and ruler of Saudi Arabia, King Abdullah bin Abdul- Aziz, announced, on 20 October 2006, the creation of a committee of princes to vote on the viability of kings and the candidature of nominated crown princes, which in effect, clarifying and further defining the Al-Saud’s line of succession process. The committee, to be known as the Bay’ah Council, would include all the sons and some grandsons of the late King Abdul-Aziz who would vote for one of three princes nominated by the king as Heir Apparents. See the king’s announcement of the Bay’ah Council in Alriydh newspaper website, (in Arabic), Available Online at <http://www.alriyadh.com/2006/10/21/article195873.html>

⁶⁴² Al-Owais, H., *The Role of the Supreme Court in the Constitutional System of the United Arab Emirates A Comparative Study*, Ph.D. Thesis, University of Durham, U.K, 1989, p. 188

⁶⁴³ See Article 55 and Article 56 of the UAE constitution.

the Supreme Council and is politically responsible collectively before the President of the Federation and the Federal Supreme Council for execution of the general policy of the federation, in both domestic and foreign affairs.⁶⁴⁴ Article 64 also states that each minister is personally responsible to the President of the Federation and the Supreme Council for the activities of his ministry or office. The Federal Supreme Court in its constitutional interpretation no. 3, 1976 confirmed such responsibility and asserted that the Prime Minister and the Ministers are politically accountable before the President of the federation and the Supreme Council, and are legally accountable before the Supreme Court for any criminal activity.⁶⁴⁵

To guarantee the impartiality of Ministers, Article 62 prevents the Prime Minister, his Deputy, or any federal Ministers, while in office, from exercising any profession, commercial or financial occupation or from entering into any commercial transactions with the Government of the federation or the Government of the Emirates; or combining with their office the membership of the board of directors of any financial or commercial company.

IV.3.1.4. The Federal National Council

The Federal National Council is composed of forty members divided as follows between the different Emirates: Abu Dhabi and Dubai 8 seats each, Sharjah and Ras al Khaimah 6 seats each, Ajman, Umm Al Qwain and Fujairah 4 seats each.⁶⁴⁶ The term of membership in the Federal National Council is two Gregorian years commencing from the date of its first meeting.⁶⁴⁷ The members have parliamentary immunity from

⁶⁴⁴ See Article 64 of the UAE constitution. See also Obaid, M., op.cit., 1994, p. 440

⁶⁴⁵ The Supreme Court judgement no. 3, for the fourth year, issued on 18-11-1976, "interpretation judgment" brought to the court by the Minister of justice to interpret Article 99(5) of the constitution.

⁶⁴⁶ See Article 68 of the UAE Constitution

⁶⁴⁷ See Article 72 of the UAE Constitution

penal proceedings and cannot be censured for any opinions or views expressed in the course of carrying out their duties within the council or its committees.⁶⁴⁸

Although the UAE constitution was designed for “*preparing the people of the federation ... for a noble and free constitutional life, progressing by steps towards a comprehensive, representative, democratic regime*”, the current method of selecting the member of the Federal National Council is that each Ruler of the Emirate chooses and appoints the member he considers best to represent the state he governs. It is worth noting, however, that the members of the Federal National Council represent all the people of the federation and not merely the Emirate which selected them.⁶⁴⁹

Although the Federal National Council is supposed to serve as the Parliament of the Federation, its legislative function has been considered by many commentators weak and the council does not go beyond being a consultative institution, established to assist the Supreme Council to exercise legislative power in the federation.⁶⁵⁰ The constitution clearly states in Article 110 (3) that amendment or rejection by the Federal National Council is not binding on the Federal Supreme Council. That is to say, if the Federal National Council inserts any amendment to the bill and this amendment is not acceptable to the President of the Federation or to the Federal Supreme Council, or if the Federal National Council rejects the bill, the President of the Federation or the Federal Supreme Council may refer the bill back to the Federal National Council. If the Federal National Council introduces any amendment on this occasion which is not acceptable to the President of the Federation or the Federal Supreme Council, or if the

⁶⁴⁸ Articles 82, and 81 of the UAE Constitution

⁶⁴⁹ See Article 77 of the UAE constitution

⁶⁵⁰ Abulmajd, A., “Annizam Addustoori li Dawlat Al-Emarat Alarabyyah Almuttahedah”, in: *Dawlat Al-Emarat Alarabyyah Almuttahedah: Derasah Mashhiyyah Shamelah*, op.cit., p. 72. See also, Heard-Bey, F., *From Trucial States to United Arab Emirates: A society in transition*, London: Longman Group, 1982, p. 377

Federal National Council decides to reject the bill, the President of the Federation may promulgate the law after ratification by the Supreme Council. This clearly shows that the Federal National Council is no more than a consultative council for the Supreme Council and its legislative power consists only of making consultative recommendations to the President of the Federation and to the Federal Supreme Council.⁶⁵¹

However, in practice the Federal National Council has used its power in full extent and managed to amend many bills and even did not hesitate to reject some bills proposed by the government. Alrokn has demonstrated in his study that the Council in the period between 12 February 1972 and 12 July 1989 succeeded in amending one hundreds and five bills which amounted to over half of the bills proposed by the government. There were also five Bills rejected by the members of the Council and this small number of rejected Bills was to avoid clashes with the government at an early stage.⁶⁵² The Federal National Council also managed to stand against the issue of the UAE penal law which took the government thirteen months to reach compromise with the Council.⁶⁵³ The main obstacle, as indicated in the Alrokn study, was the crime against state security which according to the Federal National Council was not clearly defined and the punishments were very harsh which could lead to the violation of citizens' rights.⁶⁵⁴ The Council succeeded in omitting Articles 149, 169, 183, 184, 202 and 203 which took a hard line against those expressing views or spreading information about the state.⁶⁵⁵

⁶⁵¹ See Article 110 (3) of the UAE constitution

⁶⁵² See Alrokn, M., *A Study of the United Arab Emirates Legislature under the 1971 Constitution with Special Reference to the Federal National Council*, PhD Thesis, University of Warwick, 1991, p. 257

⁶⁵³ Ibid., p. 260

⁶⁵⁴ Ibid., p. 261

⁶⁵⁵ Ibid., p. 262

IV.3.1.5. The Judiciary of the Federation

According to Article 95, the Federation recognises two types of court, the Federal Supreme Court and the Federal Primary Courts (courts of first instance). The Federal Supreme Court is the highest court in the judicial system in the UAE and sits in the federal capital and it may, exceptionally, assemble when necessary in the capital of one of the Emirates.⁶⁵⁶ The Federal Primary Courts, however, could sit in the permanent capital of the federation or in the capitals of some of the Emirates.⁶⁵⁷

The constitution provides for each Emirate to have its own judicial system. Article 104 states that the local judicial authorities in each Emirate shall have jurisdiction in all judicial matters not assigned to the federal judicature by the constitution. However, Article 105 allows an Emirate to transfer all or part of its local judicial authority to the Federal Primary Courts. This article seems to have been designed to facilitate the creation of a federal judicial system. The Federal law no. 6, 1978 which transferred local judicial authority in Abu Dhabi, Sharjah, Ajman, and Fujairah to the Federal Primary Courts in each Emirate, was the first step towards this federal judiciary. Umm al Qwain subsequently joined the federal judicial system in 1991. Dubai and Ras al Khaimah are the only two emirates which still retain their own local judicial system.

Generally speaking, there are three types of Federal Primary Courts: the Shari'ah Court, which applies Islamic law in matters related to family affairs such as proof of marriage, divorce and inheritance for Muslims; second, the Criminal Courts which have jurisdiction in criminal laws and which, in various degrees, as will be seen below, apply Islamic law for major crimes; third the Civil Courts, which have a general jurisdiction

⁶⁵⁶ See Article 100 of the UAE constitution

⁶⁵⁷ See Article 102 of the UAE constitution

on civil and commercial transactions, administrative, banking, insurance and traffic matters.

The UAE constitution did not establish federal courts of appeal; however, it suggests in Article 105 that any circumstances in which appeals against judgments by local judicial authorities shall be defined by a Federal law. Article 1 of the Federal law no.6, 1978 established the federal courts of appeal, which, in practice only converted the existing local courts of appeal into Federal Appeal Courts; one in Sharjah hearing appeals from Sharjah and the Northern Emirates, the other in Abu Dhabi hearing appeals from Abu Dhabi courts.⁶⁵⁸

Thus, according to the discussion above, the constitutional institutions which are supposed to regulate the political authorities are formally established in the UAE and the state's political powers are clearly distributed among these institutions, as well as between the local and federal governments. This is clearly an important factor for the establishment of limited and responsible government, which in its turn would enhance and promote human rights in the UAE. Islam has not been an obstacle to the endorsement of the modern values of a constitutional state. Whether or not these constitutional structures are effective is a matter that is more dependent on the political will of the state than on the principles of Islam.

IV.4. The Constitutional System of Government and the Separation of Powers

In embarking on the discussion of the kind of government the UAE constitution recognizes, it is important to tackle first the question as to whether the UAE constitution recognizes the principle of separation of powers. This principle is believed to be one of

⁶⁵⁸ Al-Ghufli, *op.cit.*, p. 33

the important mechanisms that prevent arbitrary use of powers through distributing the state's powers among the three state authorities, namely, the legislature, executive and the judiciary, requiring each authority to act independently.⁶⁵⁹ The UAE constitution has, however, distributed the state's powers among five organs, as discussed above, without indicating which organ has the legislative and which has the executive power.

The Federal Supreme Council has been accorded, according to the Article 47, the legislative authority to sanction the federal laws and state decrees⁶⁶⁰ and according to Article 110 no law can be recognized as such unless was signed by the President and sanctioned by the Federal Supreme Council.⁶⁶¹ Further, Article 110 (3) (a) seems to indicate that the Federal National Council is merely a consultative committee and the essence of its work seems to be confined to issuing non-binding recommendations to the Federal Supreme Council and the President to help them in the exercise of their legislative authority.⁶⁶² However, Article 94 of the constitution has granted the judiciary independence, suggesting that "*judges...shall not be subject to any authority but the law and their own conscience.*"⁶⁶³

Some commentators believe that the UAE constitution has not recognized the principle of separation of powers, since both the legislative and the executive powers are centred in the hands of the Supreme Council, which consists of the rulers of the Emirates with

⁶⁵⁹ Barendt, E., op. cit., p. 14-16. See also Khaleel, M., op. cit., pp. 188-189

⁶⁶⁰ See paragraph 2, 3, and 4 of Article 47 of the UAE Constitution.

⁶⁶¹ See Paragraph 2 (c) of the Article 110 of the UAE Constitution.

⁶⁶² See Paragraph 3 (a) of the Article 110 of the UAE Constitution which clearly suggests that if the Federal National Council insists on the insertion of an amendment to the proposed bill and this amendment is not acceptable to the President or the Supreme Council, the latter may promulgate the law with disregard of the Federal National Council's suggestion.

⁶⁶³ See Article 94 of the UAE Constitution which states that "*Justice is on the basis of rule. In performing their duties, judges shall be independent and shall not be subject to any authority but the law and their own conscience.*"

the union president.⁶⁶⁴ Because of such non-recognition of the constitutional principle of separation of powers, they argue, the UAE government cannot be classified under the parliamentary system of government, nor can it be described as presidential government. They believe that the main distinction between those two systems of government lies in the principle of separation of powers, which is not recognized by the UAE constitution.⁶⁶⁵ Accordingly, they conclude that the system of government is a special type of government consistent with the tribal circumstances within which the Federation was established.⁶⁶⁶

Although this argument seems to be convincing at first glance, close examination may reveal a different conclusion. The above view seems to be more concerned with the separation of persons, rather than the separation of powers, in the sense that it focuses on the form rather than the substance. To put it simply, strict separation of persons does not necessarily mean strict separation of powers. Although, for example, The USA system is traditionally believed as having strict separation of powers, close examination indicates that it recognises strict separation of persons; but with some degree of power overlap to secure the functionality of check and balance.⁶⁶⁷ The president, although he is an executive, can veto a Bill put by the Congress, the legislature. The latter, on the other hand, can override the veto of the president by a two-thirds majority of both Houses of Congress.⁶⁶⁸ The court also can override legislation enacted by the legislature or acts of

⁶⁶⁴ Khaleel, M., op. cit., p. 188, see also Alhulu, M., *Anzimat Al Hukm wa Dstoor Dawlat Al-Emarat*, op. cit., p.171. Moreover, see Abulmajd, A., "Annizam Addustoori li Dawlat Al-Emarat Alarabyyah Almuttahedah", op.cit., p.81. Furthermore, see Obaid, M., op.cit.1994, p.410

⁶⁶⁵ Khaleel, M., op. cit., p. 188

⁶⁶⁶ See Alhulu, M., *Anzimat Al Hukm wa Dstoor Dawlat Al-Emarat*, op.cit., p.171. Moreover, see Abulmajd, A., "Annizam Addustoori li Dawlat Al-Emarat Alarabyyah Almuttahedah", op.cit., p.81, Obaid, M., op.cit., 1994, p. 410. However, some commentators believe that such a tribal constitutional system does not weaken the constitution at all, because the main reason for the principle of separation of powers is to protect the rights of people and these rights and freedoms are already recognized within the text of the constitution. See Khaleel, M., op. cit., p.189

⁶⁶⁷ Barendt, E., op.cit., p.15

⁶⁶⁸ See Article 1 section 7 of the US Constitution

an executive, inconsistent with the constitution.⁶⁶⁹ Accordingly, it is unsatisfactory to say that the constitution of the USA, which adopts the presidential system of government, recognizes pure separation of powers, even though their institutions are strictly separated. It follows that prevention of the arbitrary use of powers does not necessarily need pure separation of powers. Good government can be assured even if there is overlap between state powers, as long as this overlap of powers was intended to conduct a review by one branch of government over the use of power of the other. This principle is known as a check and balance principle, which requires each branch of government to check exercise of power by the others.

In the UK constitutional system, the parliamentary system of government, there seems to be no separation of persons or even powers in terms of the legislature and the executive. The executive in this system consists of members of the legislature, to which it is responsible. The government ministers, although they are members of the executive, exercise a legislative function, not only because they sit in Parliament but also by making delegated legislation.⁶⁷⁰ So, in the UK, the legislative and the executive powers may be centred in the hands of government. However, the judicial function has been allocated to an independent branch of government, which is the judiciary.⁶⁷¹ In other words, although the legislative and executive functions are exercised by Parliament, more specifically the House of Commons, the judiciary in the UK is independent. That is because, first, full-time judges cannot sit in the House of Commons.⁶⁷² Second, the rules of the House of Commons limit the freedom of MPs to criticize the judiciary or to discuss cases pending before the courts.⁶⁷³ Moreover, senior

⁶⁶⁹ See *Marbury v. Madison* 5 U.S. (1 Cranch) 137 (1803)

⁶⁷⁰ Parpworth, N., op. cit., p. 22

⁶⁷¹ Barendt, E., op. cit., p.129

⁶⁷² See House of Common Disqualification Act 1975

⁶⁷³ Barendt, E., op.cit., p.130

judges cannot be removed except by the Crown on an address represented by both Houses of Parliament, which in its turn makes the removal of the judge more difficult.⁶⁷⁴ The British courts have played a very important role in checking the use of power by the government, especially the executive branch. The court is able to examine cases of a political nature, to an extent that enables the court to intervene in the executive affairs by virtue of judicial review.⁶⁷⁵ For example, if a minister has acted beyond his power delegated by Parliament, the courts may examine such a case and may grant remedies to the claimant.⁶⁷⁶ Therefore, it is rightly said that the separation of powers is recognized by the UK constitution in the context of judicial powers. As Barendt comments, *"the United Kingdom constitution observes the separation of powers principle in the context of judicial powers more carefully than it does to the executive and legislative branches."*⁶⁷⁷

With regard to the UAE, Article 95 of the UAE constitution establishes the Federal Supreme Court, as the highest court in the land. It is authorized by Article 99 to check on the legislative power conferred on the President and the Federal Supreme Council. Paragraph 2 confers on the court power to examine the constitutionality of Federal laws, if they are challenged by one or more Emirates alleging that they violate the constitution, or by the Federal authority if one or more Emirates is found to be violating the constitution or Federal laws. Paragraph 3 also allows the Supreme Court to examine the constitutionality of laws, legislations and regulations if such a request is referred to it by any Court in the country. Article 101 states that the *"judgment of the Federal Supreme Court shall be final and binding upon all"*. It has also been provided with the

⁶⁷⁴ See the UK Supreme Court Act 1981, s. 11

⁶⁷⁵ British doctrine recognises judicial review as deciding on the lawfulness of the exercise of executive discretionary power. It has no authority to examine the constitutionality of legislation enacted by Parliament. For more details see Barendt, E., op. cit., p. 132 and Parpworth, N., op. cit. p.254

⁶⁷⁶ Parpworth, N., op. cit., p. 252. See 31(4) of the UK Supreme Court Act 1981

⁶⁷⁷ Barendt, E., op. cit., p.129

authority to interpret the constitution provisions and such interpretation is binding on all. So, any legislation that is incompatible with the constitution may be regarded as unconstitutional by the Supreme Court, even though such legislation was issued by the President or the Supreme Council. Thus, there seem to be two independent powers recognized in the UAE Constitution; the Supreme Council with the President on the one hand, exercising both the executive and legislative powers, and the Judiciary on the other, which exercises judicial authority. Although the principle of separation of powers is not recognized in respect of the legislative and executive powers, it is clearly recognized in terms of the relationship between the legislature and the executive on the one hand and the judiciary on the other. However, it does not seem to embrace the principle as a pure one, but as the principle of check and balance.

It might be true to say, accordingly, that the separation of powers might be recognized in the UAE constitution in a similar way to the British version of check and balance, although the Supreme Court in the UAE has been granted a greater power than the British courts since it was given the power of judicial review of constitutionality of federal legislations.

It is worthwhile noting, though, that the principle of separation of powers is not necessarily the criterion on which a given government can be classified, as the previous argument seems to suggest. That is, although the principle plays a significant role in preventing the abuse of executive power, it does so in a formal way through separating the state's institutions, without reflecting the people's wishes. The legislature, for example, may enact arbitrary legislation, although it acts independently of the executive organ. So, although the principle of separation of powers gives some sense of accountability, it should not be regarded as the main element of the good constitutional

system. Human rights and fundamental freedoms seem to be more concerned with the substantive principles of justice and fairness, irrespective whether that system has recognized any formal principle, in so far as the respect of human dignity is the most fundamental element of the constitution. In the UK, the separation of powers was sacrificed by the Parliament Act of 1911-49 to the interest of democracy, which reduced the legislative power of the House of Lords, which is composed of unelected members, and strengthened the elected members of the House of Commons. According to the British, democracy might be the core principle of any legitimate government, whether it is parliamentary or presidential.⁶⁷⁸ Therefore, the pressing question, here, is does the UAE constitution recognize democratic government?

In accordance with paragraph 4 of the preamble of the UAE Constitution, it can be said that the form of government for which the constitution was set is a comprehensive, representative, democratic regime.⁶⁷⁹ However, since at the time of preparation of the constitution, it was recognized that the people were not yet prepared for a democratic regime, because they were living according to tribal principles and since they were not in a position of awareness that would enable them to implement the principle of democracy correctly, the constitution has recognized the principle of democracy on a progressive basis. In other words, until the environment for democracy is properly established, the government is undemocratic.⁶⁸⁰ This is evidenced by the fact that the Federal National Council is seen in reality as a modern form of tribal *Majles* (council),

⁶⁷⁸ However democracy, as discussed in Chapter Two, may itself conflict with human rights, especially the rights of minorities. It also may reject the idea of legal protection of human rights since the judge, an unaccountable person, is responsible for their implementation. We will see more about this in the next chapter

⁶⁷⁹ The purposes of the constitution are stated in its preamble and one of these purposes is "... preparing the people of the Federation ... for a dignified and free constitutional life, and progressing by steps towards a comprehensive, representative, democratic regime in an Islamic and Arab society free from fear and anxiety."

⁶⁸⁰ Peck, M., Formation and Evolution of the Federation and its Institutions, In: Al-Abed, I., and Hellyer, P., (eds.), *United Arab Emirates: a new perspective*, London: Trident Press, 2001, pp. 151-152

which is usually composed of the old and more influential people in the tribe, acting as consultative body that provides the ruler with advice on tribal affairs.⁶⁸¹ It is unclear when exactly will be considered the right time for democracy in the UAE. It has been more than 34 years since the federation was established, and the country still does not hold elections for any public office, and political participation is limited to the ruling family in each emirate.⁶⁸² However, considering developments in the region, which is now witnessing transformation and reforms, the President of the UAE Sheikh Khalifa took a significant step when he announced on the UAE's 34th National Day in 2005 that for the first time, half the members of the Federal National Council would be elected by the people.⁶⁸³ The decision stipulates that the Ruler of each of the seven UAE emirates will form a local council containing at least 100 times as many members as the number of the emirate's representatives in the FNC. The local council will then conduct a poll to elect half of the representatives of that emirate to the FNC, while the Ruler will appoint the other half.⁶⁸⁴ Although the decision was considered as a ground-breaking step toward democracy, many academics have emphasised that this decision should be a step towards having the members of the FNC selected wholly by election. Alrokn, a law professor, noted that *"giving the privilege to certain groups to be members of the council would not be the ideal way to have representation of the UAE nationals."*⁶⁸⁵ Dr Al Mutawa, Chairman of the Social Guidance Association, stressed that the move should be accompanied by amendments to the provisions of the UAE constitution to ensure that the FNC is given the power *"to practise a legislative role and not just, as*

⁶⁸¹ Al-Ghufli, S., op.cit., p. 123-24

⁶⁸² See Human Rights Watch Report 2005, available Online at <http://hrw.org/english/docs/2006/01/18/uae12233.htm>

⁶⁸³ Samir Salama, A landmark move, Gulf News, Available Online at <http://archive.gulfnews.com/articles/05/12/27/10007783.html>

⁶⁸⁴ See Gulf News at <http://archive.gulfnews.com/articles/05/12/27/10007783.html>

⁶⁸⁵ Eman Al Baik and Mohsen Rashid, Legislative powers for FNC advocated, Khaleej Times, 3 December 2005, Available Online at http://www.khaleejtimes.com/Displayarticle.asp?section=theuae&xfile=data/theuae/2005/december/theuae_december63.xml

now, having merely a consultative role."⁶⁸⁶ The announcement has, in fact, indicated a readiness for constitutional amendments, as the President Sheikh Khalifa, himself, said the decision is a step towards more constitutional amendments aimed at "*enhancing the role of the FNC and increasing its powers to comply with the requirements of the next stage.*"⁶⁸⁷ It is indeed a realization of the political leader in the UAE for a constitutional reform towards a comprehensive, representative, democratic regime.

IV.5. The Islamic Nature of the UAE Constitution

IV.5.1. A Moderate Constitution in an Islamic Domain

Although the United Arab Emirates is an Islamic state, it has constitutional provisions similar to those recognised in liberal states, especially with regard to the recognition of the judicial review of constitutionality. It might even be true to say that the Islamic nature of the United Arab Emirates accords to the UAE constitutional settings a degree of moderation, especially with respect to the relationship between the individual and the community. The articles of the constitution, in particular those which are concerned with the specification of the rights and freedoms, do not seem to embrace the socialist position, nor do they follow the individualist pattern. Article 39, for example, is clearly against the philosophy of communism, in that it prohibits general confiscation; it states that "*General confiscation of property shall be prohibited...*" Moreover, Article 21 protects private property, opposing the socialist theory that believes in collective ownership. It states "*Private property shall be protected ...No one shall be deprived of his private property...*" However, the restraint that is imposed on private property

⁶⁸⁶ Ibid., Dr Al Mutawa Comments

⁶⁸⁷ Samir Salama, A landmark move, Gulf News Available Online at <http://archive.gulfnews.com/articles/05/12/27/10007783.html>

suggests that the constitution also does not put more emphasis on individualism.⁶⁸⁸ The same article refers to "*circumstances dictated by the public benefit in accordance with the provisions of the law and on payment of a just compensation*"; such a constraint does not seem to be, generally speaking, of an individualist nature. The constitution also contains some articles which may be considered as having more aspects of socialism than of individualism. For example, in Article 17, the right to education, and in Article 19 the right to medical care, shall be secured by the community; in Article 20 the right to work also shall be secured by the society, and it is emphasised in Article 24 that the basis of the national economy shall be social justice, founded on sincere cooperation between public and private activities. These articles are conceived by one commentator as of a socialist nature.⁶⁸⁹

It might be true to say, therefore, that some aspects of both ideologies, communal and individualist, are recognized by the UAE Islamic Constitution; however, jurists differ in asserting its position towards the society. Some suggest that the constitution has taken a moderate individualist stance that recognizes the role of society.⁶⁹⁰ Others claim that the constitution is a moderate socialist one that recognizes the importance of the individual.⁶⁹¹

This moderate position of the UAE Islamic Constitution seems to affirm the moderate stance of Islam towards the individual and the community. Islam, as discussed in chapter three, seems to recognize the two sets of rights, individual and societal, equally as fundamental principles and as cornerstones of any constitutional system. According

⁶⁸⁸Abulmajd, A., "Annizam Addustoori li Dawlat Al-Emarat Alarabyyah Almuttahedah", in: *Dawlat Al-Emarat Alarabyyah Almuttahedah: Derasah Mashhiyyah Shamelah*, op.cit., p.28

⁶⁸⁹Khaleel. M., op.cit., pp. 163-164

⁶⁹⁰Abulmajd, A., "Annizam Addustoori li Dawlat Al-Emarat Alarabyyah Almuttahedah", in: *Dawlat Al-Emarat Alarabyyah Almuttahedah: Derasah Mashhiyyah Shamelah*, op.cit., p.27

⁶⁹¹Khaleel. M., op.cit., p. 159

to the well known Muslim scholar Al Mawdudi, Islamic teaching prevents the state from intervening if the issue is concerned with the freedom of speech, while it imposes a positive obligation upon the state to intervene if the issue is concerned with basic needs of individuals.⁶⁹² Further, protecting the soul (individual's life) is one of the five most fundamental principles in Islamic law.⁶⁹³ In the language of human rights, this fundamental principle means the right to life. It includes social security and social responsibility to ensure health care and means of prevention and treatment of diseases.⁶⁹⁴ Islam, in protecting the life of the individual, it is actually attempting to prevent the circumstances that could lead to death.

IV.5.2. Islam is the Supreme Source of Legislation.

The Islamic nature of the UAE Constitution has been clearly stated in the UAE Constitution. Article 7 of the UAE Constitution states that "*Islam is the official religion of the Federation...*" which means that the UAE is an Islamic state as opposed to those that are of a secular nature.⁶⁹⁵ It is important to draw attention to the language used in the article. It states that "*Islam is the official religion*" which means that the religious values of the state are the Islamic values and there seem to be no room for other values of a religious nature to be applicable in the state public domain.⁶⁹⁶ Accordingly, the UAE as an Islamic state cannot make rules that contradict the Islamic rules; otherwise

⁶⁹² Al Mawdudi, A., *Tadween Addustoor Al-Islami*, (in Arabic), Mua'ssasat Arresalah, 1975, pp.61-62

⁶⁹³ Five elements are believed to be the most fundamental in Islam; Religion, Soul, Mind, Procreation, Property. For more details see Al Marzouqi, I., op.cit., p.142

⁶⁹⁴ Ja'aid, K., *Al-Islam wa Huqoq Alensan fi Doua' Almutaghayyerat Al'almiyyah*, (in Arabic), Jeddah: Mujamma'a Alfiqh Al-Islami, Third Session of the Organization of the Islamic Conference, p. 9

⁶⁹⁵ It must be born in mind that 'Islamic state' in this context is not to assert the theocratic nature of the state of the United Arab Emirates, because Islam, as we discussed in chapter three, does not believe in the theocratic theory of the concept of state, but Islamic state is used here to show that the principle embraced by the UAE Constitution is that Islam is the core of the UAE state's constitutional structures and hence religion is not separated from the state authorities.

⁶⁹⁶ Annadi, F., *Mabadea' Nezam Al Hukm fi Al-Islam*, (in Arabic), First Edition, Dubai: Albayan, 1999, pp. 85-86.

they would not be Islamic and may, hence, be unconstitutional.⁶⁹⁷ Consistent with this, Article 7 has reaffirmed such an Islamic character of the state by stating that "...*The Islamic Shari'ah shall be a main source of legislation in the Federation...*"

Some authors, however, have cited the Egyptian argument that was conducted within the Egyptian constitutional system on whether Islam is the source of legislation or a source of legislation, in the belief that the overall constitutional structure of the UAE is similar to the Egyptian one. Therefore, they argued, that as the UAE Constitution indicates in Article 7 that Islam is a source, it may imply that there are also other equal sources with Islam that the legislation can be derived from.⁶⁹⁸ But, the Federal Supreme Court in the application for constitutional interpretation no. 4 of the year no. 9, 25 December 1983 has interpreted Article 7 of the UAE Constitution as Islam is the principal source of legislation having primacy over other sources of law. The court explained its judgment by saying that Article 75 of Federal Law (10) 1973 obliges the UAE Courts to apply the Islamic Shari'ah as the dominant law and to abstain from applying any law that is inconsistent with the rules of Islam. The court further argued that the Egyptian argument over the source of legislation is not applicable to the UAE constitutional system because the UAE legislature has clearly revealed its intention in the Federal law No. 80 of the year 1973, which is concerned with the specification of the authority and the jurisdiction of the highest court in the land, the Federal Supreme

⁶⁹⁷ See Mutwalli, A., op.cit., 1990, p. 16.

⁶⁹⁸ Khaleel. M., op.cit., see Abulmajd, A., "Annizam Addustoori li Dawlat Al-Emarat Alarabyyah Almuttahedah", in: *Dawlat Al-Emarat Alarabyyah Almuttahedah: Derasah Mashdiyyah Shamelah*, op.cit., pp.26-27. More details about the Egyptian disputes in this regard were also cited in Al-Muhari, B.S.B.A., *Conflict and continuity: Islamization and modernization within the UAE penal law*, Ph.D., Kent, 1994. pp. 133-235. See also Annadi, F., op.cit., p. 85. See Mutwalli, A., op.cit., 1990, pp. 15-17

Court, which obliges the court to apply Islam as the principal supreme source of legislation.⁶⁹⁹ The main principle established by the Supreme Court in this case was

*“That, although it may appear from Article 7 of the constitution that Shari’ah is to be on an equal terms with other sources of law because it is referred to as “a main source” instead of “the main source” of law, the doubt has been removed by Article 75 in which the legislation has explained the intention from Article 7 of the constitution that Shari’ah is the principal source having supremacy over other sources of law.”*⁷⁰⁰

Further, the UAE Constitutional court has asserted that since the constitution reflects the desire of the rulers of the Emirates to implement its rules and the goals of the Federation, including progressing by steps towards a comprehensive representative, democratic regime in an *Islamic society*, this indicates that the cornerstone of the Federation is to have the Islamic Shari'ah as the supreme source of the state's authority.⁷⁰¹

Moreover, The Federal Supreme Court has already emphasized in its opinion of the case no. 22 of the year no. 6, 10 December 1985 that public morality in the UAE is defined by the religious values embraced by the society which is Islam, the source of the societal values as well as the source of the legislative and state authorities.⁷⁰²

The Islamic nature of the UAE Constitution has further been emphasised in many other cases, leaving no doubt that the Islamic Shari'ah in the UAE is the supreme source of

⁶⁹⁹ UAE Federal Supreme Court's Opinion in case no. 4 of the year no. 9, 25 December 1983, In: Aham Al-Ahkam wa Almabadia' Aljaza'iyyah allaty Qarraratha Almahkamah Al-Ittihadiyyah Al'aulya, (in Arabic), Sharjah: Jam'aiyyat Alhuqoqiyyeen, 1980, p. 12

⁷⁰⁰ Ibid., p., 16 See Al-Muhari, B.S.B.A., op.cit., p. 167. See also Al-Owais, H. R., op.cit., pp. 350-351.

⁷⁰¹ The UAE Supreme Court Decision in the Case no. 4, of the year no. 9

⁷⁰² See the UAE Federal Supreme Court's opinion in the case no. 22 of the year no. 6, 10 December 1985, See also the case no. 43 of the year no. 7, 24 February 1986

legislation.⁷⁰³ As Al-Muhari observed, the Supreme Court decisions place *beyond doubt the supremacy of the Shari'ah in the hierarchy of sources of law in the UAE* by which the *hudud* punishments *had to be enforced by the courts in the UAE* legal system.⁷⁰⁴ It is worth noting that according to Article 99 (4) of the constitution, the Federal Supreme Court's interpretation of the UAE constitutional provisions is binding on all.⁷⁰⁵

Thus, the UAE constitution is of an Islamic nature and, hence, every provision in this constitution, including the rights and freedoms, must be interpreted in the context of the teaching of Islam. For example, the double portion granted to men in inheritance may not be seen as an infringement of Article 25 of the UAE constitution, which suggests "*All persons are equal before the law...*" That is, this article may well be recognized within the context of the teaching of Islam which imposes this rule, suggesting that men should inherit more than women. It, rather, would be seen as an infringement of the article, if it was interpreted that men and women are to inherit equally.

A question arises, however; if the UAE constitution has such an Islamic character, with its own understanding of people's rights, will that lead to any tension between the UAE constitutional provisions and the requirements of the international human rights law?

⁷⁰³ See the UAE Federal Supreme Court's opinion in the case no. 17 of the year no. 7, 27 May 1985. See also the UAE Federal Supreme Court's opinion in the case no. 43 of the year no. 7, 24 February 1986. Moreover, see the UAE Federal Supreme Court's opinion in the case no. 20 of the year no. 6, 21 May 1986.

⁷⁰⁴ Al-Muhari, B.S.B.A., *op.cit.*, p. 168

⁷⁰⁵ Article 99 (4) states that "*Interpretation of the provisions of the constitution, when so requested by any Federal authority or by the government of any Emirate. Any such interpretation shall be considered binding on all.*"

IV.5.3. The Flexibility of the UAE Judicial Application of the Shari'ah Law

Although the UAE Federal Supreme Court has stressed the exclusive Islamic character of the UAE constitution in its interpretation of Article 7 in several cases mentioned above, it does not seem to politicize a certain rigid vision of Islam in tackling the state political and constitutional functioning. It seems to be, as will be seen below, more inclined to recognise Islam in this respect in its universal sense and seems to avoid employing the understanding of one particular school. In several cases, as will be examined below, the UAE Federal Supreme Court has asserted that Islam is comprehensive enough to accommodate secular laws within its rules and hence Islamic law and secular law are not necessarily incompatible. For example, in the application for constitutional interpretation no. 4 of the year no. 9, 25 December 1983, the Federal Supreme Court asserted that a state punishment that was not derived from the Islamic Shari'ah in *hadd* crime does not necessarily mean a contradiction with the constitutional principle that Islam is the supreme source of legislation. This particular point is of significance and needs further explanation.

The application for constitutional interpretation no. 4 of the year no. 9, 25 December 1983 was submitted by the Court of Appeal, which was in doubt as to the validity of the local law of Abu Dhabi no. 8 of the year 1976 concerning the crime of drinking alcohol, which provides in Article 17 a punishment different from the Islamic *hadd*. The Court of Appeal noted that Article 7 of the constitution stated that Islam is a main source of legislation and the Federal law no. 10 of the year 1973 affirmed this principle and compelled the Federal Supreme Court and all Federal Courts to apply Islamic Shari'ah as the supreme source of legislation. It feared that the Abu Dhabi law no. 8 of the year 1976, which states in its Article 17 that the punishment of a person found drunk in a

public place is imprisonment for a period not less than two months and not exceeding one year or a fine not less than 500 Dirhams and not exceeding 2000 might be unconstitutional, since the punishment is different from the Islamic *hudud* of 40 to 80 lashes. However, the Federal Supreme Court asserted that different punishment does not mean contradiction and according to the Islamic *fiqh* the political leader is permitted to establish laws and punishments alongside the Islamic Shari'ah, even if they contain different rules and punishments.⁷⁰⁶ This is called *ta'zir* and it is part of the application of Islamic Shari'ah. In respect of the crime of drinking alcohol, the court argued, the Islamic punishment of *hadd alkhamr* will undoubtedly be applied if it is proven that the offender has drunk alcohol and this act of drinking is enough to invoke the punishment of *hadd*. That is because the mere act of drinking is the one which is forbidden, without looking at the result of the act. However, to reach this conclusion it must be proven that the offender was aware of the nature of the material he was drinking, in the sense that he intended to drink alcohol. If it was proven that a person has drunk alcohol with knowledge and intention, then the court could not apply any other punishment than the Islamic *hadd*. It went further to argue that this does not mean that the political leader cannot legislate another law tackling the same issues. If the leader has proven that there is a proper interest for the Muslim community in legislating another law to be applied in the same domain as the Islamic Shari'ah and that this would prevent clear harm, it would be islamically permissible.⁷⁰⁷ On that basis the court suggested that the Abu Dhabi local law no. 8 of the year 1976 concerning the drinking of alcohol is not contrary to the constitution and must be applied alongside the Islamic *hadd*. The court further explained that the main concern of the Abu Dhabi law is not the mere act of drinking alcohol, as Islamic law requires, but for the law to be applied, the act must be

⁷⁰⁶ See the UAE Federal Supreme Court's opinion in the case no. 4 of the year no. 9, 25 December 1983

⁷⁰⁷ This a clear application of the doctrine of *Siyasah shar'iyah* or legitimate governmental policy, discussed in chapter three of the study.

committed in *public* places.⁷⁰⁸ The crime mentioned in Article 17 of the Abu Dhabi local law under question is *more than just consumption of alcohol, and includes acts committed by non-Muslims as well as Muslims.*⁷⁰⁹ Hence, the secular law in this sense seems to be complementing the Islamic Shari'ah law rather than contradicting it.

Moreover, in other striking cases demonstrating the flexibility of the UAE judicial application of the Shari'ah law, the Dubai Supreme Court suggests that clerics and religious leaders have no authority in the legal proceedings and that judges, in the application of law based on Shari'ah, must not use their own understanding of Islamic law. In the cassations no. 43 of the year 1997, no. 53 of the year 1997, no. 56 of the year 1997, and no. 57 of the year 1997, the Dubai Supreme Court contends that Judges do not apply the Islamic Shari'ah, but law that is issued by the legislature. The court has suggested that Article 7 of the UAE constitution obliges the legislature, not the courts, to use the Islamic Shari'ah as the supreme source of legislation and the authority of the courts is to apply the Shari'ah based law as specified by the legislature, not as envisaged by judges.⁷¹⁰

It might be true to say that this decision was intended to be applicable to cases where relevant laws exist but in matters where there is no relevant law, the judges might be in a position to use their understanding of the Islamic Shari'ah to give a verdict. This is evidenced by Article 75 of Federal Law (10) 1973 obliging the UAE Courts to apply the Islamic Shari'ah as the dominant law in the UAE legal system. However, the judges are not left without rules controlling the scope of the Islamic rules to which the judges are limited in tackling these matters. Article 1 of the UAE Civil Transaction Code makes it

⁷⁰⁸ See the Federal Supreme Court's opinion in the case no. 4 of the year no. 9, 25 December 1983.

⁷⁰⁹ Al-Muhari, B.S.B.A., op.cit., pp. 167-168. See also Al-Owais, H. R., op.cit., pp. 350-351.

⁷¹⁰ See Dubai Supreme Court decision in the cassations no. 43 of the year 1997, no. 53 of the year 1997, 56 of the year 1997, and no. 57 of the year 1997.

clear that there would be no judicial *Ijtihad*, mental effort, where there is a clear provision of law. If a judge finds no provision of law, tackling the issue, he has to pass judgement according the Shari'ah law. However, the article obliges judges to choose among certain of the most widely-recognised Islamic schools in an effort to make the judgement more predictable. The article states

*“There shall be no innovative reasoning Ijtihad in the case of provisions of definitive import. If the judge finds no provision in this law, he has to pass judgement according to the Islamic Shari'ah but he must choose the most appropriate solutions from the schools of Imam Malik or Imam Ahmed bn Hanbal, and if none is found there then from the schools of Imam Alshafi and Imam Abu Hanefah as most benefits. If the judge does not find the solution there, then he must render judgement in accordance with custom, provided that the custom is not in conflict with public order or morals.”*⁷¹¹

This UAE legal principle challenges the argument, which suggests that the application of Islamic Shari'ah will place legal proceedings and important judicial decisions under the control of clerics and religious leaders, which, since the Shari'ah was shaped by very diverse opinions, would make the judicial judgements uncertain.⁷¹²

In another step away from the domination of certain religious understandings over some important fields, like civil transactions and contract law, the Federal Supreme Court has

⁷¹¹ See Article 1 of the UAE Civil Transaction Code 1985. For more information about this article see Ashamsi, J. A., op.cit., p. 18. It must be pointed out that legalizing certain Islamic schools to make the application of the Shari'ah law more predictable as stated in the Article 1 of the UAE Civil Transaction Code does not amount to politicizing certain Islamic schools with a certain understanding of Islam as a basis of the state's constitutional ideology, as happens in Iran. The article here is organizing a pure legal issue not a constitutional or ideological matter, in the sense that the law, here, is obliging the court to follow these schools, not the legislature. The legislature in the UAE can, if it wishes, change these schools or remove the article itself at any time.

⁷¹² See Mayer, A. E., op.cit., 1999, pp. 28, 66-67

observed in cases no. 363 and no. 380 of the year 20, 30 April 2000 that civil transactions and contract law in the UAE legal system are not exclusively reserved to a certain type of court; neither the civil court nor the Islamic court. Rather, both types of court have been given the right to examine cases of such a nature and it is up to the contract parties to decide to which court they will bring their case.⁷¹³ This recognition of both types of judicial jurisdictions, civil court jurisdiction and Islamic court jurisdiction, on an equal footing, in relation to contract law and civil transactions, is a clear judicial effort to affirm the coexistence of both laws, whether that which is enacted by humans or that which is revealed by God. There does not seem to be, as the UAE judicial practices might suggest, an Islamic obstacle to accommodate laws that are derived from human logic and reasoning, so long as this law is not enacted to replace the Islamic fixed rules.

Moreover, the UAE judicial application of the Shari'ah law has even gone beyond the mere acceptance of law that does not traditionally fall within the Shari'ah law, although not conflicting with it, but extends to include, albeit temporarily, elements that are traditionally perceived to be in clear contradiction with the Islamic Shari'ah, like *riba* (interest on loans). Although the Federal Supreme Court has recognized the Islamic prohibition of loan interest in any bank transactions, in its opinion in the case no. 245 of the year 20, 7 May 2000 it permitted necessary interest in bank transactions, so long as there is no other way in which people's basic needs can be satisfied.⁷¹⁴ The court in these opinions seems to be employing the Islamic doctrine of *Siyasah Shar'iyah*, which was discussed in chapter three, which is based on the exigencies of realities that sometimes even permit suspension of some Islamic rules.

⁷¹³ See the UAE Federal Supreme Court's opinion in cases no. 363 and no. 380 of the year 20, 30 April 2000

⁷¹⁴ See the UAE Federal Supreme Court's opinion in the case no. 245 of the year 20, 7 May 2000.

Accordingly, despite the UAE's strong constitutional endorsement of the Islamic Shari'ah as the supreme source of law, nothing, as it seems from the practice, prevents the legislature in the UAE from enacting law derived from human logic and reasoning, in so long as this law does not conflict with the main fixed principles of Islamic Shari'ah.⁷¹⁵ However, if the law is in clear contradiction with the Islamic rules the court must abstain from applying the inconsistent law⁷¹⁶ and instead the court should refer it to the Federal Supreme court to examine its constitutionality.⁷¹⁷ Even contradictory law can be allowed if there is no other way, at all, in which people's basic needs can be satisfied. Thus, the UAE's main principle of the supremacy of the Shari'ah law does not seem to indicate an application of the Shari'ah in its strict sense. This judicial approach by the UAE in the application of the Islamic Shari'ah seems to follow the school of Ibn Al-Qayyem, one of the most respected Muslim scholars discussed in chapter three. It implies that the application of the Shari'ah law does not necessarily require that a particular action should be in conformity with the Islamic Shari'ah in its strict sense, but rather, is concerned with its consistency with the main fixed objectives of Islam.⁷¹⁸ In other words, it is an application of the *Siyasah shar'iyah*, discussed in chapter three, which balances competing Islamic interests and prioritises the most useful interests by sacrificing a less useful one, or avoids the most evil action by accepting a less evil one.⁷¹⁹

Consistent with this moderate approach taken by the Federal Supreme Court in the application of the Islamic Shari'ah, the Court of Appeal in Abu Dhabi has in several

⁷¹⁵ See the UAE Federal Supreme Court's opinion in the case no. 4 of the year no. 9, 25 December 1983 discussed above

⁷¹⁶ See Article 75 of the UAE Federal Law (10) 1973

⁷¹⁷ See Paragraph 3 of Article 99 of the UAE constitution which allows the Supreme Court to examine the constitutionality of laws, legislations and regulations if such a request is referred to it by any Court in the country.

⁷¹⁸ Ibn Al-Qayyem, op.cit., 1991, p. 22. see our discussion of the doctrine of *Siyasah shar'iyah* in chapter three

⁷¹⁹ Ibn Taymiyah, op.cit., 1993, p. 67

cases prioritized the moderate opinions of the Islamic *fiqh* in the application of Islamic principles.⁷²⁰ One of these cases is case No. 8533/2003.

Case No. 8533/2003 was an adultery case in which each of the accused persons was already married. According to Islamic law, the punishment of a married person who commits the crime of adultery is stoning to death, provided the conditions of the application of this *hadd*, like being free from any doubt, and the availability of four witnesses, are satisfied. In this case, the illegal act of adultery had resulted in a pregnancy and both of the accused had confessed before the first court that they had entered into illegal sexual intercourse and the pregnancy was the result. However, in the Court of Appeal, both of the accused reverted and denied the crime. Although the Court of Appeal recognized that the punishment that must be applied to this case was the *hadd* of adultery, which is stoning to death, it decided that the denial of the crime that was made before it was enough to constitute the doubt that would invalidate the *hadd*, especially in the absence of four witnesses. It went on to argue that the denial of a confession is valid even if it was not explicitly conveyed, for example by escaping from the punishment after the confession has been made.⁷²¹ The court went on to argue that pregnancy, according to some Islamic scholars, is not powerful enough evidence to indicate the commission of adultery. Although the pregnancy may form evidence of the crime of adultery, it is also possible that it may have resulted from legitimate sexual intercourse, since the woman accused was already married. As a result, the court concluded, the *hadd* of stoning was not applicable to this case, since the evidence was not powerful enough to apply the *hadd*, although the court was convinced that the crime

⁷²⁰ See the Abu Dhabi Court of Appeal decision of 6/1/2003 on the case No. 9808/2002. See also the Abu Dhabi Court of Appeal decision of 30/11/2004 on the case No. 8533/2003. In these two recent cases the court has laid down a principle, indicating that the denial of confession is enough to constitute doubt that invalidates the *hadd*.

⁷²¹ See the Abu Dhabi court of appeal decision, p. 4

of adultery had been committed.⁷²²

A similarly moderate reading of the Islamic Shari'ah was also demonstrated in the Dubai Supreme Court in the cassation no 70 of the judicial year 2000, 18/2/2001. The cassation was brought against the Dubai Court of Appeal's ruling on inheritance issues, in which it upheld the Dubai court's decision that the inheritance of the deceased must go to the children of the deceased's sister and the children of the son of the deceased's brother, as they were the only relatives of the deceased. However, the claimant alleged that the deceased person had been a slave of the claimant's father and hence the deceased's inheritance must be transferred to her master instead of her natural inheritants. That is because, the claimant argued, in Islam a slave person and all of his belongings are owned by his or her master, and therefore as the claimant's father was the deceased's master, the belongings of the deceased must be transferred to the master's heirs and not those of the deceased.⁷²³

The Dubai Supreme Court, however, rejected this claim and asserted that at the present time, the condition of slavery has disappeared and has been internationally prohibited. The court went on to justify its opinion that Islam has never permitted such an act; rather Islam was mainly revealed to eliminate any kind of slavery or servitude to mankind and heavily stressed within its rules that this practice, which was very common in former times, should be abandoned. The court cited many evidences that urged to abandonment of this practice according to the Islamic *fiqh* and also extracted evidences

⁷²² The court found both of the accused persons guilty of committing adultery and punished them with 90 lashes and imprisonment for a period of one year, not as a *hadd* but as a *ta'zir* punishment. Ibid., p. 5

⁷²³ See the claimant argument in Dubai Supreme Court, cassation no 70 of the judicial year 2000, 18/2/2001.

from the Holy Quran and the sayings and practices of the prophet, peace be upon him.⁷²⁴

Nevertheless, although there seems to be a judicial willingness to soften the application of the Islamic rules and punishments through the moderate Islamic *fiqh* for the benefit of human life and dignity, the UAE courts in their efforts have not made any reference to the international instruments of human rights or international customary norms. The Dubai Supreme Court, for example, stressed in the cassation no 70 of the judicial year 2000, 18/2/2001, mentioned above, the Islamic stance on slavery, but without giving a proper reference to the international effort in the abolition of slavery, which is the core element of the international human rights movement. The judiciary in the UAE might have feared that such reference to the international norms of human rights would undermine the basis of the Shari'ah law.

IV.6. The UAE Constitution and the International Human Rights

This section will discuss the position of human rights in the UAE constitution. It will first discuss what rights and freedoms the UAE constitution recognises. Then, the human rights treaties that the UAE has signed will be presented. A question of whether the other rights recognised in the international community, and which are not stated in the UAE constitution and not embodied in the human rights treaties to which the UAE is party, are also applicable in the UAE jurisdiction will be analysed. The International reports of international human rights organizations concerning The UAE and some other Islamic states will also be examined.

⁷²⁴Ibid., the court decision

IV.6.1. Constitutional Specification of the Rights and Freedoms in the United Arab Emirates

It is believed that a substantive feature of the UAE constitutional system is the entrenchment of the rights and freedoms within the text of the constitution, giving the rights entrenched constitutional superiority in the hierarchy of the UAE legal system.⁷²⁵

As a result, the constitutional legislature in the UAE has avoided the uncertainty on the status of these rights that might arise otherwise.⁷²⁶ Although these rights are clearly specified in the constitution, there are no clear, specific, judicial decisions nor other guidance concerning the matter that could help in identifying the UAE approach to right implementation. The lack of judicial decision on human rights could be due to the recognized social values of Arab tribes, which encourage people to solve their problems peacefully through tribal *Majles* by wise and more influential people. In the Arab tribal system, people can even gain access to the ruler and complain to him directly without any need to go to court.⁷²⁷ Moreover, the extreme wealth that resulted from the oil industry seems to have triggered popular satisfaction, even if some constitutional rights had been at stake. Thus, as a result of the lack of judicial decisions on human rights, it was difficult to identify the UAE approach of rights implementation within the context of Islamic law. Therefore, I will specify the rights and freedoms embodied in the UAE constitution by indicating briefly each right and its constitutional sources, derived from different parts of the constitution in order to give a general understanding of the constitutional rights within the overall structure of the UAE constitution. I will give

⁷²⁵ For more about the different approaches taken by the states to secure human rights in the constitutional settings see our discussion in Chapter Two. See also Darrow, M. and Alston, P., "Bills of Rights in Comparative Perspective", In. Alston, P., op.cit., 1999, p.466

⁷²⁶ An example of the uncertainty that might have risen if the rights of people were not entrenched in the body of the constitution is France. France's constitution included the rights of people in the preamble which raised then a question of whether the inclusion of the rights of people in the preamble of the constitution, and not in the main body, is enough for them to be regarded as constitutionally binding rights. There was a strong debate over this issue until they were given constitutional value by the French Constitutional Council in 1971. See our discussion in Chapter Two. See also Sroor, A., op.cit., p. 67

⁷²⁷ Al-Ghufli, S., op.cit., p., 254

explanations of these rights in the light of the international supervision of the international human rights body.

IV.6.1.1. Traditional Rights and Freedoms

What is meant by traditional rights and freedoms, here, is those which are stipulated in the Covenant of Civil and Political Rights. Although the UAE is not party to this Covenant, the discussion will be in the light of the general comments of the Human Rights Committee, on the Covenant provisions, since they are the most recognisable explanation of the rights of a civil and political nature which are contained in the Universal Declaration of Human Rights.

IV.6.1.1.1. Non-Discrimination

Equality before the law, without discrimination, has been recognised in Article 7 of the Universal Declaration of Human Rights. The Covenant of Civil and Political Rights has laid down further details on the meaning and bans any discrimination or distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.⁷²⁸ However, Article 25 of the UAE constitution guarantees freedom from discrimination only in regard to race, nationality, religious belief or social status. It does not, for example, prohibit distinction as to sex in the sense that men may well under the UAE constitution be accorded different treatment from that provided for women. In light of this, Article 14 of the UAE constitution, which talks about equality and social justice for all citizens, does not seem to include equality in every aspect between men and women. This is evidenced by the UAE rules of inheritance and the UAE personal law, which do not seem to give the

⁷²⁸ General Comment No. 18: Non-discrimination :10/11/89. CCPR General Comment No. 18. Paragraph 1

equality of treatment that may be envisaged by the international body.⁷²⁹ This stance of the UAE Constitution is in line with its Islamic nature, which provides rules that, as discussed in chapter three, do not necessarily discriminate but differ in treatment between men and women in certain aspects.⁷³⁰

IV.6.1.1.2. The Right to Life and the Freedom from Torture or Cruel, Inhuman or Degrading Treatment or Punishment

The right to life enshrined in Article 3 of the Universal Declaration of Human Rights is recognised by the Covenant of Civil and Political Rights as the supreme right, from which no derogation is permitted.⁷³¹ Similarly, the freedom from torture and inhuman treatment or punishment is also as important as the right to life, since it lies at the heart of the integrity and dignity of human being. Therefore, the Human Rights Committee has reminded the states parties to the Covenant of Civil and Political Rights that this right, along with the right to life, even in situations of public emergency, are non-derogable.⁷³² The UAE Constitution guarantees in Article 26 freedom from torture or degrading treatment. However, the Committee's understanding of torture extends beyond torture as normally understood, to include corporal punishment, including

⁷²⁹ See Paragraph 6 of the General Comment No. 18 It states that "*discrimination against women*" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field." In chapter 5 we will see more analysis about the compatibility of Islamic law with the international standards in particular with regard to the freedom from discrimination.

⁷³⁰ Kuwait is the only Gulf state that has ratified the civil and political rights Covenant and indicated clearly, when it made its declaration with regard to the application of Article 23 of the Covenant that the Article conflicts with Islamic law on which the Kuwait personal law is based and hence it reserved the right, where the provisions of that article conflict with Kuwaiti law, to apply its national law. See Declaration and Reservation, available online at http://www.ohchr.org/english/countries/ratification/4_1.htm

⁷³¹ General Comment No. 14: Nuclear weapons and the right to life (Art. 6) : . 09/11/84.

CCPR General Comment No. 14. Paragraph 1

⁷³² General Comment No. 07: Torture or cruel, inhuman or degrading treatment or punishment (Art. 7) : 30/05/82., Paragraph 1. For more information about the right to life see General Comment No. 06: The right to life (art. 6): 30/04/82.CCPR General Comment No. 6.

excessive chastisement as an educational or disciplinary measure.⁷³³ According to the UAE Federal penal law which applies the Shari'ah law as the basic criminal law, it is clear that the UAE understanding of this right is very different.⁷³⁴ It applies the Islamic *hadd* of lashing as an acceptable legal punishment. It is worth noting that the right to life is not guaranteed under the UAE constitution and hence stoning to death has also been recognised by the UAE legal system as an acceptable punishment.⁷³⁵ This might be seen as a point of conflict with the international understanding of right to life and freedom from torture or cruel, inhuman or degrading treatment or punishment. In addition, Article 26 of the UAE constitution also guarantees another important right which is the right to freedom from arbitrary arrest, search, detention or imprisonment except in accordance with provisions of law.

IV.6.1.1.3. The Right to Freedom of Thought, Conscience and Religion

The right to freedom of thought, conscience and religion is perceived by the international human rights body as far reaching and profound; it includes freedom of thought on all matters, personal conviction and the commitment to religion or belief, whether manifested individually or in community with others.⁷³⁶ The international body distinguishes the freedom of thought, conscience, religion or belief from the freedom to manifest religion or belief and does not allow any restriction or limitations whatsoever on the freedom of thought and conscience or on the freedom to have or adopt a religion or belief of one's choice, including the right to replace one's current religion or belief

⁷³³ Ibid., Paragraph 2

⁷³⁴ See our discussion above about the UAE judicial application of the Islamic Shari'ah

⁷³⁵ It must be remembered that the UAE court in the case no. 8533/2003, cited above, did not apply the *hadd* punishment of stoning to death to the married man and women, who entered illegal sexual intercourse, not because the Islamic punishment is not applicable in the UAE legal system, but because the conditions of the application of punishment of the *hadd* for that particular case, as explained in the case, were not satisfied.

⁷³⁶ General Comment No. 22: The right to freedom of thought, conscience and religion (Art. 18) :30/07/93., Paragraph 1

with another.⁷³⁷ However, under the UAE constitution the freedom of thought and conscience, religion or belief as envisaged by the international body does not seem to be protected at all. Article 32 of the UAE constitution only guarantees freedom to exercise religious worship and that is restricted *with established customs, provided that it does not conflict with public policy or violate public morals*. As the UAE constitution is Islamic in nature, as will be seen below, the right to replace one's current religion or belief with another is prohibited.

IV.6.1.1.4. Freedom of Expression

The international human rights instruments differentiate between freedom of opinion and freedom of expression. Freedom of opinion in international instruments means the "right to hold opinions without interference" and this kind of right permits no exception or restriction. Freedom of expression is recognised as freedom to "impart information and ideas of all kinds", and to "seek" and "receive" them "regardless of frontiers" and in whatever medium, "either orally, in writing or in print, in the form of art, or through any other media of his choice".⁷³⁸ Unlike freedom of opinion, freedom of expression is subject to restrictions and limitations.⁷³⁹ However, Article 30 of the UAE constitution does not differentiate between freedom of opinion and freedom of expression and hence the limit stated in the Article appears to apply to both of them. The Article states, "*Freedom of opinion and expressing it verbally, in writing or by other means of expression shall be guaranteed within the limits of law.*" It is not clear how freedom to hold an opinion can be limited in the UAE legal system, since there is no law imposing any limit on freedom of opinion. However, freedom of expression, in particular, is

⁷³⁷ Ibid., Paragraph 3 and Paragraph 5

⁷³⁸ General Comment No. 10: Freedom of expression (Art. 19) : . 29/06/83.CCPR General Comment No. 10. Paragraph 2

⁷³⁹ Ibid., paragraph 4

limited by the UAE Federal Law No. 15 of 1980 concerning publication and publishing. The law provides a chapter of 15 articles specifying the banned matters which the publisher must not touch. Examples of these matters are: publishing any insult to Islam, making direct criticism of the person of the state president or the governors of the emirates, publishing anything that damages the reputation of any Arab or Islamic state or any other friendly state, publishing opinions violating public decency, material that incite hate crimes, confidential communications or military affairs. Article 89 states that any person who makes direct criticism of the person of the state president or the governors of the Emirates will face either or both of imprisonment for a minimum of six months and a maximum of two years and a fine varying between five thousand Dirhams and ten thousand Dirhams.⁷⁴⁰

IV.6.1.1.5. Political Rights and Freedoms

Political rights and freedoms, such as the right of every citizen to take part in the conduct of public affairs, the right to vote and to be elected and the right to have access to public service are recognised by the international body as lying at the core of democratic government, which is based on the consent of the people.⁷⁴¹ However, the

⁷⁴⁰ Article (98) of the same law reiterates the banned areas and states: “The press is free within the limits of the law. Serving, suspending or cancelling a journal administratively is forbidden unless its circulation offends the Islamic doctrine, incites against the regime, harms the higher interest of the state or publishes articles that abuse their constitutional principles, especially the concept of unity, union and threatening the public order or serves foreign interests that are inconsistent with the national interest, or if it appears that the journal has received from any foreign state aid, help or profit of any kind, for any reason or under any pretext or name or has published the thought of any adversary state or revealed the military secrets or published what may touch the main basis of the society and news or information articles leading to trouble the public opinion that contradicts the necessities of the national interest. The government may – upon the proposition of the Minister of Information and Culture – promulgate a decision in the previous cases to suspend the journal for a maximum of one year or cancel the journal’s permit. The government may also decide to suspend the journal for a maximum of one year if it publishes banned matters mentioned in Articles 70, 71, 72, 75 et 80. The decision to suspend or cancel the permit does not deny the right to criminally sue the perpetrators and impose the civil indemnities. The journal may be stopped for a maximum of two weeks by virtue of a decision from the minister notified to the government in case of urgent need and in the cases mentioned in the previous paragraph.”

⁷⁴¹ General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25) : 12/07/96., paragraph 1

UAE constitution does not guarantee this group of political rights. The UAE constitutional system is not yet democratic and hence recognises a different kind of political rights that are more concerned not with the formation of the political decision but with what might result from the undemocratically taken decision. Article 41 of the UAE constitution guarantees the right to submit complaints to the competent authorities, concerning the abuse or infringement of the rights and freedoms stated in the constitution.⁷⁴² This absence of the democratic rights makes it unclear whether all the constraints imposed to limit the rights guaranteed under the UAE constitution are permissible from perspective of the international instruments. That is because, it is universally recognised that limitations are permissible only if prescribed by law and necessary in a “democratic” society.⁷⁴³

Most of the other civil and political rights entrenched in the UAE constitution, like freedom of assembly⁷⁴⁴, the right of fair trial⁷⁴⁵, the right of communication,⁷⁴⁶ the right of privacy⁷⁴⁷, generally speaking, do not raise clear conflict with the international human rights instruments. However, freedom of movement and residence secured under

⁷⁴² Alrokn. M, "Huqoq Alensan fi Addustoor Almua'qqat le Dawlat Al-Emarat: damanat wa qoud", In: Al Alrokn. M, *Huqoq Alensan Bayn Attanzeem wa Alestibahah*, (in Arabic), Dubai: Albayan, 1999, p. 98

⁷⁴³ The International Covenants refer to democracy as a precondition to permit limitations on the covenants' rights in 5 Articles; Article 14, Article 21 and Article 22 of the International Covenant on Civil and Political Rights and Articles 4 and 8 of International Covenant on Economic, Social and Cultural Rights. The European Convention of Human Rights also refers to democracy in almost all limitation clauses. The limitation clauses will be further discussed in chapter 5

⁷⁴⁴ Article 33 of the UAE constitution states that “Freedom of assembly and establishing association shall be guaranteed within the limits of law.”

⁷⁴⁵ Article 28 of the UAE constitution states that “The penalty is personal. An accused shall be presumed innocent until proved guilty in a legal and fair trial. The accused shall have the right to appoint the person who is capable to conduct his defence during the trial. The law shall prescribe the cases in which the presence of a counsel for defence shall be assigned. Physical and moral abuse of an accused person is prohibited.”

⁷⁴⁶ Article 31 of the UAE constitution states that “Freedom of communication by post, telegraph or other means of communication and the secrecy thereof shall be guaranteed in accordance with law.”

⁷⁴⁷ Article 31 states the secrecy of the right to communication shall be guaranteed in accordance with law. Article 36 of the UAE constitution also states that “habitations shall be inviolable. They may not be entered without the permission of their inhabitants except in accordance with the provisions of the law and in circumstances laid down therein.”

Article 29 and freedom from deportation secured under Article 37 are limited to the UAE citizens.⁷⁴⁸

IV.6.1.2. Social and Economic Rights and Freedoms

IV.6.1.2.1. Right to Work

Since the right to work contributes to the survival of the individual and his or her family, it is a very fundamental right, and recognised in several important international legal instruments.⁷⁴⁹ The right to work includes the individual's right to choose or accept work freely, and the right not to be deprived of work unfairly.⁷⁵⁰ The UAE constitution guarantees the right to work under Article 20, suggesting that employment shall be secured for all citizens. The significance of this article is that it requires national legislation concerning the relationship between employees and employers to be compatible with the developing international labour law. The final sentence of the article requires the state to provide legislation protecting the rights of employees and the

⁷⁴⁸In this sense aliens in the UAE have no constitutional standards governing their expulsion. It is worth noting that Article 13 of the covenant of civil and political rights specifies standards governing the expulsion of an alien lawfully entered a state territory, which states:

"An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority."

⁷⁴⁹Committee in Economic and Social Council, The Right to Work, Article 6 of the International Covenant on Economic, Social and Cultural Rights, General Comment 18, Adopted on 24 November 2005, paragraph 1. Examples of International Instruments on the Right to Work are: Article 23 of Universal Declaration of Human Rights, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Articles 6, 7, and 8 of International Covenant on Economic, Social and Cultural Rights, Articles 8 and 22 of International Covenant on Civil and Political Rights, Article 32 of the International Convention on the Rights of the Child, Article 11 of the International Convention on the Elimination of All Forms of Discrimination against Women, Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination. See also the ILO Conventions, including Forced Labour Convention, Equal Remuneration Convention, Abolition of Forced Labour Convention, Employment Policy Convention, Occupational Safety and Health Convention, Employment Promotion and Protection against Unemployment Convention Work

⁷⁵⁰Committee in Economic and Social Council, The Right to Work, Article 6 of the International Covenant on Economic, Social and Cultural Rights, General Comment 18, Adopted on 24 November 2005, paragraph 4

interests of employers “*in the light of the developing international labour law.*” It is worth noting that the constitutional provision of the right to work in the UAE guarantees the right to work to all citizens without differentiation according to sex between men and women. Women in the UAE have been promoted to take part in the development of all areas of their society and to take up high-ranking positions. In the recent cabinet two women ministers have been appointed to serve two ministries; the Ministry of Social Affairs and the Ministry of Economy.⁷⁵¹ The UAE Constitution affirms the right to work that is fully guaranteed under the Islamic Shari’ah for all, men and women,⁷⁵² in legal terms which are applied throughout the country.

Article 34 also guarantees the freedom to choose an occupation, trade or profession *within the limit of law.* Moreover, Article 34 prohibits forced labour *except in exceptional circumstances provided for by the law and in return for compensation.* It also prohibits slavery, unconditionally.

IV.6.1.2.2. Right to Education

The right to education is internationally recognised as a human right in itself and as an indispensable means of realizing other human rights.⁷⁵³ Education empowers women to participate in their communities, and safeguards children from exploitative and hazardous labour and sexual exploitation.⁷⁵⁴ The UAE constitution realizes the importance of the right to education and guarantees in Article 17 the right to education as compulsory in its primary stage and free of charge at all stages. Article 18 also urges

⁷⁵¹ New UAE Cabinet hailed, Khaleej Times Online, 11 February 2006, Available Online at http://www.khaleejtimes.com/Displayarticle.asp?section=theuae&xfile=data/theuae/2006/february/theuae_february313.xml

⁷⁵² See more information about the right to work under the Islamic Shari’ah in Baderin, M., op.cit., pp. 176-181

⁷⁵³ Committee in Economic and Social Council, The right to education (Art.13) : 08/12/99. E/C.12/1999/10. (General Comments), paragraph 1

⁷⁵⁴ Ibid. paragraph 1

the society to provide education for its people but *subject to the provision of the competent public authorities and to their directive.*

IV.6.1.2.3. Right to Private Property

Article 21 guarantees the right of private property and provides that *no one shall be deprived of his private property except in circumstances dictated by the public benefit in accordance with the provisions of the law and on payment of a just compensation.*

Moreover, Article 39 prohibits confiscation of an individual's possession as a penalty *except by a court judgment in circumstances specified by law.* Furthermore, in an attempt to prevent any kind of class differences, the constitution states in Article 22 that *public property shall be inviolable* and in Article 23 states that *the natural resources and wealth in each Emirate shall be considered to be public property of that Emirate.*

IV.6.1.2.4. Right to Social Security

The right of everyone to social security has been recognised in Article 9 of ICESCR. The Islamic Shari'ah, as practised in the early Islamic state, also imposes the concept of social security as the state's duty to ensure the basic well-being of every member of the Islamic society.⁷⁵⁵ Article 16 of the UAE constitution translated this Islamic principle into a legally binding constitutional provision. The article states that *"society shall be responsible for protecting childhood and motherhood and shall protect minors and others unable to look after themselves for any reason, such as illness or incapacity or old age or forced unemployment. It shall be responsible for assisting them and enabling them to help themselves for their own benefit and that of the community. Such matters shall be regulated by welfare and social security legislation"*.

⁷⁵⁵ Baderin, M., op.cit., p., 189

Nevertheless, there are many important rights that are mentioned in the international instruments of human rights are not included in the UAE constitution, like the right to life, the right to vote, the right of minority to enjoy their own culture, to profess and practise their own religion and to use their own language, the right to peaceful assembly and others. A question arises, therefore, whether the international rights and freedoms recognised in the international human rights instruments have legal force in the UAE domestic legal system.

IV.6.2. The UAE Constitutional stance towards International Principles of Human Rights

The United Arab Emirates has not, in fact, ratified the most important treaties in the realm of human rights; the Covenant on Civil and Political Rights, and the Covenant on Economic, Social and Cultural Rights. However, it has ratified some other conventions concerning labour rights, such as the Convention Concerning Forced Labour 1930, the Convention Concerning Equal Remuneration 1951, the Convention Concerning the Abolition of Forced Labour 1957, and the Convention Concerning Minimum Age 1973. It has also ratified the International Convention on the Elimination of All Forms of Racial Discrimination 1966, and the United Nations Convention on the Rights of the Child 1989.⁷⁵⁶ It has very recently ratified Convention on the Elimination of All Forms of Discrimination against Women 1979.⁷⁵⁷ The main reason for not ratifying the two Covenants, which may be regarded as a comprehensive international bill of rights, and preferring, instead, to select specific rights to be implemented, might not be the unwillingness of the UAE to implement human rights and fundamental freedoms, but

⁷⁵⁶ See Zayid Centre for Coordination & Follow-up, *Huqoq Alensan wa Waqi'aha fi Dawlat Al-Emarat Alarabyyah Almuttahedah*, (in Arabic), Abu Dhabi: Zayid Centre for Coordination & Follow-up, 2001, pp. 67-68

⁷⁵⁷ It entered into force 05/10/2004. see the UN High Commission of Human Rights website, Available Online at <http://www.unhchr.ch/tbs/doc.nsf/newhvstatusbycountry?OpenView&Start=1&Count=250&Expand=183#183>

could be traced to the realization of the state that such ratification of the two Covenants would include some rights and freedoms that may conflict with the fundamental principle of the constitution, which is Islamic Shari'ah.⁷⁵⁸

However, the mentioned treaties to which the UAE is party, especially those which concern the elimination of all forms of racial discrimination, the elimination of all forms of discrimination against women, and the rights of the child, have made in their preambles a clear reference to the Universal Declaration of Human Rights and the two UN Covenants, which may indicate the state's acknowledgment of the rights contained in such important international documents of human rights. Reference is also made to the United Nations' Charter, which recognizes the inherent dignity and the inalienable rights of all members of the human family. This raises a question as to whether the United Arab Emirates is bound to implement, in addition to the rights contained in the mentioned treaties, the rights and freedoms recognized in the Universal Declaration of Human Rights and the two UN Covenants on human rights.

It has been discussed in Chapter Two of this study how important the human rights principle has become on the international level, to the extent it has even been one of the most essential standards on which a state's behaviour is judged. There is a developing notion supported by a number of scholars, that in spite of the fact that the two covenants on human rights are recognized as treaties which are supposed to be applicable to the state parties, because of the nature of their contents which relate to all human beings, they may be regarded as codifying pre-existing customary rules and, hence, their

⁷⁵⁸ See Al-Hassan, Y., "Alhewar Alwatani houl Huqoq Alensan fi Dawlat Al-Emarat: tumooh mashroo'a fi waqe'a wa'aed, In: *Al-Emarat Alarabyyah Almutahedah wa Huqoq Alensan*, op.cit., p. 164

provisions might be seen as binding on states not parties to the covenants.⁷⁵⁹ Given the fact that the rights contained in the constitution are not exclusively specified, a question arises, whether the international rights recognised in the most important international rights instruments, which are internationally considered as the International Bill of Rights⁷⁶⁰ have the same force of law in the UAE constitution by virtue of international customary law and the state's membership of the UN. This question is of a significant importance to this study and therefore to tackle such an important issue we should first understand the constitutional standards of the UAE system in dealing with international law in general. Does the UAE constitution recognize the international principles as an integral part of its legal system or as alien values that need to be incorporated before being judicially applied?

IV.6.2.1. The UAE Constitutional Approach towards the International Principles

In general, states tend to differ in dealing with international treaty law through their national courts. Some take the doctrine of dualism which regards the international legal system as a separate entity established alongside the national legal system.⁷⁶¹ Under this doctrine, there are some transformation procedures that must be satisfied for the signed treaty to be given judicial recognition and applicability in the domestic legal system of the state. British law, for example, requires parliamentary assent to a treaty, which has

⁷⁵⁹ For more discussion about extending the obligation of a treaty beyond the contracting states see Meron, T., op.cit., pp. 89-93. For more information on the binding nature of the Universal Declaration of Human Rights as part of customary law see Humphrey, J., P., "The Universal Declaration of Human Rights: its history, impact and juridical character", In: Ramcharan, B., G., op.cit., 1979.

⁷⁶⁰ The International Bill of Rights consists of the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and its two Optional Protocols. For more details see Fact Sheet No.2 (Rev.1), The International Bill of Human Rights, Available online at <http://www.ohchr.org/english/about/publications/docs/fs2.htm>

⁷⁶¹ Starke has reported that the two legal systems have two fundamental differences: "*a. the subjects of the state law are individuals, while the subjects of international law are states solely and exclusively. b. the source of the state law is the will of the state itself, while the source of the international law is the common will (Gemeinwill) of states.*" See Starke QC, op.cit., p.72.

been signed by the government, if such a treaty inflicts a major change in the British legal system. This parliamentary assent to the treaty is recognized as an Enabling Act that enables the treaty to be applied within the municipal law.⁷⁶² In Belgium, also, the consent of Chambers or Councils is the factor that determines the legal effect of a treaty conducted by the Crown.⁷⁶³

Other states take the doctrine of monism, which considers international treaty law as an important part of the national legal system in that the treaty that is signed by the government is judicially applicable without the need for any transformation steps. Under this doctrine, states differ on the status of the international principles in their legal system. Some regard the international principles of the treaty signed by the government as the highest law in the land.⁷⁶⁴ Others recognize the supremacy of international treaty principles over ordinary law, but stop short of granting them constitutional status.⁷⁶⁵ Treaties in those latter states are usually subject to constitutionality, in the sense that they must be in accordance with the provisions of the state's constitution; otherwise, at least in states which recognize the review of constitutionality, they might be invalidated by the constitutional court.⁷⁶⁶

One justification of the dualistic approach undertaken by states in dealing with international treaty principles can be found in the principle of separation of powers. If the executive power, for example, signed a treaty that made a significant change in the

⁷⁶² Tillotson, J., Foster, N., *Text, Cases and Materials on European Union Law*, Fourth edition, London: Routledge Cavendish, 2003, p. 60. See also Ali, A., *Alwajeez fi Alqanon Addawli Al'aam*, (in Arabic), Dubai: Albayan, 1989, p. 111

⁷⁶³ Robert, J., op.cit., p. 13

⁷⁶⁴ Article 6 of the US Constitution states that " ...all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land..." It is worth mentioning that the US supreme court also held that rights and freedoms stated in treaties signed by the United States are non-self-executing and hence not the source of enforceable rights. See Lillich, R. B., op.cit., p.855

⁷⁶⁵ Robert, J., op. cit., p. 14

⁷⁶⁶ Even states which recognize the review of constitutionality are hesitant on whether the court is capable of reviewing the constitutionality of international norms for the protection of human rights. See Ibid., p.15

legal system of the state or modified some existing legislation, then the executive power in this sense would take over the position of the legislature. Therefore, in such circumstances, the constitution prevents the legal effect of such a treaty until it is approved by the legislature, either in the form of legislation or in the form of a decree.⁷⁶⁷

As regards the UAE constitution, it is commonly believed that it has taken the dualistic approach, since Article 125 of the constitution requires the Federal Supreme Council's assent in any international treaty signed by the state, in order for it to be valid in the UAE legal system. It can be argued, however, that since the legislative and executive powers are confined to the Federal Supreme Council, which is also the institution that is given the right to ratify international treaties, the requirement of another procedure to validate treaties, which is also assigned to the same institution, seems to be artificial and meaningless. That is, the institution that is concerned with ratifying international treaties (the Federal Supreme Council) is actually the institution which is constitutionally recognized as the legislature.⁷⁶⁸ So, the Federal Supreme Council, in ratifying international treaties by virtue of its executive authority, is in fact legislating new national law on the ground of its legislative function.

Although this constitutional provision, when put in practice, may indicate aspects of a monistic approach in the constitution, Article 47 (4) has clarified such doubt by stating that "*such ratification shall be accomplished by decree*", indicating that the provisions of international treaties are not self executing. A transformation step is needed to accommodate any treaty in the national law, and this step, according to the article,

⁷⁶⁷ British law requires parliamentary assent to a treaty if such a treaty inflicts a major change in the British legal system, which indicates the British will to preserve the parliamentary monopoly over legislative matters in the UK. See Ali, A., *op.cit.*, p. 111

⁷⁶⁸ See Article 47 (2), (4) of the UAE Constitution.

should take the form of a decree. This clearly suggests the dualistic approach of the constitution. Once a treaty has been ratified, its provisions will be incorporated into the municipal law with the status of federal law, taking precedence over the local law of each Emirate. Article 125 asserts that

"The Government of the Emirates shall undertake the appropriate measures to implement the laws promulgated by the Federation and the treaties and international agreements concluded by the Federation, including the promulgation of the local laws, regulations, decisions and orders necessary for such implementation."

Thus, according to Article 47 (4) of the UAE constitution, the UAE judiciary does not recognise the principles of an international treaty, even if signed by the federal government, if it was not incorporated in the form of national law. It is unclear, however, whether the international customary principles have the same status as treaty law, as there is no indication of the position of international customary principles in the UAE domestic domain. Some states, like the UK, differentiate in their judicial practice between the status of international treaty law and international customary principles in the domestic legal system.⁷⁶⁹ Although the British legal system seems dualistic in principle, requiring Parliament's assent to apply treaty principles in the UK domestic system, there has been extensive case law, as will be seen in the next chapter, asserting that international customary principles are part of British domestic law as long as they are consistent with the British statutes.⁷⁷⁰ There have been no judicial cases of the British kind in the UAE. However, in case no. 316 of 1992, Dubai Supreme Court suggested that in marine commercial matters where there is no relevant law, the national courts may apply the relevant principles of the international customary law, on

⁷⁶⁹ In chapter five we will see a detailed case analysis of the receptive approach that the British judiciary has taken.

⁷⁷⁰ See the British case of *Chung Chi Cheung v. Rex*. [1939] AC 160

condition that these principles are not inconsistent with the Islamic Shari'ah. However, this decision by Dubai Supreme Court was only an application of the Federal marine commercial law no. 26 of 1981, which states in Article 8 that in matters of a marine commercial nature, if there is no relevant law covering them, the court shall apply the principles of international customary law recognised in this regard.⁷⁷¹ So, a question arises as to whether the UAE judiciary, by itself, can make reference to international customary principles in cases where there is no relevant national law, provided that these international principles are not inconsistent with the Islamic Shari'ah. There is no clear judicial practice in this regard, but in looking at the case cited above, it might be reasonable to deduce that the UAE judiciary would not have regard to international customary law if there were no reference to it in the national law, since the court in the case, just mentioned, stressed that its decision was an application of the Federal marine commercial law no. 26 of 1981. Accordingly, international human rights principles that are not embodied in the treaties to which the UAE is party, or that are embodied in a signed treaty but not incorporated in the form of national law, do not seem to have, in the eyes of the UAE judiciary, any effect in the UAE domestic system, since the position of the UAE judiciary, as it seems, is hampered by the UAE dualistic approach towards international law in general.

IV.6.3. The Practices of the International Human Rights Organizations

Although the UAE does not seem to be lacking the formal constitutional foundations for protecting human rights and fundamental freedoms, the Amnesty International regards some of its Islamic principles, particularly, flogging and the discrimination in marriage between Muslim and non-Muslim, in tension with the international rights. Amnesty

⁷⁷¹ Dubai Supreme Court decision no. 26 of the year 1981

International has expressed its view that the death penalty carried out in the UAE was, in all cases, the ultimate violation of the right not to be subjected to cruel, inhuman or degrading punishment.⁷⁷² Flogging, also, in the eyes of Amnesty International, has to stop as it is believed to be in violation of international human rights standards.⁷⁷³ Many of the practices that Amnesty International perceives as violations of human rights standards in the UAE, are associated with basic rules of Islam, and it is this that raises real difficulty in human rights implementation in the UAE domestic sphere.⁷⁷⁴ For example, the Shari'ah law enforced in the UAE is that a Muslim woman is not allowed to marry a non-Muslim man unless he converts to Islam. Such a marriage under the Shari'ah law is considered null and void, and the parties may be subject to punishment

⁷⁷²Amnesty Report, UA 99/02 Death penalty 3 April 2002, Available Online at <http://web.amnesty.org/library/index/ENGMDE250012002>

⁷⁷³ Amnesty Report, UA 268/00 Flogging 6 September 2000, Available Online at <http://web.amnesty.org/library/index/ENGMDE250042000>. In response to the flogging carried out in Saudi Arabia, Amnesty International clearly considers the punishment of flogging to be cruel, inhuman and degrading treatment amounting to torture, in contravention of Article 5 of the Universal Declaration of Human Rights, which states that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment". See Amnesty Report, UA 116/00 Fear of flogging 12 May 2000, Saudi Arabia: Fear of flogging: Nine Saudi Arabian Nationals, Available online at <http://web.amnesty.org/library/index/ENGMDE230382000>

⁷⁷⁴ There are some reports concerning other issues which are not of an Islamic nature but connected with tribal values, like the use of boys as camel jockeys, which has resulted in some serious injuries and deaths of young boys during races. See United Nations Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, Working Group on Contemporary Forms of Slavery, 30th Session, Geneva 6-10 June 2005, Available online at <http://www.antislavery.org/archive/submission/submission2005-cameljockeys.htm>. There are also issues related to some other factors of a political nature, like the case of five Libyan nationals, some of whom were forcibly expelled, and factors of a family nature, like the case of Sabrina Imtiaz Syed, a Pakistani national who was jailed at the request of her family. There is also a concern about the situation following the 11 September 2001 attacks in the USA as hundreds of UAE nationals have been arrested and held in detention without charge. See Amnesty International report 2003 concerning the UAE, Available Online at <http://web.amnesty.org/report2003/are-summary-eng>. However, since these issues are not of an Islamic nature, they are not sacred in the sense that the government could, if it wished, change the situation by a simple decision. For example, in the case of human trafficking to the UAE, the President Sheikh Khalifa resolved the problem with a federal decree in July 2005 requiring that all camel jockeys must be eighteen years of age or older. According to the new law, violators will be jailed for up to three years and/or fined a minimum of Dh50,000 (U.S.\$13,600). See Human Rights Watch Report 2005, Available Online at <http://hrw.org/english/docs/2006/01/18/uae12233.htm> Moreover, the Human Rights Watch report of 2005 has found abuses of migrant workers' rights include non-payment of wages, extended working hours without overtime compensation, unsafe working environments resulting in death and injury...etc. However, resolving these problems did not raise difficulty. The Minister of Labour and Social Welfare delivered a decision requiring the company concerned to pay all overdue wages within twenty-four hours, and prohibited it from hiring migrant workers for the next six months. This decision and others introduced by the ministry have been praised by Human Rights Watch and considered as "promising reforms that have met stiff resistance from the business community." See Human Rights Watch Report 2005, Available Online at <http://hrw.org/english/docs/2006/01/18/uae12233.htm>. Thus, matters that are not of Islamic nature are dependent solely on the political will and can easily be resolved.

III.5.3.1.1. Islam and Non-Muslims' Rights

It has been argued that Muslims in the Islamic state are the only full citizens, enjoying the full rights guaranteed by the Islamic Shari'ah, subject to some limitations to some degree in respect of Muslim women. For non-Muslims, although they are inhabitants of the Islamic state, their rights are confined to the practice of their religion and conducting their private affairs according to their own custom.⁴⁷⁵ In exchange for providing security of persons and property, non-Muslims must pay *jizyah* (tax) and submit to Muslim sovereignty in public affairs.⁴⁷⁶ Moreover, it has been argued that marriage between a Muslim man and a non-Muslim woman, in particular "people of the Book" (Christians and Jews) is permitted, while marriage between a Muslim woman and a non-Muslim man is prohibited, even if he is a Christian or Jew.

Muslim jurists, however, argue that the claim that Islamic rules are contrary to the principle of equality and non-discrimination is, for the most part, based on confusion between the concept of the nation state and the concept of the Islamic state. Al-Qaradawi observes, in respect of the burden on non-Muslims to pay *jizyah*, that the state in Islam is a state of belief, in the sense that it is established to preserve the belief and principles of Islam, and therefore it cannot be assumed that non-Muslim people will defend principles to which they do not subscribe.⁴⁷⁷ As a result, those non-Muslims are given the chance to participate in the defence of the state they live in through financial support, which is called *jizyah*, instead of with their blood. However, if any of the non-Muslims is willing to participate physically in a war to defend the Islamic state and its

⁴⁷⁵ An-Naim's view cited in Steiner, H., and Alston, P., op.cit., 2000, p. 392

⁴⁷⁶ Ibid., p. 392

⁴⁷⁷ Al-Qaradawi, Y., *Ghair Almuslimeen fi Almujtam'a Al-Islami*, (in Arabic), Beirut: Mua'ssatat Arresalah, 1983, p. 33

key role in arousing the fear of most Islamic states, including the UAE, that any further involvement in the international instruments of human rights would undermine fundamental rules of the Islamic Shari'ah.⁷⁷⁸ Taking into consideration the universal fundamental principles of Islam may, on the other hand, serve to promote human rights in the Islamic states and could encourage Islamic states to engage in more human rights instruments.

There are indeed, desperate situations in some of the Islamic states that need urgent action for reform;⁷⁷⁹ however, there is also a clear lack of understanding on the part of the members of the international organisations of human rights about the rules of Islam. For example, the Committee on the Elimination of Discrimination against Women, in its examination of the report on the situation of woman in Gambia, noted that the prevalence of discrimination against women in all areas of their lives is based, apart from customary practices, on religious Islamic family law including Islamic law of inheritance, which governs 90 per cent of the Gambian population. However, by close examination, the differentiation between men and women in Islamic inheritance law, as seen in Chapter Three, is more in the nature of justified and objective differentiation

⁷⁷⁸The extensive criticisms of the international organizations of the human rights situations in the Arab states, without mentioning the grave situation of Palestinian rights, which are grossly infringed by the Israeli occupation, creates a public impression in many Arab and Islamic states that these international organizations are set to serve Western imperialism. See Ghalyon, B., "Huqoq Alensan fi Alfikr Assiyasy Alaraby Almu'aaser", In: Al-Jeosi, S., op.cit., p., 395

⁷⁷⁹ In some of the Amnesty reports concerning the Kingdom of Saudi Arabia the organization reports that there is no upper limit on the number of lashes judges can impose. It can reach in some events up to 4,000 lashes. In the same report the organization also indicates that Saudi Arabia's criminal justice system facilitates arbitrary arrest and detention, denies of prompt access to relatives and a doctor, and does not facilitates access to lawyers and other legal assistance. The report indicates that grossly unfair trials could result in a hand cut off or a foot and hand cut off. See Amnesty International report, Saudi Arabia Culture of brutality, Available on line at <http://web.amnesty.org/library/index/ENGMDE230102000>. Amnesty International also reports about the state of Sudan that the Sudanese judicial system applies the death penalty to young offenders under 18 years old in the name of *hudud*. Although the Sudanese constitution states "The death penalty shall not be imposed on a person under the age of eighteen...", the exemption of the *hudud* crimes from the reach of this article makes the article almost worthless, since *hudud* crimes include murder and burglary over a certain amount. See Amnesty International Worldwide Appeal, Sudan: Young offender at risk of execution, Available online at <http://web.amnesty.org/appeals/index/sdn-011005-wwa-eng>

which may be permissible under the international instruments, rather than abhorrent discrimination on the basis of sex, since males are not always given the bigger share and sometimes even get less than what is preserved for females.⁷⁸⁰ Moreover, in the Summary record of the 795th meeting, a member of the committee on the rights of the child expressed his fear that a defendant might have no right to legal assistance in the UAE Shari'ah court.⁷⁸¹ The UAE report might not have been made with enough clarity in this regard; however, the member was not as much seeking information about the Shari'ah court procedures as he was making an assumption that Islamic Shari'ah recognizes no right to legal assistance. This gives the impression that this member lacks the knowledge that Islam has no rule, whatsoever, preventing an individual from having the right to legal assistance that could help judges in reaching a just verdict. The Shari'ah courts in the UAE are governed by the same law that governs federal courts, so that an individual has the same right to a lawyer and other legal assistance.⁷⁸² Hence, while Muslim officials and scholars need to take a sensitive approach towards human rights and participate in human rights activities, the members of international human

⁷⁸⁰ See our discussion about inheritance rights in Chapter Three

⁷⁸¹ See Mr. Citarella's opinion in the Summary Record of the 795th meeting: United Arab Emirates, Convention Abbreviation: CRC, 10/06/2002. CRC/C/SR.795. In reply to the committee's assumption that there is difference in the procedures of the two courts, the Shari'ah courts and the civil courts, with regard to a juvenile trial, the UAE delegate underlined that "the procedures were in fact the same: the same obligations and rights arose from the law and the juvenile had the same right to a lawyer. Conditions for legal assistance were the same for religious and civil courts" See the Summary Record of the 795th meeting: United Arab Emirates, Convention Abbreviation: CRC, 10/06/2002. CRC/C/SR.795.

⁷⁸² See Mr. Al-Suwaidi's reply in the Summary Record of the 795th meeting. However, not all Islamic states apply to the Shari'ah courts the same procedures that are applied to the civil courts. The Saudi Islamic judicial system, for example, tends to uphold secrecy over publicity in which trials are often held behind closed doors. Amnesty International has claimed that "*the proceedings invariably fail to meet the most elementary standards of fairness.*" See the Amnesty report, Saudi Arabia: Further Information on Fear of Torture and ill-treatment, PUBLIC AI Index: MDE 23/009/2004, 02 July 2004, available online at <http://web.amnesty.org/library/index/ENGMDE230092004>. Hytham Mnna'a, the spokesman of the Arab Commission for Human Rights, stated in commenting on the imprisonment of three Saudi activists who sought political reforms in Saudi Arabia, in an interview on the Aljazeera news channel, that the Saudi judicial system is based on a certain unpopular Islamic view that supports secrecy in managing public affairs and which has been discarded by all recognized Islamic sects and groups. This extreme medieval Islamic view was the reason, he said, behind the court's unjustified decision of the imprisonment of the three Saudi activists and the court's refusal to respond to all powerful legal challenges submitted by their lawyers. He affirmed that the decision was not judicial at all but a fulfillment of the Saudi political leaders' desires. See Aljazeera interview, Adda'awat Al-Eslahiyyah fi Assaudiyyah, In Arabic, Available online at <http://www.aljazeera.net/NR/exeres/03826CF6-5BE2-4787-BEBA-2DD4FE3A7CB2.htm>

rights bodies need to study Islam in depth, especially with regard to its relation to the public domain. To put the problem right, both sides should work cooperatively to reach a common understanding of human rights in order to lay down standards of implementation.

IV.7. Conclusion

Although the United Arab Emirates is an Islamic state, it does not seem to be lacking the formal constitutional foundations for protecting human rights and fundamental freedoms. The rule of law seems to be recognized through the rigidity of the constitution that, to some extent, could help to secure the supremacy of its provisions. The constitutional Article 151 clearly states that the law of the constitution prevails over the states members' constitutions, Federal laws and the legislations, regulations and decisions issued by the authorities of Emirates. Institutional arrangements for putting the provisions of the constitution in action, and which could form another safeguard of the supremacy of the UAE constitutional law, seem also to be recognized through the Federal Supreme Court, which has been assigned the power to examine the constitutionality of legislation, being regarded as the ultimate source of the interpretation of the constitutional provisions. Although there seems to be no separation of powers between the executive and the legislature, it may well be present in the independence of the judiciary.

Moreover, the political institution that is supposed to regulate the political authorities and put them in conformity with the popular demands is formally established through the Federal National Council. Furthermore, the UAE is a federal state whereby the state powers (legislative, executive judicial) are distributed between local and federal

governments, which could form another foundation for limited and responsible government.

Although the UAE system of governance is undemocratic, the constitutional recognition of the significant power of the Federal Supreme Court to review the constitutionality of legislations could balance the scale in the interest of the people. The established undemocratic regime in the UAE is not a result of the constitutionally embraced Islamic principles. Rather, it is a result of the tribal values which for long have been an obstacle to progressing towards a comprehensive, representative, democratic regime. That is to say, the UAE's Islamic constitution has clearly expressed the desire for a dignified and free constitutional life in its introduction under Islamic rules and principles. If there was a contradiction between democracy and Islam, then democracy would not have been set as the ultimate objective of the UAE Islamic constitution.⁷⁸³

To say that the UAE constitution have, to some extent, the formal foundation for human rights implementation is not to say it is fully compatible with the current international human rights standards. There are certain issues that seem not to be compatible. Those include, in addition to the undemocratic regime, flogging and the discrimination in marriage between Muslim and non-Muslim. It is necessary to pay attention to the areas of conflict and make the necessary effort to comply.

In the next chapter we will examine a much more advanced Western state that has constitutional traditions that happen to be in conflict with the international human rights standards. The UK is a state that has made good efforts to balance its international

⁷⁸³ See the introduction of the UAE constitution which states “*Desiring... to lay the foundation for federal rule.... And preparing the people of the Federation at the same time for a dignified and free constitutional life, and progressing by steps towards a comprehensive, representative, democratic regime in an Islamic and Arab society free from fear and anxiety.*”

obligation of human rights and its great constitutional traditions based on specific social and cultural beliefs, which makes it a good example to learn from in order to assess the ongoing process of the implementation of international human rights in the Islamic states. As the UK has greatly contributed to the formation of the current instruments of human rights, it seems also to have laid down standards of balance in the area of conflicts.

Chapter Five

V. Implementing International Human Rights Standards in our Relativistic World

V.1. Introduction

The previous chapter shows that although the United Arab Emirates recognise the Islamic Shari'ah law as the supreme source of legislation, there is a judicial willingness to accommodate secular law through making use of the moderate reading of Islam. Yet, the judiciary in the UAE seems to have been avoiding employing the recognised international principles particularly those concerned with human rights. The Dubai Supreme Court, for example, stressed in the cassation no 70 of the judicial year 2000, 18/2/2001, as mentioned in chapter four, the Islamic stance on slavery, but without giving a proper reference to the international effort in the abolition of slavery, which is the core element of the international human rights movement. There seems to be a common understanding among Islamic states that the Islamic Shari'ah is the only reference for human rights.⁷⁸⁴ This may be evidenced by the Islamic adoption of the 'Cairo Declaration on Human Rights in Islam' (CDHRI), adopted in August 1990 by the 19th Islamic Conference of Foreign Ministers of the OIC countries, meeting in Teheran.⁷⁸⁵ The representative of Iran had already expressed the Iranian Government's position at the 36th session of the UN General Assembly in 1981 that "*The Universal Declaration of Human Rights, which represented a secular understanding of the Judeo-Christian traditions, could not be implemented by Muslims and did not accord with the system of values recognized by the Islamic Republic of Iran.*"⁷⁸⁶

⁷⁸⁴ Ghalyon, B., "Huqoq Alensan fi Alfikr Assiyasy Alaraby Almu'aaser", In: Al-Jeosi, S., (ed.), *Huqoq Alensan Fi Al-Fikr Al-Arabi*, (in Arabic), Beirut: Markaz Derasat Alwehdah Alarabyyah, 2002, p. 402

⁷⁸⁵ Articles twenty-four and twenty-five of the Cairo Declaration clearly state that the rights and freedoms embodied in the declaration are subject to the Islamic Shari'ah, which appears to be the only source of reference for the explanation of any of the articles of this document. See Ali, S., *op.cit.*, p., 29

⁷⁸⁶ Commission on Human Rights, Fifty-ninth session, E/CN.4/2003/NGO/225, 17 March 2003, Paragraph 4

Many Muslim lawyers and politicians seem to avoid dealing with international law in general and tend to consider many of its principles, in particular those concerning human rights, as a means that can be used by the most influential states to interfere in their local matters.⁷⁸⁷ Some argue that the strong reaction in the West to human rights abuses under Islamic states, without a corresponding reaction to the grave situation of Palestinians' basic rights, which are grossly infringed by the Israeli occupation, creates a general impression in many Arab and Islamic states that the international human rights instruments are a Western conspiracy against Islam and set to serve the Western imperialism.⁷⁸⁸ Some of the human rights organizations' practices seem to affirm this stance in their insistence that some of the Islamic values run contrary to international human rights standards, without having regard to the fundamental nature of these values, like those concerning the Islamic marriage rules⁷⁸⁹, and without considering whether they are necessary for maintaining law and order in the Islamic states, like the application of Islamic *hudud*.⁷⁹⁰ The International Commission of Jurists even advised against the adoption of the Islamic Draft Declaration on Human Rights in Islam, which was presented for approval at the Summit Meeting of OIC Heads of State and

⁷⁸⁷ See Hanafi, H. "Almauqif Al-Islami Almu'aaser wa Huqoq Alensan", In: Al-Jeosi, S., (ed.), op.cit., p., 584 See also Ali, S., op.cit., p., 1

⁷⁸⁸ Ghalyon, B., "Huqoq Alensan fi Alfikr Assiyasy Alaraby Almu'aaser", In: Al-Jeosi, S., (ed.), op.cit., pp. 394-395

⁷⁸⁹ In the case of a Christian Lebanese national who married a Muslim woman in the UAE and was sentenced subsequently to 39 lashes and imprisonment of one year, the UAE was found by Amnesty International to be in violation of the right to express beliefs and the freedom from discrimination by reason of religion. See Amnesty International Report, Imprisonment and Flogging for Marriage Across Faiths: The Case of Elie Dib Ghaleb, MDE 25/003/1997, Available Online at <http://web.amnesty.org/library/index/ENGMDE250031997>

⁷⁹⁰ In response to the flogging carried out in Saudi Arabia, Amnesty International clearly considers the punishment of flogging to be cruel, inhuman and degrading treatment amounting to torture, in contravention of Article 5 of the Universal Declaration of Human Rights, which states that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment". See UA 116/00 Fear of flogging 12 May 2000, Saudi Arabia: Fear of flogging: Nine Saudi Arabian Nationals, Available online at <http://web.amnesty.org/library/index/ENGMDE230382000>. See also UA 268/00 Flogging 6 September 2000, Available Online at <http://web.amnesty.org/library/index/ENGMDE250042000>. We will see below that in the application of Article 3 of the European Convention on Human Rights, the European Court of Human Rights opens the possibility that if judicial corporal punishment were considered not only local conditions, but necessary as a deterrent and to maintain law and order in the state concerned, it could be considered that, in spite of its degrading character, it does not entail a breach of Article 3. See *Tyrer v. The United Kingdom*, 25/04/1978, Application Number 5856/72

Government held in Dakar on 9 December 1991. It called the attention of the Muslim communities and world public opinion to the negative implications which might follow the Summit's adoption of the Islamic Draft Declaration on Human Rights in Islam. Its reasoning was that such adoption would threaten the inter-cultural consensus on which the international human rights instruments are based, in that the declaration would introduce, in the name of the defence of human rights, an intolerable discrimination against both non-Muslims and women.⁷⁹¹

However, having certain internal religious or cultural elements that may in one way or another raise tension with the current understandings of human rights values is not an excuse for not recognising the legal instruments of these rights and participating in the process of their development. As Islam itself is a universal religion that came to all mankind and is not exclusively related to a certain culture or society, the Islamic states are encouraged to act within the international arrangements and to engage in a dialogue with the rest of the world to clarify the Islamic position, as well as their positions towards human rights. The UAE judicial practice, as demonstrated in the previous chapter, has shown the flexibility of Shari'ah law to accommodate values that are not only foreign to its rules but even contradictory.⁷⁹² Hence, through making use of the Islamic technique of *Siyasah Shar'iyah*, there is room for the Islamic states to engage

⁷⁹¹See the statement of former Secretary-General of the International Commission of Jurists, Adma Dieng cited in Commission on Human Rights, Fifty-ninth session, E/CN.4/2003/NGO/225, 17 March 2003, Paragraph 7. We saw in Chapter Three that such a claim against Islam, by reflection, is mistaken. The distinction between Muslims and non-Muslims is merely one of political administration, and not of human rights. Moreover the differentiation between men and women in inheritance, for example, is, as discussed in Chapter Three, not based on discriminatory issue. Rather, it was designed for the benefit of the heirs, in that it prefers needier people like youngsters who face an uncertain future, over aging people who are leaving life.

⁷⁹² As discussed in the previous chapter, Islamic Shari'ah strongly prohibits any kind of loan interest in any bank transactions, and yet the UAE Federal Supreme Court in its opinion in the case no. 245 of the year 20, 7 May 2000 permitted necessary interest in bank transactions, so long as there is no other way in which people's basic needs can be satisfied. In this judgement, the court used the Islamic technique of the *Siyasah Shar'iyah*, which is based on the exigencies of reality that sometimes even permit suspension of some Islamic rules.

in a constructive debate at the internal level, as well as in the international forum, to contribute positively to the current developing notion of human rights.

Islamic principles are not the only principles that may raise tension with the current conception of human rights but also some Western traditional understandings of democracy and human rights create complexity to the international human rights discourse. The UK political and constitutional tradition, as seen in Chapter Two, has been an obstacle to the full realization of the European convention rights; however, this did not hold the UK back from joining and strongly participating in the formation of most parts of European convention rights as well as international human rights instruments.

The UK is a good example of a state that overcomes its traditional obstacle and acts in a receptive way to the international law in general and to an acceptable degree to the internationally recognised principles of human rights. The British did not reject all the criticism made against their constitutional system, especially from the European organs, but responded with another argument through constructive dialogue that contributed positively to the development of the British constitutional system, as well as the European human rights practice. Unlike the international human rights instruments, which mostly rely on international public opinion and political pressure to enforce their principles, the European Convention's principles of human rights, as we will see below, are enforced by legally binding judgements of an independent court. The UK, instead of avoiding joining this powerful convention, contributed substantially to the formation of most of its principles. The British participation in the formation of the most powerful regional arrangement on human rights in the world may demonstrate that the domestic barrier should not be seen as a reason not to participate in the formation of the

international human rights principles. The European Court of Human Rights has responded positively to the changes made by the British government to overcome its internal obstacle, although the British reform was not carried out at the expense of the local values of the state. The European Court has developed a notion of margin of appreciation to accommodate differences in the implementation of rights in Europe. Through the use of the technique of margin of appreciation, the European Court has confirmed that human rights are so contestable that unification on one model of implementation is difficult to achieve, even on the regional level, where societies are supposed to have shared common values.

This chapter, therefore, will examine the UK experience in European human rights implementation and the development of this important doctrine of margin of appreciation, and will assess whether the doctrine of margin of appreciation is applicable to the international instruments. The chapter will also raise another important question, which is the extent that the margin of appreciation can be used to accommodate differences in human rights implementation that result from the application of the Shari'ah law. As I mentioned elsewhere in this study, the British traditional principle of Parliamentary Sovereignty has been held sacred in much the same way that Islamic Shari'ah is in the Islamic states, in that in each case, rules derived from them are supreme, even if they are contrary to human rights. However, the reference, here, is mainly to the ideological and constitutional aspects of the UK principle of Parliamentary Sovereignty, with all this may imply of legal rules inconsistent with human rights, which Parliament itself cannot change to assist in tackling the constitutional principle of Islamic Shari'ah that God is the supreme law giver, with all this may imply of rules inconsistent with human rights, which the Islamic legislature cannot change. The British experience in balancing between the two

important principles, the protection of human rights as specified in the European Convention and elaborated by the European Court of Human Rights and its fundamental principle of Parliamentary Sovereignty, could provide the Islamic states with guidance on how to overcome internal obstacle and act in a way that is acceptable to international law without affecting the main Islamic constitutional principle of the supremacy of Islamic Shari'ah which implies that God is the supreme lawgiver.

V.2. British Experience in the Implementation of Human Rights

The European Convention on Human Rights of 1953 is believed to be the most important regional instrument on human rights, which over a period of 50 years has become the most sophisticated and effective human rights treaty in the world.⁷⁹³ It is a striking example of a human rights treaty that has a special legal status in the domestic law of the contracting parties. The most powerful feature of the convention is that it imposes upon the contracting states a certain body of legally binding principles enforced by an independent and impartial tribunal, which is the European Court of Human Rights. Individuals have been given free access to submit to the court complaints against the public authorities of their own states. Therefore, the convention does not merely represent common standards of achievement enforced by public opinion, as in the case of the international instruments, but it was intended *to establish standards forming part of the public law in Europe.*⁷⁹⁴

⁷⁹³ Loucaides, L., G., "The Protection of the Right to Property in Occupied Territories", 53.3, *International and Comparative Law Quarterly*, July 2004, p. 681

⁷⁹⁴ The commission observed in the application of *Helgal and Wilhelm Gericke v. Federal Republic of Germany* that " ... the human rights and fundamental freedoms guaranteed by the Convention extend beyond the individual interests of the parties concerned ... they have led the member parties to the Convention to establish standards forming part of the public law in Europe." For more details see Drzemczewski, A., *European Human Rights Convention in Domestic Law*, Oxford: Clarendon Press, 1983, p., 24

Accordingly, the convention seems to have created a new type of European law, transcending domestic legal structures of European States. There seems to be no privilege or immunity for the state authorities to exercise against *'supra-national European judicial scrutiny'*.⁷⁹⁵ Although the judgments of the European Court of Human Rights are legally binding in international law upon contracting states and ignoring the court's decisions would lead to expulsion from the Council of Europe,⁷⁹⁶ the UK has accepted the jurisdiction of the court, despite its strong endorsement of its traditional fundamental principle of parliamentary sovereignty. Therefore, this acceptance was seen as permission for a foreign court -European Court of Human Rights- to question an Act of Sovereign Parliament of Westminster,⁷⁹⁷ which, accordingly, could make Acts of Parliament at risk of judicial review of compatibility, which is traditionally prohibited in the British constitutional system.

This British recognition of the jurisdiction of the European Court is in itself a significant lesson for the Islamic states to learn from, in that the domestic Islamic and constitutional principles that could raise tension with human rights are not an acceptable justification for not joining the international human rights conventions. Joining the human rights instruments is a clear sign that Islamic states have no local values, whether religious or traditional, that necessarily violates human fundamental rights and freedoms. In much the same way, the avoidance of these international procedures and arrangements is a powerful sign that these states are hiding local principles which are incompatible with the modern world of today, which is based on the respect of human rights and dignity. There is no doubt that in the case of Islamic states, there are Islamic

⁷⁹⁵ This phrase is taken from Lord Lester in Lord Lester, "Human Rights and the British Constitution", In: Jowell.J and Oliver.D., op.cit., p. 93

⁷⁹⁶ Ibid., p., 95

⁷⁹⁷ See Kentridge, S., "Parliamentary Supremacy and the Judiciary Under a Bill of Rights: Some Lessons from the Commonwealth", *Public Law*, 1997, p.99

values that represent fundamental constitutional principles and which cause complexity and serious tension in the domain of rights implementation. However, the legal recognition of human rights and the implementation of human rights are two different issues and hence the complexity that arises in human rights implementation should not be a reason not to recognise the legal force of the relevant international instruments. Human rights, as we have seen in Chapter Two and as we will be seeing below, are in practice subject to some variations in exercise according to different ideological, moral and religious values. The British participation in the European Convention on Human Rights and its recognition of the jurisdiction of the European Court of Human Rights did not, as we will see below, cause Britain to abandon its traditional fundamental principle of Parliamentary Sovereignty. Rather, the following discussion will show that the British recognition of the European Convention makes the UK's judges, lawyers and politicians, in various degrees, engage in a constructive effort to develop and modernise its constitutional system, which is not at the expense of its great political and constitutional traditions.

The discussion of the British experience in human rights implementation will be divided into two sections. I will, in the first section, examine the British judicial effort to reconcile the British domestic principles with international law. In the second section I will examine the legislative measure that the British government had to take to bring its legal system into line with the requirements of the European Convention on Human Rights.

V.2.1. British Judicial Practices and Human Rights

The British practice of the principle of Parliamentary Sovereignty, especially with respect to international law seems to make the principle less radical than it seems in

theory. The British courts have made a great effort to reconcile the supremacy of Parliament and the principles of international law, particularly the international customary principles. This section of the chapter will tackle the judicial role, in which I will examine various cases that have contributed to a greater reception of international principles. The following detailed examination of the British court practice will raise some judicial techniques taken by the British judges to strike the balance between British tradition of Parliamentary Sovereignty and international norms in an attempt to help Muslim judges to widen their approach in managing the area of tension between international principles and the supremacy of Islamic Shari'ah.

In considering this subject I will go back to 1888, the case of *Colquhoun v. Brooks*, to give a better clarification of the matter. The case concerned the imposition of tax. The difficulty was raised by 16 & 17 Vict. c. 34, s. 2, sched. D, dealing with the imposition of tax upon the profit of a firm situated not in the United Kingdom and which was owned by an owner residing in the UK, without mentioning whether a subject of Her Majesty or not.⁷⁹⁸ Lord Esher in his judgment asserted that if the words of the Act were taken in a broad sense, the rules would apply to foreigners who were resident in the UK for a while, whose company was located outside the UK, and who had no incomes coming into the UK.⁷⁹⁹ If the Act was interpreted in this sense, then the Act would be intended by Parliament to

⁷⁹⁸ The question arose under 16 & 17 Vict. c. 34, s. 2, sched. D, by which duties are imposed "for and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any kind of property whatever, whether situate in the United Kingdom or elsewhere, and for and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any profession, trade, employment, or vocation, whether the same shall be respectively carried on in the United Kingdom or elsewhere And for and in respect of the annual profits or gains arising or accruing to any person whatever, whether a subject of Her Majesty or not, although not resident within the United Kingdom, from any property whatever in the United Kingdom, or any profession, trade, employment, or vocation exercised within the United Kingdom" See the case of *Colquhoun v. Brooks*, the Court of Appeal, [1888] 21Q B D 52.

⁷⁹⁹ For more information about income taxation as a factor of transcending national boundaries and the state exclusive jurisdiction see McCahery, J., Picciotto, S., and Scott, C., (eds.), *Corporate Control and Accountability: changing structures and the dynamics of regulation*, Oxford : Clarendon Press, 1994, pp. 381-382

function contrary to the law of nations, which Parliament, according to Lord Esher, cannot do. As he put it, "*It is that the English parliament cannot be supposed merely by reason of its having used general words to be intending to do that which is against the comity of nations*"⁸⁰⁰ In this case the judges expressed their views that an enactment of Parliament with general words cannot be construed as intended to apply beyond the limit of international norms.⁸⁰¹ However, Fry, L.J., in deciding the same case, took a different view, suggesting that it is not for the court to decide the question of sovereignty limitation; rather, it should take the words of the Act as they are expressed. The question of expediency should be left to the law giver, the legislature, to determine; not to the court, which is supposedly concerned with the mere question of enactment.⁸⁰²

It is worthwhile to mention, here, that although Lord Esher in that case seemed very monist in his approach in accepting international law as a superior law over the Act of Parliament, he did not claim the power to invalidate the Act on the basis of its inconsistency. He, rather, looked at the intention of Parliament and supposed that Parliament did not mean to infringe the norms of international law and therefore interpreted the Act in accordance with international law requirements. This position of the effect of international law, as will be seen below, does not seem to negate the importance of the doctrine of Parliamentary Sovereignty.

In a similar case, Lord Atkin, in *Chung Chi Cheung v. The King*, 1939, although he expressed clearly his dualist view in asserting that the unincorporated international law, treaty principles, has no validity in the British legal system, acknowledged the existence of the international rules recognized by the international community, international

⁸⁰⁰ *Colquhoun v. Brooks*, the Court of Appeal, [1888] 21 Q B D 52, Lord Esher's Judgement

⁸⁰¹ Marshall, G., *Parliamentary Sovereignty and the Commonwealth*, Oxford : Clarendon Press, 1957 , p.

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⁸⁰² See Fry, L. J. Judgment in *Colquhoun v. Brooks*, the Court of Appeal, [1888] 21 Q B D 52

customary principles, and treated them as incorporated into the domestic legal system if relevant. As he put it:

*"It must be always remembered that so far at any rate as the Courts of this country are concerned, international law has no validity save in so far as its principles are accepted and adopted by our own domestic law... The Courts acknowledge the existence of a body of rules which nations accept amongst themselves. On any judicial issue they seek to ascertain what the relevant rule is, and having found it they will treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals."*⁸⁰³

It seems from Lord Atkin's opinion that not all international norms need to be adopted by domestic law to be given effect in the British legal system, nor do all of them form part of the British national law. Lord Atkin was clear in giving international customary law legal effect in the British law, in so far as it is not inconsistent with Parliamentary statutes.⁸⁰⁴ However, for Lord Atkin, international principles contained in treaties seem to have a different status in terms of their legal effect in domestic legal system. Case law suggests that judicial treatment of international rules differ according to their status in the international legal system in that international customary law is given the status of national law by British court, as long as it is consistent with the British statutes, without the need for incorporation, while unincorporated international treaties have not been

⁸⁰³ *Chung Chi Cheung v. The King*, Privy Council, [1939], AC 160

⁸⁰⁴ However, the English courts' application of the international law has been criticized as they impose their rules about the force of precedents to questions of international law in the same manner as they apply them to questions of domestic law. As one commentator put it "*English courts sometimes seem to the lawyers of other countries to be applying purely English law when they themselves profess to be applying international law.*" See Brierly, J. L., and Waldock, H., (eds.), *The Law of Nations: an introduction to the international law of peace*, London: Oxford University Press, 1963, p. 92

given so much judicial attention.⁸⁰⁵ In the following sections we will discuss the British judicial approach towards both unincorporated international treaty law and international customary law.

V.2.1.1. British Judicial Approach towards Unincorporated International Treaty Law

The British courts are, in fact, very cautious in dealing with unincorporated treaties, not only because of their dualistic approach to the reception of international law, but also because of the legislative monopoly of Parliament. It might be true to say that the dualistic approach itself is a product of the doctrine of Parliamentary Sovereignty. The courts' monistic stance with regard to international customary law and the dualistic approach in respect of international treaties, may explain why. If a treaty signed by the executive automatically entered into the British legal system as enforceable law, this would undermine the legislative monopoly of Parliament, whereas the recognition of international customary law would not, as it always would give way, like the common law itself, to the Act of Parliament in case of contradiction.⁸⁰⁶ So, in reserving the ultimate legislative power of Parliament, for the treaty to have legal effect in the British domestic law, the court would require incorporation by an Act of Parliament. In the case of *Ellerman Lines v. Murray*, the court even denied the use of the international treaty as an aid to interpret domestic legislation.⁸⁰⁷

⁸⁰⁵ See *Trendtex Trading Corp Ltd v. Central Bank of Nigeria* [1977] 1 All ER 881 at 890, [1977] QB 529, see also *R v. Bow Street Stipendiary Magistrate and others, ex parte Pinochet Ugarte (Amnesty International and others intervening)*, House of Lords, [2000] 1 AC 61, [1998] 4 All ER 897, [1998] 3 WLR 1456, See *Maclaine Watson & Co Ltd v. Department of Trade and Industry and related appeals; Maclaine Watson & Co Ltd v. International Tin Council*, House of Lords, [1989] 3 All ER 523, [1990] 2 AC 418, See *Brind v. Secretary of State for the Home Dept*, House of Lords, [1991] 1 All ER 720, [1991] 1 AC 696, See also *R v. Lyons, House of Lords*, [2002] UKHL 44, [2002] 4 All ER 1028, [2003] 1 AC 976.

⁸⁰⁶ Hunt, M., op.cit., p., 13

⁸⁰⁷ *Ellerman Lines v. Murray*, [1931] AC 126

However, British courts did not stop there. The courts have indeed exerted great effort to reconcile the most fundamental principle of British constitution, Parliamentary Sovereignty, with unincorporated international law. The main vehicle open to the courts, for such a compromise, was the court's authority to interpret Parliament's legislation. When Parliament enacted legislation in the same field as that tackled by an unincorporated international treaty, the court would assume that Parliament intended by such legislation to fulfil its obligation under the unincorporated treaty concerned. In the *Salomon* case Lord Diplock L.J. argued that where the legislation was passed after a convention, tackling the same topic that the convention dealt with, the court presumes, if there are no express words to the contrary, that Parliament did not intend to enact in breach of the convention.⁸⁰⁸ He rejected the view, supported by the *Ellerman Lines etc. v. Murray* case, that the terms of an international convention cannot be used to resolve ambiguity in a statute if there is no express reference to the international convention, and suggested,

*"I can see no reason in comity or common sense for imposing such a limitation upon the right and duty of the court to consult an international convention to resolve ambiguities and obscurities in a statutory enactment. If from extrinsic evidence it is plain that the enactment was intended to fulfil Her Majesty's Government's obligations under a particular convention, it matters not that there is no express reference to the convention in the statute."*⁸⁰⁹

⁸⁰⁸ *Salomon v. Commissioners of Customs and Excise* [1967] 2 QB 116. See also the case of *Re Westinghouse* [1978] AC 547 where all of their Lordships suggested that the Act 1975 was passed to give effect to the Hague Convention on the Taking of Evidence abroad in Civil or Commercial Matters 1970, although the Act concerned has no reference at all to the convention. For more information about the method of incorporation see Higgins, R., "Treaty-Making Power in the United Kingdom", In: Jacobs, F., and Roberts, S., (eds.) *The Effect of Treaties in Domestic Law: United Kingdom National Committee of Comparative Law*, vol. 7, London: Sweet & Maxwell, 1987, pp. 126-128

⁸⁰⁹ *Salomon v. Commissioners of Customs and Excise.*, [1967] 2 QB 116

Lord Diplock L.J., however, added "*...the court must not merely guess that the statute was intended to give effect to a particular international convention. The extrinsic evidence of the connection must be cogent.*"⁸¹⁰

Thus, in the *Salomon* case, the resort to an unincorporated treaty as an aid to interpret a statute was permitted under two conditions: first, the terms of the legislation were not clear but 'ambiguous', in that they are reasonably capable of more than one meaning; second, there was cogent extrinsic evidence that the legislation was intended to give effect to a particular international convention.⁸¹¹

However, in the case of *Garland v. British Rail Engineering Ltd.*⁸¹² Lord Diplock L.J. developed his view further in that he, so to speak, dropped the ambiguity requirement and extended the presumption to non-implementing legislation as long as the legislation is concerned with the same subject matter.⁸¹³ The principle adopted in the case was that the words of a statute were to be construed consistently with any relevant international treaty obligation of the United Kingdom if they were '*reasonably capable of bearing such a meaning*'.⁸¹⁴ Diplock L.J. argued in this case that the words of a statute may not bear more than one meaning if it were read in isolation from the treaty tackling the same issue. He called the court to give regard to Article 119 of the E.E.C. Treaty in interpreting the Section 6 of the Sex Discrimination Act 1975 without mentioning the ambiguity requirement. It might be true to say that Diplock L.J. in this case shifted from the orthodox theory of statute interpretation, which suggests that words of statutes are

⁸¹⁰ Ibid., [1967] 2 QB 116

⁸¹¹ For more discussion on the *Salomon* case see Hunt, M., op.cit., pp. 14-15.

⁸¹² *Garland v. British Rail Engineering Ltd.* [1983] 2 AC 751

⁸¹³ See Hunt, M., op.cit., pp. 18-21

⁸¹⁴ Allan, T. R. S., op.cit., p. 275

considered on their own, in isolation from any wider context, and called for looking at the meaning of the statute words within the context of international obligation.⁸¹⁵ As he put it

*"...[it is] now too well established to call for citation of authority, that the words of a statute passed after the Treaty has been signed and dealing with the subject matter of the international obligation of the United Kingdom, are to be construed, if they are reasonably capable of bearing such a meaning, as intended to carry out the obligation, and not to be inconsistent with it."*⁸¹⁶

In fact Lord Diplock L.J., in this case, did not bring about any new principle of the legal position of international law in British constitution. Rather, he reiterated an old one that can be traced to the Dicean theory of parliamentary sovereignty itself. Dicey, when he asserted his view about Parliamentary Sovereignty, was well aware of the importance of international law and was very dedicated to their preservation. At the same time, however, Dicey was also aware that *"There is no legal basis for the theory that judges, as exponents of morality, may overrule Acts of Parliament."*⁸¹⁷ Therefore, Dicey explained the limitation advanced at that time, that Parliament cannot go beyond the norms of international law, as amounting to a presumption of intended conformity with international law. As he put it:

"...judges when attempting to ascertain what is the meaning to be affixed to an Act of Parliament, will presume that Parliament did not intend to violate the ordinary rules of morality, or the principles of international law, and will therefore, whenever

⁸¹⁵ Hunt, M., op.cit., pp. 19-20

⁸¹⁶ *Garland v. British Rail Engineering Ltd.* [1983] 2 AC 751

⁸¹⁷ Dicey, op.cit, p. 60

*possible, give such an interpretation to a statutory enactment as may be consistent with the doctrines both of private and international morality."*⁸¹⁸

This principle of presumption of intended conformity with international law was already cited in the case of *Colquhoun v. Brooks*, mentioned above, where Lord Esher asserted that an Act of Parliament cannot reach beyond the law of nations by merely general words. Although the principle of the presumption of intended conformity was rooted in British history, it can be said that Lord Diplock L.J. may have attempted to close the way before sovereigntist judges who may rest on the Parliament's clear intention that it would avoid the implementation of unincorporated international law. Those judges can always preserve the opportunity to disregard the provisions of unincorporated law at all by finding that the legislation is clear or unambiguous. So Lord Diplock L.J. in the *Garland* case maintained the receptive judicial approach to unincorporated international law by asserting that in deciding the ambiguity of the meaning of a statute, the statute should be read within the context of the provisions of international law.

V.2.1.2. British Judicial Approach towards International Customary Law

According to *Chung Chi Cheung v. King*, international customary law was clearly recognized as part of British law but in so far as it is consistent with either statute or precedent. However, in the *Trendtex* case, Lord Denning adopted an advanced view towards greater receptiveness to international customary principles.⁸¹⁹ A question tackled by Lord Denning in that case was whether the change of the rules of international law causes change in the British common law too. This question is, actually, vital, especially when the change of international customary law is contrary to the domestic precedents.

⁸¹⁸ *Ibid.*, p., 60

⁸¹⁹ *Trendtex Trading Corporation Ltd v. Central Bank of Nigeria*, Court of Appeal, Civil Division, [1977] QB 529, [1977] 1 All ER 881, [1977] 2 WLR 356, [1977] 1 Lloyd's Rep 581, [1977] 2 CMLR 465, (47 MLR 600)

Does British common law change as international customary law changes or it is bound by precedents and those international customary rules which have been accepted and adopted in the past? Lord Denning, in this case, took the view that international customary law forms part of British common law and, as a result, the British domestic law is affected by any changes in international law.⁸²⁰ According to Lord Denning, the English law incorporating a rule of international customary law should develop as international law itself develops.⁸²¹ Lord Denning answered the question as follows:

"International law does change: and the courts have applied the changes without the aid of any Act of Parliament. Thus, when the rules of international law were changed (by the force of public opinion) so as to condemn slavery, the English courts were justified in applying the modern rules of international law."⁸²²

So, Lord Denning in this case dropped the condition of the compatibility of international customary law with the domestic precedents, and urged the judges to take international customary principles recognized by state practice seriously and apply them in domestic matters, notwithstanding the existence of domestic precedents to the contrary. However, there has been a debate over whether this judicial principle overriding all inconsistent precedents, or only those which are originally stemmed from international customary law and now are no longer in practice. One author argued for a "modified narrow view" of the decision in *Trendtex*, suggesting that this judicial principle is only applicable to

⁸²⁰ Haenggi, S., "The Right to Privacy is Coming to the United Kingdom: balancing the individual's right to privacy from the press and the media's right to freedom of expression", 21 *Houston Journal of International Law*, 1999, pp. 551-552

⁸²¹ See Elias, T. O., "The Doctrine of International Law", 74 *American Journal of International Law*, 1980, p. 294 See *R v Bow Street Stipendiary Magistrate and others, ex parte Pinochet Ugarte (Amnesty International and others intervening)*, House of Lords, [2000] 1 AC 61, [1998] 4 All ER 897, [1998] 3 WLR 1456

⁸²² See Lord Denning's opinion in *Trendtex v. Central Bank of Nigeria* [1977] QB 529

the precedents based on obsolete international law.⁸²³ Such a reading, it is said, an attempt to have the advantage of recognising the contemporary changes in international customary law consistently with the doctrine of precedent.⁸²⁴

V.2.1.3. Observations on the British Judicial Approach towards International Law

Although the Dicean theory of Parliamentary Sovereignty seems to be very radical dualist in receiving international law in the British legal system, judicial practice of the theory seems to indicate the flexibility of the British constitution and the ability to reconcile this fundamental constitutional principle with the norms of international law, especially in its customary part. British judges have tackled the question of the relationship between domestic and international law with wisdom and flexibility. The court does not abandon the doctrine of Parliamentary Sovereignty, in that Parliamentary enactment is always the supreme law in the land. The court also does not ignore the importance of international law, in that it applies customary international principles as part of domestic law, applicable to domestic matters even if there exist precedents to the contrary. Moreover, the Parliament's statute itself, the court concluded, should be read within the context of international law to be given the proper meaning of the words.⁸²⁵ As a result, irreconcilable conflict between the statute and international law would become highly unlikely.

This raises a question, however, as to whether such judicial efforts to comply with international law satisfy the basic requirements of human rights protection. It is true that judicial practice has made a great effort to reconcile domestic common law with

⁸²³ Cited in Hunt, M., *op.cit.*, p. 17

⁸²⁴ *Ibid.*, p. 17

⁸²⁵ See judgement of Lord Diplock L.J. in *Garland v. British Rail Engineering Ltd.* [1983] 2 AC 751

international law, but no judge has ever made any attempt to set aside an Act of Parliament. Although Lord Bingham in *A and others v Secretary of State for the Home Department* case expressed his discomfort with the suggestion of the Court of Appeal that an international obligation solemnly and explicitly undertaken can be overridden by a statute of Parliament, he could not suggest any revolutionary idea except the principle of presumption of intended conformity with the international human rights and freedoms discussed above.⁸²⁶ No judge in the above mentioned cases has accepted international norms contrary to the Act of Parliament. International law has no validation in the British domestic legal system if there is a parliamentary statute to the contrary. The main condition for judicial recognition of international principles is that the principle concerned, to be given legal effect in the British common law, must be in compliance with the will of Parliament. In the case of *R. v. Secretary of State for the Home Department, ex parte Simms*, the House of Lords clearly expressed its view that "*Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights*".⁸²⁷ Lord Lester asserts that the English court has attempted a great effort to put the convention rights in effect, but Parliamentary Sovereignty was the obstacle that drew the courts back from complete judicial incorporation.⁸²⁸ He states,

"The landmark judgments of the European Court of Human Rights against the UK had a profound impact upon senior British judges. The Strasbourg jurisprudence has

⁸²⁶ See Lord Bingham's opinion in *A and others v Secretary of State for the Home Department* (No 2), House of Lords, [2005] UKHL 71, [2006] 1 All ER 575

⁸²⁷ *R. v. Secretary of State for the Home Department, ex parte. Simms and Another*, House of Lords, [2000] 2 AC 115, [1999] 3 All ER 400, [1999] 3 WLR 328, [1999] EMLR 68

⁸²⁸ Lord Lester, "Human Rights and the British Constitution", In: Jowell.J and Oliver.D., op.cit., p.97

made them more sensitive to the fault-line in the British legal system that has resulted in repeated failures to give sufficient legal protection to individual rights.”⁸²⁹

The failures of English courts in incorporating the convention rights urged some lawyers to call for the introduction of a bill of rights based on the Convention, giving the Convention the force of law within the United Kingdom.

V.2.1.4. The British Argument against the Introduction of a Bill of Rights

The argument that has always been advanced by the opponents of adopting a bill of rights is that the positivisation of rights, as mentioned above, would transfer the legislative power, which is supposed to be in the hands of elected people, to the judges, appointed officials.⁸³⁰ It would be an undemocratic way of resolving the matter if the judge were to have the last say on such a comprehensive subject. On what basis can a judge invalidate a legislation issued by the representatives of the people of the country? Would the protection of human rights justify the judicial invalidation of popular legislation? If yes, then the bill of rights would undermine the three fundamental attributes of democracy; first, participation, in the sense that the decision making would only be in the hands of elite of lawyers with no involvement of the rest of the community; second, representativeness, in that judges do not represent the whole community; third, accountability, meaning that judges are unaccountable to the public.⁸³¹

⁸²⁹Ibid.,p. 96

⁸³⁰ Fredman, S.,” Judging Democracy: The Rule of the Judiciary under the HRA 1998”, 53 *Current Legal Problems*, 2000, 99

⁸³¹ Zander, M., *A Bill of Rights?*, Fourth Edition, London: Sweet & Maxwell, 1997, p. 78

This argument does not seem to differ very much from some of the Arab and Islamic objections to accommodate the international principles of human rights. Some Islamic and Arabic authors also make the point that it is undemocratic and another kind of imperialism to leave such an important issue that has a direct effect on the understanding and belief of the Islamic society to be decided by a handful of appointed international lawyers.⁸³² The rights of Islamic people must be decided by Islamic people themselves, not by a certain group with a certain view of human rights that is mostly irrelevant to the fundamental values of the Islamic nation. Although the actors here are different, the substance of both arguments seems to be the same, since they all rely on the popular will and lead to the same conclusion, which is that international rights should be implemented, not as required by the international instruments, but according to the popular will. This argument has in fact a legitimate point which must be taken seriously by the international human rights lawyers and advocates. There is no sensible reason to exclude people, wherever they are, from participating in deciding what rights they have.⁸³³ The British government has taken into consideration this difficulty and hence drawn, as will be seen below, legislative measures that ensure respect for human rights and at the same time uphold the supremacy of the popular will of the British people.

⁸³²Ghalyon has reported that in the Arab and Islamic thinking, international human rights movements have always been considered as an agent for advertising Western liberalism of bourgeois system and the Arab advocates of human rights have been accused of advertising, through human rights organizations, such unpopular western values in the Arab states. See Ghalyon, B., "Huqoq Alensan fi Alfikr Assiyasy Alaraby Almu'aaser", In: Al-Jeosi, S., (ed.), op.cit., pp. 394-395

⁸³³ Fredman, S., op.cit., p., 101

V.2.1.5. Observations on the British Argument against the Introduction of a Bill of Rights

Since human rights are a very contestable matter on which agreement cannot be guaranteed,⁸³⁴ it has become a common understanding in the UK that judicial invalidation of popular legislation concerning human rights matters is not necessarily the solution for a proper human rights implementation. Human rights, in the UK, are conceived to be a matter of politics, not law and hence it is for the politicians to resolve, not for the lawyers. The question that touches the heart of the matter, accordingly, is whether in the judicial interpretation of human rights provisions, the judge is really interpreting law or making a political judgment.⁸³⁵ Goldsworthy raised the question that if judges rejected legislation passed by elected people on the ground of each judge's own political morality, they would make law less predictable than judgments about the proper meaning and interpretation of the legislation.⁸³⁶ Although Goldsworthy's argument seems to be convincing, the predictability matter is very sensitive in common law and needs to be examined from different perspectives, since it was also raised, by some commentator, against the Islamic *Shari'ah*.⁸³⁷

It is uncontroversial that common law was made by judges case by case through a sufficient number of successive precedents that circumscribe a distinct path.⁸³⁸ These precedents are essential for all subsequent cases. If a judge, however, is confronted with a case that has no relevant precedent, the judge will have to apply his own experience, common sense, and his own understanding of justice and fairness.⁸³⁹ This powerful

⁸³⁴ Campbell, T., "Democratizing Human Rights", In: Leiser, B. & Campbell, (eds.), op.cit., p.183

⁸³⁵ McCrudden, C., A Common Law of Human Rights?: transnational judicial conversations on constitutional rights, 20 *Oxford Journal of Legal Studies*, 2000, p. 502

⁸³⁶ Goldsworthy, J., "Legislative Sovereignty and the Rule of Law", In: Campbell, T., Ewing, K., and Tomkins, A., (eds.), op.cit., p., 74

⁸³⁷ Mayer, A., op.cit., 1999, pp. 66-67

⁸³⁸ Rosenfeld, M., op.cit., p.1337

⁸³⁹ Ibid., p. 1337

authority of judges to make laws is generally recognized where no parliamentary statute exists tackling the issue in question. Where there is a statute of Parliament, however, judges usually have no right to exercise such authority. Instead, they should interpret the statute in a way that does not conflict with the intention of Parliament when the statute was issued. As a result, one may suggest that the codification of a bill of rights could make the application of the bill more predictable, than if there was no law at all concerning the matters.⁸⁴⁰ Subsequently, by the nature of common law, one could say the legalization of human rights may be required, if the law is to be more predictable.

However, there is a clear tension in the British constitutional system in the relationship between the courts and the government, especially in the matter of human rights implementation. While the court claims the jurisdiction over the matter as an exercise of its genuine authority to uphold the rule of law, the government claims its exclusive sovereignty and authority over this contestable matter on the ground that it represents the people's attitude in defining what constitutes rights. It is not surprising to see this tension in a state where the two important institutions, the judiciary and the government, have been regarded as ultimate sources of two important spheres of law, defined by the courts, and politics, determined by the government. These two sources, I believe, were shaped by the nature of common law itself and the British political traditions. Common law allows judges to use their own experience, common sense and understanding of justice and fairness in tackling matters that have no judicial precedents, whereas British democracy accords the elected government an exclusive authority in determining what is right and wrong for the community. The powerful authority of the judges, accorded by the nature of common law, could lead to a tension between the court and parliament on matters where the two authorities are not agreed completely on the way they should

⁸⁴⁰ Fredman, S., "Scepticism under Scrutiny: Labour Law and Human Rights", in: Campbell, T., Ewing, K., and Tomkins, A., (eds.), *op.cit.*, p. 208

be implemented, which ultimately could create a state of unpredictability, in the sense that one cannot predict the legal consequence of his act. For example, if a law is issued by Parliament to regulate a matter in certain areas and applied by the judges in a certain way, any change in the way that this law is operated could result in an innocent person being held legally responsible for an act that was not regarded as a crime at the time he committed the act. In the *R v. R* case, the judge was able to use his power to interpret the law in a manner contrary to the parliamentary intention of the Act, leading him to regard a husband as a criminal for embarking on an act that was regarded as permissible before this judgement.⁸⁴¹ Moreover, in the *Spectrum* case, Lord Nicholls suggests that judges have, in respect of statute law, an evolutive role to interpret the statute according to the changing social conditions and circumstances and this judicial interpretive power is preserved even if the interpretation runs against the original intention of Parliament when enacted the statute. As he puts it “*From time to time cases arise where changed social conditions dictate that a statutory provision should have a different and wider meaning than when enacted.*”⁸⁴² It is unclear, however, whether judges with such a power that could even enable them to give a new meaning for a statute, different from that which Parliament had in mind when it enacted it, are really interpreting the law, or making new law.

Interestingly, some human rights authors raise the same predictability argument against the involvement of the Islamic rules in resolving human rights issues, as it will likely enable judges to use their own understanding of the general rules of Islam to take away

⁸⁴¹ *R v. R*, House of Lords, [1992] AC 599. Although Parliament's intention in the Act seems not to regard a husband who has sexual intercourse with his wife against her will as committing a crime of rape, the court, which is accorded great authority in the application of law, did charge him with raping his wife, which subsequently resulted in uncertainty in the application. If the husband had known that committing such conduct was legally prohibited, he might not have had this sexual intercourse with his wife. See Barber, N. W., “Sovereignty Re-examined: The Courts, Parliament, and Statutes”, 20 (1), *Oxford Journal of Legal Studies*, 2000, pp. 146-147.

⁸⁴² See Lord Nicholls's opinion in *In re Spectrum Plus Ltd (in liquidation)*, House of Lords, [2005] UKHL 41, [2005] 2 AC 680.

some individual rights, instead of giving rights to individuals.⁸⁴³ Mayer, for example, has reported that although in Pakistan judges were able to deduce from Islamic rules to assert that a woman can serve as a judge, the Iranian Muslim cleric, after the Islamic Revolution, enforced a law, excluding women not only from the judiciary but also from studying law itself.⁸⁴⁴ We will give below more discussion on how the European Court of Human Rights dealt with the generality of the common law and whether the court decision can be used to justify Islamic law limitation on human rights.

V.2.2. The United Kingdom's Human Rights Act 1998

As mentioned earlier, the objection to the entrenchment of a bill of rights in the UK is based on democratic theory, in the sense that the right people to assert the rights of people are the people themselves not unelected, unaccountable judges.⁸⁴⁵ While it has been argued that a handful of unelected, unaccountable officials should not be given the final say on issues of fundamental disagreement, account has been taken of the danger of an unrestrained legislature, which could result in a majoritarian tyranny.⁸⁴⁶ So some sort of

⁸⁴³ Mayer, A., *op.cit.*, 1999, pp. 28-29 see also pp. 66-67

⁸⁴⁴ See Mayer, A., *Islam and Human Rights: tradition and politics*, Second Edition, London: Pinter, 1995, pp. 105-106 and the footnote of chapter 5 number 23. However, in the third edition of Mayer's book, cited above, she recognises that the Iranian regime allowed few women in 1997 to serve as judges. However, she cites, in her third edition, a court case in Pakistan suggesting that while the petitioner did manage to cite views of medieval jurists to support his view that women could not be judges, the attorney general of Pakistan in turn found a medieval jurist who held the contrary view and suggested that the other jurists had drawn an overly broad conclusion from the statement by the Prophet on women's capacity to rule. The court found the petitioner had been mistaken in his interpretations of many requirements of Islamic law as they would affect the ability of women to serve as judges. Although she cited the case to show the great disparity between the English and the Arabic versions of Article 3 of the Universal Islamic Declaration of Human Rights, the case still conforms her view that is demonstrated in her both editions that Islamic law is ambiguous to the extent that would enable judges to use their own understanding of the general rules of Islam, which in turn could open the way to nullification of rights and hence Islamic law cannot be relied on to limit or dilute human rights. Although the court in this case ruled out in favour of women to serve as judges, no one can guarantee that another judge would not rule in favour of the petitioner opinion in another case. See the discussion of the case in Mayer, A., *op.cit.*, 1999, p. 93 and the discussion of the ambiguity of Islamic law in Mayer, A., *op.cit.*, 1999, pp. 28-29 and also in pp. 66-67

⁸⁴⁵ Darrow, M., and Alston, P., "Bill of Rights in Comparative Perspective", In: Alston, P., *op.cit.*, 1999, p., 498

⁸⁴⁶ It has been argued that the distinctive feature of the HRA is that it is based upon a mature theory of the nature of parliamentary democracy and the role of the judiciary in the sense that while it does not create a government of unelected judges, it recognises the notion of Sovereignty as a flexible notion rooted in the

technique was needed to gain an agreement on the incorporation of human rights. The first principle in the mind of the drafter of the Human Rights Act 1998 was to ensure a proper Parliamentary control of judicial decision making. This clearly meant that the court would not have the authority to invalidate an Act of Parliament. The drafters were also aware of the need of some control on the legislative power of Parliament, but the question was whether it was going to be of a legal or a political nature. The big job of the drafters of the HRA was to reconcile between the traditional principle of Parliamentary Sovereignty and the establishment of new justiciable human rights.⁸⁴⁷ A democratic bill of rights, which was the goal of the drafters, was commonly recognized as to bring the court to a democratic discussion and debate over such a controversial matter, rather than to give it the authority to judge what is right and wrong. Hence, the Human Rights Act 1998 was articulated to balance the protection of human rights through incorporation and the democratic principle of popular participation in decision-making.⁸⁴⁸

There are several points that can be deduced from the 1998 Act. First, human rights matters have been codified and it is left for the court to read any legislation, whether primary or secondary, as far as possible in conjunction with the convention rights. The Act states in section 3 (1) that, "*So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights*". Accordingly, the ambiguity condition for use of the European Convention in the domestic law is dropped.⁸⁴⁹

political reality of the sharing of power. See Lester, A., "The Human Rights Act 1998- Five Years On", 3, *European Human Rights Law Review*, 2004, p. 261

⁸⁴⁷ Gearty, C. A., "Reconciling Parliamentary Democracy and Human Rights", 118 *L.Q.R.*, 2002, p. 248

⁸⁴⁸ Lester, A., "The Human Rights Act 1998- Five Years On", *op.cit.*, pp. 258-271

⁸⁴⁹ Fredman, S., "Judging Democracy: The Rule of the Judiciary under the HRA 1998", *op.cit.*, p. 118

Second, although the Act makes human rights justiciable, it does not give the court any authority to set aside an Act of Parliament. The final say on the matter has been reserved for parliament, and the authority of the court, in case of inconsistent legislation, does not go beyond a declaration of incompatibility.⁸⁵⁰ Section 4 (6) states that

“A declaration under this section (“a declaration of incompatibility”)-

(a) does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and

(b) is not binding on the parties to the proceedings in which it is made.”⁸⁵¹

Third, the Act set up a pre-legislated scrutiny to guarantee compliance with the Convention rights. When a bill is introduced in either House, the minister responsible for the bill will be required to declare that the bill is in compliance with the Convention rights, unless the government wishes to proceed with the legislation notwithstanding its inconsistency.⁸⁵² However, the government, in approving the inconsistent legislation, would have to engage in detailed debate and justification for the decision. If Parliament were convinced, then no one could stop Parliament from issuing such incompatible legislation.⁸⁵³ Parliament can still legislate in a manner contrary to the Convention rights, if the legislature expressly wishes to do so. This was clearly confirmed in *A and others v Secretary of State for the Home Department*, where Lord Bingham suggested that the Human Rights Act 1998 would not take away or reduce the power of Parliament even if

⁸⁵⁰ Clapham, A., “The European Convention on Human Rights in the British Courts: problem associated with the incorporation of international human rights”, In: Alston, P., (ed.), op.cit., 1999, p. 150. See also Clayton, R., “Judicial Deference and “Democratic Dialogue”: the legitimacy of judicial intervention under the Human Rights Act 1998”, SPR, *Public Law*, 2004, pp. 33-47

⁸⁵¹ Section 4(6) of the UK Human Rights Act 1998

⁸⁵² Section 19, Human Rights Act 1998. See also Fredman, S., “Judging Democracy: The Rule of the Judiciary under the HRA 1998”, op.cit., p., 119

⁸⁵³ Fredman, S., “Scepticism under Scrutiny: Labour Law and Human Rights”, in: Campbell, T., Ewing, K., and Tomkins, A., (eds.), op.cit., p. 209

that power was used to contradict fundamental principles of human rights.⁸⁵⁴ This was also underlined by the case of *R (on the application of Hooper and others) v Secretary of State for Work and Pensions*. In this case it was impossible for the Secretary of State to read and give effect, so far as it is possible to do so, to the relevant provisions of the 1992 and 1999 Acts in a way that was compatible with Convention rights.⁸⁵⁵ The Secretary of State, as a result, refused to pay widowers sums equivalent to the benefits to which they would have been entitled had they been widows and hence acted incompatibly, as the claimants suggest, with their Convention right and in breach of section 6(1) of the Human Rights Act 1998.⁸⁵⁶ However, the case has underlined that although the act of the Secretary of State in authorizing payment of the section 36, section 37 and section 38 statutory benefits to widows and in refusing to authorise payment of those benefits to widowers is discriminatory, the court asserts it is not unlawful. Lord Hope suggests that the Department of State has no alternative but to do what the legislation tells it, as a public authority, to do, even if the legislation requires it to act in a way which is incompatible with a Convention right. As he puts it “*The authority has no discretion to do otherwise. As it is a duty which has been imposed on the authority by or as a result of primary legislation, Parliamentary sovereignty prevails over the Convention right.*”⁸⁵⁷

⁸⁵⁴ See the case of *A and others v Secretary of State for the Home Department (No 2)*, House of Lords, [2005] UKHL 71, [2006] 1 All ER 575. Lord Bingham in this case cited Lord Hoffmann’s opinion in case *R. v. Secretary of State for the Home Department, ex parte. Simms and Another*, House of Lords, 1999, cited above, which suggests that “*Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power.*” See also *Regina (Roberts) v Parole Board and another*, House of Lords, [2005] UKHL 45, [2005] 2 AC 738. However, in *Regina (Jackson and others) v Attorney General* case Lord Hope suggests that the interpretative obligation resulted from Human Rights Act 1998 section 3 (1) enables the courts to give a meaning to legislation which is compatible even if this appears to differ from what Parliament had in mind when enacting it. See Lord Hope opinion in *Regina (Jackson and others) v Attorney General*, House of Lords, [2005] UKHL 56, [2006] 1 AC 262

⁸⁵⁵ A requirement of Section 3(1) of Human Rights Act 1998

⁸⁵⁶ Section 6(1) of the Human Rights Act 1998 states it is unlawful for a public authority to act in a way which is incompatible with a Convention right.

⁸⁵⁷ See the case of *R (on the application of Hooper and others) v. Secretary of State for Work and Pensions*, House of Lords, [2005] UKHL 29, [2005] All ER (D) 60 (May), (Approved judgment)

This raises a question as to what is the effect of the Human Rights Act 1998 if Parliament's unrestrained power is intact in which it can if it chooses legislate contrary to fundamental principles of human rights. What the judicial declaration of incompatibility can do to preserve human rights from parliamentary breach by arbitrary legislation. Lord Lester suggests that the importance of the judicial declaration is '*in bringing the problem to attention of the executive and the legislature*' and urging them to amend the inconsistent legislation.⁸⁵⁸ It would create immense political pressure on Parliament to amend offending primary legislation.⁸⁵⁹ It is the democratic nature of the Act which invites the court to make a distinctive contribution to the human rights debate. It could be argued, however, that if the declaration fails to induce the legislature to amend the incompatible legislation, the complaint may well be brought before the European Court of Human Rights, which would in all likelihood uphold the incompatibility.⁸⁶⁰ As the Home Secretary stated in the House of Commons, "*One of the questions that will always be before Government, in practice, will be, 'is it sensible to wait for a further challenge to Strasbourg, when the British courts have declared the provision to be outwith the Convention?'*".⁸⁶¹

V.3. The UK and the European Court of Human Rights

British experience of human rights implementation has shown that the application of human rights on the ground is much more complex than it may seem in theory. The UK seems to put more emphasis on the political legitimacy of human rights implementation than the process of legalization that is commonly conceived in Europe.⁸⁶² The British experience demonstrates that the political traditions of parliamentary democracies of

⁸⁵⁸ Lord Lester, "Human Right and the British Constitution", In: Jowell.J and Oliver.D., op.cit., p. 105

⁸⁵⁹ Elliott, M., The Demise of Parliamentary Sovereignty? The Implications for Justifying Judicial Review, 115 *Human Rights Law Review*, 1999, p. 127

⁸⁶⁰ Lord Lester, "Human Right and the British Constitution", In: Jowell.J and Oliver.D., op.cit., P.105

⁸⁶¹ Bradley, A., "The Sovereignty of Parliament –Form or Substance", In: Jowell.J and Oliver.D., op.cit.,P. 55

⁸⁶² See the work of Goldsworthy, J., op.cit., pp. 61-78

Western Europe are not unified in one model of human rights implementation and hence each tradition seems to have its own approach to human rights implementation.⁸⁶³ While Western civil law systems stress the codification of human rights, giving the judges the wider role in the implementation, the Western common law systems stress the political legitimacy of the authority concerned with right implementation and accord the elected officials the ultimate say on the issue. The image of one homogenous “Western right” is often a simplified or distorted one.⁸⁶⁴ Democracy has been conceived differently and Western authors, as we saw above, are still debating on the complex relationship between right and democracy.⁸⁶⁵ As one commentator suggests, “*Everyone favours democracy, but we cannot find agreement on what it is.*”⁸⁶⁶ The question of the differences in approaching human rights accordingly is not confined to whether that state is of a Western or Eastern culture or a secular or religious nature. This chapter demonstrates that the Western states themselves have different approaches to the implementation and also have traditions that even prevent full realization of international rights and fundamental freedoms. The European Court of Human Rights seems to be aware of such inevitable diversities and hence has developed an interesting legal technique that leaves room for the exercise of national sovereignty.⁸⁶⁷ It has been commonly conceived that the provisions of the European Convention do not replace the national laws, nor would the Commission replace itself in the position of the government.⁸⁶⁸ Under the supervision of the European Court of Human Rights, a state is permitted a certain measure of discretion when it takes

⁸⁶³ However, some still treat Parliamentary democracies of Western Europe as one, presenting it as a model of human rights implementation. See Robertson, A., and Merrills, J., *op.cit.*, p. 8

⁸⁶⁴ Brems, E., *op.cit.*, p. 357

⁸⁶⁵ See the work of Loughlin, M., “Rights, Democracy, and Law”, In: Campbell, T., Ewing, K., and Tomkins, A., *op.cit.*, pp. 41-60

⁸⁶⁶ Campbell, P., and Mahoney-Norris, K., *Democratization and the Protection of Human Rights: Challenges and Contradictions*, Westport: Praeger, 1998, p. 4

⁸⁶⁷ Brems, E., *op.cit.*, p. 360. The Europeans have treated the HRA as a significant event in that the UK has made the ECHR part of its domestic law, although the HRA has not added any new substantive rights to the UK common law system. See McGoldrick, D., “The United Kingdom’s Human Rights Act 1998 in Theory and Practice”, *50 International and Comparative Law Quarterly*, 2001, p. 908

⁸⁶⁸ Hutchinson, M., “The Margin of Appreciation Doctrine in the European Court of Human Rights”, *48 International and Comparative Law Quarterly*, 1999, p. 640

legislative or administrative action in the area of a guaranteed right.⁸⁶⁹ This legal technique is known as the doctrine of margin of appreciation; a term that is solely a product of Strasbourg organs.⁸⁷⁰

V.3.1. The Margin of Appreciation Doctrine

The emergence of the doctrine of margin of appreciation is commonly dated from the *Handyside* case of 1976.⁸⁷¹ The case was brought by Mr. Handyside against the United Kingdom before the European Court of Human Rights, to which the case was initially referred by the European Commission of Human Rights. The case was about a British citizen, Mr. Handyside, who had published a book, targeting school-children of the age of twelve and upwards, called the Little Red Schoolbook. The book was a subject of controversy in Britain and of extensive press comments. The book contains a section concerning "Sex" which includes sub-sections on Masturbation, Orgasm, Intercourse, Pornography, and Homosexuality. The British court found the book "*subversive to the influence of the trust between children and teachers*" and that "*tends to deprave and corrupt a significant number, significant proportion, of the children likely to read it*". As a result, the British judicial authority ceased the distribution of the book and initiated a warrant to seize the available copies. The judicial decision was based on section 3 of the British Obscene Publications Acts 1959/196.

Mr. Handyside complained that the action taken by the British authorities against his publishing of the book was in breach of his right to freedom of thought, conscience and belief under Article 9 of the Convention, his right to freedom of expression under

⁸⁶⁹ Harris, D., "The International Covenant on Civil and Political Rights and the United Kingdom Law: An Introduction", In Harris, D., and Joseph, S., *The International Covenant on Civil and Political Rights and United Kingdom Law*, Oxford: Oxford University Press, 1995, p. 13

⁸⁷⁰ Hutchinson, M., *op.cit.*, p. 639

⁸⁷¹ *Ibid.*, p. 639

Article 10 of the Convention and his right to the peaceful enjoyment of possessions under Article 1 of Protocol No. 1 (P1-1).

The European Court of Human Rights decided that the measures taken by the British authority were beyond doubt "*interferences by public authority*" in the exercise of the applicant's freedom of expression which is guaranteed under paragraph 1 (art. 10-1). However, the court pointed out that the freedom of expression is not without limitation and if the interference was "*prescribed by law*" and was "*necessary in a democratic society*", it would not be regarded as a violation of the Conventional provision of freedom of expression. The court found that the interference fell within one of the exceptions provided for in paragraph 2 (art. 10-2), in that it was first "*prescribed by law*" and second it was "*necessary in a democratic society*", "*for the protection of ... morals*".⁸⁷²

According to Article 26 of the Convention, the Convention institutions are only of relevance to the proceedings once all domestic remedies have been exhausted.⁸⁷³ The Court, therefore, pointed out that the Convention is a *subsidiary machinery* of protection to the national systems safeguarding human rights. As a result, the Convention leaves to each Contracting State, the initial task of safeguarding the rights it enshrines. The court noted that the requirements of morals vary from time to time and from place to place and since it is not possible to find a uniform European conception of morals, "... *State authorities are in principle in a better position than the international*

⁸⁷² *Handyside v. The United Kingdom*, Application Number 5493/72, Date of Judgment 07/12/1976.

Available Online at

<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31213&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49>

⁸⁷³ See Article 26 of the European Convention on Human Rights which states, "*The Commission may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognized rules of international law, and within a period of six months from the date on which the final decision was taken.*"

judge” to decide the requirement for the protection of morals and the “*necessity*” of a “*restriction*” intended to meet them.”⁸⁷⁴ The court stated that

“...it is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of “*necessity*” in this context. Consequently, Article 10 para. 2 (art. 10-2) leaves to the Contracting States a margin of appreciation. This margin is given both to the domestic legislator (“*prescribed by law*”) and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force”⁸⁷⁵

The European Court, in articulating the doctrine of margin of appreciation in the *Handyside* case, was well aware of the sensitivity of its decision to the sovereignty of the state parties. The Court realised that the functioning of the Convention is ultimately dependent on the state’s willingness to be governed by its provisions and hence the Court feared that any unfavourable result might cause the states to refuse to accept any longer the Court’s jurisdiction.⁸⁷⁶ However, the Court emphasised that the enjoyment of the power of appreciation must go hand in hand with a European supervision concerning both the aim of the measure challenged and its “*necessity*”.⁸⁷⁷ This was confirmed by the *Sunday Times* case, where it was reemphasised that it is for the European Court to make a final determination of whether the state’s interference with a convention right corresponds to the European notion of necessity. The court stressed that the state’s interference in order to fall within the margin of appreciation must correspond to a “*pressing social need*”, be “*proportionate to the legitimate aim pursued*” and the reasons given by the national authorities to justify it has to be “*relevant and*

⁸⁷⁴ *Handyside v. The United Kingdom*, Application Number 5493/72, 07/12/1976, Paragraph, 48

⁸⁷⁵ *Ibid.* Paragraph, 48

⁸⁷⁶ Jacobs, F., (ed.), *Yearbook of European Law*, Vol. 6, Oxford: Clarendon Press, 1982, p. 7

⁸⁷⁷ See *Handyside* case, *op.cit.*, paragraph 49

sufficient".⁸⁷⁸ These three requirements are the tests set to assess what is "*necessary in a democratic society*".⁸⁷⁹

The application of the doctrine of margin of appreciation varies from case to case. One of the factors that generally seems to determine the width of the margin depends on whether or not there is a uniform European standard regarding the application of the right under question.⁸⁸⁰ The margin is narrow and the court monitoring is strict if there is consensus on the application of the right and becomes wide with flexible judicial monitoring if there is not.⁸⁸¹ A clear example of European lack of uniformity is the protection of morals, in which the state is accorded a wide margin of appreciation to limit the convention rights.⁸⁸² In the *Cossey* case, the court realised that there is great diversity between member states in matters of a moral nature and, hence, despite the European Parliaments' encouragement⁸⁸³ to harmonise laws and practices in this field, the court contended that the contracting states enjoy a wide margin of appreciation.⁸⁸⁴ It has also been asserted in the case of *Open Door and Dublin Well Woman v. Ireland* that "*national authorities enjoy a wide margin of appreciation in matters of morals, particularly in an area such as the present which touches on matters of belief concerning the nature of human life.*"⁸⁸⁵

⁸⁷⁸ See *The Sunday Times v. The United Kingdom*, Application no. 6538/74, 26/04/1979, paragraph 62. See also the case of *Barthold v. Germany*, Application no. 8734/79, 25/03/1985, paragraph 55.

⁸⁷⁹ Davidov, G., *Judicial Deference and the Constitutional Protection of Human Rights*, LLM Thesis, University of Toronto, 1998, p. 47

⁸⁸⁰ Neuman, G., "Human Rights and Constitutional Rights: Harmony and Dissonance", 55 *Stanford Law Review*, 2003

⁸⁸¹ Davidov, G., op.cit., p. 48

⁸⁸² See *Handyside* case cited above. See also the case of *Open Door and Dublin Well Woman v. Ireland*, Application no. 14234/88; 14235/88, 29/10/1992.

⁸⁸³ See the reports accompanying the resolution adopted by the European Parliament on 12 September 1989 (OJ No C 256, 9.10.1989, p. 33) and Recommendation 1117 (1989) adopted by the Parliamentary Assembly of the Council of Europe on 29 September 1989

⁸⁸⁴ *Cossey v. the United Kingdom*, Application no. 10843/84, 27/09/1990, Paragraph, 40

⁸⁸⁵ *Open Door and Dublin Well Woman v. Ireland*, op.cit., paragraph, 68. However the European Court held by fifteen votes to eight that Ireland in this case was in violation of Article 10 ECHR.

The variation of the margin accorded to the states seems also to be determined by the effect of the threat. If the threat to the general interest is more urgent than the individual right, the state discretion will be a wide one.⁸⁸⁶ In the *Leander* case, although the court recognised that the protection of national security must be balanced against the seriousness of the interference with the applicant's right to respect his private life, the court suggested that the margin of appreciation available to the state in determining the appropriate means to protect national security is a wide one.⁸⁸⁷ Hence, the Court concluded that the release of the applicant's private information secretly by the police register to the military to assess the applicant's suitability for the job was not a violation of the applicant's right of privacy guaranteed under Article 8 of the Convention.⁸⁸⁸ Also in the case of *Klass*, the Court asserted that the state has a certain discretion to assess how surveillance measures can best be operated and this discretion, the court concluded, extends to cover the state's right to have recourse to surveillance measures *without obliging the authorities in every case to notify the persons concerned after the event, and the exclusion of any remedy before the courts against the ordering and execution of such measures.*⁸⁸⁹ Nevertheless, the court contended in the *Rees* case that although the exercise of the convention rights shall be subject to the national laws of the contracting states, "*the limitations thereby introduced must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired.*"⁸⁹⁰ This test of 'essence' or 'substance' has been applied in many cases,⁸⁹¹ however, there has been no

⁸⁸⁶ Brems, E., *op.cit.*, p. 366

⁸⁸⁷ *Leander v. Sweden*, Application no. 9248/81, 26/03/1987, Paragraph, 59

⁸⁸⁸ *Ibid.*, Paragraph, 68

⁸⁸⁹ *Klass and others v. Germany*, Application no. 5029/71, 06/09/1978

⁸⁹⁰ *Rees v. The United Kingdom*, Application no. 9532/81, 17/10/1986

⁸⁹¹ *Cossey v. the United Kingdom*, Application no. 10843/84, 27/09/1990 See the case of *Campbell and Cosans v. the United Kingdom*, Application no. 7511/76;7743/76, 25/02/1982. it has been asserted that "*The right to education guaranteed by the first sentence of Article 2 (P1-2) by its very nature calls for regulation by the State, but such regulation must never injure the substance of the right nor conflict with other rights enshrined in the Convention or its Protocols*" paragraph 41. See *Fayed v. the United Kingdom*, Application no. 17101/90, 21/09/1994. See also *Stubbings and others v. the United Kingdom*, Application no. 22083/93;22095/93, 22/10/1996

European uniformity on standards, determining whether or not a certain limitation touches the essence of right.⁸⁹² Below we will examine cases from the European Court providing further detail on how the test of essence of right is exercised.

In the *Johnston* case the European Court contended that the Irish constitutional prohibition of dissolution of marriage, which the applicant was seeking to enable him to marry a second woman, did not impair the essence of the right to marry guaranteed in Article 12 of the European Convention on Human Rights. The court took the words 'right to marry' in their ordinary meaning, in the sense that they cover the formation of the marital relationship but not their dissolution. Although the court admitted that such a prohibition could form a restriction on the capacity to marry, the court did not consider it touching the essence of the right to marry in a society that adheres to the principle of monogamy.⁸⁹³ The court agreed that the Convention must be interpreted in the light of present-day conditions, but it could not by means of an evolutive interpretation derive a right not included in the convention, such as the right to divorce.⁸⁹⁴ In the *Rees* case, the court also suggested that the right to marry refers to the traditional marriage between persons of opposite biological sex and hence, the court concluded, the British legal prohibition on the marriage of persons who are not of the opposite biological sex does not injure the essence of the right to marry.⁸⁹⁵

The ordinary meaning approach used by the court to assess whether the national law injure the essence of the right under question was not followed in the *Goodwin* case.⁸⁹⁶ Although the court in this case recognised that the first sentence of Article 12 refers in express terms to the right of a man and woman to marry, it was not persuaded that *at the*

⁸⁹² Brems, E., op.cit., p. 369

⁸⁹³ *Johnston and others v. Ireland*, 18/12/1986, Application no. 9697/82, paragraph 52

⁸⁹⁴ See Ibid., paragraph 53,54

⁸⁹⁵ *Rees v. the United Kingdom*, 17/10/1986, Application no. 9532/81, paragraph 49 and 50.

⁸⁹⁶ *Christine Goodwin v. the United Kingdom*, 11 July 2002, Application no. 28957/95

*date of this case it can still be assumed that these terms must refer to a determination of gender by purely biological criteria.*⁸⁹⁷ The court argued that there *have been major social changes in the institution of marriage since the adoption of the Convention as well as dramatic changes brought about by developments in medicine and science in the field of transsexuality.*⁸⁹⁸ The court asserted that in the *twenty first century there is a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals.*⁸⁹⁹ Hence the Court found no justification for barring the transsexual from enjoying the right to marry under any circumstances and suggested that the allocation of sex in national law to that registered at birth is a limitation impairing the very essence of the right to marry.⁹⁰⁰ Moreover, in the *Matthews* case⁹⁰¹ the court found the United Kingdom responsible to secure the rights guaranteed in by Article 3 of Protocol No. 1 in Gibraltar.⁹⁰² In the interpretation of Article 3 of Protocol No. 1, the court rejected the opinion of the majority of the Commission, that Article 3 is not applicable to supranational representative organs but relates to local legislative assembly and hence the United Kingdom could not be held responsible to secure election in Gibraltar to the European Parliament. The court contended that the Convention must be read in the light of present-day conditions and hence the word legislature must be interpreted in the light of the current changes of constitutional or Parliamentary structures of the European Community.⁹⁰³ The court argued that the European Parliament was now transformed from a mere advisory and supervisory organ to a body which had assumed the powers

⁸⁹⁷ Ibid., Paragraph, 100

⁸⁹⁸ Ibid., Paragraph, 100

⁸⁹⁹ Ibid., Paragraph, 85

⁹⁰⁰ The applicant complained that although she currently enjoyed a full physical relationship with a man, she and her partner could not marry because the law treated her as a man. See Ibid., Paragraph, 95-101

⁹⁰¹ *Matthews v. The United Kingdom*, Application no. 24833/94, 18 February 1999.

⁹⁰² Article 3 of Protocol 1 states "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."

⁹⁰³ *Matthews v. The United Kingdom*, Application no. 24833/94, 18 February 1999, Paragraph 39

and functions of a legislative body.⁹⁰⁴ Although the court recognised that the EU Parliament has no formal right to legislate, the court emphasised that the EU Parliament has to be seen as part of the EU Community structure which best reflects concerns as to effective political democracy and which is accordingly involved in the general democratic supervision of the activities of the EU Community.⁹⁰⁵ Thus, the court concluded that the absence of elections to the EU Parliament in Gibraltar injured the very essence of the applicant's right to vote guaranteed in the Article 3 of Protocol No.1.⁹⁰⁶

Accordingly, there seems to be no consistent judicial approach followed by the European Court to assess whether a certain limitation on right actually injures the essence of the right concerned. From this point it has been argued that the determination of which will be given the relative weight, the preservation of the public interest or the preservation of the very core of the right concerned, is entirely subjective and unpredictable, changing from judge to judge and case to case.⁹⁰⁷

The British judiciary generally pays a degree of deference to The British Parliament's view of what may constitute the interest of the public when upholding the right enshrined in the European Convention.⁹⁰⁸ This raises a question of whether the British court uses the doctrine of margin of appreciation recognised under ECHR jurisprudence

⁹⁰⁴ Ibid., paragraph 46

⁹⁰⁵ Ibid., paragraph 54

⁹⁰⁶ Ibid., paragraph 65

⁹⁰⁷ Davidov, G., *op.cit.*, p. 49. See also Hutchinson, M., *op.cit.*, p. 641. This is another demonstration of the European lack of clear standards of right implementation that could define clearly when the right concerned is violated by the state authorities. Although the European Court of Human Rights was able to define what is necessary in a democratic society, it is still unclear when the state limitation would injure the essence of rights, especially if the limitation was set to serve grounds that have no uniform European conception, like morals. If that is the case in a regional arrangement where states are supposed to share common heritage of social and cultural traditions, the differences in the implementation of international human rights in the world level, where social and cultural principles clearly vary, should, then, be appreciated.

⁹⁰⁸ Lord Woolf's opinion in *Regina v Lambert; Regina v Ali; Regina v Jordan*, *Court of Appeal (Civil Division)*, [2002] QB 1112

as part of the judicial application of HRA 1998. In the *Montgomery* case, Lord Hope suggested that the Scottish variation in method (prosecutor bearing responsibility for the protection of the right to a fair trial in the first instance) fell within the margin of discretion given to contracting states. However, Lord Hoffman refused to employ the margin of appreciation to this case, on the ground that the doctrine only exists to enable the concepts in the Convention to be given somewhat different content in the various contracting states, according to their respective histories and cultures and this was not the question of the present case. For Lord Hoffman, the question of the case was a purely United Kingdom question involving simply the construction of United Kingdom legislation and hence he refused *without further argument, to accept that the concept of a margin of appreciation should be employed to enable the same provision of the Convention to be given different meanings according to whether it has been incorporated into the law of one part of the United Kingdom rather than another.*⁹⁰⁹

The Divisional Court in *R (on the application of Pelling) v Bow County Court* maintained that the discretionary judgement in the national court concerning the application of Article 6 within the national legal order is sometimes confused with the doctrine of margin of appreciation, which is a doctrine available only to the Strasbourg court.⁹¹⁰ Lord Hope clearly made the point in *R v Director of Public Prosecutions, ex parte Kebeline* that the doctrine of margin of appreciation underlines the principle that the convention, as a living system, does not need to be applied uniformly by all states but may vary in its application according to local needs and conditions.⁹¹¹ Lord Hope, however, also pointed out that this technique is not available to the national court in

⁹⁰⁹ *Montgomery v. HM Advocate*, Privy Council, 2001 SC(PC) 1

⁹¹⁰ *R (on the application of Pelling) v. Bow County Court*, Queen's Bench Division, [2000] CO/4774/1999

⁹¹¹ *R v Director of Public Prosecutions, ex parte Kebeline and others; R v Director of Public Prosecutions, ex parte Rechachi*, [2000] 2 AC 326, Lord Hope

resolving convention matters within their own countries. The judicial deference to the view of elected body in areas that are seen as incompatible with the convention, unlike the margin of appreciation, which is more concerned with the question of what content should be given to the concepts of the convention, involves questions of balance between competing interests and issues of proportionality.⁹¹²

Thus, the international doctrine of margin of appreciation, which leaves a degree of discretion to states to differ in the implementation of the convention provisions, cannot be used by a national court to justify the state's violation of a convention right. However, the judicial deference to the elected body within a country will still be developed under the jurisprudence of the European Court. As Lord Hope emphasised, the convention should be seen as an expression of fundamental principles rather than as a set of mere rules and the national court will always need to bear in mind the jurisprudence of the European Court in tackling the convention provisions.⁹¹³

The subject of the right limitation clause and the margin of the discretion available to the states in interpreting the international rights is a very important matter to this study, since it tackles the recognised standards for the permissible variations of the right implementation. Therefore, a further discussion will be made below to assess the international application of this doctrine and whether it could be applied to the Islamic values.

⁹¹² Ibid., Lord Hope's opinion

⁹¹³ Ibid. For more information about the judicial deference to the elected body in the UK see McGoldrick, D., *op.cit.*, pp. 26-28. See also Clayton, R., *op.cit.*, pp. 33-47

V.4. International Use of Margin of Appreciation to Accommodate the Islamic Values

Although the term, “margin of appreciation” is a product of the European Court of Human Rights, the idea that the state is the one which is in charge of the determination of how the international norms should be put into effect is recognised worldwide, particularly in the UN human rights instruments. In the UN human rights treaties, many rights recognised as essential, like the right to a fair and public hearing, freedom of expression, the right of peaceful assembly and the right to freedom of association, are subject to state interference. It seems that almost all rights in the Covenant of Civil and Political Rights which require state abstention and would in their exercise be likely to require manifestation and demonstration in public are subject to various types of state limitation, whereby the state has a margin to determine the means of implementation. For example, Article 19, paragraph (1) which guarantees the right to hold opinions seems to have been set free from any state limitation, since its exercise clearly does not need demonstration in public, while in paragraph (3) the freedom of expression stated in paragraph (2) and which requires in its exercise manifestation and demonstration in public has been limited for protecting various objectives. Similarly, the right to freedom of thought, conscience and religion is stated in Article 18 but when it comes to the manifestation and practices of the religion, various limitations have been put to serve various goals and objectives. Therefore, the right of peaceful assembly and the right to freedom of association have unsurprisingly been limited to protect *national security or public safety, public order (order public), the protection of public health or morals or the protection of the rights and freedoms of others.*⁹¹⁴ It is worth noting that these limitation clauses, unlike derogations, are permanent and must be provided by law.⁹¹⁵

⁹¹⁴ See Article 21 and 22 of the International Covenant on Civil and Political Rights

⁹¹⁵ Kiss, A., “Permissible Limitations on Rights”, In: Henkin, L., *The International Bill of Rights: the Covenant on Civil and Political Rights*, New York : Columbia University Press , 1981, p. 290

However, this international recognition of the state margin to determine how the international rights should be implemented is not without standards controlling the scope of the grounds on which the state margin of implementation must be based. The state's limitation in both International Covenants has to be 'provided by law', 'in conformity with law', or 'prescribed by law', and for certain limitation clauses it must be 'necessary in a democratic society'.⁹¹⁶ Moreover, state limitations are permitted only where they were provided and for the objective specified. For example, if the limitation was permitted to protect national security or public safety, other than these objectives would not be permissible grounds for the limitation.⁹¹⁷ Although the definition of these objectives of the limitation clause seems to fall under the state's discretion, which may vary from state to state, this state discretion is also restricted not to impair the essence of the right concerned.⁹¹⁸

It seems that the law that is able to qualify human rights and freedoms is that which uses precise criteria⁹¹⁹, is based on clear legal grounds⁹²⁰ and complies with the provisions, aims and objectives of the international instruments.⁹²¹ A question arises, here, as to whether the Islamic *Shari'ah* law is capable of qualifying human rights. Mayer asserted that the vagueness of the Islamic criteria made by too diverse pre-modern jurists would make the international rights illusory.⁹²² Therefore, Mayer concluded that Islamic law cannot be a legitimate basis for curtailing rights.⁹²³ As she put it

⁹¹⁶Limitation clauses that must be necessary in a democratic society see Article 14, Article 21 and Article 22 of the International Covenant on Civil and Political Rights and Articles 4 and 8 of International Covenant on Economic, Social and Cultural Rights.

⁹¹⁷ Kiss, A., "Permissible Limitations on Rights", In: Henkin, L., op.cit., p. 296

⁹¹⁸ UN General Comment No. 27, Freedom of movement (Art.12) 2 November 1999, CCPR/C/21/Rev.1/Add.9. paragraph 13

⁹¹⁹ Ibid., paragraph 13

⁹²⁰ Ibid., paragraph 16

⁹²¹ UN General Comment No. 16: The right to respect of privacy, family, home and correspondence, and protection of honour and reputation (Art. 17) : . 08/04/88. CCPR General Comment No. 16., Paragraph 3

⁹²² Mayer, A., op.cit., 1999, p., 66-67

⁹²³ Ibid., p. 66

*“Even on those topics, where there are extensive rules in the Shari’ah, there is enough diversity and nuance in the relevant legal doctrines to give the state considerable leeway in deciding what rules should be chosen as embodying the official Islamic norms.”*⁹²⁴

Interestingly, the vagueness of the law as an issue to render the law concerned incapable of limiting human rights was in fact raised against British common law in the case *Sunday Times v United Kingdom* before the European Commission of Human Rights and the European Court of Human Rights. As mentioned above, the common law system leaves the judges with powerful authority to deduce law from judicial precedents or even from their own experience, common sense, and their own understanding of justice and fairness if there is no relevant precedent for the case in question. As Rosenfeld suggests, unless judicial precedents resulted in determinate outcome, the common law cannot guarantee predictability, in the sense that one cannot predict the legal consequence of his or her act, until further judicial decisions are made in future cases, setting up the legal specificities of such conduct.⁹²⁵

The *Sunday Times* brought an application against the United Kingdom before the Commission, alleging that the law of contempt of Court was so vague and uncertain that the restraint imposed by it could not be regarded as "prescribed by law". The Commission referred the case to the European Court which, on the assumption that the injunction had been prescribed by law, articulated that there had been a violation. In respect of whether the limitation imposed by common law on the convention rights is prescribed by law the court stated, *“it would clearly be contrary to the intention of the drafters of the Convention to hold that a restriction imposed by virtue of the common*

⁹²⁴ Ibid., p. 67

⁹²⁵ Rosenfeld, M., op.cit., pp. 1337-1338

law is not "prescribed by law" on the sole ground that it is not enunciated in legislation" as this would strike the very root of the common law states' legal system.⁹²⁶

The court found the two implied requirements for the norm to be a recognized law, which are first it must be adequately accessible and second must be formulated with sufficient precision to enable the citizen to regulate his conduct, unattainable. The court further argued that "*whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances*"⁹²⁷ The court admitted that "*many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice*"⁹²⁸

With regard to the applicant's contention that the British prejudgment principle was novel and that they therefore could not have had an adequate indication of its existence, the court responded that the applicant could have known, with legal advice if necessary, that a particular principle might be applied by the courts.⁹²⁹

Accordingly, if the *Shari'ah* law, because it has vague standards made by too diverse pre-modern jurists is insufficient to limit the international rights as claimed by Mayer, then the common law system, which was also made by too diverse judges, would be regarded as such, since it too consists of vague principles, as demonstrated above. However, the European court has made it clear that the vagueness itself may be necessary to avoid being rigid in the changing circumstances and hence the precision required should not mean to be more than the existence of sufficient indications that a

⁹²⁶ *The Sunday Times*, op.cit., paragraph 47

⁹²⁷ *Ibid.*, Paragraph 49

⁹²⁸ *Ibid.*, Paragraph 49

⁹²⁹ For more information about the limitations clauses of the European Convention of Human Rights and for more comments on the *Sunday Times* case and others see Brisby, L., and Jacobs, F. G., *Yearbook of European Law Vol. 6*, Oxford: Clarendon Press, 1982, pp. 10-25

particular act is prohibited by a particular principle that might be applied by the courts. It is worth noting here that the Islamic system does not seem to leave judges to pick what they like or dislike from the Islamic teaching. Rather, the judicial *Ijtihad* (mental effort) and reasoning must be consistent with the principles specified by the legislature. In the UAE legal system, judges are obliged to apply the Islamic principles that are already underlined by the legislature in the form of law or in the form of legislative decree.⁹³⁰

Another condition governing the permissible limitation of the international rights is that the limitation must be 'necessary in a democratic society'. The phrase is very general and could bear different interpretations. What would constitute necessity is problematic and the words 'in a democratic society' are not elaborated enough to articulate the basis on which the word democracy can be universally defined. An attempt to narrow down the generality of the word democracy was that a democracy can be identified by its respect for the principles and objectives of the UN Charter, the Universal Declaration of Human Rights and the international Covenants on Human Rights.⁹³¹ However, these international human rights instruments are themselves problematic in implementation, raising enough generality to be interpreted differently according to each state's political ideology and legal system. It is rather strange to define a general notion by reference to more general and complex principles. Hence, the international instruments seem to contribute little to settle an agreement on how a particular limitation on international rights might be necessary in a democratic society.

⁹³⁰ The Article 1 of the UAE Civil Transaction Code states "The legislative provisions shall apply to all matters dealt with by those provisions in the letter and in the spirit. There shall be no innovative reasoning *Ijtihad* in the case of provisions of definitive import. If the judge finds no provision in this law, he has to pass judgement according to the Islamic Shari'ah. If no provision is found here either, he must choose the most appropriate solutions from the schools of Imam Malik or Imam Ahmed bin Hanbal, and if none is found there then from the schools of Imam Alshafi and Imam Abu Hanefah as most benefits. If the judge does not find the solution there, then he must render judgement in accordance with custom, provided that the custom is not in conflict with public order or morals...."

⁹³¹ Kiss, A., op.cit., p. 306

One can notice, here, that reference to democracy as a condition for the limitation of international rights is only made in five Articles of both International Covenants of Human Rights.⁹³² On the other hand, the European Convention of Human Rights has made reference to democracy in almost all limitation clauses and hence the European Convention on Human Rights and its machineries like the European Commission and the European Court of Human Rights may be the instrument that have made the most contribution in the elaboration and exploration of what could constitute what is 'necessary in a democratic society'.

The European Court of Human Rights has underlined three requirements to assess what is necessary in a democratic society. The court asserted in cases like *The Sunday Times* and *Barthold* that the necessary limitation in a democratic society must correspond to a "pressing social need", be "proportionate to the legitimate aim pursued" and the reasons given by the national authorities to justify it must be "relevant and sufficient".⁹³³ Moreover, the court has emphasised that limitation must not impair the *essence* of the Convention rights. However, the European Court of Human Rights, as discussed above, seems unable to reach a consistent European approach based on clear standards able to strike a balance between the limitation that is necessary in a democratic society, and the preservation of the very essence of rights, leaving the door open, especially in areas where there is less European consensus like morality, to subjective decisions of each individual judge. If that is the case in a regional instrument, where states are supposed

⁹³² Unlike the European Convention of Human Rights that refers to democracy in almost all limitation clauses, the International Covenants refer to democracy only in 5 Articles; Article 14, Article 21 and Article 22 of the International Covenant on Civil and Political Rights and Articles 4 and 8 of International Covenant on Economic, Social and Cultural Rights.

⁹³³ See *The Sunday Times v. The United Kingdom*, op.cit., paragraph 62. Available online at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31298&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49>

See also the case of *Barthold v. Germany*, op.cit., paragraph 55. Available online at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31146&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49>

to share a common heritage and values, then it is unsurprising to see very diverse views and understandings of what may constitute necessity in a democratic society on the world level. Therefore, as Brems rightly suggests, a broader use of the margin of appreciation may be appropriate on the international level, particularly in areas where vague and general notions exist.⁹³⁴ Within this context, a question arises as to whether the Islamic *hadd*, corporal punishment, like flogging, could be regarded as acceptable in a democratic society.

Article 7 of the International Covenant on Civil and Political Rights makes it illegal for the state to have in its legal system any punishment that subjects a person to torture or to cruel, inhuman or degrading treatment or punishment. In the general comment no 20, the Human Rights Committee emphasised that the text of Article 7 allows of no limitation, even in situations of public emergency; no derogation from the provision is allowed.⁹³⁵ It went on to suggest that “*no justification or extenuating circumstances may be invoked to excuse a violation of article 7 for any reasons.*”⁹³⁶ However, the committee has not provided a precise definition of what punishment might be regarded as torture, cruel, inhuman or degrading. In fact, the committee considered an engagement to define these concepts unnecessary and contented itself with providing some general and perhaps vague guidance to identify whether a punishment is prohibited under the Article. The committee refers to the *nature, purpose and severity* of punishment or treatment as standards to identify whether a punishment or treatment is torture, cruel, inhuman or degrading.⁹³⁷ However, these standards do not specify from what perspective a punishment can be seen as involving torture or degrading elements.

⁹³⁴ Brems, E., *op.cit.*, p. 399

⁹³⁵ General Comment No. 20: Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (Art. 7) : . 10/03/92. Paragraph 3

⁹³⁶ *Ibid.* paragraph 3

⁹³⁷ *Ibid.*, paragraph 4.

Without clear and precise standards to identify what would constitute torture, cruel, inhuman or degrading punishment, difficulty would arise in the implementation of this article.⁹³⁸ On what basis can one say that a punishment is torture or of a degrading nature, if the society where this punishment is applied, say, does not consider it as such? In other words, if a society views certain punishments applied to its members as not of a degrading nature, can the international organ consisting of a handful of appointed officials decide to the contrary? Moreover, some societies may view the effectiveness of punishment on the basis of how much pain or degradation it involves and without such elements a punishment may not be an effective deterrent.

The European Court of Human Rights tackled this question in length in the *Tyrer* case and provided answers to all these propositions. The facts of this case constituted a breach of Article 3 of the Convention which provides that "*No one shall be subjected to torture or to inhuman or degrading treatment or punishment.*"⁹³⁹ The applicant had been punished by the authority of Isle of Man, a dependency of the United Kingdom, with three strokes of the birch in accordance with the relevant legislation. As mentioned in the facts of the case, the *birching raised, but did not cut, the applicant's skin and he*

⁹³⁸ In *Ireland v. UK*, the European Court of Human Rights has differentiated according to the intensity of the suffering inflicted between the concept of torture and the concept of "inhuman or degrading treatment and punishment". According to this distinction the court concluded that the five techniques including, wall-standing forcing the detainees to remain for periods of some hours in a "stress position", hooding, subjection to noise, deprivation of sleep, deprivation of food and drink, used by RUC security forces to obtain intelligence information, although they amounted to a practice of inhuman and degrading treatment, did not occasion suffering of the particular intensity and cruelty implied by the word torture as so understood. The court contended that for a treatment to be regarded as torture, it has to contain a special stigma of deliberate inhuman treatment causing very serious and cruel suffering. It refers to UN General Assembly resolution adopted on 9 December 1975 which declares: "Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment". See *Ireland v. UK*, Application no. 5310/71, 18 January 1978, paragraph 167. It is unclear, however, how the court considers inhuman and degrading treatment as an element to assess the intensity of suffering that constitutes torture and at the same time asserted the distinction between the two concepts. It is rather vague how the scale of aggravation in suffering can be assessed in a way that easily leads to the conclusion that it commences with degradation, mounts to inhumanity and eventually reaches the level of torture.

⁹³⁹ Article 3 of the European Convention on Human Rights

*was sore for about a week and a half afterwards.*⁹⁴⁰ The applicant alleged that the judicial corporal punishment he was subjected to consisted of elements of torture or inhuman or degrading treatment or punishment and hence was in a breach of Article 3 of the European Convention on Human Rights. However, the court considered the level of suffering according to the facts of the case did not reach such a level that the punishment could be classified as ‘inhuman punishment’ and as a result it limited the question which would be tackled by the court to whether the punishment was degrading.⁹⁴¹

In considering the question of whether the punishment of three strokes of the birch was of a degrading nature, the court noted that the assessment of whether there is a humiliation element in the punishment is relative and “*depends on all the circumstances of the case and on the nature and context of the punishment itself and the manner and method of its execution.*”⁹⁴² The court took into account that the local public opinion can have a bearing on the interpretation of the concept of “degrading punishment” and may view the punishment as effective on the basis of the element of degradation which it involves.⁹⁴³ However, the court also noted that “*a punishment does not lose its degrading character just because it is believed to be, or actually is, an effective deterrent or aid to crime control.*”⁹⁴⁴ For the application of Article 63 (3),⁹⁴⁵ there would have to be positive and conclusive proof of a requirement that without recourse to that punishment law and order could not be maintained.

⁹⁴⁰ *Tyrer v. The United Kingdom*, 25/04/1978, Application Number 5856/72, Paragraph 10

⁹⁴¹ *Ibid.*, Paragraph 65

⁹⁴² *Ibid.*, paragraph 30

⁹⁴³ *Ibid.*, paragraph 31

⁹⁴⁴ *Ibid.*, paragraph 31

⁹⁴⁵ Article 63 (3) of the European Convention states that “*The provisions of this Convention shall be applied in such territories with due regard, however, to local requirements.*”

A striking point, in the case, was that the court opened the possibility that if it was provided that judicial corporal punishment was considered not only appropriate to local conditions, but necessary as a deterrent and to maintain law and order in the Isle of Man, and there was positive and conclusive proof of a requirement, then it might have been considered, according to Article 63 (3), that in spite of its degrading character, it did not entail a breach of Article 3.⁹⁴⁶

Indeed, the court concluded that the judicial corporal punishment of the island was in breach of Article 3 of the Convention and no local requirement could be cited to make use of a punishment contrary to Article 3. However, the reasoning of the case seems to have been based on the European common heritage of political traditions that does not use such punishment and of which the Isle of Man has been regarded an inseparable part.⁹⁴⁷ In this connection, the court emphasized that “*in the great majority of the member States of the Council of Europe, judicial corporal punishment is not, it appears, used and, indeed, in some of them, has never existed in modern times...*”⁹⁴⁸ This, according to the court, is enough to cast doubt on whether the availability of this penalty is a requirement for the maintenance of law and order in a European country.⁹⁴⁹ Thus, the common understanding of the European states with respect to judicial corporal

⁹⁴⁶ *Tyler v. The United Kingdom*, op.cit., paragraph 38. The court says “....for the application of Article 63 (3) (art. 63-3), more would be needed: there would have to be positive and conclusive proof of a requirement and the Court could not regard beliefs and local public opinion on their own as constituting such proof. Moreover, even assuming that judicial corporal punishment did possess those advantages which are attributed to it by local public opinion, there is no evidence before the Court to show that law and order in the Isle of Man could not be maintained without recourse to that punishment.” See also the case of *Matthews v. The United Kingdom*, Application no. 24833/94, 18 February 1999, Paragraph 59

⁹⁴⁷ The court states in paragraph 38 “*The Isle of Man not only enjoys long-established and highly-developed political, social and cultural traditions but is an up-to-date society. Historically, geographically and culturally, the Island has always been included in the European family of nations and must be regarded as sharing fully that “common heritage of political traditions, ideals, freedom and the rule of law” to which the Preamble to the Convention refers. The Court notes, in this connection, that the system established by Article 63 (art. 63) was primarily designed to meet the fact that, when the Convention was drafted, there were still certain colonial territories whose state of civilisation did not, it was thought, permit the full application of the Convention.*”

⁹⁴⁸ *Ibid.*, paragraph 38

⁹⁴⁹ *Ibid.*, paragraph 38

punishment seems to have been the main factor in not giving regard to the local values of the island, in the sense that if there was great European variation in this regard, the resort to Article 63 (3) might have been of relevance.

Consistent with this, if it was proven that there is Islamic common heritage of social, cultural and political traditions, considering the punishment of Islamic *hadd* as a deterrent and to maintain law and order and there is, not only belief but positive and conclusive proof of a requirement that without recourse to that punishment law and order could not be maintained in Islamic states, would they be acceptable in a democratic society? If, however, the international organ decided 'No', would this decision of a handful of appointed international lawyers, itself, be acceptable in a democratic society? It does not seem to be democratic to leave such an important issue that has a direct effect on the understanding and belief of the Islamic societies to be decided by a handful of appointed international lawyers. Local Islamic views supported by the vast majority of Islamic societies, therefore, should have a bearing on the interpretation of the concept of torture or to cruel, inhuman or degrading treatment or punishment stated in Article 7 of the International Covenant on Civil and Political Rights. More tolerance is needed to accommodate the variations of values on the world level, especially those that are not only fundamental for the maintenance of the law and order, but form a main factor of legitimacy of the state authorities like the Islamic ones.⁹⁵⁰ The employment of a wider margin of appreciation might be helpful in this regard.

⁹⁵⁰The Islamic Shari'ah is, as Fuller observed, the most powerful ideological force across the Muslim world, operating in parallel to other globalizing forces. See Fuller, G. E., op.cit., p. 67. When the former president of Iran, the *Shah*, endeavoured to westernize the political life of Iran in a very radical way that rejected the very basics of Islamic Shari'ah, the result was the collapse of the regime through a Shiite revolution that brought about the current theocratic state. See Price, D. E., op.cit., pp. 113-114. Algeria has suffered from political disorder that was caused by its crucial decision to ban the Islamic party that won the election in 1991. For more information about democracy in Algeria see Volpi, F., *Islam and Democracy: The Failure of Dialogue in Algeria*, London : Pluto, 2003.

It is worth to note, here, that Islamic states should not take advantage of the international use of the doctrine of margin of appreciation to disguise their violation of human rights under the cloak of cultural differences.⁹⁵¹ States can only claim a margin of appreciation to interfere in human rights if there is clear proof that the limitation on the rights concerned is “*necessary in a democratic society*”.⁹⁵² The states’ exercise of the doctrine will be supervised by international human rights instruments in which the states will be required to demonstrate that the interference in human rights corresponds to a “*pressing social need*”, is “*proportionate to the legitimate aim pursued*” is justified by the national authorities with “*relevant and sufficient*” reasons.⁹⁵³ As mentioned earlier, these requirements are the tests set by the European Court on Human Rights to assess what is necessary in a democratic society and can be applied internationally to assess the state implementation of human rights. Moreover, national Islamic courts cannot use the doctrine of margin of appreciation to justify the government’s violation of international human rights. The doctrine of margin of appreciation was not designed for domestic use, to leave the government unrestrained. The Islamic governments should be ruled by law and the judiciary are under obligation to protect the supremacy of law. The doctrine of margin of appreciation is an international technique which tackles the relationship of the international supervisory system to the national system

⁹⁵¹ Schmidt expressed the fear that the international admission of the margin of appreciation “*might prompt some states parties to rely on arguments of 'cultural relativism', however ill-defined or inappropriate in the circumstances of a given case, or to seek to justify serious human-rights abuses.*” See Schmidt, M., “The Complementarity of the Covenant and the European Convention on Human Rights--Recent Developments”, In: Harris, D., and Joseph, S., op.cit., p. 657

⁹⁵² Davidov, G., op.cit., p. 47

⁹⁵³ See *The Sunday Times v. The United Kingdom*, op.cit., paragraph 62. Available online at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=311298&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49>

See also the case of *Barthold v. Germany*, op.cit., paragraph 55. Available online at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=311146&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49>

and not a constitutional norm that can be cited for more governmental or administrative discretion.⁹⁵⁴

As the proposal, here, is to encourage the international human rights body to give more attention to the doctrine of margin of appreciation to accommodate differences among states in cultural, moral and religious values, the Islamic states, along with the Islamic scholars, should also embrace a complementary approach for the promotion of human rights through making use of the Islamic doctrine of *Siyasah Shar'iyah*, the legitimate governmental policy. The dilemma that may be raised from the conflicting Islamic views on democracy and human rights can be resolved through the unification of Islamic states on clear standards of human rights implementation through regional effort based on the European model. The use of the Islamic doctrine of *Siyasah Shar'iyah* and the Islamic unification on clear standards of human rights implementation through Islamic regional arrangement would ultimately enhance human rights in the Islamic states. These two elements will be further discussed below.

V.5. Islamic Use of the Islamic Doctrine of *Siyasah Shar'iyah* to Accommodate the International Human Rights Values

In this modern time of openness and solidarity between cultures, the hardliners' vision of Islam based on a static interpretation that is rooted in the history of the Crusade wars should now be reconsidered. The international principles of human rights are not necessarily a Western conspiracy against Islam, nor are the international movements to promote respect for human rights over the world another form of imperialism. Although the West might be the greatest contributors to the development of the notion of human rights, human rights are not an exclusively Western idea. They are a result of

⁹⁵⁴For more discussion of the use of the doctrine of margin of appreciation in the domestic legal system see McGoldrick, D., op.cit., p. 27

international realization that human beings, whatever their religion and whatever their culture or tradition, deserve a better life, free from fear and want. It might not be appropriate to see Muslim scholars justifying the rule of dictators through a medieval interpretation on the basis of defending the Islamic state, at a time when the international community has reached the point of regarding all human beings of the world as members of one human family in an attempt to lay down foundation of freedom, justice and peace in the world.⁹⁵⁵ It might also be inappropriate to see in the current Islamic discourse the notion of government reduced in the person of the ruler and used as a means to satisfy his own desire, while in the world of today the government is understood as a machinery that processes the people's demands and brings about the outputs that meet popular expectations. It is important, therefore, that Islamic judges and scholars be careful in reading their reality, taking the international efforts with regard to human rights in good faith and sincerity. Since the Islamic judges are the ultimate resort of the victim of human rights and since justice is to a degree relative to the judge's understanding and values, the judges should have a proper human rights education with a receptive approach to international norms in general.⁹⁵⁶ If it was legitimate for *Muawia*, the ruler of the Islamic state after the fourth wise Caliph, to borrow the internationally recognised rule of hereditary system of governance, the predominant international principle at that time, advocated by Rome and others, why should it not be legitimate for the current Islamic states to borrow the international values of representativeness, accountability and the respect of human rights, promoted, generally speaking, by the same nations, on the basis that they are the values of disbelievers? Therefore, tolerance is also needed on the part of Islamic jurists to accommodate international norms of freedom, justice, and peace.

⁹⁵⁵ See the introduction of the Universal Declaration of Human Rights.

⁹⁵⁶ Baderin, M., op.cit., p. 224

Within this context of tolerance with a proper understanding of current reality, the Islamic doctrine of *Siyasah Shar'iyah* can be of remarkable benefit for the enhancement of human rights in the Islamic states. It is undisputable in the Islamic *fiqh* that the matters that fall in the realm of the 'Adat, particularly those related to the relationship between the governor and the governed, are mostly governed by very general Islamic principles that bear different interpretations. These different Islamic interpretations of the Islamic general rules are themselves governed by the Islamic methodology, of which the main concern is the protection of the interest of human beings.⁹⁵⁷ What may constitute human interest (*Maslahah*) is, too, a matter that itself bears different interpretations according to each scholar's understanding, shaped by the scholar's awareness of the conditions and circumstances of his reality. In this sense the *Siyasah Shar'iyah* will serve as a technique that balances competing Islamic interests and prioritises the most useful interests by sacrificing a less useful one, or avoids the most evil action by accepting a less evil one.⁹⁵⁸ This will give a margin for the Islamic jurists to resolve the issue of conflict with human rights norms, particularly in respect of women's rights, minority rights and the application of the Islamic punishments. In so far as the core principles of the *Shari'ah* are preserved, the other principles that are seen sometimes as prohibited can now be permissible if it were proven to be, under the current circumstances, in the interest of Islam. For example, the distinction that was made between the residents of Islam (*dar al-Islam*) and the residents of war or disbelievers (*dar Al-harb*) and the rules that resulted from this distinction, although they might have been acceptable at a time when war was the main principle governing international relations, might not be appropriate at this time, when the relationship between states is based upon international norms of freedom, justice and peace. Making use of the *Siyasah Shar'iyah* in this regard will require looking at the circumstances

⁹⁵⁷ Al-Qadi, A., op.cit., p. 135

⁹⁵⁸ Ibn Taymiyah, op.cit., 1993, p. 67

under which this distinction was formulated and comparing them with the current circumstances to measure what rule could serve more the Islamic interest, *Maslahah*.⁹⁵⁹ In this example, if the Islamic interest at that time was on the side of the distinction to preserve the Islamic identity and integrity, then it would be at this time against that distinction, since international relations are now based on peace between states, and this distinction could endanger this international principle of peace.⁹⁶⁰ As discussed in Chapter Three, even the *hadd* punishments, like amputation of the hand and stoning, can be temporarily repealed, if sometimes they form a cause of injustice. This was clearly demonstrated by *Umar*, the second Caliph, who repealed the *hadd* of theft in the year of poverty, when all the people were starving.⁹⁶¹ The doctrine of *Siyasah Shar'iyah* teaches not how to follow the traditions, but how to be guided by those who made the traditions and how to engage in new thinking that responds to the current trends and conditions. Well trained jurists equipped with this doctrine and proper knowledge of the international norms would pave the way for better communication between the international law and Islamic law.

The moderate reading of the Islamic *Shari'ah* through the use of the *Siyasah Shar'iyah* may even make the Islamic *hadd* like flogging fall within the margin of appreciation as articulated by the European Court of human rights. If the *hadd* of flogging is set to be executed in all *hadd* crimes with moderate force in a way that does not lacerate the convict's skin, provided that the application of the *hadd* of flogging does not only satisfy local conditions, but it is necessary as a deterrent and to maintain law and order, it might be, according to *Tyrer* case, an acceptable punishment. However, the medieval

⁹⁵⁹ See Al-Qadi, A., op.cit., particularly the first two parts.

⁹⁶⁰ See Addeek, M., *Almo'ahadat fi Ashareea'h Al-Islamyyah wa Alqanon Addawli*, (in Arabic), Dubai: Albayan, pp. 62-71

⁹⁶¹ For more information about the validity of an act even if it is incompatible with the Islamic *Shari'ah* if it is proven to be taken to implement a competing Islamic interest see Mutwalli, A., op.cit., 1990, pp. 145-180.

Islamic views over the execution of the *hadd* of flogging, although they are similar in general, are in specificity different. Many scholars, for example, differentiate between the crimes of *hadd* committed and, as a result, differentiate in the execution of the punishment. If the crime was a *zina* (adultery) the force used to execute the flogging, according to this view, would be harder,⁹⁶² and the stripes would be applied directly on the convict's base skin.⁹⁶³ One supporter of this view went further and suggested that the stripe can even be applied on the convict's head to reach a stronger deterrence.⁹⁶⁴ Using *Siyasah Shar'iyah* based on *maslahah* in this case would necessarily uphold the moderate Islamic view that could facilitate better understanding between the Islamic principles and the requirement of the doctrine of margin of appreciation as articulated by the European Court of Human Rights. There are respected views in the traditional *fiqh* suggesting that the execution of the *hadd* has to be applied with moderate force in all *hadd* crimes, *zina*, alcohol drinking, and the *hadd* of *qadf*, and that the level of force should not be such as to lacerate the skin of the convict.⁹⁶⁵ Muslim scholars specify certain procedures that could define moderate force in practice, which include: first, the person appointed to apply the flogging must not raise his hand above his head and after he has applied the stripe he must raise the whip aloft and not pull in off.⁹⁶⁶ Second, the stripes have to be applied without taking off the convict's clothing.⁹⁶⁷ Third, the stripes must not be concentrated on one part of the body so as not to cause the skin to be cut or

⁹⁶² It has been suggested by a number of respected scholars that Muslims have been commanded by Allah in the Quran 24:2 that the woman and the man guilty of adultery have to be flogged a hundred stripes and Allah expressly says "*let not compassion move you in their case, in a matter prescribed by Allah*" which means, according to their view, hardening the use of force in the execution of flogging in the *hadd* of adultery. Whereas the *hadd* of drinking alcohol was not prescribed by Allah in the Holy Quran but it was deduced by the companions and therefore its punishment should not have the same pain as the other *hadd* prescribed by Allah. See Assarkasy, S., *Almabsoot*, Part 9, Beirut: Dar Alm'arefah, 1406 (Islamic calendar), p. 71

⁹⁶³ Cited in Alkasani, A., op.cit., p. 60

⁹⁶⁴ See the opinion of Abu-Yosuf cited in Ibn Qudama, op.cit., p. 141

⁹⁶⁵ Cited in Al-Qurtubi, M., op.cit., p. 163

⁹⁶⁶ Alkasani, A., op.cit., p., 60

⁹⁶⁷ Ibn Qudama, op.cit., p., 142

damaged, but have to be spread all over the body.⁹⁶⁸ Fourth, the stripes must not be applied to the head, face, stomach or chest or the delicate parts of the body of the convict.⁹⁶⁹ Hence, the execution of flogging, as far as the opinion of European Court of Human Rights in the case of *Tyrrer* is concerned, does not seem to reach, according to the moderate Islamic view, the level of suffering that could constitute torture or inhuman treatment. Moreover, it is well known to Muslims that the application of Islamic *hadd* is not only appropriate to local conditions, nor is it only necessary as a deterrent and to maintain law and order, but it is widely recognised as forming a factor of legitimacy of the legal system of the Islamic states. Although flogging can be applied to people whose age is 13 or 14, which is the age of *takleef* according to the traditional Islamic *fiqh*, through the use of the *Siyasah Shar'iyah*, which leaves a margin for change according to current requirements, it can be raised to 18, the internationally recognised age of adulthood, since the modification of the age does not seem to bring significant change in the application of the punishment, and since most of the Islamic states, in their legal systems recognise the age of 18 as the age of adulthood.⁹⁷⁰

Indeed, Islamic opinions over human rights matters are very diverse. However, these differences of opinion that exist within Islamic jurisprudence on the general subject of Islam and human rights can be resolved through inter-State co-operation as a means for officially recognising the Islamic opinions that are most conducive to the enhancement of human rights and dignity. Creating an effective regional mechanism for the

⁹⁶⁸ Assarkasy, S., op.cit., p., 72

⁹⁶⁹ Ibn Qudama, op.cit., p., 141. These procedures, governing the force used in the execution of flogging are actually stated in the Pakistani Islamic Criminal Law in the Execution of the Punishment of Whipping Ordinance, 1979. See Waqar-Ul-Haq, M., *Islamic Criminal Laws: hudud laws and rules with up to date commentary*, Lahore: Nadeem Law Book House, 1994, p. 455-458

⁹⁷⁰ Amnesty International condemns the Sudanese judicial application of death penalty to young offenders under 18 years old in the name of *hudud*. Although the Sudanese constitution states "The death penalty shall not be imposed on a person under the age of eighteen...", the exemption of the *hudud* crimes from the reach of this article makes the article almost worthless, since *hudud* crimes include murder and burglary over a certain amount. See Amnesty International Worldwide Appeal, SUDAN: Young offender at risk of execution, Available online at <http://web.amnesty.org/appeals/index/sdn-011005-wwa-eng>

enforcement of human rights in the Muslim world “*can provide a community framework among modern Muslim States within the international order as a regional arrangement for the practical realization of international human rights law in the Muslim world.*”⁹⁷¹ In adhering to an Islamic collective supervision based on the doctrine of *Siyasah Shar'iyah* over the application of the *hadd* of flogging, for example, would create a better understanding of the Islamic *hadd*, which is, as seen above, not necessarily of the nature of inhuman punishment. The Organization of Islamic Conference could play a key role in performing this task and in establishing proper communication between Islamic states and international human rights instruments.

V.6. The Use of the Organization of Islamic Conference (OIC) as a Regional Arrangement for Human Rights Protection

The Islamic states engaged in 1969 in a type of regional arrangement to collectively tackle some important issues, such as promoting Islamic solidarity among Member States, encouraging economic cooperation, and supporting international peace and security founded on justice.⁹⁷² In the preamble of the OIC Charter, the Member States have expressed their commitment to the United Nations Charter and fundamental Human Rights freedoms.⁹⁷³ In a significant step to the promotion of human rights, the Member States have endorsed the 1990 Cairo Declaration on Human Rights in Islam, a document that is issued to serve as a general guidance for Member States in the field of

⁹⁷¹ Baderin, M., op.cit., p. 226

⁹⁷² See the objectives of the Islamic Organization Conference stated in Article 2 section (A) of the OIC Charter. Article 2 section (A) states:

“The objectives of the Islamic Conference shall be to promote Islamic solidarity among Member States; to consolidate cooperation among Member States in the economic, social, cultural, scientific and other vital fields of activities, and to carry out consultations among Member States in international organizations; to endeavour to eliminate racial segregation, discrimination and to eradicate colonialism in all its forms; to take necessary measures to support international peace and security founded on justice; to coordinate efforts for the safeguarding of the Holy Places and support of the struggle of the people of Palestine, to help them regain their rights and liberate their land; to back the struggle of all Muslim people with a view to preserving their dignity, independence and national rights; to create a suitable atmosphere for the promotion of cooperation and understanding among Member States and other countries.” Available Online at <http://www.oic-oci.org/>

⁹⁷³ The Charter of the OIC has been registered in conformity with Article 102 of the United Nation’s Charter on February 1st, 1974. See Article 14 of the OIC Charter

human rights.⁹⁷⁴ The OIC has, further, established in 2004 a Covenant on the Rights of the Child in Islam.⁹⁷⁵ This regional human rights arrangement could play an important role in promoting human rights in the Islamic world and in establishing communication with international human rights instruments on clear and unified Islamic human rights standards. There is a notable willingness from Islamic states to bridge the gap between the OIC and UN human rights organs, like the Resolution No.3/29-LEG, which requests the Member States and the Secretary General of the OIC to hold meetings with the UN human rights organs and agencies to clarify the Islamic states' positions on important human rights issues, like minorities' rights.⁹⁷⁶

Many regional efforts have been elaborated in the light of the international instruments to promote human rights and fundamental freedoms in the world. The European Convention on Human Rights in 1950, the American Convention on Human Rights in 1967, and the African Charter on Human and Peoples' Rights in 1981, have all elaborated regional standards with detailed arrangements of implementation.⁹⁷⁷ These regional efforts do not seem to present themselves as alternative options to the international instruments of human rights. Rather, they seem to be mainly intended to lay down standards of implementation for a particular region that might not have been achieved on the world level, as a result of the worldwide diversity in the level of specificity in the implementation of the concept of human rights. These regional engagements in human rights protection would narrow down this wide divergence in the world understanding of human rights, which is affected by cultural values and social

⁹⁷⁴ See the introduction of Cairo Declaration on Human Rights in Islam

⁹⁷⁵ Covenant on the Rights of the Child in Islam, Available Online at <http://www.oic-oci.org/english/conventions/Rights%20of%20the%20Child%20In%20Islam%20E.pdf>

⁹⁷⁶ OIC Resolution No.3/29-LEG on Coordination among Member States in the Field of Human Rights

⁹⁷⁷ Chapter 3 of *The Major Regional Human Rights: Instruments and the Mechanism for their Implementation*, UN publication, available Online at http://www.ohchr.org/english/about/publications/docs/CHAPTER_3.pdf

codes and which has always been cited as an excuse for not applying the universal rights.⁹⁷⁸ The UN General Assembly affirmed this in its resolution 32/127 which encourages regional co-operation for the promotion and protection of human rights, particularly in areas where no regional efforts of such a nature exist.⁹⁷⁹

Islamic societies do share common values of justice and freedom embodied in Islam, which could form a strong unifying factor for the Islamic states to represent themselves in one human rights instrument. However, this common heritage shared by all Islamic societies seems not to have helped Islamic states to reach an agreement on a certain effective machinery of uniformity over human rights protection, as has happened in the European community. Although there seem to have been some efforts to reach that level of regional cooperation, these efforts seem not to have reached beyond the paper they were written on. The OIC Cairo Declaration on Human Rights in Islam, the most comprehensive human rights document conducted under the OIC, has not yet resulted in any machinery of enforcement. This absence of enforcement procedures, leaving Islamic states with wide discretion to interpret the Islamic *Shari'ah* in a way that fits their desires and which ultimately led to severe limitation on even basic rights, rendered the Cairo Declaration mostly inoperative.⁹⁸⁰ Although the Charter of the OIC affirms members' commitment to the UN Charter and the treaties on human rights, Muslim states succeeded in escaping their obligation to the UN human rights instrument through vague interpretation of Islamic law.⁹⁸¹ Thus, the effectiveness of this Islamic organization seems solely dependent on reaching consensus on a universal interpretation of the *Shari'ah* with the regional organ serving as a monitoring body of

⁹⁷⁸ Baderin, M., op.cit., p. 225

⁹⁷⁹ UN General Assembly Resolution, GA Res. 32/127 (1977), Available Online at <http://www.un.org/documents/ga/res/32/ares32r127.pdf>

⁹⁸⁰ Baderin, M., op.cit., pp. 228-229

⁹⁸¹ Verma, V., "Debating Rights in Malaysia: Contradictions and Challenges", Vol. 32, *Journal of Contemporary Asia*, 2002

states' application of the international rights recognised in the Cairo Declaration. This regional body could also facilitate proper communication with the international human rights instruments based on a clear and unified Islamic conception of fundamental rights and freedoms. The UN General Assembly clearly expressed the UN readiness to cooperate with the OIC for the enhancement of international peace and security, disarmament, self-determination, decolonization, fundamental human rights and economic and technical development.⁹⁸² Moreover, in a recent significant step the UN has signed a Memorandum of understanding of human rights on July 2006 with the OIC according to which the two organizations will work together in promoting and encouraging respect for human rights and fundamental freedoms.⁹⁸³ Hence, in spite of the ineffectiveness of the current form of the OIC in respect of human rights, the OIC as an internationally recognised regional organization which consists of almost one-third of the UN members could, after developing the necessary enforcement procedures, serve as a valuable existing regional arrangement for the promotion of human rights in the Islamic states and also on the world level. Part of the necessary machinery for the implementation of the international rights within the OIC members is the establishment of a regional binding convention on human rights on the basis of the European Convention on Human Rights. Resolution No.2/29-LEG is one of a significant step for human rights promotion in which the Member States have called to start the formulation and consideration of Islamic charters on human rights which shall take the form of covenants.⁹⁸⁴ This would eliminate any difficulty that might arise from the legal status of the Cairo Declaration, which has not been recognised as having binding principles. Moreover, a regional Islamic court of human rights, based on the European model of

⁹⁸² The UN General Assembly Resolution, A/RES/53/16, 11 November 1998

⁹⁸³ See OIC News website Available Online at <http://www.oic-oci.org/press/english/2006/July%202006/un-oic-memo.htm>

⁹⁸⁴ Resolution No. 2/29-LEG, On the Follow-up of the Cairo Declaration on Human Rights in Islam

human rights court, would be of great benefit for the enhancement of human rights, in that it would raise the legal culture of human rights through its case law in Islamic world. The significance of the establishment of a regional court of human rights is evidenced by the success of the two most effective regional arrangements of human rights protection, the European Convention on Human Rights and the Inter-American Convention on Human Rights, in which the regional courts were the key players. However, for the regional Islamic human rights court to be sufficient and effective, it would need to adopt a dynamic approach of the Shari'ah law interpretation that corresponds to the present-day conditions. It would need to take advantage of the doctrine of *Siyasah Shar'iyah* that is based on *maslahah*, which could enable it to adopt the juristic opinions that are most conducive to enhancing human rights and dignity.⁹⁸⁵ The principle of *takhayyur* (a technique which permits selecting a course of legal action from the various juristic opinions) will also not only assist judges to chose the right opinion but can also be used with the help of the doctrine of *Siyasah Shar'iyah* to develop Islamic law through enlightened interpretation of the Shari'ah. When the Caliph *Umar* repealed the *hadd* of theft in the year of poverty, as mentioned earlier, he did not change the divine text but what he changed was the interpretation of the divine provisions in light of the requirements and conditions of his time. As I said above, the doctrine of *Siyasah Shar'iyah* teaches not how to follow the traditions, but how to be guided by those who made the traditions and how to engage in new thinking that responds to the current trends and conditions.

V.7. Conclusion

As shown in this chapter, Britain as a signatory state of the European Convention on Human Rights was legally compelled to engage in a constitutional reform to satisfy the

⁹⁸⁵ See Baderin, M., op.cit., p. 230

Convention requirements. One of great obstacles that held Britain from full compliance with the convention provisions was the absence of justiciable rights entrenched in the British constitution. However, as discussed above, the entrenchment of the convention rights was not an easy task, since it conflicts with the very fundamental constitutional tradition in the United Kingdom. The sovereign Act of Parliament, under the British constitution, cannot be repealed by international law. There is no institution, whether internal or international, that can ever legislate inconsistently with Parliament's Act. So Britain had to find a way to preserve its constitutional essence while implementing its international obligation. However, Britain in doing so did not bring about any major constitutional change or any revolutionary idea, such as giving the court the authority to invalidate the Act of Parliament. Rather, the international obligation has been implemented in a way compatible with the British constitution. In other words, the question, in the eyes of the British lawyers, was not how to make the British constitution consistent with international law, but how to implement the latter in compliance with the British constitutional law. Accordingly, as far as the Human Rights Act 1998 is concerned, the constitutional principle of Parliamentary Sovereignty has taken precedence over international law, in that the final say on the matter has been reserved for Parliament, but also, at the same time, the international obligation has been implemented in the British domestic sphere by giving human rights the force of national law.

Thus, it might be right to conclude that one of the distinctive features of the British constitution is the obvious reliance on the traditional common values of the British people. The UK demonstrates that traditions are of significance in maintaining political stability as long as those traditions are consistent with human rights and democracy. British use of traditions has created a strong connection between the political elite and the rest of the members of the society which has made the UK one of the few states in

modern times that enjoy both political stability and substantive features of democracy. The UK, as one of the most developed countries in the Western world, which has participated strongly in forming most parts of international law, has also shown that the reconciliation of the most fundamental constitutional principles with the most fundamental of international norms is widely possible. The UK's constitutional principle of sovereign Parliament seems to constitute to a large degree the same obstacle that the supremacy of Shari'ah is forming in the United Arab Emirates and other Islamic states that adhere to the Islamic constitutional principle that God is the supreme lawgiver. Both are raising difficulty in the implementation of the international rights, although they differ in their justifications of the limitations.

The European legal technique to accommodate the British differences in the implementation of the convention rights can be of benefit for the international instruments to set standards for permissible variations, as well as for the other states to adjust their differences within the international framework. European Court practice has shown flexibility in tackling states' implementation of the convention rights and allowed a good margin for the states to determine how rights can best be implemented in accordance with each state's legal values and constitutional traditions. Even in the case of rights like the right to freedom from torture or inhuman or degrading treatment or punishment, the court contends that the local public opinion can have a bearing on the interpretation of the concept of "degrading punishment". If that is the case at the regional level, where states are supposed share a common heritage, then more tolerance is needed to accommodate the wider variations of values, on the world level, which are not only fundamental for the maintenance of the law and order, but form the main factor of legitimacy of the state authorities like the Islamic ones.

Chapter Six

VI. Conclusion

VI.1. Findings of the Research

The previous chapters clearly demonstrate that there are many aspects of international human rights that need to be addressed more carefully in terms of their applicability. As seen in Chapter Two and Chapter Five, the image of one homogenous “Western right” is misleading and not realistic. They have shown that the Western states themselves, although springing from the same ideology of individualism, are not unified in a certain model of human rights implementation. British experience demonstrates that disagreement over such a contestable matter is difficult to accommodate even on the regional level, where societies are supposed to have shared common values. It can even exist within one state and hence it is not surprising to see that human rights on the international level are such a controversial subject. The UK’s endeavour to accommodate international rights within its common law system revealed that there are many aspects of the notion of right that still need more elaboration and exploration, especially when it comes to the realm in which the two important fields, law and politics, each claims its own exclusive jurisdiction. British emphasis on the political legitimacy of human rights implementation is of significance, calling for more attention to the area where a potential conflict between law and politics could occur. The advocates of the universality of human rights have generally simplified the matter of implementation and seem to be less enthusiastic to take into account the complexity that arises from the process of right application in the state constitutional settings. They seem to mix the process of recognition, which generally does not go beyond the assessment of whether to ratify a certain human rights treaty, with or without reservation, with the process of realization, which requires the assessment of whether

the right is effectively applied by the state and practised fully in the country, which is more difficult to measure.⁹⁸⁶ From this perspective, this study appeals for reconsideration of the international human rights discourse to avoid being biased to the Western culture, trying to suggest that the use of traditions to a certain degree is inevitable to establish real universal human rights with full realization of their essence. As Surin Pitsuwan suggested in an expert seminar held by the Office of the High Commissioner for Human Rights in accordance with the UN resolution 2001/41, people are only convinced by their own rich cultures, and hence they should be encouraged to achieve human rights on the wings of their own cultures, inspirations and teachings.⁹⁸⁷

Hence, although some of the Islamic values and principles may seem incompatible with the principles and values of the current international trend of human rights, this does not necessarily mean these Islamic principles and values must be changed to comply. Rather, it may more appropriately be suggested that this developing notion of human rights should be reconsidered to make universal rights more universal and not relative to a certain regional part of the world.

It must be noted, here, that the question of disagreement over rights present in this study is not whether a right is obligatory in its legal sense but how to apply this obligatory right within the social and religious context. There is, as discussed above, no international fixed model of right implementation, but only theoretical standards which are, in many parts, controversial. Many human rights authors, like Mayer and Donnelly, make their claims against Islam without having proper knowledge of what Islam really is. They seem to overstate the Islamic recognition of the individual's duty towards God

⁹⁸⁶ Arat, Z., "Human Rights and Democracy: expanding or contracting", Vol. 32 *Polity*, 1999

⁹⁸⁷ Commission on Human Rights resolution 2001/41, Continuing dialogue on measures to promote and consolidate democracy, *A/RES/2001/41*

and society in claiming that Islam has only recognised the concept of duty rather than the concept of right. Chapter Three of this study has given a detailed examination of the concept of right in Islam which according to the most recognised schools in the Islamic *fiqh* appears to be a comprehensive notion, covering both concepts; right as a claim as well as the concept of duty. Although the Islamic scholars have not defined the notion of right in the same context that the Western authors have defined it, the rules vindicated by the Islamic scholars on the basis of their understanding of right clearly assert that the right in Islam is not a mere duty but also an individual claim with the force of the Shari'ah law against whoever violates his right, even if it was the state.⁹⁸⁸

Many of the human rights authors seem also to overstate the Islamic principal belief that God is the ultimate legislative power in an attempt to suggest that Islam is undemocratic, as it contradicts the democratic main value that people, not God, are the ultimate legislature. In so arguing, they seem to have not properly understood the differentiation presented in the Islamic *fiqh* between sovereignty and legitimacy. This affirms that although God is the source of legislation of very broad and general political and legal structures of the state, the people, in Islam, are still the source of political power and legitimacy for governance. This Islamic conception of democracy does not seem to differ very much from the Western one since, as seen in Chapter Three, the main components of democracy, which are representativeness, accountability, and the respect of individual rights and freedoms are generally recognised. It is worth noting, here, that this study does not underestimate the Western authors' claim against Islam, since there are Islamic scholars who are against democracy and who seem to even conceptualize a theocratic nature of the Islamic state. Western criticisms are of significance and it may even be necessary to have outsiders' comment on this particular

⁹⁸⁸ See our discussion in Chapter Three

field in order to review the Islamic discourse and see where the weaknesses are. However, the study is calling upon those authors to raise their awareness about Islam, particularly in areas which, on the surface, seem to conflict with the international right and which by close examination indicate, rather than conflict, a permissible difference. The inheritance right, for example, at first glance may seem to be conflicting with the international right of non-discrimination, as the Islamic teaching gives males a bigger share of inheritance than is given to females. However, on reflection, this differentiation, as seen in Chapter Three, seems to be more in the nature of justified and objective differentiation which may be permissible under the international instruments, rather than abhorrent discrimination, since males are not always given the bigger share and sometimes even get less than what is preserved for females.⁹⁸⁹ However, it is worthwhile to note that not all Islamic principles can be reconciled with the current international right and may even never bear modification, like the Islamic *hudud* punishments. This particularly calls for particular attention to be given by the international instruments to reconsider their discourse to be more accommodative to others' fixed values, in much the same way they seek the others' discourse to be accommodative to their values. The technique of the doctrine of the margin of appreciation, discussed in Chapter Five, might be of benefit to strike that balance.

The study also calls upon the Islamic authors to reconsider their discourse and be more receptive to the internationally recognised values of human rights. Human beings do share common values and there is no such particularity that justifies the breach of the *very essence* of the basic right of individual and hence Muslims deserve to live in a state of justice in much the same way the people in other parts of the world do. Instead of hiding behind the cloak of cultural differences, they should work together with the

⁹⁸⁹ See Chapter Three

international rights jurists and advocates and challenge the arguments against them with another argument for, not against, the promotion of human rights. Building a proper communication between the two sides through the UN human rights bodies and forums would pave the way for better understanding, which in its turn would clear the air and correct misconceptions about both approaches to human rights. But this might not be of relevance if Muslim jurists have not used the same language between themselves in the first place and hence Muslim jurists are encouraged to be unified under universal and fixed principles of Islam, with a sensitive approach to human rights promotion in the Islamic states. The OIC would be helpful to unify Islamic states under a universal Islamic conception of human rights.

It is worthwhile noting, however, that this divergence of opinions of Islamic scholars should not be taken as a sign of ambiguity of the Islamic *Shari'ah* to discredit Islam as having unqualified rules and hence, as is sometimes claimed, being incapable to qualify human rights.⁹⁹⁰ The divergence of opinions should not raise any ambiguity or confusion; rather, it should be seen as affording greater options to choose from in a quest for a solution. Islamists, like secularists, have right wing, moderate and left wing but in Islamic terms. *Ulama* or Islamic scholars are also very much the same as lawyers in the secular realm. Why is it good for secularists to differ in their opinions and regarded as a healthy process and a support for freedom of speech, but when it comes to Islam, the same behaviour raises uncertainty? Therefore, this study is not trying to close the door before differences in opinions, but rather calling upon the Islamic authors to avoid politicising a particular vision of Islam at the expense of the others, and to give others who differ the respect they deserve, as no one can claim the ultimate truth. Within this context of tolerance, Islam, in this changing world, should be read in a

⁹⁹⁰ See Mayer, A., op.cit,1995, pp. 64-65

receptive way that can accommodate changes in conditions and circumstances but without affecting the main fixed fundamentals. The discouraging situation in the Islamic states in the field of human rights may be a result of such politicization of a certain vision of Islam, whose main concern is not to change but to uphold the traditions through changing circumstances.

The gross violation of human rights in most Islamic states is a result of the absence of a clear Islamic vision of the relationship between the governor and the governed. Chapter Three clearly demonstrates the democratic feature of Islam in principle, which is based on representativeness, accountability and the respect of human rights, but this is not to say that Islam has not recognised other, hereditary forms of government too. The later ages of Islamic history have shown an abundance of this substantive feature of Islam and this diversion from the principle of democracy has for long been accepted and promoted by most Islamic jurists and scholars. If we measure the age of Islamic government based on the respect of individual rights, we will undoubtedly find it, in the Islamic history, occupying a very short period of time compared with the authoritarian Islamic regime established after the golden era of the Companions' governance. This confusing stance of Islamic jurists towards democracy, together with the lack of clear political machinery concerning the application of the Islamic political beliefs and values, have brought about a state of confusion and vagueness which in its turn has led to the current political situations of the current Islamic states. This absence of a clear Islamic political form of government may be one reason that encourages some Islamic states to uphold a certain vision of Islam at the expense of others.

However, the gross violation of human rights in Islamic states may not only be due to this factor but there is another strong factor that maintains the state of emergency in

many Islamic states. It can be concluded from the comparative study conducted by Daniel E. Price⁹⁹¹ that most Islamic states that have worst human rights records appear to be governed by governments that came through military upheaval, like Syria, Iraq, Libya, Sudan, etc., while states like the Gulf States,⁹⁹² whose governments were established without revolution, although tribal, seem to have less violation of human rights. This result might be natural, since the nature of a state whose government came through revolution is likely, if it does not base itself in democratic principles, to take the form of a police state, that is always concerned with its security rather than the respect of individual rights, as it is always under fear of another revolution. Although Price, in his study, has given a sophisticated analysis of the relationship of Islam to democracy, in which he concluded that *Islam is not the force that is repressing democracy in Muslim nations*, referring to other emerging secular values in the Islamic public life that could play a more important role of repressing, the fact that these states are governed by people who came into power through military upheaval cannot be underestimated. Many studies which are concerned with the promotion of human rights in Islamic states seem to ignore this important element and many of them seem to put the blame on Islam alone as the factor of non-compliance with the international rights.

The approach taken in this study, therefore, has taken this fact into account and uses the United Arab Emirates as a case study, because it is an Islamic state which has no particular image about Islam to uphold, and its government was established without revolution. What also makes the UAE an interesting case study, here, is the fact that it is a federal state of which the power map of the state institutions is clear. We do not overstate the situation in the UAE, since it is undemocratic and still established on tribal

⁹⁹¹ Price, D., *Islamic Political Culture, Democracy, and Human Rights: a comparative study*, Westport, Connecticut: Praeger, 1999

⁹⁹² Especially those which do not fall into a trap of politicizing a certain vision of Islam

values, which may be evidenced by the fact that the Federal National Council is seen in reality as a modern form of tribal *Majles* (council), which is usually composed of the old and more influential people in the tribe, acting as a consultative body that provides the ruler with advice on tribal affairs.⁹⁹³ However, these tribal values are not sacred and nothing stands in the way of any attempt to change them if there is a political will for change and development. This is evidenced by the introductory statement of the UAE constitution which stresses that a dignified and free constitutional life underpinned by a comprehensive, representative, democratic regime is one of the main goals of the UAE constitution, although the approach set to achieve that happened to be a gradual one.⁹⁹⁴

The examination of the UAE constitutional settings in Chapter Four clearly demonstrates that although the UAE is an Islamic state with strong endorsement of the Islamic rules and principles in both its constitution and judicial practices, the main formal structure of the modern state is also recognised. Islam does not seem to be an obstacle to the endorsement of the modern values of a constitutional state. Whether or not these constitutional structures are effective is a matter that is more dependent on the political will of the state than on the principles of Islam. However, the examination of the UAE also reveals that there is a clear tension between the principles of Islam and the international rights, particularly in relation to flogging and the discrimination in marriage between Muslim and non-Muslim. Unlike the other tribal values that may exist in the UAE constitutional system, these values are so sacred that they cannot be changed, since they have been revealed by God through the Islamic *Shari'ah*. From this point it might be right to say that the tension between Islam and the international rights does not seem to go beyond this legal perspective since, as it seems, it does not have a real problem with the modern notion of democracy that is underpinned by the rule of

⁹⁹³ Al-Ghufli, S., *op.cit.*, pp. 123-24

⁹⁹⁴ See the introduction of the UAE Constitution.

law, civil society and free media. Even if there is an Islamic view opposing these modern values of a modern state, although it represents a minority of jurists, there is a wide space in the Islamic *fiqh* to argue and resolve the problem through constructive interpretation, since these matters are of an '*Adat* nature; they fall in the realm of human logic and are governed by the necessities of the realities that change from time to time.

Within this context, reference to the United Kingdom was made in Chapter Five to learn how the tension between local values and international norms can be resolved. Although the UK has a great tradition of democracy and has made a great contribution to the establishment of the current international instruments of human rights, it has a rigid constitutional tradition that holds the UK back from full realization of human rights. Like the sacred principles of the *Shari'ah* law in the United Arab Emirates, the Parliamentary enactment seem to be so sacred that the judiciary cannot override it, even if it was contrary to the international rights. The constitutional principle of supremacy of the Islamic *Shari'ah*, which implies that God is the supreme lawgiver in the UAE, and which cannot be changed by the legislature, seems to be comparable to the supremacy of the constitutional principle of Parliamentary Sovereignty in the UK, which even Parliament itself cannot change. So, Islamic religion and British tradition seem to come to a point of convergence in respect of the foreign values represented by the international norms of human rights. The British experience has shown, however, that the resolution of this tension is not necessarily to be made at the expense of the local values of the state, especially if these values are of such an inviolable nature. The UK, in resolving the tension, seems to have put both sides relevant to the matter, itself and the European Court of Human Rights, on an equal footing, as both are concerned to resolve the incompatibility. Although the UK seems to have upheld its constitutional

principle of Parliamentary Sovereignty, such reconciliation seems to have been performed with sincerity and in good faith.

Islamic judges can make use of the British courts' flexible approach of incorporating Customary International law and Treaty law into their interpretation of Islamic law. British judges have clearly identified the areas where they can implement international principles without affecting the UK fundamental principle of Parliamentary Sovereignty. They adopt a flexible method of interpretation of parliamentary statutes, whereby the courts assume that such statutes are not intended to violate international law. As Islam is, in itself, a universal religion revealed to all human beings by God to promote justice on earth, Islamic judges can, then, assume that Islamic law was not intended to violate the general principles of international human rights. Where tension arises, Islamic judges should make use of the UK courts' experience along with the doctrine of *Siyasah Shar'iyah* and adopt a dynamic approach in the interpretation of the Shari'ah law that corresponds to the present-day conditions. One of the areas, where the British judicial principle of the presumption of intended conformity with international human rights law can be of use to the Islamic judges is, for example, women's right to participate in political affairs. Islamic judges can assume in their interpretation of Islamic rules that the rules of Shari'ah are not intended to deprive women of such a right, since there is no clear explicit Quranic text or Prophetic saying or practice to the contrary, as discussed in Chapter Three. However, this does not mean they should disregard the fixed fundamentals of Islam, such as the application of Islamic *hudud*, but rather they should preserve, as the British judges did when preserving the UK fundamental principle of Parliamentary Sovereignty, the supremacy of the Shari'ah and apply its irreconcilable rules as required by the Shari'ah law, notwithstanding their inconsistency with the current understanding of international human rights. International

human rights bodies also bear the responsibility to be more sensitive to others' fixed principles, in much the same way as they ask others to be sensitive to theirs.⁹⁹⁵

Thus, the language used by some international advocates of human rights, which implies that international law norms must not be compromised, and insists that harmonization between international rights and Islamic law depends only on Muslim scholars exploring alternative interpretations, should now be discarded.⁹⁹⁶ Both international human rights instruments and Islamic states, along with the Islamic scholars, should embrace a complementary approach for the promotion of human rights in the Islamic states. Such a complementary approach can be achieved internationally through making use of the doctrine of margin of appreciation and Islamically through making use of the Islamic doctrine of *Siyasah Shar'iyah*. The unification of Islamic states under one conception through regional effort would also help to eliminate the complexity that may be raised from the conflicting Islamic views on democracy and human rights, which ultimately would enhance human rights in the Islamic states.

⁹⁹⁵ Indeed, Islamic variations in human rights implementation should fall within the boundaries of international standards of human rights protection if they were to be internationally acceptable, and as a result Muslim jurists should develop a dynamic approach in the application of Islamic variations that correspond to the present-day conditions. The moderate reading of the Islamic Shari'ah through the use of the *Siyasah Shar'iyah*, as we saw in Chapter Five, may make such Islamic variations fall within the acceptable margin of appreciation. Human rights approach of implementation should, after all, work both ways, in the sense that international human rights bodies should recognise variations in social and constitutional settings but social and constitutional settings should recognise they cannot self-define how individuals are treated and hence the limitations on individual rights have to be based on the universally accepted international standards of human rights protection in that they have to be, as seen in Chapter Five, prescribed by law and necessary in a democratic society.

⁹⁹⁶ Cited in Baderin, M., op.cit., p. 222

Glossary

<i>'Adat</i>	Customs.
<i>'Adl</i>	Justice.
<i>Al-Ansar</i>	Muslim inhabitants of Medina, who welcomed the prophet Muhammad and the other Meccan Muslims when they migrated to Medina from Mecca.
<i>Al-Mahdi</i>	A male spiritual leader regarded by Shiites as a descendant of Muhammad divinely appointed to guide humans.
<i>Al-Muhajreen</i>	The early Muslims, companions of Muhammad, who emigrated with him from Makkah to Medina in the wake of the Hijra.
<i>Alqadhf</i>	Slander.
<i>Bay'ah</i>	Pledge of allegiance.
<i>Dar Al-harb</i>	House of war: home of the infidels or unbelievers.
<i>Dar al-Islam</i>	The home of Muslims.
<i>Darora</i>	Necessity.
<i>Dhimmis</i>	Non-Muslims citizens of the Islamic states.
<i>Diyyah</i>	Blood money, compensation for murder or injuries under Islamic law.
<i>Faqih</i>	Islamic scholar.
<i>Fiqh</i>	Islamic jurisprudence.
<i>Hadd alkhamr</i>	The punishment of alcohol drinking.
<i>Hadd and Hudud</i>	Fixed Quranic punishment or punishments for certain crimes under Islamic law.
<i>Hadith Alefk</i>	The narration of the Lie.
<i>I'ateqad</i>	Belief.
<i>Ibadat</i>	Acts of worship.
<i>Ibahah</i>	Permission.

<i>Ihl Al-Hal wa Al-'Aqd</i>	The electoral college.
<i>Ijtihad</i>	The intellectual effort of Muslim jurists to reach independent religio-legal decisions.
<i>Jihad</i>	A Muslim holy war or spiritual struggle against enemies.
<i>Jizyah</i>	Tax imposed on adult males of other faiths under Islamic law.
<i>Khatim An-Nbuwat</i>	Final Prophet of God.
<i>Khawarij</i>	The name of a reactionary Islamic group that emerged during the fighting between 'Ali and Umayyad founder and tried to establish its own purified caliphate to enforce justice and a more orthodox Islam.
<i>Koriysh</i>	Ancient Bedouin tribe that controlled Mecca.
<i>Madinah</i>	A city of Al-Ansar where the Prophet Muhammad migrated to from Makkah. It is the second holy city of Islam, after Makkah.
<i>Majles</i>	Council.
<i>Ma'onah</i>	The tax that brings relief to the needy persons in the community.
<i>Maslahah</i>	Interest.
<i>Maslahat al'aebad</i>	The interest of Muslims.
<i>Murtaddeen</i>	Apostates.
<i>Muttaqi</i>	Righteous.
<i>Qawamah</i>	Guardianship.
<i>Qisas</i>	Law of retaliation (life for life, injury for injury).
<i>Riba</i>	Prohibited collection of interest under Islamic law.
<i>Sadaqa</i>	Charity.
<i>Saqeefat bani Sa'aedah</i>	A place where the Muhajreen and Al-Ansar are gathered to elect a leader for Islamic state after the death of the Prophet Muhammad peace upon him.
<i>Shubhah</i>	Doubt.
<i>Shura</i>	Consultation.

<i>Siyasah Shar'iyah</i>	The legitimate governmental policy.
<i>Sultan</i>	A ruler of a Muslim country.
<i>Sunni Madhab</i>	The Islamic school of Sunna: a major cult of Islam.
<i>Ta'zir</i>	Unfixed Punishments under Islamic law where judge has great flexibility in deciding their application.
<i>Tahrim</i>	Prohibition.
<i>Takhayyur</i>	A technique recognised in Islamic jurisprudence which permits selecting a course of legal action from the various juristic opinions.
<i>Takleef</i>	The concept of liability in Islamic legalism.
<i>Twelver Ja'fari</i>	A major cult of Shiite.
<i>Uhud</i>	A place in Madinah where the second battle in Islamic history has taken place. That battle was called the battle of Uhud.
<i>Ulama</i>	Muslim scholar.
<i>Ummah</i>	Islamic nation.
<i>Wahhabism</i>	A member of a Muslim sect founded by Abdul Wahhab (1703–1792), known for its strict observance of the Koran and flourishing mainly in Arabia.
<i>Walayat Alfaqeeh</i>	The rule of religious scholar.
<i>Wali</i>	One of the state authorities in the Islamic state.
<i>Zakat</i>	Islamic religious tax, one of the five basic requirements of Islam. All adult Muslims of sound mind and body with a set level of income and assets are expected to pay zakat.
<i>Zina</i>	Adultery and fornication.

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