

**Disproving the Claim of Inherent Incompatibility
Between
Islamic Criminal Law
And
International Human Rights Law**

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*‘There is a powerful driving force inside every human being that,
once unleashed,
can make any vision, dream, or desire a reality’*

You will find your force James, I believe in you.

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Glossary of Arabic Terms

Adalah / Adl	Justice
Ahl al-Kittab	‘People of the book’ one of four labelled groups of the Medinan Prophetic Period
Alaqaha	Interests
Al-Mihna	The inquisition
Al-quest	Justice and equality
Al-wala wa al-bara	Loyalty to Muslims and disavowal of infidels – one of five principles of Salafi jihadism
Amir-al-Mumin’um	Commander of the faithful
Ansar	‘The helpers’ one of four labelled groups of the Medinan Prophetic Period
Aqila	Male relatives
Arash	Compensation payment for bodily injury category of qisas crimes
Asl	Original case (relating to use of ijma)
Ayat	Verse of the Qur’an
Baghi	Rebellion
Balig wa rashid	Third stage of childhood development where a child is considered to have attained the status of an adult with full understanding
Dar-al-harb	House of War
Dar-al-Islam	House of Islam
Darura	Doctrine of ‘Necessity’
Dhimmi	People of the book, the monotheistic Jews and Christians
Dirham	Arabic monetary currency
Diya	Blood money or compensation
Faqhi	Scholar of Islamic legal science or jurisprudence
Far	New case (relating to use of ijma)
Fatwa	Ruling on a point of law given by a recognised authority
Fiili	Practice (pertaining to urf/custom)
Fiqh	Islamic jurisprudence

Fitna	Civil war / sedition
Fitra	Human nature, human condition, connected with autonomy
Furu-al-fiqh	Branches of Islamic Law - as opposed to <i>usul al fiqh</i> – roots of Islamic Law
Gharana	A fine
Gharib	Stranger
Ghuraba	Minority of strangers – one of five principles of <i>Salafi</i> jihadism
Habs	Imprisonment
Hadd	A crime for which there is a fixed punishment
Hadith	Sayings (as opposed to actions) of the Prophet
Hadith Qudsi	Sub category of hadith attributable to a previous prophet
Haja	Doctrine of ‘Need’
Hajj	Pilgrimage to Mecca – one of the pillars of Islam
Hakimiyyah	Establishment of a caliphate on earth – one of five principles of <i>Salafi</i> jihadism
Halal	Acceptable
Haram	Forbidden actions
Harfiyyah	Scriptural literalism
Hijra	Migration to Medina from Mecca
Hikma	Rationale / Wisdom
Hirabah	Highway robbery
Hudud	Mandatory category of punishments in criminal law
Ibadat	Rules that apply between man and God
Ihsan	Third level of faith
Ijma	Consensus
Ijtihad	Independent reasoning or interpretation, rational argument
Illah	Effective cause – relating to the use of <i>ijma</i>
Ilm al-Qur’an wa’sl tafsir development	Qur’anic exegesis of the classical period – <i>fiqh</i>
Ilm usul al fiqh	Deep understanding
Iman	Second level of faith
Islah	Renewal or restoration
Islam	First level of faith

Ismah	Inviolability
Isnad	Method of deciphering the authenticity of ahadith
Istihsan	Juristic preference – a jurisprudential mechanism
Istidlal	Juristic dedications – a jurisprudential mechanism
Istishab	Inference – a jurisprudential mechanism
Istislah	Public interest – a jurisprudential mechanism
Jahiliyyah	Age of ignorance before Islam
Jald	Flogging
Jali	Obvious analogy (relating to practice of ijma)
Jarima	Offence, crime or sin
Jinaya	Like jarima, this is also an offence, crime or sin
Kaa'bah	Place of worship in Mecca - originally utilised by polytheists but thought by Muslims to have been built by Abraham, an ancestral monotheist
Kafir	Unbeliever
Karamat	Dignity
Khafi	Hidden analogy (relating to the practice of ijma)
Khalifa	Ultimate leader of Islam in the absence of the Prophet
Khalifat	Caliphate – the jurisdiction of the khalifa
Khulafa	Plural form of khalifa
Madhab	School of Islamic jurisprudence
Madhahib	Plural form of madhab
Mahkama	Court
Makruh	Reprehensible actions
Mandub	Recommended actions
Maqasid al-Shari'a	Objectives of Islamic Law
Maslaha al-ummah	Collective wellbeing
Maslaha mursala	Public interest
Maslaha shakhsiyyah	Individual wellbeing
Minhaj	Open way – a formula for engaging with human reason
Mu'adal	Perplexing hadith
Mu'allaq	Hanging hadith
Mu'amalat	Rules that apply between man and man – the justiciable category of rules

Mubah	Permissible actions
Mubasharat	Direct cause
Mufti	A jurisprudential scholar who also applies legal principles to current realities
Muhajirun	‘The immigrants’ one of four labelled groups of the Medinan Prophetic Period
Muhsen	Those attaining Ihsan, the third level of faith
Mujtahidun	Jurists
Mujrim	Personal circumstances of the criminal
Mu’men	Those attaining Iman, the second level of faith
Mu’minun	Believers
Munafiqun	‘The hypocrites’ one of four labelled groups of the Medinan prophetic Period
Munqati	Broken hadith
Mursal	Hurried hadith
Mutassil	Continuous hadith
Mu’tazilah	Rational theorists at the time of the Abbasid Empire
Nafi	Exile
Nafs-e-Ammara	Commanding soul – element of conscience
Nafs-e-Lawwama	Self accusing soul – element of conscience
Nafs-e-Mutma’innah	Soul at peace – the interplay of the elements of conscience and love and faith in God
Nass	Divine source of law
Niqah mu’tah	Temporary marriage
Nusus	Divine sources of law – plural of nass
Qadi	Judge
Qadhf	False accusations of zina - defamation
Qa’ida usuliyya	Basic principle
Qanun	Legislation
Qanun-ul-Islamia	Islamic Law
Qarina	Circumstantial evidence
Qat al Tariq	Alternative name for hirabah, translates as highway robbery
Qawad	Category of qisas crimes denoting bodily injury
Qawaid	Legal maxims

Qawli	Words (pertaining to verbal urf/custom)
Qisas	Retributive category of punishments in criminal law
Qiyas	Analogical reasoning
Qudsi	Revealed to a previous prophet
Qur'an	Compilation of the divine revelations of God described as the guiding principles of Islamic Law
R'ay	Discretion
Riba	Usury – charging interest
Riddah	Apostasy
Risala	Prophethood
Sabab	Indirect cause
Sadd al-dhar'ai	Maliki fiqh method of reasoning based on prevention of a lawful means being used to achieve an unlawful outcome.
Sahaba	Companion
Sahabi	Companions
Salat	Daily prayer – one of the pillars of Islam
Sariqah	Theft
Sariqa al Qubra	Alternative name for hirabah but translates as great theft
Sawm	Fasting – one of the pillars of Islam
Shahada	Declaration of faith in one God and his Messenger – one of the pillars of Islam
Shari'a	Rules governing man's relationship with God and Man derived from the Qur'an and the Sunnah
Shubha	Doubt
Shura	Council
Shurb al-Khamr	Drinking alcohol
Siyasa	Administrative justice
Sunnah	Compilation of the traditions of the Prophet Mohammad. His actions are considered 'Sunnah' whilst his sayings are considered 'Hadith' - though both have been used interchangeably.
Sunnah Mutawattir	Sequential tradition – a method of Maliki fiqh
Surah	Chapter
Tafsir	Qur'anic exegesis

Tajid	Revival and purification
Takfir	Declaration of unbelief
Taqlid	Imitation
Taqwa	Piety
Tauba	Repentance
Taubikh	Reprimand or warning
Tawhid	Islamic theory that all things, everywhere, come from God
Taz'ir	Discretionary category of punishments in criminal law
Tha'r	Vendetta or revenge
Ulama	Interpreters of religious knowledge
Ummah	Islamic community
Ummi	Illiterate person
Uquba	Punishment
Urf	Custom
Usul-al-fiqh	Roots of Islamic Law or principles of jurisprudence
Uqubat al iiedam	Death
Wajib	Obligatory category of actions
Zakat	Tax collected from the rich to maintain the poor – one of the pillars of Islam
Zann	Probability
Zina	Adultery or fornication
Zulm	Injustice

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*“The choice is never between objectivity and interpretation,
But,
Between an interpretation that is unacknowledged as such,
And,
An interpretation that is at least aware of itself”.*

Stanley Fish
Interpreting the Variorum 1976

INTRODUCTION

The focus of this thesis is the question of whether, as is widely asserted, Islamic Criminal Law (that is, the law contained in the allegedly divinely revealed sources of Islamic Law - *Shari'a*) is incompatible with International Human Rights, and, if so, whether this incompatibility is inherent and necessary and arises by reason of the texts of both *Shari'a* and the International Bill of Rights, or whether, in the alternative, it exists by reason of how various entities interpret these texts. Thus, the underlying research question asks:

'Is Islamic Criminal Law inherently repugnant to the text of the International Human Rights instruments, or, is it repugnant only by reason of the manner in which these instruments are interpreted?'

The central conclusion is that the perceived incompatibility between the two is not inherent. This is for two reasons. Firstly, and whereas this may not be true for all Muslim majority states (whose criminal laws are not the focus of this thesis), *Shari'a* provides scrupulously for the kind of due process concerns in relation to criminal prosecutions and investigations that are demanded by International Human Rights (IHR). Secondly, as is discussed in Chapter Five, the core values that underpin IHR are also the core values that underpin *Shari'a*. Where they *are* at odds this is because of particular interpretive approaches adopted both by the United Nations Human Rights Committee, and by Muslim fundamentalists, that have the effect of creating a divide between these two ideological worldviews. This thesis, whilst not advocating for the *adoption* of a *particular* interpretation, in proving incompatibility is not inherent, does highlight the *availability* of an *alternative* interpretation that does not have the effect of creating such a divide.

The research methodology adopted throughout is largely doctrinal. It examines the Universal Declaration of Human Rights and aspects of the remaining instruments of the International Bill of Rights as well as the rationale behind their content. It similarly examines the Cairo Declaration of Human Rights in Islam and aspects of the Holy *Qur'an* and the *Sunnah* of the Prophet. The technique, or method, is wholly comparative in order to establish similarities and differences that will determine whether Islam (and more

specifically Islamic Criminal Law) and International Human Rights Law are inherently incompatible.

Structurally, the thesis adopts a certain shape that lends itself to the application of the proposition that the fundamentalist approach to interpretation on the part of Islamic Fundamentalists is matched by a fundamentalist approach to interpretation on the part of the UNHRC, representative of the U.N.; and, particularly, that these fundamentalist interpretations are largely responsible for the assertion that Islam and International Human Rights are inherently incompatible. Thus, the structure is constructed as follows: Part One attempts to introduce Islam, identify the manner in which Islamic texts open themselves up to interpretation, ground its fundamental aspects within its historical and religious parameters, and set out its criminal law accordingly. In doing so, Part One culminates in the rational identification of aspects of Islamic Criminal Law that may be problematic in the twenty first century.

Once these aspects are identified, the direction of the thesis changes and the conclusions of Part One are temporarily set aside whilst Part Two progresses the thesis from a separate angle. In doing so, it turns to the subject of human rights and analyses the current instruments that represent the International and Islamic world views of human rights before asking how the values of each instrument compare, and, what impact their distinctions have. Part Two ultimately establishes the absence of inherent incompatibility of human rights values, and, this being the case, licenses Part Three to then reintroduce those identified problematic aspects of the Islamic Criminal Law and test them against the thesis proposition that fundamentalist interpretations are at play in both schemes.

Secton Three submits that Secular fundamentalism on the part of the UNHRC in terms of its interpretation of public morality, and, Islamic fundamentalism on the part of fundamentalist literalists in terms of their interpretation of the rules of punishment in Islam are largely responsible for the assertion of incompatibility. Having earlier established in Part One that there are alternative approaches to the interpretation of Islam, and in Part Two that both schemes of rights have compatible values, this opens up the prospect of refuting the permanency of the current interpretational approaches in order to identify an alternative, modernist approach to interpreting Islam that works towards closing the interpretational divide.

The substantive thrust of each part of the thesis functions thus:

Part One comprises the first three chapters that introduce and contextualise both *Shari'a* as a legal code and Islamic Criminal Law in particular (noting its vulnerability to IHR critique). We learn that for Islam, religious doctrine and the law cannot be separated and that protection of all religious precepts is of paramount consideration. However, the truth of legal propositions is open to interpretation and this may sub-divide the interpretive community. In learning the Islamic community may sub-divide on interpretation in this way demonstrates the potential for alternative interpretations, which lends itself to the thesis proposition in Chapter Seven regarding resort to alternative interpretations of Islam. We further learn the rationale for the criminal law revealed in the 7th century and its suitability for 7th century Arabian societal conditions and threats. Protection of the Islamic community or *ummah*, it is discovered, is a priority goal of the *Shari'a* and the criminal law components of *Shari'a* were necessary, at the time, to support the objectives of a fledgling religious community in 7th century Arabia. Part One concludes in establishing Islamic Criminal Law as a valid penal scheme with significantly developed rules of due process. However, it also isolates the two features of Islamic Criminal Law that transpire as problematic in the twenty first century, namely, (a) the fact that the criminalisation of various acts is (allegedly) justified purely on the basis that God decrees that they should be crimes, and, (b) in the absence of consensus on interpretation, the harsh and cruel nature of the criminal punishments that are prescribed in the *Qur'an*.

Part Two of the thesis comprises chapters four and five and compares the nature of human rights in both International and Islamic human rights law. It firstly compares the representative international organisations and illuminates the impact of their historical and moral origins on their world view, before moving to consider the content and interpretation of their respective human rights instruments. It is at this juncture that the IHR claim to universal legitimacy is challenged. The proposition of the thesis here is that if the template for rights interpretation is to exclusively be the UDHR, can it be proven that its philosophical and religious influences were neutral, and, even if they were not, was there potential for these influences to be diluted, or for any such obstacles to be overcome, throughout the process of its creation that could give credibility to the IHR claim of universal legitimacy. In investigating these issues Part Two legitimises critique, in particular Islamic critique, of the UDHR, thus simultaneously legitimising the OIC

resort to drafting the CDHRI. If the UDHR is biased in terms of its secular nature and its religious and philosophical underpinnings, how can the human rights it champions merit the description of ‘international’ when they do not encompass the ideology of nearly a quarter of the world’s population?

Notwithstanding this claim, the instruments of both the UN and the OIC are deemed comparable in that they both seek to effect common values and, whereas there are differences between the two, they are significantly outweighed by the similarities between them. In terms of common values, Part Two identifies in the respective instruments, and, in order to leave no doubt, extensively charts the presence and protection of, the values of human dignity, autonomy and equality both in IHR and Islam. It is discovered that these values, whilst differing in their origin and interpretation in each scheme of rights, are nonetheless common core foundational human rights principles on which each scheme of rights is constructed. Moreover, in having these grounding principles in common this suggests both schemes share a similar view of justice. To test this proposition, the circumstances within which each scheme will permit a restriction on rights is explored and a commonality is yet again discovered in concluding that both schemes provide for the restriction of rights for reasons of, *inter alia*, the protection of public morals.

In terms of differences, the thesis points to the nature and source of each scheme’s purported objective truth, their perspective on rights ownership, and, their employment of distinct moral languages. Regarding the nature and source of objective truth it is established that whilst the nature of universal moral truth in Islam is religious and sourced in God alone by virtue of the theory of *tawhid*, with a clear rejection of any suggestion to the contrary; and whilst the nature of moral truth in IHR is secular and sourced in humanity alone by virtue of the inherence theory, with a clear rejection of any suggestion to the contrary; neither can actually be proven as objectively true. This is so because it is impossible to prove either the inherent possession of rights or the existence of God, thus making it impossible to assert one version of moral truth as having primacy over another. Whilst each scheme may reject the other’s perspective on the nature and origin of moral truth, the moral substance comprising the common values remains, and so this distinction does not lead to an automatic rejection of one scheme by the other.

Similarly, with the distinction in ownership of rights – whilst within the Islamic scheme God is the owner and controller of rights to whom humankind owe a duty to ensure they are respected, and, within the IHR scheme the human person is the owner and controller of rights who can command their respect by all other humans - all this distils to is a conclusion that the source of morality is indeed the owner of rights, and as the source of moral truth cannot be proven, this has little impact other than on the dialect of moral language (that is the language of rights versus the language of duties) used by each scheme to best reflect its origins. The third distinction between the schemes of rights that is the aforementioned moral dialect, sees the scheme of Islamic human rights employing the language of duties and the scheme of IHR employing the language of rights. The benefit of a chosen moral language is that it best reflects the moral origins of each scheme, but, as rights and duties are shown to be the counterpoints of one another, they are seen more so as mechanisms to deliver an end rather than ends in themselves. If then, it is established that the benefit is realised by the individual in the same way regardless of the chosen dialect, this also cannot suggest an inherent incompatibility between Islam and IHR.

Part Two concludes that as there are coinciding values that operate as fundamental necessities for the protection of humanity in the two major global visions that impact the thrust of the world's population, there is international consensus on the values necessary for human flourishing, despite some significant distinctions which, in reality, amount to symbolic distinctions only. Thus, the values and concerns underpinning Islamic Criminal Law, being in accordance with the values and concerns underpinning Islamic human rights, cannot be said to be incompatible with the UDHR, and if it is *still* submitted that they are, which it is, perhaps it is the interpretation of these values that is responsible for such an assertion.

Part Three comprises the final two chapters and addresses the issues identified at the intersection of Parts One and Two separately. These issues are encapsulated within the lack of clarity on whether the Islamic Criminal Law itself, rather than the values and concerns underpinning it which have already been proven as compatible, is incompatible with IHR. Part One identified three issues, namely: the criminalisation of certain actions purely on the basis that this is what God wants; the criminalisation of actions that are not criminal in the Western world such as consumption of alcohol and apostasy (both of these

are issues that are based in the presence or absence of God); and, the fact that its *hadd* punishments are seen as cruel and draconian. Whilst these are reasonable concerns, the thesis suggests they may not necessarily point to *inherent* clashes between Islamic Criminal Law and IHR, but rather such clashes may turn on the manner in which either ideology is interpreted.

In this respect Part Three addresses the presence of God and the harsh nature of criminal punishments separately. Regarding the presence of God it first looks to the interpretation of the matter of public morality on the part of the UNHRC and it is at this point the thesis suggests that the UNHRC has resorted to a fundamentalist interpretation of IHR, alternatively, Secular Fundamentalism. This is so because the International Bill of Rights permits rights to be restricted in the name of public morality, but, in both General Comments 22 and 34 of the UNHRC there is an executive decision made, without any textual treaty basis for its legitimacy whatsoever, regarding the manner in which public morality *must* be interpreted. According to these Comments, public morality may not be constituted by a single religion only. Thus it is only by interpreting the concept of public morality in human rights treaties as *excluding* God, that the issues of criminalisation of actions because God dictates them to be so, and the criminalisation of actions not deemed criminal in the secular west such as apostasy or adultery, become a point of contention between the Islamic and IHR ideologies.

Regarding the issue of cruel and draconian punishments, it cannot be argued that punishments such as stoning, amputation and crucifixion are not incompatible with IHR. Part Three addresses this issue by charting such punishments from the time of their revelation and their suitability to the temporal threats of seventh century Arabian society in the context of a fledgling religious community through various historical events that impacted the manner in which they were interpreted, applied, and, ultimately resorted to in the post colonial era by elitist minorities who sought to use them symbolically to defend the Islamic world against modernity. Once more, critically, it is only by interpreting *Shari'a* in a manner utilised by this minority (that resort to the *fiqh* texts for legitimacy rather than the guiding principles of the *Qur'an*) that is both fundamentalist and literalist, and also decontextualised, that one can conclude that such punishments are still required by Islam in the twenty first century. Thus, it is only by interpreting the

punishments in this literalist and decontextualised way that this issue becomes a point of contention between the Islamic and IHR ideologies.

The thesis ultimately argues that the actual incompatibility between Islamic Criminal Law and IHR is not inherent, but the product of the extent to which elements within both systems have gone in their approach to the business of interpreting their codes, that is, a resort to Secular Fundamentalism on the part of the machinery of the UN and a resort to Islamic Fundamentalism on the part of Islam.

In proving the primary thesis claim in this way, Part Three proposes that an alternative approach to interpretation of Islamic Criminal Law, in particular the *hudud* punishments, returns Islam to its object and purpose origins whilst it simultaneously removes the incompatibility. The modernist approach, in resorting to the *maqasid-al-Shari'a*, or the objectives of Islam, provides a formula that, combined with an acceptance that the world has moved on from harsh physical punishments due to the introduction of police forces and prisons, consigns the draconian and cruel punishments of the *hudud* to their rightful historical place in seventh century Arabia.

To add legitimacy to this prospect, Part Three embarks on a further comparative analysis of Islamic Criminal Law with the criminal laws of Judaism, and notes the former to have been entirely compatible with such alternative legal systems that co-existed temporally with it. In this respect, the current position of Talmudic criminal law is examined in order to discover how the modern state of Israel found a solution to the issue of reformulating the traditional religious law according to the conditions of the twenty first century world using the methods of recognition of religious cultural imperatives, an altered Zionist theory, the common language of human dignity, the retention of Rabbinical Courts and the promotion of equality both in terms of equal recognition of various streams of Judaism and in terms of individual equality outside the scope of personal status matters. It is ultimately suggested this could represent a precedent for the reformulation of the law of Islam and a blueprint for actioning the identified alternative interpretational approach to human rights, that is, the modernist approach to interpretation, that works towards closing the divide between the fundamentalist interpretations adopted by the UNHRC and fundamentalist Islamists presently, alternatively, between Secular Fundamentalism and Islamic Fundamentalism.

PART ONE

Part One of this thesis comprises chapters one, two and three that overall seek to establish the validity of the Islamic Criminal Law and determine the issues with it that appear problematic from an International Human Rights perspective. In looking to the framework of *Shari'a* and its development, particularly the development of the criminal laws that comprise such a minor part of it, it is beneficial to have a picture of how this whole system of law came to exist at the outset.

The law of the *Qur'an* was purportedly revealed to Mohammad who was a reluctant prophet. When those close to him succeeded in convincing him to publicise his experiences he was altogether exiled by perturbed tribes and his small community of followers struggled to survive in both contexts of existence and belief. In Medina, a perfect storm of circumstances led to Mohammad becoming a leader, but a leader under pressure. At this point, having to provide direction to a rapidly growing community of believers under threat in their environment prompted revelations of a more specific legalistic nature and this is the origin of the immense focus that is trained on the protection of the *ummah* within Islamic law. The initially reluctant Prophet and reluctant leader returned to Mecca a hero, allowing him to attach Islam to established places of worship and assume the role of a religious leader renowned for centring society around a common moral goal of righteousness in preparation for the day of judgment.

Considering the manner in which events unfolded, the *Qur'an* was never intended by the Prophet to comprise a legal document, not to mention set the parameters of a legal system that would eventually address nearly two billion people. On the contrary, the *Qur'an* was compiled after the Prophet's death with the simple goal of ensuring his moral guidance could continue to benefit the community of believers. Expansion, the influence of politics, and the best efforts of the *ulema* to keep Islamic Law as true to its moral origins as possible, would be responsible for the shape of the eventual edifice of Islamic Law and its subsequent interpretation.

CHAPTER ONE

THE ISLAMIC LEGAL SYSTEM

1. Introduction

This thesis addresses the issue of compatibility between *Shari'a* criminal law and International Human Rights. There appears to be a general assertion of incompatibility between the two that has gained much traction, and this thesis attempts to explore that assertion and comparatively analyse International Human Rights and Islamic Law in an effort to discover the presence or absence, inherently or otherwise, of such incompatibility. In discerning this incompatibility issue and the tendency towards judging the *Shari'a* on secular standards, the issue arises as to whether, in doing so, International Human Rights can claim universal legitimacy.

Chapter One, in the first step of attending to this thesis question, asks two questions: firstly, what Islamic Law is, and secondly, whether it is valid. In setting out what Islamic Law is, Chapter One outlines its origin and its sources as they developed. The relationship between religious doctrine and the law is then methodically set out, pointing out the precise location of the *Shari'a* within Islam. This pinpointing illuminates the *Shari'a* as such a necessary and integral cog in the operation of the faith of Islam that the impossibility of separating them becomes comprehensible. In assessing the validity of Islamic Law the interconnection of law, morality and truth is explored in an attempt to clarify a number of issues: firstly, precisely what law is considered to be; secondly, what makes any legal proposition true; thirdly, how an interpretive community arrives at this truth and the outcome of divergent approaches to establishing the truth of legal propositions that might sub divide interpretive communities; and, finally, what the consequences of validating this truth are for the legal system itself, and for alternate legal systems.

2. Shari'a and its Religious Framework

Islamic Law or *qanun ul islamia* was not devised as a set of rules to govern a state¹ or even a set of constitutional rights and procedures. Rather, it is a set of guidelines disseminated to encourage believers to follow 'the right path' in life – *Shari'a* translates as the 'path to water' – as the source of all life and a metaphor for Allah.² It is widely accepted that the *Qur'an* was never intended to be considered a legal document - the majority of verses deal with overarching themes³ and moral guidance rather than specific regulations.⁴ It sought initially to regulate the relationship of humans with their Creator rather than their fellows.⁵ The founder of Islam, the Prophet Mohammad, in other words, albeit not responsible for the final formation of *Shari'a*, relayed the words of God that were aimed at teaching humankind how to prepare for the day of judgement in order to enter paradise.⁶

Of the 6,236⁷ verses (*ayats*) of the *Qur'an*, traditional estimates characterise approximately only 500 as relating to 'legal' matters.⁸ Modern estimates reduce that to about 350 - only 3% of the entire number of verses in the *Qur'an*. Of these, some relate to justice and equality, more relate to evidence and citizens' rights and duties, and others to consultation in government affairs and economic matters. As little as thirty verses relate to crime and punishment.⁹

¹ M. Cherif Bassiouni, *The Shari'a and Islamic Criminal Justice in Time of War and Peace* (Cambridge University Press 2014) 40.

² Irshad Abdal-Haqq, 'Islamic Law: An Overview of Its Origin and Elements' (2002) 27 *Journal of Islamic Law and Culture* 34.

³ Fazlur Rahman, *Major Themes of the Qur'an* (University of Chicago Press 2009). The overarching themes of the *Qur'an* are God (Tawhid), Man as Individual, Man in Society, Nature, Prophethood and Revelation, Eschatology, Satan and Evil, and, The Emergence of the Muslim Community.

⁴ Ahmed Affi and Hassan Affi, *Contemporary Interpretation of Islamic Law* (Troubador Publishing 2014) xviii.

⁵ Matthew Lippman, 'Islamic Criminal Law and Procedure: Religious Fundamentalism v. Modern Law' (1989) 12(1) *Boston College International and Comparative Law Review* 30.

⁶ Ann K.S. Lambton, *State and Government in Medieval Islam* (Psychology Press 1981) 2.

⁷ There are differing opinions regarding the exact count. Lippman states there are 6,342 *Lippman* (n5). Other sources note it depends whether you count the Bismillahs as separate verses. The Maliki and Hanafi schools omit the Bismillahs when counting the verses of the *Qur'an*. The Hanafi count became the most accepted enumeration at 6,236. Regardless, the argument only surrounds where each verse begins and ends - not the content of the *Qur'an* – each edition has the same number of words (77,639) and letters (323,015). See Afzal Hoosen Elias, *Complete Qur'an Made Easy* (Zam Zam Publishers 2004) 21.

⁸ Janin, H. & Kahlmeyer, A., *Islamic Law: The Shari'a from Muhammad's Time to the Present* (MacFarland 2007) 18.

⁹ Kamali, M.H., 'Law and Society: The Interplay of Revelation and Reason in the Shari'a' in John L. Esposito, *The Oxford History of Islam* (Oxford University Press 2000) 120.

2.1 Sources of Islamic Law

There are a number of sources of Islamic Law and so to colloquially use the term *Shari'a* for all Islamic Law is a misnomer.¹⁰ There are two prongs of Islamic Law sources - primary and secondary. *Shari'a* comprises the primary sources (both of which are sourced in divine revelation), namely, the *Qur'an* and the *Sunnah* and *Hadith* (the recorded practices and sayings of the Prophet and his closest followers). The secondary sources which make up the whole of Islamic jurisprudence, or *fiqh* (translated as human reason) employ the method of *ijtihad*, or interpretation, to apply primary source principles to real situations in order to create rulings for developing societies. All *fiqh* finds its origin in the *Qur'an* which is explained and elaborated on by the *Sunnah*.¹¹ The methods of interpretation accepted by all *madhahib* (schools of Islamic jurisprudence) are *ijma* (consensus of the scholars) and *qiyas* (analogical reasoning) - both of which are used to draw corollaries from the primary sources and may not be used to form rulings that are in any way repugnant to the principles contained therein. Indeed, Islamic legal maxims or *qawaid*, operate as a check to ensure the risk of repugnancy is eliminated.

There are further supplemental sources of Islamic Law that are more controversial and not universally adopted by all *madhahib* as they venture further into the domain of human reason and away from divine revelation. They are more adequately described as juristic tools of interpretation, or *ijtihad*, to accommodate changing society, and can be listed as *istihsan*,¹² *istislah*,¹³ *istidlal*,¹⁴ *urf*¹⁵ and *istihsab*.¹⁶ A *faqhi*¹⁷ or a *mufti*¹⁸ may interpret

¹⁰ Haqq (n2) 31, 32.

¹¹ Muhammad Abu Zahrah, *Usul al-Fiqh* (Dar al-Fikr 1958) 80.

¹² John L. Esposito, 'Istihsan' in Esposito J.L., *The Oxford Dictionary of Islam* <<http://www.oxfordislamicstudies.com/article/opr/t125/e1136>> accessed 27 May 2016. *Istihsan* refers to juristic preference - a tool allowing a jurist to make exceptions to strict or literal legal reasoning in favour of the public good, to choose an outcome from several potential ones or to abandon a strong precedent for a weaker one in the interests of justice. The term is used synonymously with *maslaha mursalah* also meaning public interest and has a direct link with the third major goal of the *Shari'a* - the realisation of benefit. Whilst *istihsan* is an obvious equitable tool necessary for adaptation to changing society it does demonstrate the potential for multiple interpretations.

¹³ John L. Esposito, 'Istislah' in Esposito J.L., *The Oxford Dictionary of Islam* <<http://www.oxfordislamicstudies.com/article/opr/t125/e1139>> accessed 9 June 2016. *Istislah* is regarded as the object and purpose of Islamic Law - public interest. It is used to seek the best solution to serve the Muslim community's general interests. Its use is limited to necessity and can require the reinterpretation of textual sources ranking higher than it. This equitable principle is particularly useful for new phenomenon for which there is no historical precedent.

¹⁴ Rosalind Ward Gwynn, *Logic, Rhetoric and Legal Reasoning in the Qur'an: God's Arguments* (Routledge 2014) ixv. *Istidlal* suggests a corresponding ruling on the basis of reasoned deliberation, without finding a source that is agreed upon. It allowed jurists to avoid strict analogy in a case where no

the same *Qur'anic ayat* or same *hadith* differently depending upon the circumstances of the situation that is to be resolved, the school of thought they belong to, the legal principles they subscribe to and the local or national traditions or culture of any particular Islamic state.

2.1.1 Divine Revelation – The *Qur'an* and the *Sunnah*

The *Qur'an* is the Islamic holy book written in Arabic containing the divine revelations of God to the Prophet Mohammad between the years 610AD and the Prophet's passing in 632AD. It is the primary source of Islamic Law. Thus, divine revelation in the *Qur'an* takes precedence over the *ahadith* of the *Sunnah* which serves as a support document elaborating on and explaining the general principles and rules set out in the *Qur'an*.¹⁹ Revealed gradually and in stages - more than half in Mecca - the revelations were relayed to Mohammad's *sahabi*²⁰ or closest companions, then read aloud to him to ensure their accuracy.

The compilation of the book itself occurred after the Prophet's death and was led by one of his scribes, Zayd ibn Thabit. As Mohammad was an *ummi* – illiterate person – the

clear precedent could be found. The danger of overuse of this principle however was that the jurist would unduly assume the legislative authority of the Prophet. See also Munir Ahmad Mughal, 'What is Istidlal?' (2012) Social Science Research Network

<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2039843> accessed 27 May 2021; and Anver M. Emon, *Islamic Natural Law Theories* (Oxford University Press 2010) 127.

¹⁵ Imran Ahsan Khan Nyazee. *Outlines of Islamic Jurisprudence* (Advanced Legal Studies Institute 1998) 201, 202. *Urf*, or custom, expands the selection of juristic tools of adaptation and whilst it can be compared to *ijma* it relates to a smaller scale than the worldwide community of Muslims referring to just one local area or one country and to the use of words (*qawli* – verbal *urf*) and practices (*fiili* – actual *urf*) of that local society rather than jurists' explicit agreement on an issue.

¹⁶ John L. Esposito, 'Istishab' in Esposito J.L., *The Oxford Dictionary of Islam*

<http://www.oxfordislamicstudies.com/article/opr/t125/e1138?_hi=0&_pos=20> accessed 9 June 2016. *Istihsab* is a principle that allows jurists to make decisions based on the presumption of continuity – where a situation existing previously is deemed to continue to exist until the contrary is proven.

¹⁷ A *faqih* is an Islamic Scholar who studies the science of deriving practical legal rulings from the *usul al fiqh* (roots or sources of law). The *faqih* studies the primary texts and derives legal rulings from them outlining which human acts belong to the obligatory, prohibited, disliked, recommended and permissible categories.

¹⁸ A mufti is a *faqhi* but also capable of relating the legal ruling to current realities for the purpose of achieving the objectives of *Shari'a* (preservation of the self, intellect, religion, honour and property).

¹⁹ There is difference in opinion as to whether the *Qur'an* and *Sunnah* are deserving of the same reverence. On one hand it is argued the *Qur'an* takes precedence as it is the actual word of God and the *Sunnah* is the word of man. On the other hand, it is argued that as Mohammad was divinely inspired his sayings and traditions are to be acknowledged or revered on the same level as the *Qur'an*. This debate is exemplified in the categorisation of *hudud* crimes in Islamic Criminal Law. There are schools of thought that do not accept certain crimes as *hudud* as their punishments are not specifically delineated in the *Qur'an*.

²⁰ Mohammad's four close followers or *sahabi* succeeded him as the leaders of Islam and were known as the 'Rightly Guided Caliphs'. Abu-Bakr 632 – 634AD, Umar 634 – 644AD, Uthman 644 – 656AD and Ali 656 – 661AD.

Islamic assertion is that this authenticates the content of the *Qur'an* as the direct word of Allah on the basis that Mohammad could not have been influenced by readings of pre-Islamic scriptures.²¹ A further assertion of authenticity is based on the eloquence of Arab language at the time and the general consensus that Mohammad did not display an art of linguistic composition such as that which dictated the *Qur'an*. Moreover, the *Qur'an* sets forth a challenge for any man to write something that would surpass it in style, linguistics and intellect, which it is believed has never been achieved.²² This, it is asserted, further authenticates the *Qur'an* as divinely composed as no human has the ability to replicate it.²³ Adding to these 'proofs' are the statements within the *Qur'an* that testify as to its own divine conception.²⁴

For Muslims, the *Qur'an* is the incorruptible word of God that contains non-legal in addition to legal instructions on an array of matters occurring in daily life.²⁵ It is considered the final revelation of God to humankind. The *surahs* (chapters) contain all that a Muslim requires for guidance to lead him or her to salvation. Islamic eschatology is at the kernel of the *Qur'anic* purpose, that is, preparation for the after-life when humans will be judged and receive that which they deserve. *Qur'anic* guidance however is generally vague, bestowed upon the *ummah* (community of believers) in principled format. Rarely are the *ayats* (verses) burdened with heavy detail and it is this feature which gives Islam the flexibility to adapt (using the above legal principles) to changing times and societies. However, there are exceptions where detail is provided and the rule is definitive, such as the penalties prescribed for certain crimes. If the *Qur'an* is definitive in its wording then the *ayat* is not open to *ijtihad*. The detailed commandments developed through *fiqh* and suitable for the various conditions and times in which

²¹ Sebastian Gunther, 'Muhammad, the Illiterate Prophet: An Islamic Creed in the Qur'an and Qur'anic Exegesis' (2002) 4(1) Journal of Qur'anic Studies 1. Holy Qur'an, Surah Al-Ankab'ut 29:48. "And you (O Muhammad) did not recite any book before this, nor were you able to transcribe one with your right hand. In that case, indeed those who talk vanity could have doubted".

²² Holy Qur'an, Surah Al-Isra 17:88 "If mankind and the jinn gathered in order to produce the like of this Qur'an, they could not produce the like of it, even if they were to each other assistants."

²³ Holy Qur'an, Surah Al-Baqarah 2:23 "And if you all are in doubt about what I have revealed to My servant, bring a single chapter like it, and call your witnesses besides God if you are truthful." Holy Qur'an, Surah Al-Isra 17:88 "Say: 'If all mankind and the jinn would come together to produce the like of this Qur'an, they could not produce its like even though they exerted all and their strength in aiding one another.'"

²⁴ Holy Qur'an, Surah As-Sajdah 32:2 "This is the revelation of the book in which there is no doubt from the Lord of the Worlds". Qur'an 26:192 "Verily this is a Revelation from the Lord of the Worlds". Holy Qur'an, Surah Ya-Sin 36:5 "It is a revelation sent down by Him, the Exalted in Might, Most Merciful".

²⁵ Affi & Affi (n4) xviii. See also Lambton (n6) xiv-xviii.

Muslims live are all based on the general rules and principles contained within the *ayats* and *surahs* of the *Qur'an*.²⁶

The literal translation of *Sunnah* is 'beaten track'²⁷ or an established course. The *Sunnah* of the Prophet is a collection of material compiled by those who gathered reports from his companions who observed his ways and listened to his advices. Its contents are usually described as the things the Prophet said and the things he did or his 'traditions'. There are several thousand records of these traditions and each is known as a *hadith*. As the *Qur'an* calls Muslims to obey the Prophet²⁸ and reminds them that his words are divinely inspired,²⁹ his traditions become the clarifications and elaborations of *Qur'anic* principles and the final source of *Shari'a*, the second source of Islamic Law. Accordingly, if one cannot find an answer in the *Qur'an*, s/he proceeds to the *Sunnah* to search there. The *ahadith* can be divided into legal and non-legal and it is those in the former category that amount to binding law - the criteria for which are the acts, words and tacit approvals of the Prophet in his capacity as Messenger of God, Head of State and Judge.³⁰ All the rulings of the Prophet in such capacity, particularly those corroborating the contents of the *Qur'an* constitute binding law.³¹

2.1.2 Human Reason: *Fiqh: Ijma and Qiyas*

Progressing from the divine sources of law whose many prescriptions and proscriptions comprise *Shari'a* we encounter the broader sphere of *fiqh* which addresses substantive law, procedural or adjective law and evidence. *Ilm usul al fiqh*, meaning deep understanding, is the phrase used to describe the science of interpretation or the principles of Islamic jurisprudence. *Fiqh* itself is interpretation, or more colloquially known and distinguished from divine revelation as human reasoning – that branch of Islamic Law that is derived from human intellectual endeavours. Although this has a limited basis in

²⁶ Hasan Saeed Ibrahim, 'Basic Principles of Criminal Procedure Under Islamic Shari'a' in Muhammad Abdel Haleem et al. (eds), *Criminal Justice in Islam: Judicial Procedure in the Shari'a* (Bloomsbury Academic 2003) 21.

²⁷ D.S. Margoliouth, *Early Development of Mohammadanism* (Simon Publications 2003) 75. See also Meir Max Bravman, *The Spiritual Background of Early Islam: Studies in Ancient Arabic Concepts* (Brill 2009) 152.

²⁸ Holy Qur'an, Surah An-Nisa 4:80 "Whosoever obeys the Prophet verily obeys God". Holy Qur'an, Surah Al-Hashr 59:7 "Whatever the messenger gives you take it and whatever he forbids you, avoid it"

²⁹ Holy Qur'an, Surah An-Najm 53:1-6 "As the stars fell away your friend (Muhammad) was not astray, nor was he deceived. Nor was he speaking out of a personal desire. It was divine inspiration dictated by the most powerful possessor of all authority from His highest height."

³⁰ Recep Dogan, *Usul al-Fiqh: Methodology of Islamic Jurisprudence* (Tughra Books 2015) 12.

³¹ Abd al Wahhab Khallaf, *Ilm Usul al-Fiqh* (Dar al-Qalam 1977) 34.

the *Qur'an*³² it is permissible based on the premise that what is within the realm of divine knowledge is not known to humankind, and, as knowledge increases, spirituality develops, and needs of societies change, so too must Islamic Law evolve to cater for same.³³ Fundamentally, *fiqh* allows for dynamism in a legal system where the primary sources are finite. Modernist scholars agree that as God is not forgetful he omitted to rule on every conceivable issue as he wanted breadth, not narrowness, in people's lives³⁴ and left matters for humankind to discern for itself. Thus, *fiqh* is justified in this regard. The death of the Prophet created a need for further interpretation and *fiqh* became the detailed legal system via which Muslim issues were resolved and settled through the examination of circumstances, comparisons with Islamic teachings, and evaluations. Thus, if *Shari'a* is the law, or path of living Islam, then *fiqh* is the process employed to apply it.³⁵

As Muslims do not disagree on the two primary sources of Islamic Law it is only in relation to *fiqh* that divergence occurs, and those divergences in thought and opinion are the basis for the founding of the *madhahib*. This period of developing legal theory occurred in the second century after the migration to Medina, or, *hijra* (800CE) and was based on the writings of scholars dealing with different aspects of Islamic Law based on different interpretations of the primary sources, different views of good and evil, and different socio-economic and political circumstances.³⁶ Four main Sunni *madhahib* emerged – Hanafi,³⁷ Hanbali,³⁸ Maliki³⁹ and Shafii,⁴⁰ all named after the jurists who

³² Holy Qur'an, Surah An-Nisa 4:59 "Oh you who have attained to faith. Pay heed unto God, and pay heed unto the Apostle and unto those among you who have been entrusted with authority. And if you are at variance over any matter refer it to God and the Apostle, if you truly believe in God and the Last Day".

³³ Bassiouni (n1) 48.

³⁴ Holy Qur'an, Surah Al-Baqarah 2:185 "God desireth for you ease, he desireth not hardship for you".

³⁵ Hakeem, F.B.; Haberfield, M.R.; Verma A., *Policing Muslim Communities: Comparative International Context* (Springer 2012) 12.

³⁶ Ibid. 8.

³⁷ The eponym of the Hanaf'i School of Thought is Abū Hanīfa an-Nu'man ibn Thābit. It's foundational texts include *Al-fiqh al-akbar* (theological book on jurisprudence), *Al-fiqh al-absat* (general jurisprudence), *Kitab al-athar* (*ahadith* with commentary), *Kitab al-kharaj* and *Kitab al-siyar* (doctrine of war, distribution of spoils of war, apostasy and taxation of dhimmi). It is prevalent in Turkey, Pakistan, the Balkans, the Levant, Central Asia, the Indian subcontinent, Egypt and Afghanistan, and, parts of Russia, China and Iran.

³⁸ The eponym of the Hanbali School of Thought is Abu Abdillah Ahmad ibn Muhammad ibn Hanbal Ash-Shaybani, referred to as ibn Hanbal. It is the smallest school primarily found mostly in Saudi Arabia and Qatar. Ibn Hanbal is most renowned for his collection of hadith – The Musnad.

³⁹ The Maliki school was founded by Malik ibn Abas. It is predominantly found in North and West Africa, Chad, Sudan, Kuwait and Bahrain and the Emirate of Dubai. Most prominent texts are the al-Muwatta and al-Mudawwana.

⁴⁰ The Shafi'i school of thought was founded by Mohammad ibn Idris al-Shafi'i, a scholar of ibn Malik, in the early ninth century. The Shafi'i school is widely followed and found in Somalia, Eritrea, Ethiopia, Djibouti, parts of Egypt, Swahili Coast, Hijaz, Yemen, various Kurdish regions, Indonesia, Malaysia, Sri

developed the original jurisprudence and each having their own religious texts. Whilst all schools agree on the basic precepts of *fiqh* - *ijma* and *qiyas* – there are a number of further sources or juristic tools upon which they differ in adherence to or ranking of, and this is what differentiates *usul al fiqh* from *furu' al fiqh*⁴¹ – the roots of law from the branches of law – the roots remain the same but the laws differ from *madhab* to *madhab* based on their individual interpretations and applications.⁴² Nonetheless, it is agreed by all schools of thought that *ijma* and *qiyas* rank first and second in that list respectively.

When no answer to an issue can be found in the *Qur'an* or *Sunnah* the reference to *ijma* in both is the basis for allowing an answer to be found if there is consensus among the scholars on the issue.⁴³ Al Shafii defines *ijma* as ‘*the adherence of the congregation of Muslims to the conclusions of a given ruling pertaining to what is forbidden and what is permitted after the passing of the Prophet*’.⁴⁴ Essentially, *ijma* is the growth of new ideas, beginning with the *ijtihad* of an individual jurist and culminating in this opinion being universally accepted over time.⁴⁵ For *ijma* to occur three criteria must be fulfilled: participation of a reasonable number of jurists (*mujtahidun*); who reach a unanimous decision; based on an unequivocal statement of agreement by each.⁴⁶ These criteria refer only to active consensus where there must be express consensus of the scholars – *ijma* that all *madhahib* subscribe to; there is also passive consensus where consensus is reached via a lack of dissent from *mujtahidun* aware of the *ijtihad*⁴⁷ – not all schools subscribe to passive *ijma*. As there is no method for determining consensus, the lack of

Lanka, the Maldives, Kerala, some regions of India, Singapore, Myanmar, Thailand, Brunei and the Philippines. The foundational text of the Shafi'i school is the ‘al-Risala’ translated as The Message.

⁴¹ Stanley Nider Katz, ‘Furu-al-fiqh’ in Katz, S.N. (ed) *Oxford International Encyclopedia of Legal History* (Oxford University Press 2009) 110.

⁴² M Cherif Bassiouni, ‘The Shari’ah: Sources, Interpretation and Rule Making’ (2002) *UCLA Journal of Islamic and Near Eastern Law* 141. Bassiouni (n1) 51. The development of legal theory within the individual *madhahib* makes it very difficult to categorically state the order of importance or ranking of supplemental sources of Islamic Law. Bassiouni attempts to generalise and create a ranking however between his 2002 article and his 2014 book. He has even slightly changed the order in which he lists the sources and has reduced the list from 12 to 10 supplemental sources.

⁴³ Holy Qur’an, Surah An-Nisa 4:115 “If anyone contends with the apostle even after guidance has been plainly conveyed to him and follows a path other than that becoming to men of faith, we shall leave him in the path he has chosen and land him in hell – What a refuge”. Holy Qur’an, Surah An-Nisa 4:59. “O you who believe, obey God, and obey the Messenger, and those charged with authority among you”. Holy Qur’an, Surah An-Nisa 4:83. “If they would only refer it to the Messenger and those among them who hold command, those of them who investigate matters would have known about it”. Al Khata 9, 14. “My Ummah shall never agree upon an error”. Al Amidi 1, 214. “Whatever the Muslims deem to be good is good in the eyes of God”

⁴⁴ Sayyid Rami al Rifai, *The Kufr of Not Blindly Following* (Sunnah Muakada 2015) 11.

⁴⁵ Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (Islamic Texts Society 1991) 119.

⁴⁶ Joseph Schacht, *An Introduction to Islamic Law* (Clarendon Press 1964) 30.

⁴⁷ Michael Mumisa, *Islamic Law: Theory and Interpretation* (Amana Publications 2002) 84.

factual evidence makes it difficult to prove, and the gap between the theory and practice of *ijma* is a striking feature of the doctrine.⁴⁸

Classical Islamic theory holds that consensus must be consensus of the successors of the Prophet, but over the centuries *ijma* has become localised and it is the consensus of jurists qualified to reach an independent personal opinion based on the sources that constitutes *ijma*.⁴⁹ After the ninth century CE a closing of the gates of *ijtihad* was attempted, and this should have put an end to the use of *ijma*. Scholars were instead to resort only to decisions previously reached by the four *madhahib* when reaching conclusions.⁵⁰ This process was termed *taqlid*, translated as imitation, which it has been claimed, succeeded in stabilising doctrine.⁵¹ Others claim it stagnated the law.

Qiyas, meaning analogy, follows *ijma* in the ranking of the secondary sources and is resorted to if an answer, as before, cannot be found in the *Qur'an*, *Sunnah* or *ijma*. Support is found in the *Qur'an* for *qiyas* at 4:105: “We have sent to you the book with the truth so that you may judge among people by means of what God has already shown you”.⁵² Its basis in the *Sunnah* is in the form of an exchange between the Prophet and Mu’adh ibn Jabal upon him being tasked with travelling to Yemen as a *qadi* (Judge) wherein the Prophet agreed with Mu’adh’s method of resorting first to the *Qur'an*, second to the *Sunnah* and third to his own reasoning in decision making. Further, when Mohammad’s successor Umar gave instruction to a judge for reaching decisions he stated he should use his brain on matters that cannot be found in the *Qur'an* or *Sunnah*, and further that he should study similar cases and evaluate situations through analogy with them.⁵³ Fundamentally, *qiyas* is the extension of a *Shari’a* value from an original case to

⁴⁸ Kamali (n45) 118.

⁴⁹ Bassiouni (n42) 153.

⁵⁰ Kamali (n45) 119. Ahmad Hasan, *The Early Development of Islamic Jurisprudence* (Adam Publishers 1994) 160. Schacht (n46) 75. There is much debate about whether or not the gates of *ijtihad* actually closed. Kamali opines that this is but a superficial equation. Hasan states that in all probability *ijma* continued to play a role in consolidating and unifying the law after the supposed termination of *ijtihad*. Schacht states the supposed closing of the gates of *ijtihad* may have stabilised doctrine but resulted in a *Shari’a* which fits the social and economic conditions of the early Abassid period which has grown more and more out of touch with later developments of state and society. See also Wael B. Hallaq, ‘Was the Gate of Ijtihad Closed?’ (1984) 16(1) *International Journal of Middle East Studies* 3-41. Malise Ruthven, *Islam in the World* (Penguin Books 1984) 361.

⁵¹ Schacht (n46) 75.

⁵² Holy Qur’an, Surah an-Nisa, 4:105.

⁵³ Bassiouni (n42) 155.

a new case as both cases have the same effective cause⁵⁴ - a step further perhaps than just interpretation.

Four components are necessary to carry out *qiyas*: an original case (*asl*); a new case (*far*); an effective cause (*illah*) of the *asl* that is also an attribute of the *far*; and the rule governing the *asl* which is to be extended to the *far*.⁵⁵ Each of these components must also satisfy its own stringent criteria. Regarding classifications, two sets occur. Firstly, *qiyas* are divided into superior (*qiyas al-awla*), equal (*qiyas al-musawi*) and inferior (*qiyas al-adna*). Superior *qiyas* are those where the *illah* is more pronounced in the *far* than the *asl*, inferior is the converse and *qiyas* of equals is where the *illah* is equally effective in both – this type of *qiyas* is often referred to as *qiyas* proper. A second set of classifications separates *qiyas* into obvious (*qiyas jali*) and hidden (*qiyas khafi*) analogies. The first occurs when any discrepancy between the *illah* of each case is easily removed by clear evidence and the second occurs when the discrepancy is removed by probability or *zann*.⁵⁶

2.2 Religious Dogma and the Law

The locus of *Shari'a* in the grand scheme of Islam can help to illustrate its position in both contexts of placement and purpose. In Islam three levels of faith or dogma occur – *Islam*, *Iman* and *Ihsan*.⁵⁷ The base level is *Islam*, concerned with physical needs and the way in which a Muslim shows s/he is faithful through his/her everyday actions by fulfilling his/her obligations surrounding the five Pillars of Islam.⁵⁸ The next level is *Iman*, concerned with intellectual needs⁵⁹ and the third, *Ihsan*, with spiritual needs.⁶⁰ It is

⁵⁴ Kamali (n45) 137.

⁵⁵ Mawil Izzi Dien, *Islamic Law: From Historical Foundations to Contemporary Practice* (University of Notre Dame Press 2004) 53.

⁵⁶ Kamali (n45) 150.

⁵⁷ Shaykh Muhammad Hisham Kabbani, 'Understanding Islamic Law – Invoking Divine Principles and Human Reason' Islamic Supreme Council of America <www.islamicsupremecouncil.org/understanding-islam/legal-rulings/52-understanding-islamic-law.html> accessed 27 May 2021.

⁵⁸ Shahada (profession of the oneness of God), Salat (daily ritual prayers), Zakat (giving of alms to the poor), Sawm (fasting during the month of Ramadan) and Hajj (pilgrimage to Mecca for those who are capable).

⁵⁹ The title of *Mu'men* is attributed to those attaining the second level of faith, achieved through dedication to a deeper understanding including belief in the angels, respect for and belief in the books revealed to the prophets who came before Mohammad, judgement day, and, the good and evil of divine destiny. It is more theoretical and intellectual than the base level, *Islam*. For further reading on *Iman* see Abdullah An-Na'im, *The Second Message of Islam: Contemporary Issues in the Middle East* (Syracuse University Press 1996) 271 – 274. See also Hassan Ali El-Najjar, 'Three Levels of Faith: Islam, Iman and Ihsan' *The Khalids* <<http://www.thekhalids.org/index.php/newsletter-archive/534-three-levels-of-faith-islam-iman-and-ihsan>> accessed 27 May 2021.

this base level of dogma, *Islam*, showing faith through actions via adherence to the compilation of injunctions, that is the manifestation of *Shari'a*. This position of *Shari'a* in the grand scheme of Islam illustrates both its function - working to maintain the physical aspects thereby complementing the intellectual and spiritual ones (*Iman* and *Ihsan*) - and its inability to be disconnected from the faith and made to operate as a stand-alone legal system. The very characteristic of *tawhid*, or the centrality of God, in the Islamic faith has an influence running so deep that every discussion proceeds from it, and it is the single reason why religion cannot be separated from law, morality or politics.⁶¹

This intertwining of law and religion also has roots in the fact that Mohammad, unlike Jesus, was the leader of a community and responsible for the regulation of a society as well as a recipient of divine inspiration and revelation. Similarly, *Shari'a* should not be confused with the whole of Islam,⁶² *Shari'a* is comprised of only those parts of the *Qur'an* that contain specific prescriptive and proscriptive norms, some of which carry earthly consequences and some of which contain consequences in the hereafter.⁶³ *Shari'a* operates then, as an internal regulator and maintainer of devotion to Allah⁶⁴ at the base level of the faith ensuring physical actions (finance, family relationships, inheritance, crime and many other physical aspects of life) are carried out day to day in accordance with its precepts. Ultimately, *Shari'a* is the core of a religious legal system similar to how such a system of law still exists in the Catholic Church – Canon Law in the Vatican - though diminished in influence over time via the advancement of secularism.⁶⁵ For Muslims, secularism has largely not occurred⁶⁶ and so Islamic laws remain aligned with the religious law of the faith.

⁶⁰ The title of *Muhsen* is attributed to those attaining the third level of dogma. It involves a devotion so strong the individual believes Allah is seeing him all the time and does only what pleases Allah. It is considered more spiritual than *Iman*. In addition to the three levels of dogma known as the belief phase there is another phase that follows known as the knowledge phase also divided into three. The final and seventh stage is once again named *Islam* but is far removed from the base level that began the process of progression in belief and knowledge. For further reading on this matter see Mohamed Mahmoud, *Quest for Divinity: A Critical Examination of the Thought of Mahmud Muhammad Taha* (Syracuse University Press 2007).

⁶¹ Mohammad Hashim Kamali, 'Source, Nature and Objectives of Shari'a' (1989) 33 *The Islamic Quarterly* 218.

⁶² *Ibid.* 215.

⁶³ Bassiouni (n1) 40. See also Kamali (n61) 217.

⁶⁴ When we think of *Shari'a* from this perspective we see how it is rationalised that turning your back on *Islam* is a crime – the fundamental purpose of the *Shari'a* being a law to maintain the devotion – if that law is breached then the crime of apostasy is a natural consequence.

⁶⁵ The Vatican City is still subject to Italy's secular laws.

⁶⁶ The question of 'secular' Turkey is a case in point here.

2.2.1 Impact of Religious Dogma on the Criminal Law

Critically, for the purposes of this thesis, within Islamic Law the protection of religious precepts is paramount, including its criminal precepts. The law, in other words, is valuable for its own sake and not because of the results that it achieves. As such, for a state that abides by the precepts of Islamic Law, crimes and punishments are not identified, analysed and administered according to their resulting harm to the person; they are identified, analysed and administered according to whether or not they are delineated in the *Qur'an* and *Sunnah* - a very different approach to criminal law in secular states.

Whilst secular law grew out of society and evolved with changing societal circumstances, *Shari'a* was imposed from above. It precedes and controls society and as it is divine, is accepted as it is.⁶⁷ A transgression of a *Qur'anic* prohibition for which there is a mandatory punishment outlined (a *hadd* crime), though formulated fourteen hundred years ago, and regardless of how such a transgression may seem draconian or anachronistic in modern society, is categorised as a most serious offence because it violates rules directly set by God.⁶⁸ Having said that, and as is discussed in Chapter Three, these *hudud*⁶⁹ crimes are minimal and difficult to prove, and aside from these, the *Qur'an* largely treats criminal law as a civil matter,⁷⁰ providing loose guidance only.

2.3 Goals and Objectives – *Maqasid al-Shari'a*

The rules and principles of Islam combine to attain its goals and objectives. Unlike any western systems the *Shari'a* encompasses the public and private domains of individuals' activities controlling inner conscience and external social relations through the interplay of rituals, beliefs, actions and community consciousness.⁷¹ All of these rules are derived from the guiding principles of the *Qur'an* - supported by the *Sunnah*, and made practical

⁶⁷ Hakeem (n35) *Policing Muslim Communities: Comparative International Context* (Springer Science and Business Media 2012) 8.

⁶⁸ Homocide is a good example here. Though it is one of the most serious crimes against the person in the Western world, in Islam it is regarded as a civil matter, in the lesser category of crimes called *Qisas*. Drinking alcohol and illicit sexual relations rank in the most serious category of offences – *Hadd* offences. This can be difficult for non-Muslims to appreciate as the prism secularists view crime through is mostly that of resulting harm as opposed to source of law.

⁶⁹ A prohibited action for which there is a punishment delineated in the *Qur'an*.

⁷⁰ Mohamed Al-Awabdeh, 'History and the Prospect of Islamic Criminal Law with Respect to Human Rights' (Ph.D. Thesis University of Berlin 2005) 30 <<http://edoc.hu-berlin.de/dissertationen/al-awabdeh-mohamed-2005-07-07/PDF/Al-Awabdeh.pdf>> accessed 27 May 2021.

⁷¹ Hakeem (n35) 9.

through the use of *fiqh* – “*The path of Shari’a is laid down by God and his messenger; the edifice of fiqh is erected by human endeavour*”.⁷² It is these disciplines and principles that govern the behaviour of a Muslim towards his or her self, family, neighbours, community, nation and the Muslim polity as a whole, the *ummah*.⁷³ The rules fall into two categories – those guiding the individual’s relationship with God - *ibadat*- and those guiding individuals relationships with one another - *mu’amalat* – the latter being the justiciable category of rules.⁷⁴ In Islam there are five classifications of actions that help guide a Muslim in their daily life, namely *wajib* (obligatory), *mandub* (recommended), *mubah* (permissible), *makruh* (reprehensible) and *haram* (forbidden), and it is the *mu’amalat* and *ibadat* actions occurring in the *wajib* and *haram* classifications, or the obligatory and forbidden classifications, that are those which comprise the injunctions of *Shari’a*. Those in the classes of *mandub*, *mubah* and *makruh* actions comprise the moral guidance of Islam.⁷⁵

Combined, the legal rules and moral principles aim to achieve three major goals of Islamic Law enumerated by Abu Zahrah as being the nurturing and development of the righteous individual,⁷⁶ the establishment of justice⁷⁷ and the realisation of public

⁷² AAA Fyzee, *Outline of Muhammadan Law* (Oxford University Press 1974) 22.

⁷³ El-Najjar (n59).

⁷⁴ Kamali (n61) 218.

⁷⁵ Ziauddin Sardar, *An Early Crescent: The Future of Knowledge and the Environment of Islam* (Mansell 1989) 62.

⁷⁶ Holy Qur’an, Surah Ash Sharh 91:7-10. “And the soul and he who proportioned it and inspired it it’s wickedness and it’s righteousness, he has succeeded who purifies it and he has failed who instils it with corruption”.

Holy Qur’an, Surah Taha 20:75-76 “And he who comes before Him as a believer having done righteous deeds, exalted ranks are for such people, evergreen gardens beneath which streams flow. They shall abide therein forever and this shall be the reward of those that keep themselves pure.”

Sahih Al-Bukhari, 1:77 Hadith No. 5682; Muslim 43:16 Hadith No. 2321. “The best among you are those who are morally sound from others”.

Sahih Al-Bukhari, 4:61 Hadith No. 3549. “These are the people who are very dear to me”.

Abu Da’ud, 1:43 Hadith No. 4799; Jami at-Tirmidhi, 4:1 Hadith No. 2002. “On the Day of Judgment, it will be high moral behaviour which will carry most weight in the scales of a person”.

Abu Da’ud, 1:43 Hadith No. 4798; Jami at-Tirmidhi, 4:1 Hadith No. 2003. “A believer achieves the same rank through high moral behaviour as can be achieved through fasts and the night prayers”.

⁷⁷ Holy Qur’an, Surah An-Nahl 16:90 “Indeed, Allah orders justice and good conduct and giving to relatives and forbids immorality and bad conduct and oppression. He admonishes you so that perhaps you will be reminded”.

Holy Qur’an, Surah An-Nisa 4:135 “O you who have believed, be persistently standing firm in justice, witnesses for Allah, even if it be against yourselves or parents and relatives. Whether one is rich or poor, Allah is more worthy of both. So follow not inclination, lest you not be just. And if you distort or refuse, then indeed Allah is ever, with what you do, acquainted”.

Holy Qur’an, Surah Al-Ma’idah 5:8 “And do not let ill-will towards any folk incite you so that you swerve from dealing justly. Be just; that is nearest to heedfulness”.

benefit.⁷⁸ In order for Islamic Law to achieve these three broad goals scholars have identified five objectives of the *Shari'a* which Al Ghazali breaks down into purposes of the hereafter and purposes pertaining to this world.⁷⁹ Within the former lies the objective of preservation of religion and the latter the remaining four objectives: preservation of life,⁸⁰ progeny (family),⁸¹ mind (also intellect and reputation)⁸² and property (wealth).⁸³ All rulings promoting the five objectives or preventing harm to them fall into a further trio of levels, namely, necessities, needs and refinements.⁸⁴ A ruling essential to the protection of an objective is labelled a necessity such as forbidding killing (protection of life). One without which the objective would still be achieved but with greater difficulty is labelled a need (for example prohibition of monopolies for the preservation of wealth), and a ruling that seeks to hone an existing one or improve the quality of the preservation

⁷⁸ The practice of maslaha is the realisation of benefit for the public good. The realisation of benefit goes hand in hand with preventing a harm – both seek to achieve the five objectives of Shari'a. In the creation and balancing of rulings, preventing a harm will trump the creation of a benefit. Holy Qur'an, Surah Al-Anbya 21:107 "We have not sent you but as a mercy to the world". Holy Qur'an, Surah Yunus 10:57 The Qur'an characterises itself as "a healing to the ailment of the hearts, guidance and mercy for the believers". See also Kamali (n61) 215 'The basic purpose of this and all other divine guidance is to enable man to forsake the dictates of hawd , that is the untrammelled lust and desire,; to lead him to righteousness and truth; to make him upright and worthy of assuming the divine trust of Khilafah, the vicegerency of God on earth'.

⁷⁹ Nyazee (n15) 202.

⁸⁰ Holy Qur'an, Surah Al-An'am 6:151 "...take not life, which God hath made sacred, except by way of justice and law: thus doth He command you, that ye may learn wisdom".

⁸¹ Holy Qur'an, Surah An-Nur 24:32 "And marry the unmarried among you and the righteous among your male slaves and female slaves. If they should be poor, Allah will enrich them from His bounty, and Allah is all-Encompassing and knowing".

Holy Qur'an, Surah An-Nisa 4:34 "Men are the protectors and maintainers of women, because Allah has made one of them to excel the other, and because they spend from their means. Therefore, the righteous women are devoutly obedient (to Allah), and guard in the husband's absence what Allah orders them to guard".

Holy Qur'an, Surah Al-Isra 17:23 "And your Lord has decreed that you not worship except Him, and to parents, good treatment. Whether one or both of them reach old age [while] with you, say not to them [so much as], "uff," and do not repel them but speak to them a noble word".

Holy Qur'an, Surah Al-Isra 17:24 "And lower to them the wing of humility out of mercy and say, "My Lord, have mercy upon them as they brought me up [when I was] small".

⁸² Sunnah, Al-Tirmidhi Hadith No. 422. "God, His angels and all those in Heavens and on Earth, even ants in their hills and fish in the water, call down blessings on those who instruct others in beneficial knowledge". Al Tirmidhi Hadith No. 108 "Knowledge from which no benefit is derived is like a treasure out of which nothing is spent in the cause of God".

⁸³ Holy Qur'an, Surah Al-Ahzab 33:72 "Lo! We offered the trust unto the heavens and the earth and the hills, but they shrank from bearing it and were afraid of it. And man assumed it. Lo! he hath proved a tyrant and a fool". Holy Qur'an, Surah Al-Ahzab 33:72 "Blessed is the wealth of a Muslim from which he gives to the poor, the orphans and the needy traveller". Sunnah, Ibn Majah Hadith No. 4130 "The plentiful will be the lowest on the Day of Judgement, except he who distributed his money left and right, while he earned from pure (means)".

⁸⁴ Also referred to as essential, complementary and embellishment.

of an objective is labelled a refinement (such as the protection of the family by shielding a woman's beauty from the gaze of a man).⁸⁵

In achieving the goals and objectives through the operation of the *Shari'a* there have arisen over time many circumstances for which the *Shari'a* has no ruling, or no adequate ruling. In this event the jurists turn to the *Sunnah* of the Prophet in search of a source of authority on the matter. If no satisfaction is found there, the jurist moves to explore the interpretations of the divine sources by humankind, written into *fiqh*. However, the further away from the revealed *Qur'an* one goes to seek legal authority, the greater the risk of prioritising humans' word over God's. To minimise this risk jurists resort to the legal maxims of *fiqh*, or *qawaid*,⁸⁶ that must be adhered to in order to ensure interpretations remain aligned with the goals and objectives of the *Shari'a*.

This resort to the sources of Islamic Law and the manner in which they operate according to the doctrine of *tawhid* and the goals and objectives of Islam or *maqasid al-Shari'a*, is key to the progression of this thesis given that the manner in which sources have been interpreted has had a dividing impact on the *ummah*. The issue of interpreting the *Qur'an* since the era of colonialism is a struggle to determine which interpretation represents Islamic truth, and the right to represent this truth internationally. The *ummah* can be categorised into (a) those who are of traditionalist orthodox Islam - the silent majority who value the history and heritage of Islam as that which is necessary for inspiring an Islamic life today, (b) those who have resorted to a fundamentalist interpretation of the sources in order to re-Islamise and re-legitimise the Islamic world in response to the detrimental impact of colonialism on Islamic states, and, (c) those who have resorted to a reformist or modernist approach to interpretation in order to represent Islam as the progressive moral guidance of its origins, and as a corollary align Islam with International Human Rights.

Whilst the modernists utilise the interpretational approach of the *maqasid al-Shari'a*, that is, the alignment of the sources with the overall objectives of Islam for the determination of Islamic truth, the fundamentalist approach is selective in its choice of *Qur'anic* verses

⁸⁵ Holy Qur'an, Surah An-Nur 24:30 "(O Prophet), enjoin believing men to cast down their looks and guard their private parts. That is purer for them. Surely Allah is well aware of all what they do".

⁸⁶ For a list of *qawaid* examples see Muhammad Al-Madni Busak, *Perspectives on Modern Criminal Policy & Islamic Shari'a* (NAIF Arab University for Security Sciences 2002) 85, 86.

that it interprets in a literal manner, and focuses on the *fiqh* texts of man-made origin to validate these chosen *ayats*. The issue with *fiqh* texts is the extent to which, over centuries, various political influences impacted the manner in which the early jurists understood the *Qur'an*. Thus, the very caution noted above regarding prioritising the word of humankind over the word of God is a risk with this approach to interpretation as it moves further away from the primary sources to establish its Islamic truth. The extent to which the differences in approach to interpretation may impact the thesis focus of incompatibility between International Human Rights and Islamic Criminal Law is addressed in Chapter Seven.

Having delineated the primary and secondary sources of Islamic Law, pinpointed the locus of the *Shari'a* within the entire scheme of Islam and emphasised the interconnectedness of law and faith as a method of protecting the *maqasid al-Shari'a*, it becomes apparent that Islamic Law is a monolithic edifice seemingly capable of orienting its community around a common belief in, and devotion to, the divine law of God. However, in order to fully legitimise Islamic Law it must be tested against those criteria required to establish the validity of any legal system. It is to this endeavour that Chapter One now turns.

3. Establishing the Validity of a Legal System

Comparatively speaking it is essential to have an understanding of what makes law acceptable in any given community. To ascertain this there are a number of elements that require discussion. One of the foremost questions is that of the nature of truth and its relationship to law. As a user of a legal system, when we look to law we expect to find solid facts that we can invoke to find solutions, take law abiding direction from or to find our rights and know our obligations as part of the community. By looking at what an interpretive community believes law is and how morality plays a role in that, a picture of how elusive universal truth is, begins to come into focus. Moral truth is not the same for all communities. If differing moral communities then launch their own appropriate means of interpretation to find the truth, and even to refine those truths further, the picture of the extent to which universal truth evades us becomes clearer still. Essentially, how truth is established substantiates the legitimacy of the law and consequently the legitimacy of the legal system emerges. If a legal system is deemed legitimate by its

community, then it is validated within the larger scheme of things and must be counted as viable and sustainable.

3.1 What is Law?

The question of what law is has been answered in a number of ways from differing philosophical perspectives. Natural law theorists claim law is an inherent element of human nature to which positive laws should correspond as closely as possible.⁸⁷ They believe the authority of legal standards is derived from ethics and morality and that there is a universal higher law that is a law according to nature which transcends time and culture.⁸⁸ Legal Positivists theorise that law is a social construct using social practices or rules to identify norms which we then call laws - they see no connection between law and morality.⁸⁹ Legal Interpretivists then find the balance between natural and positive law. The Interpretivist claims that whilst law is a social construct based on identified rules and practices, these legal rights and duties are based on a foundation of the values of the interpretive community, hence natural law is fundamental to Legal Interpretivism. This view is today a widely accepted theory of what society believes law to be.⁹⁰

In the Islamic world the law is derived from God and is his will for humanity with the eschatological purpose of preparation for presentation of the soul on the last day. Accordingly, Islamic philosophy is careful not to ascribe authority to any source of law that may be viewed as competing with the divine texts (*nusus*) for supreme authority.⁹¹ This does not however preclude the entertainment of philosophical legal theory, rather such philosophising is justified on the basis that alternative media of discovering what the law is are necessary to fill the gaps where the *nusus* are silent or ambiguous. Pre-modern Islamic philosophers come from a prevailing natural law standpoint. Islamic natural law theorists claim a fusion of fact and value substantiate the ontological authority given to

⁸⁷ For further reading on natural law theory see generally T. Hochstrasser and P Schroder, *Early Modern Natural Law Theories: Context and Strategies in the Early Enlightenment* (Springer Science and Business Media 2003). See also Howard P Kainz, *Natural Law: An Introduction and Re-Examination* (Open Court Publishing 2004). Finally see Anver M. Emon, Matthew Levering and David Novak *Natural Law: A Jewish, Christian and Islamic Trialogue* (Oxford University Press 2014).

⁸⁸ Aristotle, *Art of Rhetoric* - Book 1 Chapter 10, in Robert C. Bartlett (trans.) *Aristotle's Art of Rhetoric* (University of Chicago Press 2019).

⁸⁹ See generally Tom Campbell, *Legal Positivism* (Ashgate 1999); Mario Jori *Legal Positivism* (Dartmouth 1992).

⁹⁰ David Lefkowitz, *Philosophy and International Law* (Cambridge University Press 2020) 40-50.

⁹¹ Emon, Levering & Novak (n87) 148.

reason to investigate the world around them⁹² - man should resort to his own knowledge, and nature is rendered a positive good that can be used for naturalistic reasoning.⁹³ Combined, divine revelation, nature and knowledge are termed the sacred reality.

With this natural law philosophical permission to resort to human reason, the entire body of *fiqh* was established in Islamic Law, but, even within the primary texts there are various references to human nature and human reason as a source of law - we note Umar's instructions to a *qadi* to use his brain on matters that cannot be found in the *Qur'an* or the traditions when deciding a case.⁹⁴ Moreover, in Islamic Law the categorisation of acts from permissible to impermissible are also based on a value system ranging from *wajib* to *haram* with the intervening categories emblematic of the close association of morality with Islamic Law. In essence, Islamic Law is a legal system within which the law has been identified by its own interpretive community as that which invokes natural law theory to ascertain, discover and interpret the divine will – a hermeneutic exploration and interpretation of revelation through tradition.⁹⁵

3.2 What is Truth?

Having established what law is, it has been deduced that law has a number of meanings dependent upon the orientation of those who define it – the interpretive community. The interpretive community is a concept popularised by Stanley Fish who claims ‘*Interpretive Communities are those who share interpretive strategies... for writing texts, for constituting their properties and for assigning their intentions.*’⁹⁶ Whilst outside of Islam law may be defined variously, interpretivism, looking to the values of the interpretive community, is the most widely accepted societal definition of law. Within Islam, law is defined as a hermeneutic exploration and interpretation of revelation through tradition. This definition is entirely compatible with legal interpretivism, which relies on natural law for its foundations. Natural law philosophy subordinates the law from criteria of religious, social or political justice.⁹⁷ As affirmed above, Islamic Law has

⁹² Ibid. 149.

⁹³ Courtney Bender, Pamela E. Klassen, *After Pluralism: Reimagining Religious Engagement* (Columbia University Press 2012) 70.

⁹⁴ Bassiouni (n42) 155.

⁹⁵ Norman Calder, ‘Law’ in Seyyed Hossein Nasr and Oliver Leaman (eds), *History of Islamic Philosophy* (Psychology Press 1996) 980.

⁹⁶ Stanley E. Fish, ‘Interpreting the Variorum’ 1976 2(3) *Critical Inquiry* 483.

⁹⁷ Raimo Siltala, *Law, Truth & Reason: A Treatise on Legal Argumentation* (Springer Science and Business Media 2011) 201.

a grounding in natural law theory, thereby endorsing its subordination of law to religious criteria. Law so defined means any questions concerning the validity of the law are deeply intertwined with its moral worth.⁹⁸ Therefore, morality, or more importantly, the unified approach to morality within a community, lies at the heart of answering questions about the truth of law and its validity. If what a community agrees on as right or wrong decides their public morality and this then substantiates the basis of their legal truths or laws, it seems plausible that this would then validate that community's legal system.

3.2.1 Truth and Morality

A moral truth is not so easily defined. It is dependent upon whether one perceives a moral truth to be objective or subjective - moral absolutism versus moral relativism. The mere mention of 'perception' immediately implies choice or interpretation. If there is choice at the outset this is suggestive of an inability to establish a universal understanding of moral truth. If morality is subjective every person's moral truth is different from the next thereby suggesting every legal community's moral truth is different from the next, and on this basis there is no objective moral right or wrong. Conversely, if morality is objective, every person, therefore every community, therefore every legal community, is subject to the same universally binding moral rules in all similar cases.⁹⁹ However, for there to be objective truth there must have been an original decision maker who established that truth. In a secular society who could that decision maker be? Perhaps the elders of the original community, or just simple acceptance without objection of the way things were in the beginning. From a non-secularist perspective maybe the ownership of original moral truth lies with a supernatural authority. Regardless of whether we choose to be absolutist or relativist we can say for sure that when it comes to defining the truth via its correspondence to morality there are a variety of truths available depending on such factors as choice, belief, societal traditions or values. For a secular legal system, morality is an ascription to individually inherent values agreed by the secular community. For the Islamic system of law, morality is that which is set out in the *nusus* as being the word of God or the lived morality of the Prophet.

⁹⁸ Ibid. 201

⁹⁹ Sean McDowell, 'Are there Absolute Moral Truths?' <<http://www.allaboutphilosophy.org/moral-truth.htm>> accessed 13 May 2016.

3.2.2 Truth as a Matter of Interpretation

The criteria for establishing truth in any system must be examined and appealed to for unity to occur. There must be self investigation and self affirmation of the truth of a legal proposition - thus, in both the non-religious and religious interpretive communities there exists methods of language interpretation. If the law provides that a form of words determines the content of a standard, their effect must be determined.¹⁰⁰ Interpretation, accordingly, discovers the finest truth of a controversial proposition for an interpretive, or sub-interpretive, community. Just as Common Law is familiar with, for example, purposivism, or the literal, golden, and, mischief rules of interpretation,¹⁰¹ Islamic Law applies its own methods of interpretation contained within the methodology of legal hermeneutics.

For the legal interpretivist (the most commonly accepted approach to analysing legal truth in the non-religious schemes of law), legal meaning is found within legal principles. Law gains its legitimacy from these principles and interpretation stops at the point when a judgement call is made by someone well versed in the legal tradition.¹⁰² Legal hermeneutics, whilst similar, denies there is an end point in interpretation. Whilst interpretive, it is anti-foundationalist in nature, theorising that there is no definitive interpretation, just better or worse interpretations. The search for legal meaning for the hermeneutist involves critical engagement with previous interpretations¹⁰³ and as a methodology of interpretation it is essentially concerned with texts,¹⁰⁴ fundamentally, religious texts or scriptures.

Islamic Law with its use of ancient texts as its primary sources of law and its interpretation of the revelations through the historical traditions is a hermeneutical discipline thought to have its origin in a quote from the fourth caliph Ali when he said “*The Qur’an is recorded script, bound between two covers and it does not speak. It is*

¹⁰⁰ Timothy Endicott, ‘Law and Language’ in Edward N. Zalta (ed), *The Stanford Encyclopedia of Philosophy*, (2016) <<http://plato.stanford.edu/entries/law-language/#UseLangLaw>> accessed 27 May 2021.

¹⁰¹ Aharon Barak, *Purposive Interpretation in Law* (Princeton University Press 2005) 88.

¹⁰² Tina Botts, ‘Legal Hermeneutics’ *Internet Encyclopedia of Philosophy* < <http://www.iep.utm.edu/leg-herm/>> accessed 12 September 2016.

¹⁰³ Ibid.

¹⁰⁴ Theodore George, ‘Hermeneutics’ *Stanford Encyclopedia of Philosophy* <<http://plato.stanford.edu/entries/hermeneutics/>> accessed 27 May 2021.

only men who give voice to it".¹⁰⁵ The *tafsir* literature (*fiqh* texts) of the classical period¹⁰⁶ came into being as a result of a lapse of time whereby the death of the Prophet and his companions and the changing generations supplied a need for the development of a *Qur'anic* science to resolve and guide new societal and life experiences. The science was an exegesis of the *Qur'an* known as *ilm al-Qur'an wa'sl tafsir* and became the main industry of Islam for a number of centuries. The *tafsir* literature is the embodiment of hermeneutics as it is the written works of exegetes concerned with understanding the meaning of the core Islamic text, and translating those understandings into interpretations of the text - the finding of truth - which then form the basis of religious and judicial decision making.¹⁰⁷

Three of the most prominent exegetes of this Golden Age, before the metaphorical gates of *ijtihad* closed, were a *Qur'anic* commentator named al-Tabari (224/838-310/922),¹⁰⁸ a philosopher named ibn Sina (Avicenna 370/980-428/1073),¹⁰⁹ and a mystic named al-

¹⁰⁵ Oliver Leaman, *The Qur'an: A Philosophical Guide* (Bloomsbury Publishing 2016) 116. See also David Vishanoff, *The Formation of Islamic Hermeneutics: How Sunni Legal Theorists Imagined a Revealed Law* (American Oriental Society 2011) 56.

¹⁰⁶ These centuries became known as the Golden Age of Islam – they were between the 2nd century AH (8th Century CE) and the 6th century AH (12th Century CE)

¹⁰⁷ Tahera Moseni, 'The Comparative Study of Qur'an Interpretation & Classic Hermeneutics' 2014 5(9) International Journal of Business and Social Science 184.

¹⁰⁸ Abu Ja'far Muhammad ibn Jarir al-Tabari's most prominent work is his fifteen volume running commentary of the *Qur'an* titled 'Jāmi' al-bayān'anta'wīlāy al-Qur'ān' (Collection of Statements on Interpretation of Verses of the *Qur'an*) known as 'Tafsir al-Tabari'. It was his second work after 'Tarikh al-Rusulwa'l-Muluk' (History of the Prophets and Kings) known as "Tarikh al-Tabari". For further biographical information see David Waines 'Al-Tabari', *Encyclopedia Britannica* <<https://www.britannica.com/biography/al-Tabari>> accessed 27 May 2021. Al-Tabari's approach was philological in nature focusing on truth in a word for word format from a grammatical, semantic and historical perspective. Whilst in an era when traditions were being forged, citing his sources was an essential component of supporting his interpretations but al-Tabari, though endorsing his own theories, never sought to exclude the interpretations of others, instead leaving them open to his readers as alternatives on the basis of those interpretations also being derived from the texts and also plausible. See Peter Heath, 'Creative Hermeneutics: A Comparative Analysis of Three Islamic Approaches' (1989) 36(2) *Arabica* 185.

¹⁰⁹ Ibn Sina holds an agreed rank of the first major Islamic philosopher. His two most recognised works are 'The Cure' and 'The Canon'. For further biographical information see Sajjad H. Rizvi, 'Avicenna' *Encyclopedia of Philosophy* <<http://www.iep.utm.edu/avicenna/#H2>> accessed 27 May 2021. Ibn Sina's approach to hermeneutics expounded a hierarchical expression of religious truth and meaning. According to Ibn Sina (and other medieval Islamic philosophers), philosophers held an elevated position with regard to comprehension of both the intelligibles of the *Qur'an* and the metaphoric symbolism therefore they were best placed to interpret the *Qur'an* and share those interpretations with the community. This approach allowed philosophers to decide what parts of the *Qur'an* were true and what parts symbolic, paving the way for *Qur'anic* texts to be allegorised away. This version of Islamic hermeneutics was ultimately a minority perspective due to the identification of the fact the *Qur'an* was losing its textual privilege – a factor at the heart of all hermeneutical studies – as the hierarchical version of interpretation would deem *Qur'anic* truths to be comprehensible by philosophers only who were entitled to decide what had textual significance and what was symbolic. See Heath (n108) 192, 193.

Arabi (560/1165-638/1240).¹¹⁰ Each exegete had his own hermeneutical approach to interpretation of the *Qur'an* but as textual literalism was the interpretational trend of the era, each of their approaches would later be deemed traditionalist, if not fundamentalist as they were heavily reliant on words.¹¹¹ As with the nature of legal hermeneutics, their three approaches are aligned with discovering truth and are equally legitimate. Notwithstanding, after the supposed closing of the gates of *ijtihad*¹¹² the progressive nature of interpretation for some streams of Islamic society came to a halt, and this is where the traditionalist/modernist dichotomy emerged. As Fish claims;

*'If a community believes in the existence of only one text, then the strategy its members employ [for interpretation] will be forever writing it. The first community will accuse the second of being reductive, and they in turn will call their accusers superficial. The assumption in each community will be that the other is not correctly perceiving the 'true text', but, the truth will be that each perceives the text [the interpretive community's] strategies demand and call into being'.*¹¹³

Whilst many Islamic religious conservativists, or traditionalists, are inclined to rely only upon interpretations of the classical period, accepting them as final and adapting new circumstances to those interpretations seen as both immutable and quasi-sacred in a process known as *taqlid* (imitation), modernist Islamic scholars argue the gates of *ijtihad* never closed. One such scholar is Shabistari¹¹⁴ who has promoted the continued open-

¹¹⁰ Al-Arabi was considered one of the greatest Sufis of Islam. His written legacy consists of more than 100 works and he explored such controversial issues as the status of prophecy vis-à-vis sainthood, the concept of the perfect man, the ever-changing and elusive self-manifestation of the transcendent Divine Absolute in the events and phenomena of the empirical universe, the different modes and realms of the divine will, as well as the allegorical/esoteric aspects of the Muslim scripture. In this respect he remained true to the textual privilege and interpreted accordingly. See Heath (n108) 192, 193.

¹¹¹ During these centuries the texts were capable of being interpreted literally as society had not advanced to the extent that it would in subsequent centuries. This means the textual content of the *Qur'an* was compatible with how society functioned at the time, or, at least, society had not moved so far away from the early centuries of Islam that the textual meaning seemed inappropriate.

¹¹² The closing of the gates of *ijtihad* is a metaphorical term for a shift in attitude when concerns arose over the excessive placement of decision making in the hands of man at the end of the 3rd century AH (9th century CE). For further discussion on the closing of the gates of *ijtihad* see Chapter Two and Chapter Six.

¹¹³ Fish, (n96) 484.

¹¹⁴ Rujjat al-Islām Nlu'ammad Mujtahid Shabistari is an Iranian Shi-I scholar and a member of the clergy. He holds both a doctorate from an Iranian secular university and a degree in *ijtihad*. In this respect Shabistari focuses on three aspects of engagement in interpretation: filters; the relationship between the interpreter and the text; and the text itself. Filters according to Shabastari are part of the *a priori* knowledge an interpreter brings to his reading of the text. These include presuppositions (*pishfardha*), prior

endedness of interpretation from a more contemporary understanding of religious exegetical and hermeneutical ideas - believing religious interpretation in Islam can never be complete, comprehensive, final or unchanging, as per the definition of legal hermeneutics.¹¹⁵ The unveiling of meaning in any text, according to Shabistari, occurs through the peculiar relation that interpreters establish with it.¹¹⁶ He claims that like any other text, religious texts require interpretation because their meaning is never made wholly clear or manifest, and, that meaning is never offered to the interpreter as something explicit and unambiguous, but instead remains elusive and needs to be perpetually uncovered. It is for this reason he rejects closure of the interpretive process on the basis of the falsifiability principle,¹¹⁷ and claims any interpretation must withhold repeated tests of criticism, thus paving the way for new and better interpretations ultimately getting closer to the original truth embodied in the scriptures as a basis for acceptable law.

3.3 Relative Truth and Law

Throughout the above investigation a number of conclusions as to what truth is have been arrived at, but all can be summarised in the conclusion that the truth of law, or even of controversial propositions of law, via its correspondence to morality, sustains a variety of available truths and those truths are what the interpreters, in concord, say it is. Truth then, it appears, is an epistemological and metaphysical phenomenon. The above versions of what truth is, or how it is found, only serve to illuminate the topic of ownership of a subjectively superior version of truth. Whose version of truth is the correct one? What we can say with certainty from the preceding discussion is that every interpretive community, religious, secular or otherwise, and every sub-interpretive community within, has its own variety of philosophical orientations that seek to establish

understanding (*pishfahmha*), prior knowledge (*pishdānistahā*), interests (*alaqaha*) and expectations (*intizarha*) of the interpreter. The relationship of the interpreter to the text is also of significance to Shabastari who acknowledges the historical difference between interpreters and texts and the state of mind of the interpreter who approaches the text influenced by his perspective (*chishmandaza*), points of view (*zaviyaha*) and intentions (*manzurha*), all three influenced by the filters noted above. For further biographical information see Roxanne D. Marcotte, 'Hermeneutics and the Renewal of Islamic Interpretations' (2010) 33(3/4) *Hamdard Islamicus* 67-77.

¹¹⁵ Ibid. 67, 68.

¹¹⁶ Ibid. 70, 71. Marcotte.

¹¹⁷ Karl Popper's falsification theory is based on the fundamental principle that theories are never empirically verifiable therefore suggesting it is not the verifiability but the falsifiability of a system that is taken to be the criterion of demarcation. See Karl Popper, *The Logic of Scientific Discovery* (Routledge Classics 2002). See also Karl Popper, *Conjectures and Refutations: The Growth of Scientific Knowledge* (Psychology Press 2002) This work is a statement of the fundamental idea that not only our knowledge, but our aims and our standards grow through an unending process of trial and error.

its individual truth from its own traditions and values, and, one is not qualified to assert primacy over another when each of their theories are valid to their own agreeable community.

The appreciation of this concept of valid truth, and the concept of God as a valid source of moral truth is a key factor in the progression of this thesis. The reality is that the public morality of most Muslim majority states is grounded in Islam – perceived as the embodiment of the word of God and thus of universal truth. As such, to the extent that the criminal laws of these states elide with the rules in the *Qur'an*, they are seen, by definition, as being universally ‘true’. Critically, however, as is discussed in Chapter Six, the United Nations Human Rights Committee, as representative of the international human rights movement, in its General Comment No. 22 rejected the idea that a nation’s public morality could derive from a single religious tradition (despite the absence of any textual authority within the international bill of rights for such a conclusion). In doing so, it necessarily rejected the truth claims on which Islamic ideology, as relied on by Muslim majority states, is based, and thus constructed a fundamental point of disconnect between *Shari’a* and International Human Rights (IHR) Law. Had there been a textual basis for doing so, that would have been one thing, but, to do so in the *absence* of such a textual basis is quite another.

For now, it is of fundamental importance at the conclusion of Chapter One to state the following: to the extent that Islamic Criminal Law is contained in the *Qur'an*, the belief of most Muslims is that it comes directly from God, represents complete truth, and is morally perfect (albeit that in practice it may require interpretation by humans).

4. Conclusion

Chapter One has introduced Islamic Law and established its validity as per the conditions for validity of any legal system. It has been established that Islamic Law is a legal system built by Mohammad’s successors in order to preserve his moral teachings. The *Shari’a* is the prescriptions and proscriptions in the *ibadat* and *muamalat* rules that fall into the categories of *wajib* and *haram* only. The doctrine of *tawhid* illuminates the impossibility of ever separating law and faith and the paramount concern of Islamic Law is the

protection of all religious precepts, thus the protection of the criminal laws, as no human is entitled to interfere with God's will.

Chapter One noted that the Islamic community defines law as a hermeneutic exploration and interpretation of revelation through tradition. The Islamic legal system, legitimised in this way, attracts validation in the wider scheme as viable and sustainable, thus, Islam is a valid legal system. Moreover, the truth of this law is deciphered using Islamic legal hermeneutics. Hermeneutical interpretation varies from sub-community to sub-community, hence the modernist and traditionalist, and now fundamentalist, approaches to interpretation, to which all of the rules of Islamic Law, including Islamic Criminal Law are exposed.

Chapter Two now proceeds to chart the growth and development of Islamic Law from its origins to the present day, noting the contextual foundations of the criminal laws and the factors influencing its presentation of itself in the twenty first century.

CHAPTER TWO

HISTORY AND DEVELOPMENT OF ISLAMIC LAW

1. Introduction

Chapter One has established precisely what Islamic Law is and the specific placement of the *Shari'a* within the scheme of Islam in order to pinpoint the locus of the criminal proscriptions that are the articles of investigation in the main thesis question. Chapter One further established that Islamic Law was constructed from a moral code revealed by God and therefore can never be separated from it, and, that interpretation of the law is on the basis of hermeneutical exploration that lends itself to a variety of approaches. Chapter Two now embarks on a chronological account of the history and development of Islamic Law focusing on those events that most impact three themes of this thesis. Firstly, the development of the criminal law that will be further addressed in Chapters Three and Seven, secondly, the relationship between the Islamic and Western worlds that will be further addressed in Chapters Three and Four, and thirdly, the diversity in approaches to interpretation that will be further addressed in Chapters Six and Seven.

2. Development of Islamic Law

The development of Islamic Law or *qanun ul islamia* is more accurately termed the development of *fiqh*. *Shari'a* could be described as having developed within a relatively short timeframe of approximately twenty years during the Prophetic mission in both Mecca and Medina¹ when thereafter, with the Prophet's passing, concern was aroused as to how the revelations would be preserved, interpreted, communicated and managed, giving rise to the need to develop 'a system'. As the divine revelations together with the observation of the Prophet's traditions and sayings concluded with his death, the *Qur'an* and *Sunnah* were complete. They awaited only their physical compilation as respectively 'the guiding principles of Islamic Law' and 'the traditions of the Prophet'. Therefore, it is *fiqh* - that body of Islamic Law developed via human reason and over subsequent centuries - that is our focus as we consider the development of the law, including, critically for the purposes of this thesis, the criminal law.

¹ Mohammad Hashim Kamali, 'Law and Society: The Interplay of Revelation and Reason in the Shariah' in John Esposito (ed) *The Oxford History of Islam* (Oxford University Press 1999) 110.

Embryonic Islamic Law was not the product of governmental direction or positive law evolving from court practices or remedies that were apparent in other legal systems such as the *writ* in English Common Law or the *actio* in Roman Law. Rather it was essentially an idealistic scheme of ‘ought’ behaviour concerned only with setting a high moral standard for Muslims and cementing religious dogma. Islamic Law *per se* is a subsequent academic formulation of laws generated from the divine revelations and traditions of the Prophet² that sought only to establish this early moral code. This feature of Islamic Law is one that sets it aside from other worldly legal systems insofar as it encompasses both public and private domains of individuals’ daily life activities.³

In terms of a system that embodies religious dogma and moral standards (*ibadat* rules) as well as legal relations between people (*mu’amalat*)⁴ it is thought provoking to wonder at the catalysts for its inception and its consequential development as a system that fourteen hundred years later would penetrate the lives of approximately two billion people worldwide. In order then to chart Islamic Law’s course we look to the landscape of the Arabian Peninsula during the lifetime of the Prophet from a religious, social, economic and legal perspective and to the various stages of development of the Islamic legal system as a whole. Scholars vary in their enumeration of specific periods but all include the following significant eras in the inception and development of Islamic Law: *Jahiliyyah* – the period prior to the first revelations in 610 CE; the Prophetic Period 610 to 632CE; the Rashidun Caliphate 632 to 661CE; the Umayyad Empire 661 to 750 CE, the Abbasid Empire 750 to 1258CE, the Ottoman Empire 1453 – 1922, Imperialism and Colonisation 1922 - 1970, and, the Islamic Reawakening. According to those themes noted in the introduction, our focus is on *Jahiliyyah*, the Prophetic Period, the Rashidun Caliphate and the Islamic Reawakening.

2.1 Jahiliyyah - Age of Ignorance

When Mohammad first heard the divine revelations in the cave of Hira, society was living in what came to be known in Islam as ‘*Jahiliyyah*’. Broadly, *Jahiliyyah* is understood to describe pre-Islamic pagan times of the Arabian Peninsula, but it is a little more specific

² Noel J. Coulson, *A History of Islamic Law* (Aldine Transaction 2011) 82.

³ For further discussion on the full scope of Islamic Law see ‘Shari’a and its Religious Framework’ in Chapter One.

⁴ For further discussion regarding the justiciable and non-justiciable rules of Islam see Chapter one.

in meaning insofar as its use in the *Qur'an* covers three concerns: the age in advance of the prophesy when the oneness of God was unknown; a state of mind of society or an ignorance affecting human behaviour;⁵ and a description of those who have become or remain ignorant.⁶ A combination of the first and second functions is most appropriate when pertaining to the landscape of pre-Islamic Arabia.

In Northern Arabia, the climate combined with the desert terrain produced a civilisation that was nomadic. The Bedouins moved across wide regions in search of growth to feed and maintain their livestock and this prevented any form of permanent governance, legal rule or criminal justice outside of that which could be maintained within a moving society.⁷ Accordingly, governance was localised within the tribe regardless of their location. The leader of a tribe was the prominent male who earned his title by proving himself but often these positions were handed down from father to son. The position was a moral rather than political or legal one with no executive authority.⁸ The chief duty of a tribal leader was maintaining tribal unity, frequently endangered by the individual behaviour of the tribe's members.⁹ Arabs often lived in abject poverty which prompted stealing from wealthier tribes - carried out where possible without loss of life as the cost of killing carried severe penalties in the pursuit of personal justice.¹⁰ This form of justice occurred then within the context of the absence of executive power in the hands of a tribal leader; accordingly, if a clan member within a tribe was attacked or killed his kinsmen would avenge this to equalise the score.

However, tribal solidarity necessitated defence of a member's actions, whether these were right or wrong. Consequentially, feuding between tribes arose, often escalating to

⁵ Holy Qur'an, Surah 5 Al-Ma'idah uses *Jahiliyyah* in both the context of time and societal mindset. <<http://www.oxfordislamicstudies.com/article/book/islam-9780192831934?Surah=5&astart=>> accessed 20 November 2016. Holy Qur'an, Surah 33 Al-Ahzab expresses *Jahiliyyah* in the latter sense. <<http://www.oxfordislamicstudies.com/article/book/islam-9780192831934?Surah=33&astart=>> accessed 20 November, 2016. Holy Qur'an, Surah 48 Al-Fath is a third example of this latter context. <<http://www.oxfordislamicstudies.com/article/book/islam-9780192831934?Surah=48&astart=>> accessed 20 November, 2016.

⁶ Holy Qur'an, Surah 6 Al-Anam uses the word *Jahiliyyah* in this sense and which connotation has led to its modern usage as a term to describe a set of circumstances that are 'un-Islamic'. For further discussion see Oxford Islamic Studies Online <http://www.oxfordislamicstudies.com/article/opr/t236/e0406?_hi=5&_pos=15> accessed 20 November, 2016.

⁷ Herbert Joseph Muller, *The Loom of History* (Harper 1958) 271.

⁸ Sayyid Ali Ashgar Razwy, *A Restatement of the History of Islam and Muslims* (Lulu Press 2014) 16-18.

⁹ Carl Brockelmann, *History of the Islamic Peoples* (Routledge & Kegan Paul 1960) 5.

¹⁰ Maxime Rodinson, *Mohammad: Prophet of Islam* (IB Taurus 2002) 14.

ongoing blood feuds with no recourse to peace, where whole generations of Arabs were consumed by *tha'r* (vendetta). Tribal leaders, usually after protracted fighting throughout generations of assassinations could have attempted to prevent further bloodshed in agreeing the payment of blood money (at the time mostly paid for in camels), however, the leaders, again with no executive authority, had to rely on the agreement of the feuding clans. The Bedouins, due often to the boredom of desert life, often fought for the sake of fighting, to win glory and honour for their tribe.¹¹ Essentially, Bedouin society had no obligation to submit to orders from anyone¹² and on the eve of Islam tribal clashes had reached an unsustainable level. Arabs, until the coming of Islam, were true anarchists.

Politically the Arabian Peninsula sat between two great empires with the lesser kingdoms of Himyar and Axum in Southern Arabia and the Horn of Africa respectively. The Byzantine Empire in the west had its capital at Constantinople and the Sassanian Empire in the east at Ctesiphon in Persia, south east of Baghdad in modern day Iraq. With Rome and Persia struggling against one another for centuries the Byzantine and Sassanian clashes comprised the most recent phase of their ongoing battle for religious domination – Christianity versus Zoroastrianism – and for domination of the oriental trade. Arabia therefore was caught up in the struggle between both empires who, in addition to forging alliances with lesser states and tribes on the fringes of their dominions, both interfered in Arabian affairs due to its strategic trading position.¹³

From a religious perspective Judaism was strong in the Hijaz area of Arabia within which Mecca and Medina were situated. Christianity had a presence in Northern Arabia after the Romans converted the Ghassan tribe and migration brought them to Hijaz. Polytheists, or idolaters, were prominent in tribal Arabia and the *Kaa'bah* temple in Mecca housed hundreds of wooden and stone idols for worship. Arabia was home also to Sabines (who worshipped the stars), Zindiqs (who believed in the dualism of nature) and

¹¹ Razwy (n8) 16-18.

¹² Brockelmann (n9) 3-5. See generally Philip Khuri Hitti and Nabih Amin Faris, *The Arab Heritage* (Greenwood Press 1985) 25 – 53; and Joseph Schacht, 'Pre-Islamic Background and Early Development of Jurisprudence' in Majid Khadduri, Herbert J. Liebesny (eds) *Law in the Middle East Vol I: The Origin and Development of Islamic Law* (The Middle East Institute 1955) 29.

¹³ Fred M. Donner, 'Muhammad and the Islamic Caliphate – Political History of the Islamic Empire up to the Mongol Conquest 570-1258 C.E.' in John Esposito (ed) *The Oxford History of Islam* (Oxford University Press 1999) 1-4. Also available at <<http://www.oxfordislamicstudies.com/article/book/islam-9780195107999/islam-9780195107999-chapter-1>> accessed 12 December, 2016.

Zoroastrians who, whilst also recognising cosmogonic dualism,¹⁴ believed in eschatological monotheism.¹⁵ Mohammad's family belonged to a clan of monotheists who followed the teachings of Abraham, though they were not Jews.¹⁶ The Arab monotheists' recognition of Allah as creator of the world operated in parallel with their tribal ritual bond with an idol, and the decline in significance of the latter gave rise to the increased significance of the former. Pilgrimage to Mecca was already a feature of religious practice that united many Arabs for worship. The concept of 'Allah' (THE God) began to usurp the moon god Hubal's position as Lord of the *Kaa'bah* and the increasing prominence of the preceding monotheistic religions of Judaism and Christianity further propelled the monotheistic notion.¹⁷ As the Arab monotheists believed Abraham and his son Ismail constructed the temple within which the *Kaa'bah* stood, this belief was the basis for the future reclamation of the Meccan temple from idolatrous worship.¹⁸

Economic conditions saw Hijaz as the economic hub of Arabia, particularly the economic centres of Yathrib (later Medina) and Mecca. As the Southern Arabian climate and landscape lent itself to agriculture, commercial custom was more advanced than in the North and was enforced among the traders themselves. Land law and agricultural contracts were also developed but family relationships, inheritance and penal law both among the Bedouins and the settled tribes remained dominated by ancient Arabian tribal systems.¹⁹ Jews owned the arable land and were invested in any ongoing industry – mostly armaments. Business men were usurers or money lenders, traders and merchants, and formed the upper classes whilst slaves, forming the lowest social class were bought and sold like animals.²⁰ In Mecca logistics was a prominent business with caravan trade

¹⁴ Cosmogony relates to the origin of the universe and cosmogonic dualism surrounds the notion that although the universe is thought to have been created by good, there is an opposing evil force at play that accounts for the bad in the world. It is a commonality in various perceptions of dualism that in terms of eschatology, good will triumph.

¹⁵ Gherardo Gnoli, 'Dualism' in *Encyclopaedia Iranica* <<http://www.iranicaonline.org/articles/dualism>> accessed 28 May 2021. See also Gherardo Gnoli, 'Dualism in Transformation: Varieties of Religion in Sasanian Iran' 45 (1)4 East and West 415-422.

¹⁶ Although Mohammad's Quraysh tribe were monotheistic followers of Abraham they were not Jewish. Whilst both Jews and Monotheists were believed to be descendants of Abraham, the monotheists were considered a separate ethnic and cultural group. See also Brockelmann (n9) 9.

¹⁷ Brockelmann (n9) 9.

¹⁸ The three principal goddesses worshipped at the Kaa'bah were 'al-Manat' - the goddess of fate, 'Allat' - the great mother of the gods and 'al-Uzza' - the mightiest. All three appear in the Qur'an at 19:20. See also De Lacey & O'Leary, *Arabia Before Mohammad* (Taylor & Francis 2013) 194; Brockelmann (n9) 23.

¹⁹ Schacht (n12) 29.

²⁰ Razwy (n8) 18-20.

essential to the economy. Usurers charged extortionate rates of interest, often more than 100% but the modest business man was compelled to borrow if he was to partake in the profitable caravan trade.²¹ Significantly, the usury net extended not only to the Meccan business and tribesmen (the Quraysh tribe were local to the economic centre) but also to the Bedouins due to the fact that all classes of society were active in trade - if only tangentially. In pre-Islamic Arabia, usury was the principle means of oppression, ensuring the rich excelled and the poor remained suppressed.²²

Socially in *Jahiliyyah*, Arabia was a male dominated society. With Arabia being a vast land, attitudes towards women varied from tribal culture to tribal culture but in nomadic society where the strong dominated the weak, women were oppressed. There are examples of successful women who contributed to and were valued in society (none more so than Mohammad's first wife Khadija who was a wealthy trader) and had the right to choose a husband or to divorce him,²³ conversely there are excessive accounts of female oppression. Women could not inherit, choose a husband, or divorce him if she was ill-treated.²⁴ A woman's most important assets were her purity upon marriage and her fertility, to ensure the children she bore were indeed those of her husband, and, to further ensure the continuation of the patriarchal blood line for inheritance and nobility purposes.

Subsequently, women were valued on the basis of the dowry they could bring to the tribe they married into and this forms the basis for the absence, in *Jahiliyyah*, of a woman's right to inherit – a tribe most certainly did not wish to leave its wealth to a woman who had married into a rival tribe as this would only serve to increase their enemy's wealth and prominence.²⁵ Women in nomadic pre-Islamic times were essentially objects of lust with no limit to the amount of wives a tribesman would take and no responsibility on his part to maintain them. This unlimited polygamous culture led to a lesser value placed on women and their resort to prostitution or starvation were likely the only options available to them should their husbands decide to no longer support them.²⁶ Indeed, in a society

²¹ Evgenii Aleksandrovich Beliaev, *Arabs, Islam and the Arab Khalifaate in the Early Middle Ages* (Praeger 1969) 90.

²² Ibid.

²³ Nikki R. Keddie, *Women in the Middle East: Past and Present* (Princeton University Press 2012) 18.

²⁴ Muslim Women's League, 'Women in Pre-Islamic Arabia' <<http://www.mwlsa.org/topics/history/herstory.html>> accessed 10 December 2016.

²⁵ John L. Esposito and Natana J. De Long Bas, *Women in Muslim Family Law: Contemporary Issues in the Middle East* (Syracuse University Press 2001) 13.

²⁶ Ibid.

where there was compulsion in drinking, gambling and debauchery, prostitution was a common occupation of women with no male support and sexual relations were a loose and unregulated aspect of society. The *niqah mu'tah* (temporary marriage) was a common occurrence allowing men to enter into relationships with women for as long or short a time as they preferred before moving on to other, or more, women. Infanticide in *Jahiliyyah* further reduced the status of women in society and many newborn females were subjected to the practice. Baby girls were buried alive and often against their parents' will, but under pressure from their tribe to whom loyalty was steadfast.

In essence, *Jahiliyyah* was an altogether anarchic and uncivilised era across much of Arabia. Women were undervalued, slavery was a business institution, blood feuding was rife based on vendetta to protect tribal honour, no national, regional nor even local governance was in place, two strong empires either side of Arabia interfered in its affairs, penal law was absent and the pursuit of personal justice rife, religion was varied though progressively moving towards monotheism, and social classes maintained their distinction not least through the practice of usury with excessively burdensome rates of interest. All of these issues combined catalysed change in Arabia - the landscape economically, legally, socially and for some religiously, could not be sustained in the manner it existed as each component of a properly functioning society was spiralling out of control. Whilst Mohammad, it seems, never intended to become a *bona fide* legislator, his Islamic way of life would provide a focal point around which all people could gather, it would redefine standards of moral behaviour, and, it would lay the foundation for the development by his successors of laws that would maintain a strong and obedient society.²⁷

2.2 Prophetic Period 610 to 632 CE

Prior to the first prophetic revelation Mohammad had already taken to asceticism spending much of his time in a quiet cave at Hira.²⁸ His continued musings at how long Allah might be willing to allow pagans to continue in ignorance with their idolatrous worship eventually led him to contemplate whether he might indeed be the intended messenger of the truth. His reluctance to develop this perceived prophetic responsibility

²⁷ Regarding pre-Islamic life in Arabia see further and generally: Khuri Hitti & Faris (n12) 25 – 53; Reza Aslan, *No God But God: The Origins Evolution and Future of Islam* (Random House 2008) 3 – 22; Michael Lecker, *Jews and Arabs in Pre and Early Islamic Arabia* (Ashgate 1999); and F.E. Peters *The Arabs and Arabia on the Eve of Islam* (Routledge 2017).

²⁸ For a good description of Mohammad's early life see Sir William Muir, *The Life of Mahomet* (Elder Smith & Co 1861) 1-12.

was altogether struck out when his experience involving the visitation of the angel Gabriel upon him fully assured him of his duty. First confiding in his wife Khadija and close family and friends, Mohammad began to convey his monotheistic message with much effort on his part to set himself aside from those who commonly emerged as soothsayers, revealing their prosaic thoughts in order to diffuse tensions or resolve disputes within their tribe.²⁹ Mohammad's own Quraysh tribe were pagans who did not receive his eschatological professions well, particularly as his message that only one God would judge on the final day insulted the existence of their gods and their fathers' gods. The Quraysh were particularly infuriated, not least due to the fact that whilst Mohammad encouraged *zakat* (poor tax collected from the rich to maintain the poor) and shunned polytheism, the Quraysh were both leading usurers in Mecca and the high priests of the Pagan Pantheon.

Only with the protection of his Banu Hashim clan, under the hand of his uncle Abu Talib and with the financial help of his friend Abu Bakr did Mohammad and his small following of mainly paupers and freed men remain safe in Mecca. Once Abu Talib died and his position within the clan was replaced by a strong opponent of Mohammad's teachings (though tribal loyalties meant Mohammad could not be persecuted) it became clear the strained relationship was unsustainable and ultimately that his community of *mu'minun*, or believers, would be better protected elsewhere. Thus, the ensuing *hijra* (migration to Medina) was prompted.³⁰

As the revelations continued, Mohammad was convinced the Jews and Christians before him had distorted the messages from God to his prophetic predecessors and arrived at the conclusion that his was the ultimate prophesy, and the divine messages he received were the final and true message of God,³¹ calling those in ignorance of *tawhid* to God's intended way. This was in contrast to the first number of years of his prophesy when Mohammad did not necessarily distinguish his beliefs from those of the Jews or Christians – the prominent focus and fundamental precept being that of the recognition of the oneness of God,³² a salient precept of both preceding faiths.

²⁹ Brockelmann (n9) 14 – 15.

³⁰ Ibid. 15 – 19.

³¹ John L. Esposito, *What Everyone Needs to Know About Islam* (Oxford University Press 2002) 1-12.

³² Fred Donner, 'From Believers to Muslims: Confessional Self Identity in the Early Islamic Community' 2002 50/51 *Al Abhath Journal of the Faculty of Arts and Sciences* 11.

Ideologically, the divine revelations received by Mohammad, and publicly circulated, echoed the conditions of society and religion at the time - they called for reform, both religious and in terms of social justice.³³ Accordingly, during this Meccan phase of the Prophetic Period the revelations were not laws *per se* but the formation of the general principles of Islam or the conceptualising of what would soon transpire as comprising many of the overarching themes of the *Qur'an*, namely: God (monotheism); Prophethood and Revelation; Eschatology; The Emergence of the Muslim Community; Humans as Individuals; Humans in Society; Nature; and, Satan and Evil.³⁴

The Medinan phase of the Prophetic Period between the years of 622 and 632 saw a dual expansion of Islam in terms of firstly its *mu'minun* and secondly the development of the law. The social situation in Medina at the time was that of tribal disunity – perhaps a perfect storm for the arrival of an outsider espousing moral righteousness. The Aus and the Khazraj Arab tribes had immigrated to Medina in the early 4th century where the Nadir and Qurayzah were the prominent Jewish tribes. The Aus and Khazraj succeeded in disrupting the Jewish economic power but fought amongst themselves. Despite consciousness of their unity as Arab tribesmen amongst the Jews, their internal struggle continued and up to the eve of Mohammad's arrival in Medina there remained no prospect of arbitration.³⁵ Thus Mohammad was invited to Medina as a worthy leader who could broker a constitutional settlement. This in turn solidified his position, and was the catalyst for the development of Islamic Law.

As the Arab tribes of Medina accepted Mohammad as the spokesman of God and the leader of a novel grouping which, via the bond of a common faith, transcended the borders of tribalism,³⁶ they became known as the '*ansar*' or helpers - one of the four communities of the Medinan period. The remaining three were those who feigned support – *munaḥiqun* (the hypocrites), the Jews and Christians – *Ahl al-kitab* (people of the book) and those believers who completed the *hijra* to Medina –*muhajirun* (the

³³ See *Jahiliyyah* above at 2.1

³⁴ Some of these overarching themes were not to emerge until after the migration to Medina. See generally: Fazlur Rahman, *Major Themes of the Quran* (University of Chicago Press 2009).

³⁵ Brockelmann (n9) 19.

³⁶ Coulson (n2) 11.

immigrants).³⁷ At the same time, the fledgling Muslim community looked to the divine revelations to provide legal answers for all its perplexities. Mohammad appears to have regarded the revelations as sufficiently flexible to accommodate evolving human needs and this point cannot be underscored enough in critically assessing the development of the law. In other words, the first Islamic laws occurred in the context of Islam being developed according to the externalities of its then current environment.³⁸

As critical as the landscape of Arabia in *Jahilliyah* is to the appreciation of the nomadic and anarchic culture of the society Mohammad sought to improve, so too is the unfolding of events during the Prophet's time in Medina critical to the appreciation of the situations that prompted particular revelatory guidance that would later become binding law. The opportunistic circumstances that greeted the Prophet and his contingent of *muhajirun* soon provided a platform from which to catapult his position as leader of a minor grouping to that of *bona fide* head of state, beginning in the second year of his residency in Medina. This opportunity to lead his community on a more political level arose when war was threatened between Mecca and Medina. As a natural peacekeeper and messenger of a faith that transcended tribal boundaries, the Prophet drafted a treaty that bound Medina's tribes in alliance against Mecca. Whilst effectively a peacekeeping treaty between the *muhajirun* and the Jews, the *muhajirun* and the *ansar*, and, the *muhajirun* and the polytheists, the treaty also established a pact to form a unified community with agreed rules to be observed in an attempt to protect their city, and live harmoniously. This was the earliest form and meaning of 'the *ummah*' or community.³⁹ Notably, this 'Constitution of Medina' respected the independent religious views of the Jews and sought from them only a contribution to the costs of war and recognition of Mohammad as a head of state.⁴⁰

³⁷ Ahmad Von Denffer, *Ulum al-Qur'an: An Introduction to the Sciences of the Qur'an* (Kube Publishing 2015) 64-67.

³⁸ Mawil Issi Dien, *Islamic Law: From Historical Foundations to Contemporary Practice* (Edinburgh University Press 2004) 4.

³⁹ Awad Halabi, 'Constitution of Medina' in John Esposito, *The Oxford Encyclopedia of the Islamic World* Oxford Islamic Studies Online <<http://www.oxfordislamicstudies.com/article/opr/t236/e1003>> accessed 14 January 2017. For a developed meaning of '*ummah*' see Frederick M. Denny, *Islam and the Muslim Community* (Waveland Press 1998) 10. See also Hannah Rahman, 'Conflicts Between the Prophet and the Opposition in Medina' (1985) 62(2) *Der Islam* 266.

⁴⁰ At this time however, the Prophet was still courting the Jews as potential converts and was aligning religious events such as fasts and the frequency of prayer with that of the Jewish religious calendar partially as a persuasion method. It was later when he realised the Jews would not be converted that he emphasised both the Arab nature of his community and the scriptural differences in their beliefs, though it has been

Further, the terms of this Constitution of Medina, had a particular impact on the development of the law and the status of Mohammad as a leader. Particularly relating to the development of the law, the Constitution provided for the referral of disputes to God and Mohammad, the granting of authority to Mohammad to declare war and the prevention of further blood feuding. From this point forward responsibility for the actions of a murderer rested with the murderer only.⁴¹ No tribe could retaliate against those avenging a death and those avengers could target the culprit only. Aspects of criminal law now had legal foundation and Mohammad was recognised as a political leader of a substantial community. This development and escalation of Mohammad's position within his community, the terms of the treaty, the expansion of the *ummah* and his respect for the *dhimmi* or 'People of the Book' further formed the underpinnings and early shape of Islamic Law. In fact, the Constitution of Medina is long established as the first explicit written work of Islamic Law.⁴²

Following on from the Constitution, a number of battles ensued between Mecca and Medina with the underlying tension arising from the Quraysh fear of losing their status and privileges as guardians of the *Kaa'bah*, hence, recipients of the revenue streamed from the annual pilgrims. If Islam was to be accepted by all Arabs this would consequently deliver a death blow to their economic and political power.⁴³ The Prophet initiated the first battle in 624, the Battle of Badr, thought to be prompted by their relatively meagre living conditions and the Medinans simply ambushed trading caravans *en route* to Mecca, and though outnumbered returned victorious with their spoils of war. This was significant for Mohammad's reputation as a leader and increased his following in Medina, but also angered the Quraysh whose reprisal in the Battle of Uhud in 625 was a successful one on the battlefield, though it failed to inflict much damage on Mohammad's standing in society.⁴⁴ The realisation prompted the Quraysh to prepare for

noted in the latter case that this was a defensive tactic when his lack of Jewish scriptural knowledge became apparent.

⁴¹ For further discussion on this category of retaliatory crimes see Chapter Three. See also Brockelmann (n9) 21.

⁴² Jessica Raddin, 'Thematic Guide to Islamic Law'

<http://www.oxfordislamicstudies.com/thematic_guides/06_12_Islamic_Law.html> accessed 14 January 2017.

⁴³ Razwy (n8) 19.

⁴⁴ Much significance in how future events in Islam would unfold lay in these early battles. During the Battle of Uhud, Abu Sufyan, the Quraysh leader, rode into battle with Hubal, the God of the Kaa'bah, on

war again, this time on a grand scale with the aim of wiping out the Prophet and Islam in its entirety. In what became known in Islamic history as the Battle of the Trench in 627, Persian influenced methods of warfare prevented the Meccan army of thousands from trampling Medina and Ali's duel with the most renowned Meccan warrior saw the retreat of the Meccans and the advancement of Islam secured. Notably, during this same year the situation prompting divine guidance on accusations of adultery arose on a raiding expedition when one of Mohammad's wives, Aishah, did not return until the following day after she went in search of a missing necklace. She returned with a man whom she claimed to have previously known and upon accusations of adultery was sent home to her parents. It was a month later when God revealed her innocence to the Prophet and his punishment for false accusations of adultery was articulated to the believers.

During these early years in Medina relations with the Jewish tribes also soured despite an amicable beginning. Mohammad's ban on alcohol and gambling imposed to improve the alertness of the *ansar* and the *muhajirun* during their battle years had a negative impact on Jewish trade as the Medinans were no longer taking out loans with high rates of interest from the Jewish usurers. The Jews also pointed out gaps in Mohammad's knowledge of their scriptures and his response was a claim that the Jews were preaching deviant interpretations.⁴⁵ This divergence in their shared monotheistic ideal and opposing thoughts on capitalism consequentially resigned the Prophet to the Jewish resistance and he began to focus more on the Arab nature of Islam, turning his attention to the retrieval of the *Kaa'bah* from the polytheists.

After the Treaty of Hudaibayya⁴⁶ granted access to the *Kaa'bah* and prescribed peace between the Muslims and the Quraysh, the recognition of Mohammad by the Quraysh as an equal, as opposed to a fugitive of their vengeance, led to the rapid expansion of Islam, as those secret believers in Mecca could now practice their faith openly. The Treaty of Hudaibayya opened the floodgates for mass acceptance of Islam and by 630 Mohammad

his horse. He was thereby communicating to the Medinan believers that this battle was in the name of their religion – in essence, a holy war. Further Abu Sufyan was the leader of the Banu Umayya clan who would eventually form the Umayyad Dynasty.

⁴⁵ Razwy (n8) 22.

⁴⁶ The Treaty of Hudaibayya was a pact reached between the Muslims and the Quraysh regarding the permitted use by the Muslims of the *Kaa'bah* for pilgrimage for three days each year. Interestingly, when the Treaty of Hudaibayya was finalised Mohammad declared a victory, which he had not done after each of their victorious battles and is one point in history that is pointed to in emphasising Mohammad's aversion to war and inclination towards peace.

controlled vast swathes of Arabia (more as a result of religious persuasion and political alliance than warfare) and had defeated Mecca and laid claim to the *Kaa'bah*.⁴⁷ He proceeded to finalise rights to free worship in return for a financial tribute with the remaining Jewish and Christian tribes, and completed his mission as the Prophet with a final pilgrimage to Mecca to become known as the 'Farewell Pilgrimage'. His actions during this pilgrimage are referred to as the 'model of the correct performance of the sacred rites' during which he enjoined the basic duties of Islam upon his believers.⁴⁸

During the Prophetic Period it was the customs of tribal Arabia that were altered so that they were either forbidden, or continued along a stronger moral justification⁴⁹ and essentially were given an Islamic sensibility. The Medinan phase saw a certain departure from the type of revelations the Prophet received in Mecca. The themes espousing moral righteousness and emphasising the unity of God and eschatological concerns though continuing, were replaced often by revelations regarding the proper governance and leadership of a society with legal and social implications such as marriage, inheritance and punishment.⁵⁰ The conclusion of the Prophetic Period finalised the *Qur'anic* basis for the *Shari'a*, in particular the criminal law, and more particularly, the *hudud* crimes, as by their very nature *hudud* crimes must originate with the Prophet's express (or implied via the *Sunnah*) instructions.⁵¹

As will be seen in Chapter Three, Islamic Criminal Law has three categories of crimes: *hudud*, *qisas* and *taz'ir*. The *hudud* crimes are those that punished behaviours that had the most grave impact on tribal society in *Jahiliyyah* and were revealed by God, thus cannot be altered by a human. Enumerating each of the *hudud* crimes where there is consensus among the *madhahib* (Schools of Islamic Jurisprudence) we can already identify their origin within the Prophetic Period, thus establishing a solid understanding of the true intention behind the decision to punish and the punishment itself based on the condition of society at the time. This is especially relevant in relation to how the law is to be interpreted now that these factors have since dissipated. The *hudud* crimes as understood today can be listed as *zina* (adultery and fornication), *qadhif* (false accusation

⁴⁷ Donner (n13) 1-4.

⁴⁸ Brockelmann (n9) 35.

⁴⁹ The change in terminology from *tha'r* (revenge) to *qisas* (just retaliation) is a strong example of customs continuing, though modified, along a stronger moral justification. In this regard see Coulson (n2) 18.

⁵⁰ The chronological order of revelations can be found at Von Denffer (n37).

⁵¹ For more detailed discussion of *hudud* crimes see Chapter Three.

of *zina*) *shurb al-khamr* (drinking alcohol), *sariqah* (theft), *hirabah* (highway robbery), *baghi* (rebellion) and *riddah* (apostasy).

Taking first *zina* and *qadhaf* it is submitted that, given the position of women in society and their general status as objects of lust, the original purpose behind these crimes was to dramatically increase respect for women in society. Fornication and adultery were forbidden and marriages capped at a maximum of four wives - further qualified by the man's ability to care for them equally, which if he could not do, then he must only take one.⁵² Similarly, *qadhaf* was forbidden in order to protect the good reputation of a woman arising from the revelation that followed the previously noted disappearance of Aishah. *Shurb al khamr* was forbidden originally to increase alertness in warfare. Forbidding *sariqah* was a direct result of both the level of poverty and the desperate state of tribal feuding which *sariqah*, together with the giving of alms to the poor, or the payment of *zakat*, intended to alleviate. The sharing of wealth consequentially reduced the need to steal which further reduced the blood feuding.

Where *hirabah* (highway robbery or banditry) was concerned the punishment seemingly arose from the occurrence of a particular incident that befell Muslim villagers. Members of the Uraina tribe after a peace treaty with Muslims feigned belief and sought help for illness. Mohammad directed them to camel shepherds at the edge of the village who nursed them back to health. When well, they carried out torturous attacks on the shepherds, stole their property, and left.⁵³ The punishment for *hirabah* was revealed upon the discovery of the shepherds' remains in an attempt to outlaw banditry, another plight of the tribal landscape. Both *riddah* and *baghi* were forbidden to protect the *ummah* in terms of both its military strength and its faith⁵⁴ and reflected the need to preserve a fledgling community in order to guarantee its survival.

⁵² Holy Qur'an, Surah An-Nisa 4:3 "And if you fear that you cannot act equitably towards orphans, then marry such women as seem good to you, two and three and four; but if you fear that you will not do justice (between them), then (marry) only one or what your right hands possess; this is more proper, that you may not deviate from the right course". This ayat which reduces marriage to a maximum of four wives is further qualified by Holy Qur'an, Surah An-Nisa 4.129 which states "And you have it not in your power to do justice between wives, even though you may wish (it)...". This verse is commonly believed by many Muslims to forbid polygamy within Islam.

⁵³ Hashim bin Mehat, *Malaysian Law and Islamic Law on Sentencing* (International Law Book Services 1991) 61. See also Michael Mumisa and Mohammad Habbash, *Shari'a Law and the Death Penalty* (Penal Reform International 2015) 24.

⁵⁴ *Riddah* and *Baghi* do not enjoy consensus between the *madhahib* as *hudud* crimes and are only considered *hudud* by some schools.

This is critical insofar as this thesis is concerned. The moral principles behind the crimes (to act ethically, do justice and not to undermine the interests of others) are, no doubt, permanent, but the *specific* concerns that they reveal are focused on particular issues arising at the time and in the place of the revelations. The Prophetic Period therefore provides the most necessary contextual foundation for a sensible comprehension of Islamic Law and specifically Islamic Criminal Law.⁵⁵ It is doubtful, in other words, whether the (eternal) moral principles must, in the 21st century, be interpreted in their 7th century context. This is the focus of Chapter Seven.

2.3 Rashidun Caliphate - The Rightly Guided Caliphs 632 – 661

Upon the death of the Prophet there immediately arose the issue of succession. No instructions as to who would lead the *ummah* after his departure had been left⁵⁶ and so it came to pass that Mohammad's successor was elected from his four closest companions, all of whom in turn succeeded to the position of *khalifa* and who became known collectively as the Rightly Guided Caliphs. The first *khalifa* was Abu Bakr (632-634), one of Mohammad's oldest companions and his father-in-law. Awarded the title of *Khalifat Rasul Allah* (Successor to the Messenger of God) and reigning as *khalifa* for just two years until his death, Abu Bakr successfully directed what later became known in Islamic history as the Riddah Wars.⁵⁷ These tribal rebellions against the Islamic State were attempts to regain independence from Islamic rule as tribal elders claimed their allegiance was a political contract that ceased upon the Prophet's death.⁵⁸ The rebelling tribes - some of which were led by emerging self-proclaimed prophets - refused to pay *zakat* and prompted the wars that resulted under Abu Bakr's *khalifat* in a successful defence of Islam and the retention of Muslim rule across the entire Arabian Peninsula.⁵⁹

⁵⁵ Most hudud punishments in Islamic Criminal Law contain punishments both in this life and in the hereafter. The punishment that would be meted out in the afterlife for wrongdoing would far outweigh any punishment that could be delivered upon a criminal on earth. The fear of God's judgement was utilised as a deterrent in preventing crime.

⁵⁶ The majority of Sunni Muslims believe no successor had been appointed by the Prophet before his death. However, Shii'ah Muslims believe express authority was handed to Ali as his bloodline descendant.

⁵⁷ For further reading on the Riddah Wars see Brockelmann (n9) 45-46.

⁵⁸ John L. Esposito, *The Straight Path* (Oxford University Press 2016) 43.

⁵⁹ Asma Afsaruddin, 'Abu Bakr' in *The Oxford Encyclopedia of the Islamic World* available at Oxford Islamic Studies online <www.oxfordislamicstudies.com/article/opr/t236/e1006?_hi=0&_pos=1> accessed 20 January 2016.

The Riddah Wars were particularly significant for the development of Islamic Law insofar as the death toll dramatically reduced the number of those who had memorised the revelations. Prompted by the increasing fears of Abu Bakr's future successor Umar, it was during the reign of Abu Bakr that the physical compilation of what would amount to the content of the *Qur'an* began. Zayd ibn-Thabit, Mohammad's former secretary was tasked with the collection of *ayats* from date leaves, pieces of leather, parchment and recitations of those who had memorised them. He compiled the *Qur'an* into one volume of which the *khalifa* became custodian. Abu Bakr's legacy in terms of legal development was his consolidation of the support of the Arabian peoples into a faithful and militarily strong *ummah* and the funnelling of their energies against powerful Persian and Byzantine empires either side of the peninsula, together with the physical compilation of the *Qur'an*.⁶⁰ Abu Bakr demonstrated the viability of a vast Muslim State.⁶¹

Umar Ibn al-Khattab (634 – 644) succeeded Abu Bakr to the title of *Khalifa*, became custodian of the *Qur'an* and was the first *khalifa* to have the title *Amir al-Mumin'un* or 'Commander of the Faithful' conferred upon him. Umar's reign is considered paradigmatic due to the general consensus that he best exemplified and implemented the moral, social, and political objectives envisioned by the *Qur'an* for the post-prophetic Muslim polity.⁶² Umar's dedication to the progression of Islamic rule brought about numerous accomplishments during his tenure. He created an entire governmental structure for the political governance of Arabia and beyond, and, he was far sighted in his decision to prevent those in official positions from engaging in trade to avoid corruption,⁶³ as well as catering for a complaints process when officials attended compulsory *hajj*. At this point, scholars had for a number of years, not only been memorising *ayats* verbatim but had the benefit of the *Qur'an*, which, fast becoming a substantial collection of texts, enabled the swift communication of confirmed Islamic principles far and wide, which in turn cemented Umar's now undeniably principled delivery of justice according thereto.⁶⁴

⁶⁰ There is more than one account of how the *Qur'an* was compiled and hence, who should receive the credit therefor. A detailed discussion of this topic is to be found in Theodor Nöldeke, Friedrich Schwally, Gotthelf Bergsträßer, Otto Pretzl, *The History of the Qur'an* (Brill 2013) 21-31.

⁶¹ www.islamichistory.org, *The Rightly Guided Caliphs* <www.islamichistory.org/the-rightly-guided-khalifas/> accessed 20 January 2017.

⁶² Afsaruddin (n59).

⁶³ M. Qazi, *Umar al Farooq: Man and Khalifa* (Notion Press 2015) 176.

⁶⁴ Holy *Qur'an*, Surah An-Nahl 16:90 "God commands justice and fair dealing". Holy *Qur'an*, Surah Al-Ma'idah 5:8 "Oh you who believe, be upright for God and be bearers of witness with justice". Holy

Umar further contributed to development in Islamic Law through his interpretation of a considerable number of *ayats* and this is where the development of Islamic Law or *fiqh* as a legal science began to bud. As alluded to above, the development of Islamic Law is more appropriately described as the development of *fiqh*. During the prophethood, Mohammad's existence as the embodiment of God's will on earth was based solely on God's revealed moral guidance in an effort to improve the standard of life for a tribal society, but his decision making was not at the time conceived of as the foundations of a future legal system. Realistically, Mohammad could never have been aware of the requirements that would arise in terms of legal development for an *ummah* that later expanded far beyond what his original expectations may have been. Necessarily, it is at this point in history, as Mohammad's successors sought the acquisition of tools to propel the regime forward that the law began to develop *per se* and the practice of *fiqh* officially began.

Umar is considered by many as the original jurist and founder of *fiqh* and of his several thousand legal dicta, approximately one thousand of those relate directly to matters of fundamental importance to the law and the science of it.⁶⁵ Indeed, both Abu Bakr and Umar's practice of accepting advice dictated that the right of interpreting the law did not belong to the *khalifa* only, therefore was not a reserved privilege but a practice any member of society respected for their piety and social conscience could indulge.⁶⁶ A small number of companions of the Prophet were considered to be the 'pillars of *fiqh*'.⁶⁷ These companions argued together on matters of importance which led to a commonality in methods of assessing various circumstances of religious/legal significance.

Under the authority of the *ayat* "O you who have believed, obey Allah and obey the Messenger and those in authority among you"⁶⁸ the *khalifas* alone assumed the power of positive legislation.⁶⁹ From this authority sprang much Islamic Law under Umar including his system of land tenure (albeit developed out of necessity given the extent of

Qur'an, Surah An-Nisa 4:135 "Oh you who believe, stand out firmly for justice, as witnesses to Allah, even if it be against yourselves, your parents and your relatives, and whether it is against the rich or the poor..."

⁶⁵ Mohammad Shibli Numani, *Umar: Makers of Islamic Civilisation* (IB Taurus 2004) 122.

⁶⁶ Coulson (n2) 25.

⁶⁷ Numani (n65) 122.

⁶⁸ Holy Qur'an, Surah An-Nisa 4 59.

⁶⁹ Coulson (n2) 25-26.

conquered territories), extensive fiscal laws, and in the criminal arena amendments to punishments such as his prescription of eighty lashes for the punishment for *zina* to bring it in line with the punishment for *qadhaf*, overriding his predecessor who set it at forty. Notably, Umar's dedication to Islam occasioned the alteration of the Islamic calendar according to the *hijra*.

The Islamic law of inheritance is often cited for its ability to exemplify the transition between tribal customary law and the laws of the new faith, as well as the difference in approach from Mohammad to his successors. Where inheritance was concerned the tribal customary position was inheritance along the male agnate line. In terms of alteration according to an Islamic sensibility the focus of the new Islamic faith on the family sought the retention of the estate within the family unit. The Prophet was comfortable in delivering *ad hoc* resolutions to various individual inheritance situations but his successors were inclined to provide rules that were to be adhered to, and, under this *Qur'anic* authority changed the law of inheritance until it became that which was fair, all the while aligned to the Islamic focus on the family and the *Qur'anic* principles of justice.⁷⁰ Therefore, whilst Mohammad made no attempt to codify the law, these types of regulations marked the beginnings of the growth of a legal structure.⁷¹ Crucially, they also exemplify the continuous development of the law according to the core principles of Islam and not the precise wording of any of Mohammad's *ad hoc* decisions.

Umar was assassinated in 644CE/23AH by a man believing he was wronged by a decision of the *khalifa* regarding his tax payments, but, prior to his death he appointed a committee to elect his successor and from which committee Uthman ibn-Affan was elected (644 to 656CE/35AH). Significantly, Uthman was of the Umayyad clan who were historically in strong opposition to Mohammad, and Uthman's appointment of members of his family to administration roles eventually became his downfall amidst accusations of nepotism in stark contrast to the precedent set by his predecessors regarding moral excellence in official appointments.⁷² It was this very nepotism – the

⁷⁰ Two stories tell of the changes in inheritance law made by the successive caliphs. The first is the 'Minbariyyah' or the 'Pulpit Case' during which Ali unreservedly altered inheritance laws during a sermon and the second is the 'Himariyyah' or the Donkey Case in which Umar likewise altered the legal provisions on inheritance.

⁷¹ Coulson (n2) 22. Noel J. Coulson, *A History of Islamic Law* (Aldine Transaction 2011) 82.

⁷² Asma Afsaruddin, 'Uthman bin Affan' in *The Oxford Encyclopedia of the Islamic World* <www.oxfordislamicstudies.com/article/opr/t236/e1089> accessed 14 January 2017.

placement of power into the hands of the Umayyads - that laid the foundation for future political unrest.

Uthman is responsible for continuing the military expeditions until Islamic rule had spread to the balance of the Sassanian Empire,⁷³ and, he did succeed in consolidating rule in these areas until, in the last year of his term as *khalifa*, this very consolidation of Islamic rule earned him enemies who assassinated him during prayer in Medina. Where legal development is concerned, Uthman was made aware of concerns a travelling *sahaba* (companion of the Prophet) had with regard to the *Qur'an*, specifically, changes to recitations and pronunciations brought on mostly from countries now under Islamic rule that did not speak Arabic. Uthman borrowed the original *Qur'an* from Umar's daughter Hafsa, the official custodian, and ordered ibn Thabit, who compiled it, to begin making copies that were ultimately distributed throughout the Islamic Empire, with all variants ordered to be destroyed. To this extent Uthman's legacy regarding legal development is that of the final recension of the *Qur'an* to the format in which it continues to exist today.

When Ali succeeded to *khalifa* much change was afoot in the political future of Islam and his tenure was wracked with political unrest and civil strife.⁷⁴ Ali, Mohammad's son-in-law and cousin, had already challenged the appointment of Abu Bakr on the basis of Mohammad's clear instruction that Ali would be his direct successor, and here the scholars diverge according to their allegiance.⁷⁵ Ali's supporters (*Alids*) who agreed the position of *khalifa* should devolve within Mohammad's family and bloodline were satisfied Ali had finally assumed his rightful role. Regardless, the *khalifat* under Ali was for the first time to witness *fitna* (civil war) within Islam; for the first time in history, Muslims would challenge Muslims for authority. Ali is believed to have been one of the instigators of the insurrection against Uthman.⁷⁶ He accepted the public oath of allegiance on the very day of Uthman's death and failed to avenge it leading to suspicion

⁷³ The Sassanian Empire spanned modern day Iran, Iraq, Bahrain, Kuwait, Oman, Qatif (small area of eastern Saudi Arabia), Qatar, United Arab Emirates, Syria, Palestine, Lebanon, Israel, Jordan (the Levant), Armenia, Georgia, Azerbaijan, Dagestan, South Ossetia, Abkhazia (the Caucasus), Egypt, Turkey, Afghanistan, Turkmenistan, Uzbekistan, Tajikistan, Yemen and Pakistan.

⁷⁴ Abdulaziz Sachedina, 'Ali ibn Abi Talib' in *The Oxford Encyclopedia of the Islamic World* <www.oxfordislamicstudies.com/article/opr/t236/e1089> accessed 18 January 2017.

⁷⁵ See generally Barnaby Rogerson, *The Heirs of Mohammad: Islam's First Century and the Origins of the Sunni Shia Split* (Overlook Press 2006); Leslie Hazelton *After the Prophet: The Epic Story of the Shia-Sunni Split in Islam* (Doubleday 2009); Saul S. Friedman, *A History of the Middle East* (McFarland Jefferson 2006) Chapter 16.

⁷⁶ Brockelmann, (n9) 66.

on the part of his supporters who questioned his motives and revolted against him. The Battle of the Camel ensued and on this occasion of *fitna* Ali was victorious. Ali then moved the seat of Islam from Medina to Kufah in Mesopotamia (modern day Iraq) where he was recognised as *khalifa*.⁷⁷

Uthman's cousin Mu'awiyah, whom he had appointed as Governor of Syria, rose against Ali once more after attempts by Ali to remove him from office and his assumption of the role of avenger of Uthman's death. The situation culminated in a battle known as the 'Battle of Siffin' renowned for the actions of the Syrians in supposedly emerging with copies of the *Qur'an* on the tips of their swords in a show of loyalty to it and reversion to its instructions within, stating that in cases of dispute, God should decide.⁷⁸ Whilst Ali already considered the battle almost won by the Mesopotamians he indulged their seemingly pious attempt to resolve the drawn out negotiations and battles. Arbiters were chosen for both sides who held neither Ali nor Muawiyah were eligible for the *khalifat*. Ali was unwilling to submit to the decision and during and after Ali's retreat from Siffin a sect broke away on the basis of their disagreement with Ali submitting to arbitration in the first instance. They became known as the Kharijites who elected their own *khalifa*, Abdallah ar-Rasibi, and who were ultimately responsible for Ali's assassination in 661, ending the period of the Rashidun Caliphate.

Ali's legacy is generally reported as that of his part in the great schism of Islam rather than his contributions to a developing system of Islamic Law. This first occasion of inter Muslim warfare, or *fitna*, is noteworthy in terms of the hypothesis of the thesis insofar as the departure of the Kharijites from the mainstream would set a precedent for those who would become known as Salafi *jihadis* in the twenty first century. They too would react against perceived un-Islamic governance and impact the perception of Islam in the Western world. Due to his close relationship with Mohammad and his contributions to Mohammad's mission throughout his Prophethood and beyond, Ali is, regardless of the schism, revered equally by both *Shiia* and *Sunni* Muslims as an exemplary figure of Islam.

⁷⁷ Ibid. 67.

⁷⁸ Holy Qur'an, Surah An-Nisa 4:59 "O you who have believed, obey Allah and obey the messenger and those in authority among you. And if you disagree over anything, refer it to Allah and the messenger, if you should believe in Allah and the Last Day. That is the best way and best in result"

The period of the Rashidun Caliphate is witness to the effect that opportunities to attain great power can, and did, have - particularly as society was still within its generation of tribalism with full memory and experience of their historical ways. Conflict and factionalism were familiar territory. Although the Islamic way of life was maintained, for those within reach of power, sight was perhaps lost of the original goals of justice, morality and equality promoted by the Prophet and rather political sights were set instead. This foray into power politics and away from early Meccan moral guidance would go on to have an impact on the manner in which *fiqh* would later develop.

Despite political turmoil, the period of the Prophet and the period of the Rashidun Caliphate combined, comprise what is known in Islamic legal history as the Normative Period. This is due to a number of factors including the inception of the trans-border community based state, the formation of the bond of a common religious identity and purpose, the origination of the primary sources of law, the reference to this period as a basis for Islamic revival and reform, the symbolism of the success and power generated during this period in terms of the validation of Islam and Islamic Law as a successful model of social, political, legal and religious existence, and the reverence of the era as the one during which the final Prophet was delivered unto them by God.⁷⁹

One essential matter that we need to be constantly cognisant of in the discussion of the development of Islamic Law and arising from the period of the Prophet and the Rashidun Caliphate is the manner in which the law was imposed upon the *ummah*, and this is of particular importance when considering the modernist / traditionalist divide and the future development of the law. During the Medinan stage of the Prophetic Period where Islamic Law was essentially in embryo, the law was revealed in line with the contemporaneous needs of society. During the Rashidun Caliphate, the *khalifas* adopted a purposive approach to implementation of the law. Consulting with their fellow jurists, the *khalifas*, particularly Abu Bakr and Umar, employed a methodology of discernment of the particular reason for an injunction in light of the public interest.⁸⁰ Injunctions were often suspended on the grounds that they lacked the circumstances the *Qur'an* and *Sunnah* required for their application. Examples include Umar's suspension of the punishment

⁷⁹ Esposito (n58) 45.

⁸⁰ Public Interest is known as *maslaha mursala*. For further discussion of *maslaha mursala* see Chapter One.

for theft during famine times, the change from Mohammad's method of treating lost camels (let them roam free) to Ali's method (established care sanctuary) given the impact societal change (more camels, more dishonest people) had on the matter, and Umar's reduction of the length of the divorce process from that which Mohammad established to an immediate process in order to curb a rising trend in the misuse of divorce pronouncements.⁸¹ Therefore, based on the foregoing, we see that both Mohammad and the succeeding *khalifas* adapted and evolved the law according to the contemporaneous needs and circumstances of society, strongly indicative of a pattern of treatment of the law and of an intention that this methodology would be utilised by successive *khulafa* and jurists.

2.4 Umayyad Empire 661 to 750CE (41 to 132 AH)

The Umayyad Empire moved the seat of Islam to Damascus and the position of *khalifa* now devolved on the basis of hereditary succession⁸² (despite the schism this precise issue caused previously). The move to Damascus allowed greater control over conquered territories and the Umayyads transformed the *ummah* from an Arabic shaykdom into an Islamic Empire that stretched far and wide.⁸³ The sheer size of the Empire led to the *qadi* or judge resorting to guidance from political superiors rather than prominent jurists, and this indicated the move from the law of God to the law of the caliph.⁸⁴ Although the *qadi* did attempt to mediate a dialectic between the social and moral imperatives and the demands of legal doctrine⁸⁵ the distance between *qadis* now meant they too were applying the law in a more diverse fashion throughout the empire.⁸⁶ Notwithstanding, this is the third occasion where it can be seen that those responsible for the administration of the law attempted to follow the method established by Mohammad and followed by his Rightly Guided Caliphs of adapting the law to the contemporaneous needs of their society. With the rapid spread of Islam, non-Arab laws and customs, provided they did not conflict with Islamic norms, were considered normative for their communities and so Islamic Law diversified further with inclusions of Roman, Talmudic, Canon and

⁸¹ Issi Dien (n38) 6.

⁸² William Muir, *The Khalifaate, Its Rise Decline and Fall from Original Sources* (Literary Licensing 2014) 316.

⁸³ Gerald R. Hawting, 'Umayyads' in Joseph W. Meri ed., *Medieval Islamic Civilisation: An Encyclopedia* Vol 13 (Routledge 2005) 847.

⁸⁴ Wael B. Hallaq, *An Introduction to Islamic Law* (Cambridge University Press 2009) 11.

⁸⁵ Ibid. 62.

⁸⁶ Joseph W. Meri, *Medieval Islamic Civilisation: An Encyclopedia* Vol 13 (Routledge 2005) 848.

Sassanian laws.⁸⁷ The politicisation and diversification of the law subsequently prompted pious Muslims, who noticed the gap between God's law and Umayyad rule, to embark upon the path of developing an Islamic jurisprudence.⁸⁸ Whilst this may have appeared to be an attempt at unifying the *ummah*, the political affiliations of the *ulama*, their religious knowledge, the legal customs they were exposed to and the places they then travelled to, led to further variation in the understanding and application of the religious texts.⁸⁹ Ultimately, the expansions under Umayyad control demanded the development of Islamic Law, or *fiqh*.

2.5 Abbasid Empire

The Abbasid Empire enjoyed the benefit of the Umayyads already having secured the Islamic territories and this allowed them to invest in a period of expansion and definition in various disciplines that would see the centuries of Abbasid control termed 'The Golden Age of Islam'. There were power struggles both internally and as a result of the Crusades. Islamic successes strengthened the belief that a strong community was a faithful community and the military successes were all the proof the Islamic world needed to justify their religion and their laws. There were however also losses. The legacy of the Crusades would be the memory of the unyielding savagery of the Christians who, unlike Muslims, massacred all their women and children and destroyed their religious buildings.⁹⁰ Nonetheless, even the Mongol Invasion and the fall of Baghdad in 1258 could not wholly destroy Islam and a version of the *khalifat* lived on in Egypt.⁹¹ Coming out of the Abbasid period, or the Golden Age of Islam, the *Shari'a* was operating as a full system of law, but crucially, the secondary texts or *fiqh* texts had also been compiled. This was made possible by the Abbasids' attempt to distinguish themselves from the Umayyads by investing heavily in the development of Islamic legal theory that pious Muslims had embarked upon towards the end of Umayyad rule.⁹²

⁸⁷ Esposito (n58) 47-56.

⁸⁸ Ibid. 55.

⁸⁹ Issi Dien (n38) 7.

⁹⁰ Esposito (n58) 66.

⁹¹ Muir (n82) 587-590.

⁹² Joseph Schacht, 'The Schools of Law and Later Development of Jurisprudence' in Majid Khadduri, Herbert J. Liebesny eds., *Law in the Middle East Vol I: The Origin and Development of Islamic Law* (Middle East Institute 1955) 57.

This period in Islamic history is pivotal in terms of the modernist/traditionalist divide. The *khalifa* at this time, al-Ma'mun, was a particularly open minded rationalist who supported the theories of the Mu'tazilah.⁹³ Imposing the doctrine nonetheless saw him faced with strict opposition grounded in the fact that accepting the *Qur'an* as created and disregarding its eternal status flew in the face of all the jurisprudential endeavours of the pious Muslims. Al-Ma'mun's efforts ultimately failed and he was succeeded by a traditionalist supporter of the *ulama*. Rational thought however was not entirely repressed and the differences between the rationalists and traditionalists precipitated the variety of schools of thought, or *madhahib*, that were emerging.⁹⁴

The schools of thought dedicated immense time to the science of *fiqh* and the various approaches to it. At *Qur'an* 5:48 we are told "*To each among you God has prescribed a law and an open way....*".⁹⁵ Regarding this *ayat* attention has been drawn to the use of the word 'and' instead of 'or'. Both a law 'and' an open way or *minhaj* are required for proper progression – a law without an open way would lose its vitality and relevance and an open way without a law would lead to normative confusion and anarchy.⁹⁶ At 6:97 we are told "*It is God who has appointed for you the stars, that by them you may guide yourself in the darkness of land and sea...*".⁹⁷ At *Qur'an* 16:16 it is stated "...and he has set other landmarks in the earth. And by the stars too do people find their way...".⁹⁸ This metaphorical authority and inspiration was the basis for the development of various schools of legal thought that would be pivotal in the development of Islamic Law. The *Qur'an* was about to receive the interpretation which would determine the rest of its existence. Whether the Muslims would allow for modernising interpretations or be insistent upon its interpretations according to the textual, traditionalist and ultimately fundamentalist point of view remained to be seen. If the former prevailed, Islam could expand as ideas expanded and the very modern and radical propositions within, such as the treatment of women, could be expanded and reinforced, but in the event of the latter

⁹³ For more on the Mu'tazilah rationalist movement see Rachael Omari, 'Mu'tazilah' in *The Oxford Encyclopedia of the Islamic World* <www.oxfordislamicstudies.com/article/opr/t236/e1073?_hi=0&_pos=7#match> accessed 20 February 2017.

⁹⁴ Fuad Baali and Ali Waardi, *Ibn Khaldun and Islamic Thought Styles: A Social Perspective* (GK Hall 1981) 72.

⁹⁵ Holy Qur'an, Surah Al-Ma'idah 5:48.

⁹⁶ Ibn Khaldun, *The Muqaddimah: An Introduction to History* (Princeton University Press 1967) 55.

⁹⁷ Holy Qur'an, Surah Al-An'am 6:97.

⁹⁸ Holy Qur'an, Surah Al-An'am 6:16.

prevailing, Islam would insist on returning time and again to its base principles – the core definition of fundamentalist Islam.

In the Abbasid period the different schools of thought became so influential that Muslims were identified according to their association with a particular one. A person who did not have an affiliation with a particular *madhab* would be thought of as not having an authentic faith and so despite divine revelation having influenced the founders of the *madhahib*, the level of adherence to them saw human interpretation triumph over the sacred source.⁹⁹ These beginnings of uncritical reverence of the *fiqh* texts would have a powerful impact on the interpretation of the criminal rules of the *Shari'a* by future fundamentalist Islamists. The *fiqh* schools laid the foundations for the practice of modern Islamic Law today and are essentially the single most significant advancement in the development of Islamic Law throughout the ages.

2.5.1 Schools of Islamic Jurisprudence

In Arabia, particularly in Mecca and Medina, early Islamic jurisprudence derived from the learned brother-in-law (Abdallah b. Umar) and uncle (Abdallah b. Abbas) of Mohammad. Their close ties to the Prophet and their historically simple way of life occasioned little need for divergence from the religious texts and this engendered a culture of strictly traditional interpretation in Arabia, or, a literal understanding of the texts. In Mesopotamia, where Ali had resided during his *khalifat* there was a history of both nomadism and urbanism and the south of the province subscribed to three influential *ulama* namely Abu Musa al-Ash'ari, Anas b. Malik and Mohammad b. Sirin. It was between these two countries that the initial two strands of religious thought emerged - textual traditionalism was rooted in Medina whilst Kufah supplied the urbanised, multi-cultural environment for diversity in opinion to flourish.¹⁰⁰

It was in Mesopotamia that the Hanafi school¹⁰¹ would be conceived under the eponymous Abu Hanifa al-Nu'man b. Thabit (699-767CE / 79 – 150AH), remembered as

⁹⁹ Ali Khan, 'The Reopening of the Islamic Code: The Second Era of Ijtihad' (2003) 1(1) University of St. Thomas Law Journal 341.

¹⁰⁰ Issi Dien (n38) 7 - 12.

¹⁰¹ The Hanafi School is prominent in Kazakhstan, Turkmenistan, Kirgizstan, Afghanistan, Pakistan, Bangladesh, Azerbaijan, Turkey, Egypt, Tajikistan, Maldives, Syria, Jordan, and Uzbekistan.

the founder of *ijma* (analogy)¹⁰² due to his methodology of thinking up hypothetical situations and treating them according to the reasoning that he found within the texts. Abu Hanifa wrote no major works of his own and his legacy is viewed through his writings on issues related to Islamic creed and education including ‘al-Fiqh al-Akbar (The Most Important Law), al-Radd ‘Ala al-Qadariyyah (Refuting Pre-Destinationists) and al-Alimwa al-Muta’allim (Teacher and Student).¹⁰³

Malik b. Anas (710-796CE 91-179AH) founded the Maliki school¹⁰⁴ based on the teachings and methods of Umar and accordingly this school of thought has a fundamental textual base in contrast to Hanafi’s analytics. Malik was strictly critical of *ahadith* and in contrast to Hanifa refrained from hypothetical analysis. Malik also resorted to the practices of the people of Medina rather than their narrations on the basis of a form of *sunnah mutawattir* (sequential tradition), believing their practices were inherited from the preceding generations.¹⁰⁵ His main sources of legal deduction were the *Qur’an*, the *Sunnah*, the consensus of the people of Medina, analogy, the statements of the Prophet’s companions, *maslaha* (public interest), *urf* (custom), *sadd al-dhar’ai*,¹⁰⁶ *istihsan* and *istishab*.¹⁰⁷ Malik’s prominent work is his collection of *ahadith* in the Mutawatta (The Well Trodden Path). The Mudawanna, compiled by his scholars, is a work of legal philosophy but the Mudawanna al-Umm (The Mother Account), compiled by students al-Furat and Sahun, bridged the gap between the Hanafi and the Maliki schools and is recognised as one of the most important reference books in the Maliki School of Thought.¹⁰⁸

¹⁰² For a detailed explanation of *ijma* see Chapter One.

¹⁰³ His students however did compile his narrations. This included Muhammad b. Mahmoud Khawarizmi who compiled ‘Marwiyyat Abu Hanifa’ and Abu Yusuf who was appointed as Chief Qadi under al-Rashid and compiled ‘Kitab al-‘Athar’ (The Book of Recounts). Mohammad ibn al-Hasan wrote a compendium of *fiqh* volumes now considered the most prominent Hanafi reference books - the most significant of which is al-Jami al-Kabir (The Large Compendium) See Jassar Auda, *Maqasid al-Shariah as Philosophy of Islamic Law: A Systems Approach* (International Institute of Islamic Thought 2008) 66.

¹⁰⁴ The School is now prominent in Algeria, Libya, Morocco, Tunisia, Mauritania, Kuwait and Bahrain.

¹⁰⁵ Issi Dien (n38) 16-18. Mawil Issi Dien, *Islamic Law: From Historical Foundations to Contemporary Practice* (Edinburgh University Press 2004) 4.

¹⁰⁶ *Sadd al-Dhar’ai* is a reasoning based on prevention of a lawful means being used to achieve an unlawful outcome.

¹⁰⁷ For a detailed description of *maslaha mursala*, *istihsan* and *istishab* see Chapter One.

¹⁰⁸ Issi Dien (n38) 18-19.

The Shafi'i school¹⁰⁹ has been described as representing a change in the juridical reasoning of Islamic Law insofar as al-Shafi'i (774-854 CE / 150-240AH), in contrast to his peers who were generally known for their compilations of *ahadith*, debuted a book of methodological reasoning. To Shafi'i is attributed the laying of the foundations of *usul al-fiqh* as a separate branch of knowledge in Islamic Law.¹¹⁰ Shafi'i, having a generational gap between the foundation of the previous schools and his own, coupled with his having travelled to study both systems under many scholars, provided him the opportunity to analyse both before establishing his own methodology that created a systematic adhesion of the *Qur'anic* law to the *Sunnah*. Thus, Shafi'i's independent methodology was to resort first to the *Qur'an*, then to the *Sunnah*. If no answer could be found in either, resort was had to *ijma* and the statements of the Prophet's companions prioritising them in accordance with their compliance with the *Qur'an* and *Sunnah*. If the matter could not be resolved using these techniques the statements of the orthodox *khalifa* were resorted to in preference to other sources; *qiyas* was a final resort for Shafi'i. Shafi'i's most renowned works are 'al-Risala (The Message), Kitab al-Hujja (The Book of Proof), and Kittab'al-Umm (The Motherbook).¹¹¹ Al-Hujja is significant in terms of the development of Islamic Law insofar as we see, once more, the inclination to adapt Islamic Law to new environments - when Shafi'i wrote the Hujja in Mesopotamia, he adapted it substantially when he travelled to Egypt to suit the vicissitudes of his new environment.¹¹² Likewise, the al-Umm created its own legacy in its ability to be described as the seminal work of Islamic legal hermeneutics applied.¹¹³

Ahmad b. Hanbal (780-855CE/164-241AH) founded the Hanbali school,¹¹⁴ the fourth and final major Sunni school of thought influenced by Shafi'i's arrangement of the sources of law. Hanbal's methodology was strong reliance upon the religious texts after which he would resort to *ijma* of the companions, if there was no consensus he would look to their

¹⁰⁹ The Shafi'i school of thought is prominent today in Indonesia, Malaysia, Brunei, Sudan, Ethiopia, Somalia, Djibouti, Yemen and Eritrea.

¹¹⁰ Wael B. Hallaq, *A History of Islamic Legal Theories: An Introduction to Sunni Usul al-Fiqh* (Cambridge University Press 1999) 34.

¹¹¹ One of the primary works in the Shafi'i *madhab* is written by Shafi'i's student Ibrahim b. Yahya al-Muzani entitled Mukhtasar al-Musani. Later scholars of the al-Shafi'i school included al-Qaffal al-Shashi, Abd al-Malik al-Juwayni and Abu Hamid al-Ghazali.

¹¹² Issi Dien (n38) 16-19.

¹¹³ For further discussion on Islamic Legal Hermeneutics see Chapter One.

¹¹⁴ The Hanbali school of thought is prominent today in Qatar and Saudi Arabia but there are large minorities in areas of Yemen, UAE, Oman and Iraq.

statements prioritising those with consensus among them but upon occasions of dispute he would choose by concordance with the issue at hand. If the matter could still not be resolved Hanbal would resort to weak *ahadith* in preference to indulging the practice of *qiyas*. Hanbal, like Shafi'i, utilised *qiyas* only when all other options had been exhausted and deemed a correct *hadith* impossible to overturn by a lesser ranking source. Moreover, strictly dedicated to the textual sources as he was, Hanbal warned against the codification of his thoughts owing to the danger it posed to replacing the conduct of the *Sunnah*. Hanbal thus unwittingly founded a school of legal methodology, as the fundamental purpose of his teaching was to warn against any codification of human reasoning in Islamic Law.¹¹⁵ Hanbal's most esteemed work is his *al-Musnad* compiled by his son Abdullah and comprising in excess of forty thousand *ahadith*.¹¹⁶ Ibn Hanbal did not just espouse traditionalism but took a stance of anti-rationalism, polemically condemning his rationalist peers and establishing a body of jurisprudence that would later have a profound impact upon Islamic fundamentalism.

This great period during which *fiqh* was invented and the major *madhahib* were established did, perforce, come to an end.¹¹⁷ A number of factors combined contributed to what has been termed 'The Closing of the Gates of Ijtihad' commencing around the very beginning of the tenth/fourth century. It is debated whether or not these metaphorical gates were in fact closed but it is the case, that at this point in history Islamic Law took a turn for traditionalism that would move further in that direction until the latter end of the nineteenth/thirteenth century. The factors contributing to this legal development were many and staggered and induced a gradual change. The Abbasids' control over the Empire was beginning to slip with internal revolt and external pressure from the Crusades. Recalling the cohesive nature of the relationship between the faithful *ummah* and the strong *ummah*, it was suggested their military defeats were the result of a less faithful community due to indulgence in human interpretations of the divine text. It was further suggested these texts required no further interpretation and that enough provision had been made for the application of the law into the future. From this point

¹¹⁵ Issi Dien (n38) 22-23.

¹¹⁶ Hanbal's *fatwa* were compiled by his students including his two sons Salih and Abdullah. A later student of the Hanbali *madhab* Abu Bakr 'al-Khallal wrote an encyclopedia of *fiqh* entitled *Kittab al-Sunnah* (Book of Traditions) but Hanbali legal theory strictly so called was only articulated at a much later stage by Ibn-Taymiyyah and Ibn al-Qayyim in the fourteenth century CE or eighth century AH who wrote a substantial amount of material between them. See Auda (n103) 67.

¹¹⁷ This thesis focuses on the four main Sunni *madhahib*.

forward there was to be no further creative interpretations of the primary sources and this, it was believed, would return the *ummah* to full strength.

Heretofore, God had provided the directions for advancement – *ayat* 6:97 says “*It is God who has appointed for you the stars, that by them you may guide yourself in the darkness of land and sea...*”. Now, with the inaccessibility of *minhaj* there arose risk of a loss of relevance and vitality. Interpretation turned inwards to further interpretation of the already established *fiqh* rather than further creative engagement with the primary sources. Islam had now set its final terms of reference and *fiqh* gradually lost touch with the evolutionary forces of life. The loss of a rationalist *khalifa*, the jurists running out of intellectual steam, thereby acquiescing to the changed focus, and the loss of intimacy with the Prophet¹¹⁸ combined, resulted in a turn to traditionalism and stagnation of intellectual creativity. The ‘gates of *ijtihad*’ were closed. *Ijtihad* was replaced with *taqlid*, or imitation of legal decisions or interpretations that had been reached or established during that period of classical *fiqh* which ended after the last of the founders of the *madhahib* died in 875.¹¹⁹

2.6 Ottoman Empire 1453/857–1922/1340

Despite the fall of Baghdad when it would have been understandable if Islam went into such decline that it disappeared from the radar, it resurfaced and peaked once again in the sixteenth/tenth century with the emergence of three separate empires; the Ottoman Empire ruling from Istanbul, Anatolia (Turkey), The Safavid Empire from Isfahan, Persia (Iran) and the Mughal Empire from Delhi, India. The Ottomans, identifying themselves as Defenders of the Faith,¹²⁰ were nonetheless defeated in 1571 at the Battle of Lepanto when they attempted to take Cyprus¹²¹ and further defeated by the Holy Roman Empire at the Siege of Vienna in 1683, marking the beginning of the end of domination in Eastern Europe¹²² and the final boundaries of the Ottoman Empire. The defeat in Vienna paved the way for the rise of Europe and the spread of nationalist ideas prompted a series of

¹¹⁸ Coulson (n2) 65.

¹¹⁹ Ali Khan (n99) 365-369.

¹²⁰ James Reston Jnr, *Defenders of the Faith: Christianity and Islam Battle for the Soul of Europe 1520-1536* (Penguin 2009).

¹²¹ Michael Ray, ‘Battle of Lepanto’ in *Encyclopedia Britannica* <<https://www.britannica.com/event/Battle-of-Lepanto/additional-info#history>> accessed 10 February 2017.

¹²² Tony Bunting ‘Siege of Vienna’ in *Encyclopedia Brittanica* <<https://www.britannica.com/event/Siege-of-Vienna-1529>> accessed 10 February 2017.

internal uprisings from various ethnicities seeking autonomy and self-determination within the Ottoman Empire. The Empire, now engaging in considerable trade with the West had come to rely financially upon it,¹²³ and despite the introduction of the Tanzimat Reforms, the Empire could no longer compete with Europe.

Due to the diversity of ethnicities and religions within the empire the Ottoman legal structure encompassed a number of sub systems, most prominently the millet system, similar to the *dhimmi* system, where separate communities enjoyed semi-legal autonomy. Thus, there were Jewish, Christian, Islamic and Customary laws operating simultaneously within the Empire, though the courts system, employing Hanafi law, whilst primarily used for Muslims was also available to non-Muslims. Both God's law and secular law operated within the empire with the latter developed to fill the gaps where the *Shari'a* had been silent, or alternatively and notably, where the *Shari'a* was too much at odds with reality to be applicable.¹²⁴

This acknowledgement of the sacred provisions of the *Sunnah* being incapable of foreseeing future societal conditions draws further attention to the essentiality of the principle of *minhaj* and the provision of a clear way with principled guidance for navigation down the path of societal progress. The opposing view, that God is all knowing and accordingly has revealed all that is required for the *ummah* to chart their course based on looking inward to the practices of the normative period and the jurisprudence of the *madhahib* up to the closing of the gates would likely disallow secular law. Notwithstanding, within the confines of the Ottoman rationalist Hanafi jurisprudence, this secular law coexisted harmoniously with religious law on the basis of its justification as a necessity in such a vast empire. In short, the Ottomans were not opposed to innovating with legislation for a now advanced and complex multi ethnic, multi religious society – though it is fair to add that positive law was tempered with the religious oversight of the Chief Mufti and his religious academic hierarchy, and it did derive its authority from the powers vested in the Sultan within the framework of those

¹²³ Stanford J. Shaw, Gokhan Cetinsaya, Joseph A. Kechichian, 'Ottoman Empire' in *The Oxford Encyclopedia of Islam and Politics* <http://www.oxfordislamicstudies.com/article/opr/t342/e0368?_hi=1&_pos=3> accessed 15 February, 2017.

¹²⁴ Ibid. 244. Colin Imber, *The Ottoman Empire 1300 – 1650: The Structure of Power* (Palgrave Macmillan 2002) 216 – 225.

Qur'anic ayats espousing obedience to God, his Prophet and 'those in command'.¹²⁵ It seems *ijtihad* had not been utterly repressed and the metaphorical gates remained ajar. The secular law strategically satisfied pious aspirations without upsetting legal reality. The secular law books that emerged across the Empire from the late fifteenth/ninth century gradually became standardised and homogenised and the term 'Ottoman Law' to describe the *urfi* or custom based positive law provisions was in common usage beside the term 'God's Law' for the sacred provisions.¹²⁶ It couldn't however be said to substantiate a legal system of its own considering the *Shari'a*, also codified during the Ottoman era, formed 85% of the legal system.¹²⁷

Between 1839 and 1876 however, with substantial European influence, the Tanzimat Reforms were introduced with the aim of making a fundamental change from theocracy to a secular state. The *Shari'a* codes were updated and recodified upon a foundation of 'the requirements of the age' and the Majallah appeared in 1876. As codification expanded so too did the limits of legislative power, accordingly, many provisions appear to be directly copied from European Law codes. Moreover, jurists ventured into not only the jurisprudence of other *madhahib* but the jurisprudence of non-Islamic states, mostly European, and continued with this method of legislation beyond the end of the State and into the republican era.¹²⁸ The Ottoman Empire, dismissing its move into republicanism as non-essential in terms of demonstrating modernisation, is a prime example of how rational thought can take an ancient law and continuously adjust it to correspond to the rigours of evolving society. Despite this, it would be untrue to say there were not substantial factions opposed to the modernisation of the Empire along western lines.

2.7 Colonialism and Imperialism 1922-1970

It was not only from the expansion of the Ottoman Empire and agreed capitulations that western influences meandered into Islamic Law. Whilst the substantive changes to the law itself will be noted here, the impact on the Islamic people during the period of colonisation that greatly influenced the interpretation of Islamic Law today will be

¹²⁵ Holy Qur'an, Surah An-Nisa 4:59 "O you who believe, obey Allah and obey the Messenger and those having authority among you".

¹²⁶ Imber (n124) 245 – 250

¹²⁷ Ahmed Akgunduz, 'Legal Developments in the Ottoman State: 1299 – 1926' in Saim Kayadibi (ed) *Ottoman Connections to the Malay World: Islam, Law and Society* (The Other Press 2011) 100.

¹²⁸ Ahmed Akgunduz, 'Islamic Law in the Ottoman Empire' in *The Oxford Encyclopedia of Islam and Law*. <www.oxfordislamicstudies.com/article/opr/t349/e0072?_hi=0&_pos=1> accessed 10 February 2017.

explored in detail in the next section – the Islamic Reawakening. The Islamic system, incompatible with the political, social and economic mores of the west was further flooded with European laws via colonisation and imperialism which had the final historical impact on Islamic Law as it appears today.

From 1875, Egypt adopted French Law to the extent that in addition to the penal, commercial and maritime French codes already in place it created its own French Law based civil code. The Egyptians also borrowed from Italian Law for the 1937 criminal code. Turkey's 1926 criminal code is also based on Italian Law and a subsequent criminal procedure code was inspired by German Law. Lebanese and Libyan Law was also influenced by French and Italian laws. Further, Turkey adopted the Swiss Civil Code in 1937. In India a variety of English, Islamic and Hindu laws were applied but by 1862 the English criminal law substantiated the Indian penal code, and India's courts, adopting an English decision making policy of justice, equity and good conscience, were similarly anglicised – only laws within the realm of Family Law remained under the *Shari'a*.

Sudan adopted the Indian codes (previously created under British influence) but retained the provision for *diya* or blood money as this *Shari'a* provision was entirely compatible with their tribal society. The Sudanese courts operating the same decision making policies as India also became anglicised in the same way. Algeria was subject to French codes and Indonesia to Dutch codes. From the latter part of the nineteenth/thirteenth centuries pure *Shari'a* law was confined in the Middle East to the area of family law and it was only the Arabian Peninsula that managed to avoid the tentacles of western systems infiltrating their domestic *Shari'a*.¹²⁹ There now remains only three countries globally who maintain a purely Islamic system of law: the Maldives, Saudi Arabia and Afghanistan – the remainder apply fusions of Common Law, Civil Law, Islamic Law and Customary Law.¹³⁰

2.8 Islamic Reawakening – Islamic Law in the 21st Century 1970 to 2021

After the Crusades and the Fall of Baghdad there was a perception that Islam was failing due to modernist progressive interpretation and so the metaphorical gates of *ijtihad* closed

¹²⁹ Coulson (n2), 149-162.

¹³⁰ Juriglobe Research Group 'Muslim Law Systems and Mixed Systems With A Muslim Law Tradition' in <www.juriglobe.ca/eng/sys-juri/class-poli/droit-musulman.php> accessed 19 February 2017. Specification list of the combinations of influences in Islamic States' codes.

with interpretation proceeding on the basis of *taqlid* (imitation) only.¹³¹ Whilst this significantly stagnated interpretation and the ability to adapt the *Qur'an* to changing society throughout the following centuries, and, whilst the Siege of Vienna in 1683 caused more frustration in attempting to explain losses away to a weak *ummah*, it is from the 18th century onwards that any remaining concord between the two worlds began to unravel. Given the extent to which systems of law throughout the Islamic world had been manipulated into codes that did not always resemble their traditions and origins by imperialists, it is less than startling that an Islamic reawakening would focus its attention on what shape Islamic Law would now take and how it would operate to re-Islamise state and society.

Some Muslims developed an approach to interpreting the *Qur'an* that would see a return to the Salafi Period, that is, the period of the Prophet and the Rightly Guided Caliphs. This Salafist approach would see seventh century rules of Islam being reintroduced as the most appropriate method of interpreting Islam and its laws for the betterment of the twenty first century *ummah*. However, in considering the number of centuries that had lapsed since the Salafi Period, the changed nature of state and society must to be factored in considering the impact of such an approach to imposing Islamic Law. This consideration becomes particularly significant in terms of the central thesis question of compatibility with International Human Rights as the issue of whether seventh century rules can be applied, or adequately and successfully applied, in a twenty first century world now begins to come into focus.

The idea of returning to the Salafi Period for answers in the thirteenth and fourteenth centuries during a period of Islamic vulnerability was usually reformist and progressive in terms of attempting to directly reconnect with the values of the *Qur'an* and its early interpreters for guidance in times of great change. This can be seen with the attempts of the conservativist, Ibn-Taymiyyah, who, using the concepts of *islah* (renewal/restoration) and *tajid* (revival/purification) refused to accept the closing of the gates of *ijtihad* in response to the Mongol invasion. Ibn Taymiyyah was a people's reformer thought of as

¹³¹ The closing of the gates of *ijtihad* is debateable. Traditionalists will argue it did close whilst modernists will argue it never closed. For a discussion on this see Wael B. Hallaq, 'Was the Gate of Ijtihad Closed?' (1984) 16(1) International Journal of Middle East Studies 3-41. See also Shaista P. Ali-Karamali and Fiona Dunne, 'The Ijtihad Controversy' (1994) 9(3) Arab Law Quarterly 238-257.

liberal and radical¹³² but his concepts would later be used in a way unimagined by him. Upon the fragmentation of the Ottoman Empire in the late eighteenth century Al-Wahhab managed to establish a break-away state on the Arabian peninsula, shunning all medieval *fiqh* and declaring those not dedicated to pristine Salafist Islam as inauthentic and apostates. He implemented a regime based on the primordial Muslim archetype and revival of the 'pure' Islam of the seventh century.¹³³ His interpretation of *tawhid* was a pure *tawhid* that, because of his obsession with creed, and those who had deviated from it, focussed on the words as they appeared literally in the *Qur'an*, devoid of all context.¹³⁴ The Wahhabis treated the primary texts as an instruction manual to a virtual utopia modelled on the state of Medina. The aim was that if Muslims could return to adopting the correct beliefs and practices mandated by God, the reasons for their collective sense of humiliation would disappear because Muslims would once again earn God's favour and support.¹³⁵ Al-Wahhab's scriptural literalism, internal rejectionism, and violent methods, though condemned by his peaceful contemporaries, would later combine with Ibn-Taymiyyah's *islah* and *tajid* to contribute to the full complement of elements that would come to substantiate fundamentalist interpretations elsewhere.¹³⁶

Throughout the period of colonisation in the Middle East, western attempts at economic innovation, industrial modernisation, and imposition of secular democratic structures were sold to colonies as beneficial but ultimately failed those outside the elite. Those most profoundly affected by the imposition of modernisation processes in a conservative society were the ordinary people. Colonial reformers such as Al-Banna¹³⁷ and Rashid Rida¹³⁸ were not successful in their peaceful approaches either by way of grassroots

¹³² Majid Fakhry, *A History of Islamic Philosophy* (Columbia University Press 1970) 350-354. Marshall G.S. Hodgson, *The Venture of Islam* (University of Chicago Press 2009) 470-471.

¹³³ Karen Armstrong, *The Battle for God: Fundamentalism in Judaism, Christianity and Islam* (Harper Collins 2001) 44.

¹³⁴ Ed Hussein *The House of Islam* (Bloomsbury 2018) 136.

¹³⁵ Khaled Aboul el-Fadl, *The Great Theft: Wrestling Islam from the Extremists* (Harper Collins 2009) 57.

¹³⁶ John Voll, 'Renewal and Reform in Islamic History' in John Esposito (ed) *Voices of Resurgent Islam* (Oxford University Press 1983) 37, 39-42. Albert Hourani, *Arabic Thought in the Liberal Age – 1798-1939* (Cambridge University Press 1983) p37-38.

¹³⁷ Al Banna was a young Egyptian concerned for the condition of the ummah. He believed a return to the faith and living Islam whole heartedly could bring back the dynamism of Islam from long before foreign invasion. He believed they should not have to copy foreigners as Islam had already given all that was required for the values of liberty, equality, fraternity and social justice. Although he was the original founder of the Muslim brotherhood, he always insisted he had no intention of radicalism but simply a reform of Muslim society that had been cut off from its roots. See Armstrong (n133) 220/221.

¹³⁸ Rashid Rida was a typical Muslim reformer in Iran who wanted to return *ad fontes* (to the texts). He believed a new and vibrant Islam could be created by returning to the ideals of the *salaf*, the first generation of Muslims. Rida was not attempting a slavish return to the past, rather he was attempting to absorb the

movements or attempts to marry Islam with imposed modernity through governance. Recalling the importance of *tawhid*, and that for Muslims the whole of life is ordered around God to achieve a personal and societal integration, the idea of declaring certain areas of life off limits to God is a shocking violation of this principle - tantamount to a denial of God himself.¹³⁹ Thus, the organisation of society according to God's will throughout the period of colonisation being completely turned on its head, the plight of the Islamic people in comparison to the colonists, the complete exploitation of resources, and the detention and torture of those attempting to claw back Islam from its greatest threat in centuries led many in the Islamic world to view western secularism and modernity with unapologetic distaste.

This period of imperialism, when Muslim societies were surrounded by powerful enemies, is thought to have been the most vulnerable the *ummah* had been since their years in Medina being persecuted by the Quraysh.¹⁴⁰ Whilst the break-up of the Ottoman Empire after WWI and the west siding with the Jews in WWII had isolated the Islamic world, the imposition of western modernity was equally damaging. The impact was described as odious and destructive, a theft of power and wealth, an agonising loss of prestige and influence,¹⁴¹ a process of deprivation, dependence and imperfect imitation, a violent and coercive assault,¹⁴² a system of greed, tyranny, spiritual bankruptcy, humiliation, occupation and destruction,¹⁴³ and a lethal policy designed not to free religion but to destroy Islam.¹⁴⁴ Secular nationalism, it was realised, was just as destructive as any religious crusade or purge; and, with unlimited rationalism seemingly compelled to create a hell on earth, some Muslims would see modernity and the secular ideology as just as evil and demonic as the depths of Auschwitz to a secular liberalist.¹⁴⁵ The recognition that humanistic narratives can oppress as well as liberate has since been

values of the west by placing them in an Islamic context. Instead of creating a counter discourse, he was trying to attempt a marriage of Islam and modern western culture. See Karen Armstrong, *The Battle for God: Fundamentalism in Judaism, Christianity and Islam* (Harper Collins 2001) 193.

¹³⁹ Armstrong (n133) 37.

¹⁴⁰ Karen Armstrong, *The Lost Art of Scripture: Rescuing The Sacred Texts* (Penguin Random House 2019) 238.

¹⁴¹ Araf Lufti al-Sayyid Marsot, 'The Role of the Ulama in Egypt During the Early Nineteenth Century' in P.M. Holt (ed) *Political and Social Change in Modern Egypt: Historical Studies for the Ottoman Conquest to the United Arab Republic* (Oxford University Press 1968) 278-279.

¹⁴² Armstrong (n133) 123, 192.

¹⁴³ Mohammad al-Ghazali, in Richard P. Mitchell, *The Society of the Muslim Brothers* (Oxford University Press 1969) 229.

¹⁴⁴ Shahrugh Akhavi, *Religion and Politics in Contemporary Iran: Clergy-State Relations in the Pahlavi Period* (Sunny Press 1980) 58-59.

¹⁴⁵ Armstrong (n133) 44, 221.

hard won¹⁴⁶ but this diagnosis led developing fundamentalists to resort to a neo-Hanbali interpretation of Islam that was carried well beyond its original fourteenth century interpretations when revolt against a Muslim leader was never within its boundaries, but where the now revamped doctrine interpreted *riddah*, or apostasy, to be present wherever the *Shari'a* was not applied.¹⁴⁷

The emerging fundamentalist Muslim Brotherhood movement, influenced later by Sayyid Qutb,¹⁴⁸ represented this view, but, although they had returned to the scriptures to reinterpret Islam to find a path forward, they remained critical of the Wahhabi approach and condemned its resort to seventh century punishments and literalistic interpretations of the scriptures.¹⁴⁹ Qutb's experience of America led him to be outraged by the decadent lifestyle there in the late 1940s and he campaigned for *Shari'a* Law to be reintroduced into the law of Egypt.¹⁵⁰ It was throughout the 1970s and early 1980s however, during turbulent years of the Brotherhood when the Egyptian President was assassinated, that the traditionalist group splintered. Struggling to ensure that Muslims did not sink to the modernist, western, secular, immoral depths that decadent America symbolised, the Brotherhood split on the question of the necessity of violence. The impact of the plight of Muslims fleeing Palestine¹⁵¹ increased the tension felt in the Muslim atmosphere and, with the Brotherhood repressed by Nasser's regime and their barely suppressed rage becoming stifling in the concentration camps, some would see a resort to violence and terror as the only solution.¹⁵²

¹⁴⁶ Linda Hogan, *Keeping Faith with Human Rights* (Georgetown University Press 2015) 66.

¹⁴⁷ Gabriel A. Almond, R. Scott Appleby & Emmanuel Sivan, *Strong Religion: The Rise of Fundamentalisms Around the World* (University of Chicago Press 2003) 42.

¹⁴⁸ Ana Belen Soage, 'Islamism and Modernity: The Political Thought of Sayyid Qutb' (2009) 10(2) *Totalitarian Movements & Political Religions* 189-203.

¹⁴⁹ Richard P. Mitchell, *The Society of the Muslim Brothers* (Oxford University Press 1969) 235, 240-241.

¹⁵⁰ Sayyid Qutb, 'The America I Have Seen: In the Scale of Human Values' 1951 *Sociology of Islam and Muslim Societies* (Portland State University).

<<http://www.pdx.edu/sites/www.pdx.edu.sociologyofislam/files/The%20America%20I%20Have%20Seen%20Sayyid%20Qutb%20Ustad.pdf>> accessed 20 June, 2021. We recall that imperialism and colonisation succeeded in fusing Islamic Law in the colonised states with the imperialists' legal codes, and a fully functioning purely Islamic legal system was by this time rare.

¹⁵¹ The Six Day War of Arab Israeli conflict saw Israel victorious and capture certain areas claiming them as Israeli territory. See generally Michael B. Oren, *Six Days of War and the Making of the Modern Middle East* (Randomhouse Publishing 2017).

¹⁵² Anwar Sadat, *Revolt on the Nile* (Wingate 1957) p142-143. See also Ed Hussein, (n134) 128. Qutb, along with many other political prisoners in the concentration camps were exposed to torture, humiliation and rape – even having dogs set upon them. At Qutb's lowest point he was asked 'Where is your God now?' leading to the prominent call in his commentary on the Qur'an being '*Rule is for God alone*'.

This tangible rage would be channelled into the emerging ideology of Pakistani scholar, Maududi, whose works were published in Egypt and who feared that Islam was about to be destroyed¹⁵³ as he acknowledged the ideological conflict in Muslim countries resulting from an inability to realise the divine will.¹⁵⁴ It is from this point forward that Islamic concepts would be taken from their original context and reformulated to serve the need some Muslims believed had arisen to protect Islam from annihilation. Maududi began re-contextualising Islamic concepts and converted all of the complexities of Islam into a simple rational discourse based on the sovereignty of God. He used the values of liberty and the rule of law but gave them an Islamic slant seeking to liberate humanity from the clutches of human control. He declared *jihad* the central tenet of Islam¹⁵⁵ that would now become a struggle against the Western world.¹⁵⁶ For Maududi, the Western world now represented a modern *Jahiliyyah* to Islam;¹⁵⁷ and as a last resort, Muslims must be prepared for armed struggle.¹⁵⁸

Qutb, having survived Nasser's concentration camps, picked up Maududi's theories, but, went one step further. In his declaration of Nasser as un-Islamic and an apostate for making false promises, he was now seeing *Jahiliyyah* within Islam as well as outside it – he had now subsumed the Wahabbi internal rejectionist strategy into his campaign.¹⁵⁹ Qutb then sought to use the milestones of the Prophet Mohammad's life to chart a course for the creation of a society of the purest Muslims.¹⁶⁰ Despite being a *Qur'anic* scholar, he relied on the *Sunnah* to substantiate his ideology,¹⁶¹ carefully selecting supportive sources, and ultimately discarding sources that reflected the original spirit of Islam.

¹⁵³ Charles T. Adams, 'Mawdudi and the Islamic State' in John Esposito (ed) *Voices of Resurgent Islam* (Oxford University Press 1983) 101.

¹⁵⁴ Jaan Islam, *The Political Thought of Abul A'la Maududi and the Limits of the Secular* (University of British Columbia 2019) iii. Available at <https://open.library.ubc.ca/cIRcle/collections/ubctheses/24/items/1.0384591> accessed April 29th 2021.

¹⁵⁵ Armstrong, (n133) 237-239.

¹⁵⁶ Mohammed Ayoob, Danielle Nicole Lussier, *The Many Faces of Political Islam: Religion and Politics in Muslim Societies* (University of Michigan Press 2020) 8.

¹⁵⁷ Mansoor Moadell, *Islamic Modernism, Nationalism and Fundamentalism: Episode and Discourse* (University of Chicago Press 2005) 6.

¹⁵⁸ S. Abul a'La Maududi, *Jihad in Islam* (Islamic Publications 1976) 5-6.

¹⁵⁹ El-Fadl, (n135)52.

¹⁶⁰ Sayyid Qutb, *Milestones* (International Islamic Publishers 1988).

¹⁶¹ Armstrong (n140) 399.

Sayyid Qutb introduced a new militancy into Islamic discourse¹⁶² and is known as the founder of Sunni fundamentalism that would spark the *jihadi* movement of Salafists.¹⁶³

Throughout the late sixties and seventies when the Western world thought it had seen the back of religious assertiveness, the time had instead come for its re-emergence - not least exemplified by the overthrow of the Shah in Iran, directly resulting from U.S. exploitation and distortion of Islamic governance.¹⁶⁴ As will be seen in Chapter Four, it was also during the seventies that the language of human rights became common parlance in the Western world,¹⁶⁵ that the OIC was established to give the Islamic world an international platform, and, that Islamic states were emerging from colonialism attempting to re-establish their own identities with varied results and the rise of authoritarian regimes.¹⁶⁶ It was at this point of social and political upheaval in the Muslim world that there began a sustained interest in the foundations of the UDHR and its incompatibility with Islam.¹⁶⁷ The imposition of a perceived Judaeo-Christian western document¹⁶⁸ was described as moral imperialism and the ferocity and intensity of the debate over the monitoring function of the proposed UN High Commissioner was a new turn which saw the posture of many of the former colonies that had previously been ambivalent towards the human rights project now hardening their resistance.¹⁶⁹ Iran stated that the machinery of the United Nations could not be based on ‘*a narrow interpretation of concepts that were understood differently in a world which was divided by such great differences*’.¹⁷⁰

At this point in time, western secularism had left a very bitter taste in the mouth of the Islamic world. Western secularism, for many Muslims, was symbolic of the frictions of the past when despite knowing little to nothing of Muslims before the first crusade they

¹⁶² Ibid.

¹⁶³ Salafism developed into three main strains, those who pursued physical *jihadi* methods in an attempt to once again realise a global caliphate (*jihadi* salafism), those who lived to follow the path of al-Wahhab (salafi manhaj), and those who pursued salafism through political activism (salafi harakis or Islamists).

¹⁶⁴ Darioush Bayandor, *The Shah, The Islamic Revolution and the United States* (Springer 2018).

¹⁶⁵ Samuel Moyn, *The Last Utopia: Human Rights in History* (Harvard University Press 2012) 157.

¹⁶⁶ Linda Hogan, *Keeping Faith with Human Rights* (Georgetown University Press 2015) p24.

¹⁶⁷ Abdulaziz Sachedina, *Islam and the Challenge of Human Rights* (Oxford University Press 2009) p6.

¹⁶⁸ See Chapter Four for further discussion on the western nature of the UDHR.

¹⁶⁹ Hogan (n146) 25.

¹⁷⁰ Roland Burke, *Decolonisation and the Evolution of International Human Rights* (University of Pennsylvania Press 2010) 138 quoting Summary records of the Third Committee, 43rd Meeting, 32nd Session November 10th 1977 A/C.3/32/SR.43, para 26.

were described upon return as vile, abominable degenerates enslaved by demons,¹⁷¹ it was symbolic of the *logos* imposing on the *mythos* where preservation of the past was prioritised over innovatively tackling the future and the fear this imposition ignited,¹⁷² it was symbolic of imperial exploitation of Islamic resources,¹⁷³ it was symbolic of the absence of its advocated humanism in its colonies,¹⁷⁴ but most of all, it was symbolic of an alien ideology that was seeking to determinedly impose itself on the Islamic world.

Ultimately, from the 1970s onwards, the secular and Islamic world views or ideologies were pitted against each other. The complex was reduced to the simple with communications between the Islamic and secular worlds distilled to dealing in oppositional terminology such as Islamism versus secularism, Western versus Islamic, democracy versus theocracy and freedom of expression versus blasphemy. It had become apparent from this period in the seventies that religious counter culture movements had made a move to literalist interpretations of scripture, removed from their original context¹⁷⁵ in a fundamentalist attempt to utilise Islam in a way that they considered would best protect and preserve both Islam and the *ummah* in the twenty first century. This move would, within decades, lead to the expansion of puritanical regimes utilising the collective concepts of their predecessors, that is - the revival and purification concepts of ibn-Taymiyyah, the internal rejectionist concept and imitation of seventh century rules of Al-Wahhab, the re-contextualised concepts of *Jahiliyyah* and *jihad* of Maududi and, for some, the charted course to a pure enclave of Muslims of Qutb.¹⁷⁶

2.8.1 Islamic Fundamentalism in Perspective

The rise of fundamentalist interpretations of Islamic Law is of particular consequence to the central theme of compatibility of Islamic Criminal Law and International Human

¹⁷¹ Foucher de Chartres, *A History of the Expedition to Jerusalem 1095 to 1127* in Frances Rita Ryan (ed and trans) (Norton 1973) 60-67. Johnathan Riley-Smith, *The First Crusade and the Idea of Crusading* (University of Pennsylvania Press 1986) 143.

¹⁷² The equation used by Karen Armstrong in her description of the disparity between the two systems and the difficulties in attempting to manipulate a society grounded in mythos into a position that would allow it to communicate effectively with the society grounded in logos. See generally Armstrong (n133).

¹⁷³ Armstrong (n133) 112 – 132. Generally, see also H. Lyman Stebbins, *British Imperialism in Qajar Iran: Consuls, Agents and Influence in the Middle East* (Bloomsbury Publishing 2016) and Aaron G Jakes *Egypt's Occupation: Colonial Economism and Crises of Capitalism* (Stanford University Press 2020).

¹⁷⁴ Samuel Moyn, *Human Right and the Uses of History* (Verso Books 2014) 99-120.

¹⁷⁵ Almond et al. (n147) 42.

¹⁷⁶ Other early contributors to fundamentalism include Ayatollah Khomeini and Ayatollah Motahhari in Iran, Mustafe al'Siba'i from Syria and Abbasi Madani, Shaikh Nahnah and Ali Belhaj from Algeria. See Moadell (n157) 5.

Rights, and this interpretation will be analysed further in Chapters Six and Seven. For now, what is necessary is to put the rise of fundamentalist application of Islamic Law into perspective in the twenty first century, particularly given the stereotype that has come to prominence in the non-Islamic perception of Muslims that is visible within the decision making machinery of the UN, as will also be addressed in greater detail in Chapter Six. This ultimately involves a return to the Salafi period, or, as entitled earlier in this chapter, the Prophetic Period and the Rashidun Caliphate combined.

Not all Muslims are Islamists. Most Muslims attempt to live their lives piously and quietly. Islamists then, are those who have a desire to politicise Islam in order to assert its legitimacy in the modern world, largely as a response to the bashing of Muslim dignity and the exploitation of Islamic resources throughout the period of imperialism. For Islamists, being a privately pious Muslim is not enough and their agenda is a return to Islamic governance in order to re-establish Islam globally. As with politics generally, there are those who strive to do this within the architecture of legitimate political processes within their own states such as the attempts in Turkey, though these attempts have had their ups and downs.¹⁷⁷ In Tunisia there has been a shift in governance from Islamist ideology towards democratic conservatism.¹⁷⁸ When Shaikh Rachid al-Ghannouchi's party, 'Ennahda', were defeated in 2015 they did not seek to impose their interpretation of Islamic Law in public – a move away from earlier Islamism – their Islamist agenda is instead grounded in co-existence and pluralism.¹⁷⁹ Ghannouchi's principles are not centred in an obsession with confronting the west but in healthcare, education, ethical economics, foreign investment and infrastructure.¹⁸⁰ Ghannouchi defers to the teachings of Shaikh Abdullah bin Bayyah, a contemporary Muslim religious authority who explains that any government that aligns their policies with the protection of the objectives of Islam, or *maqasid al-Shari'a*, is a *Shari'a* compliant government.

¹⁷⁷ Carlotta Gall, 'Turkey's President Suffers Stinging Defeat in Istanbul Election Redo' New York Times 23 June 2019
<<https://www.nytimes.com/2019/06/23/world/europe/istanbul-mayor-election-erdogan.html>> accessed 3 July 2021.

¹⁷⁸ See generally Isabel Schafer, *The Tunisian Transition: Torn Between Democratic Consolidation and Neo-Conservatism in an Insecure Regional Context* (European Institute of the Mediterranean 2015).

¹⁷⁹ Hussein (n134) 130.

¹⁸⁰ Ibid. 132.

This twenty first century interpretation of Islamic Law claims the secular authority of the state and its courts are completely compatible with Islam.¹⁸¹

Simultaneously there are those who believe that Islamism requires more than official wrangling within a state's political structures and these are the puritan or fundamentalist Islamists inspired by such figures as Qutb and his predecessors who prefer to be labelled Salafi, or Salafists. For Salafists, their interpretation of what God is separates them from mainstream Muslims as they see God and his laws in a highly literal context.¹⁸² For example, where orthodox traditionalists view references to God's face, hands and sight as metaphors for his essence, his power and his vigilance, Salafists view these descriptions as those of God's literal physical attributes. Rather than God being 'everywhere', or 'in your heart', for Salafists God physically sits on a throne. Likewise, rather than the Prophet's suggestion of letting men's beards grow being a lesson in humility as orthodox interpretation goes, Salafists take this as a literal instruction to grow their beards.¹⁸³ Similarly, the criminal proscriptions of the *Shari'a* are interpreted with the same literalism and so are imposed by Salafists on this strict reading of Islamic Law. Literalism, stemming from the focus on creed, is what justifies the internal rejectionism of Salafi Wahhabism and what makes mainstream Muslims the greatest target of accusations of heresy within Islam.¹⁸⁴

Just as most Muslims are not Islamists, most Islamists are not Salafists, and, most Salafists are not *jihadis*. Notwithstanding, *jihadi* regimes are all products of Salafi Wahhabism but go one step further in engaging in violence to secure their aims. Salafi *jihadi* application of Islamic Law is described by non-Salafists as breaching the preconditions of *jihad* which is known to mean struggle (but not necessarily killing or war) and *jihadis* have been described as akin to the Kharijites of the Salafi Period, or neo-Kharijites.¹⁸⁵ The Kharijites (meaning those who strayed from the righteous path) we

¹⁸¹ Mohammed Hashim Kamali, *Actualisation of the Higher Purposes of Shari'a* (International Institute of Islamic Thought 2020).

¹⁸² For a clear distinction between varieties of salafi interpretation and a useful infographic on where these approaches sit on the spectrum between text and reason see Tariq Ramadan, *Western Muslims and the Future of Islam* (Oxford University Press 2004) 23-31.

¹⁸³ Hussein (n134) 137.

¹⁸⁴ Ibid.

¹⁸⁵ Alexander R. Dawoody, *Eradicating Terrorism from the Middle East: Policy and Administrative Approaches* (Springer 2016) 73-75. See also Zuleyha Keskin and Fatih Tuncer 'Causes of Radicalisation:

recall, from the Rashidun Caliphate above, claimed that rule was for God alone, and, unhappy with even the *Khalifa* Ali for not ruling closely enough to the word of God within the *Qur'an*, were ultimately responsible for his assassination. The Kharijites were the first extremists within Islam who resorted to actions including extreme piety, separatism, literalism in scripture, *takfir* (declaration of unbelief) and violence.¹⁸⁶ In a modern incarnation of the Kharijites, Salafi *jihadi* application of Islamic Law relies heavily on their belief in a largely similar set of five ideological principles.

The first of these principles is that of *ghuraba*, or, 'being a minority of strangers' just as the Kharijites were considered in the Salafi Period. They see themselves as right and truthful in a world full of wrongdoers and fundamentalists or puritans of this guise rely on *harfiyyah* or scriptural literalism to justify this principle¹⁸⁷ as the Prophet is reported to have said '*Islam began as a stranger and it will once again become something strange. Blessed are the strangers*'.¹⁸⁸ The second principle, an extension of *ghuraba* is '*al-wala wa al-bara*', or, loyalty to Muslims and disavowal of infidels. This principle advocates separatist strategies by demanding loyalty and honesty among Muslims but labelling disbelievers sworn enemies of Islam who should not be trusted, befriended or emulated. It also includes political confrontation of the greatest of disbelievers.¹⁸⁹ The third principle is *takfir*, or, declaration of a person as a non-believer. This principle violates *al-wala wa al-bara*, but, on the *harfiyyah* or literalist interpretation legitimises killing on religious grounds by deeming the person an infidel. *Takfir* is the justificatory principle for the use of violence by Salafi *jihadis*.¹⁹⁰ The fourth principle is *hakimiyyah*, or, the establishment of a caliphate on earth. These puritans or radicalists believe that unless this obligation is fulfilled, Muslims are sinful and will be punished in hell.¹⁹¹ The fifth and final principle is the understanding that until the caliphate is established, that Muslims are living in *dar al-harb*, or, the abode of war. In this abode of war the rules change and reliance on tactics of seventh century conflicts justifies bringing harm to the enemy in

Theological Arguments as the Ultimate Trigger' in Fethi Mansouri and Zuleyha Keskin eds. *Contesting the Theological Foundations of Islamism and Violent Extremism* (Springer 2018) 16.

¹⁸⁶ Hussein (n134) 160.

¹⁸⁷ Hussein (n134) 142,143

¹⁸⁸ Sunnah, Sahih Muslim, Hadith No. 279.

¹⁸⁹ Hussein (n134) 144, 145.

¹⁹⁰ Ibid. 146, 147.

¹⁹¹ Ibid. 147

every possible way, including the killing of innocents.¹⁹² Devious actions are permitted to deceive the enemy and the rules of *Shari'a* do not apply.¹⁹³

The development of Islamic Law throughout the Islamic Reawakening has been divisive in the Muslim world but the proportion of Muslims who subscribe to the fundamentalist development of the law has now been put into perspective. Of all Muslims in the world the majority are orthodox traditionalists. Modernists are in the minority as are fundamentalists. We recall that of all Islamists, only some are Salafists, and of all Salafists, only some are Salafist *jihadis*, but the international violent activities of al-Qaeda, ISIS, Boko Haram or any other fundamentalist groups, have clouded the vision of non-Muslim observers and have impacted the shape of the Muslim stereotype in the secularist mindset to the extent that Islamic Law is often only understood in the Western world in terms of the way this grouping has developed it.¹⁹⁴ Whilst the development of fundamentalism has resorted to literalism in its understanding of how Islamic Law is best utilised to preserve and protect both Islam and the *ummah* respectively in the twenty first century, modernist Muslim authority figures have resorted to applying the spirit of Islamic Law guided by the *maqasid al-Shari'a*. On this development of the law, any government protecting the *maqasid* is *Shari'a* compliant – therefore eliminating the requirement for *hakimiyyah*, or the establishment of a caliphate by order of the fundamentalists, as null and void. The Islamic world in the twenty first century is thus divided in its approach to the development of the law. The impact of this Battle for the Soul of Islam would prove fateful in the attempt of the Islamic world to campaign for the true internationalisation of IHR. This impact will be taken up again in Chapter Six.

3. Conclusion

Chapter Two aimed to set out chronologically the history and development of Islamic Law, particularly highlighting the relevant aspects impacting the main thesis claim of incompatibility between Islamic Criminal Law and International Human Rights - those being the development of the criminal law, the diversity in approaches to interpretation and the relationship between the Islamic and Western worlds. In this respect, the

¹⁹² Ed Hussein 148

¹⁹³ It is this principle of living in a state of *dar al-harb* that permitted the 9/11 plane hijackers to drink alcohol and use prostitutes before they carried out their attacks.

¹⁹⁴ El Fadl (n135) 38.

Prophetic Period set out the basis for the establishment of the *hudud* punishments evidencing their appropriateness and effectiveness given the conditions of society at the time of their inception. Where interpretation is concerned, all periods throughout Islamic history from the Prophetic Period to the Ottoman Empire have, to one extent or another, exemplified the practice of those responsible for administering the law of adapting its principles and provisions to the contemporaneous needs of the society at the time and given the conditions of its existence. Despite this, the politicisation of Islam and the concern for expansion and control have seen a series of returns to the basic Islamic formula of reliance upon faith and strength whenever it has deemed itself to be in vulnerable positions throughout its ages of development, not least upon the imposition of all things western during the period of colonisation and imperialism.

The fallout from World War I was catastrophic. The *khalifa* was a successor to the order created by Mohammad and the guarantor of the global unity of the *ummah*. If Islam was to survive after the war without a material symbol of God's shadow on earth at its core, then methods of doing so required to be discovered. Various approaches to Islamic interpretation had now solidified as a result of much Islamic debate - neo-orthodoxy, neo-fundamentalism, liberal modernisation and nationalism, charismatic leadership and millenarianism all led to modern forms of Islamism.¹⁹⁵ Traditionalism was prominent, rationalism though never having been eliminated, was sidelined, and literalist fundamentalism was attracting considerable global attention. Accordingly, whilst substantively Islamic Law has hardly changed since the impact of colonialism, in application it varies according to the approaches taken by those battling for the correct representation of Islamic Law in the twenty first century. In particular, for the purposes of this thesis, the emerging attractiveness of the political force of fundamentalism is critical.

Whilst Chapter Two has shown the growth and development of Islamic Law to the format it appears in today, of equal significance is the manner in which the law has been interpreted by Muslims from era to era, eventually ending up in this crisis of

¹⁹⁵ Philip Jenkins, '*The Great and Holy War: How World War I Changed Religion Forever*' (Lion Books 2014) 26; Philip Jenkins 'The Last Crusade: The First World War and the Birth of Modern Islam' in *ABC Religion and Ethics* <<https://www.abc.net.au/religion/the-last-crusade-the-first-world-war-and-the-birth-of-modern-isl/10099124>> accessed 19 February, 2017.

interpretation, or battle for representation of Islamic truth globally; not least caused by the interference of the Western world. Chapter Three now turns to the more specific content of Islamic Criminal Law and the manner in which the evolution of interpretation affects it, in light of the thesis question of incompatibility with International Human Rights.

CHAPTER THREE

ISLAMIC CRIMINAL LAW

1. Introduction

Chapter Three seeks to assess the nature of the *Shari'a* criminal laws in context. Context is crucial and it must always be borne in mind that these rules arose in a seventh century tribal society according to the temporal threats to society as a whole and to the punishment types temporally acceptable in most legal systems.

In this regard, it must again be stressed that the validity of Islamic criminal rules depends not on their effectiveness or the results they achieve (as is the case for all non-religious schemes of criminal law), but on their divine source. Nonetheless, the *hudud* category of crimes, (that is, those where there is a definite prohibition or punishment in the *Qur'an* or the *Sunnah*) must (as we saw in Chapter Two) be contextualised by the situation in which they arose - namely that of seventh century Arabia. There are, however, two further categories of crimes, namely, *qisas* crimes attracting punishments based on retribution and involving the input of the victim or his heirs, and, *ta'zir* crimes which are a residual category that allow the *qadi* or judge discretion in deciding the punishment most suited to the particular circumstances presented to him.

Chapter Three, after setting out relevant precursors to the discussion, aims to highlight the intricacies and complexities of certain aspects of Islamic Criminal Law. It then aims to rationalise these criminal rules by addressing their specific purposes and functions that play a role in the protection of the objectives of the *Shari'a* – *maqasid al-shari'a* – and connect these rules with the recurring matter of the interconnection of the law with the faith and, its balanced outlook on the individual and society. Finally, it makes the point that the Islamic criminal rules coexist with a body of criminal justice provisions that has all of the hallmarks of criminal justice schemes in modern non-religious schemes of law. Thus, it is argued that Islamic Criminal Law is potentially compliant with International Human Rights concepts of criminal justice provided that a contextualised approach to its application is utilised.

This contextualised approach to its application is a crucial theme in a number of ways. Firstly, the world at large has altered so that the rationale for draconian punishments for crimes in the 7th century no longer applies. Hence if a contextualised approach to interpretation is utilised, Islam could retain the basic values that underpin these crimes, namely, submission to God, and protection of the community and the individual within it, but, relocate them in a twenty first century context. By contrast, a fundamentalist interpretation which, in resorting to a literalist approach to the criminal rules, attempts to retain the words and ignore the context must necessarily position Islamic Criminal Law in opposition to International Human Rights Law. Secondly, however, the permanent moral principle in Islam that a justification for criminal law is to give effect to the will of God remains - thus its validity from an IHR perspective depends on the extent to which a nation is permitted to claim that a concern with a particular vision of the will of God forms part or all of its public morality.

2. Criminal Law in The Shari'a

At the inception of Islam, Mohammad it seems had no expectation of the rate at which he would garner support and no expectation that he would lead a community as a 'head of state' figure in Medina. As such he was likely unaware that his relaying of the revelations to his people would eventually comprise a body of law. Accordingly, the *Qur'an* was not necessarily revealed as a legal edifice. Approximately, as little as three hundred verses refer to legal matters, and as only thirty of these *ayats* relate to crime and punishment - the provision for criminal law in the *Qur'an* is minimal. Although Mohammad was Head of State as well as the embodiment of God's will on earth, his actions can be described as arming his people with the guidance they required to live a moral life and prepare themselves for standing before God on the last day. Irrespective, the *Qur'an* does contain certain proscriptions, as does the *Sunnah*, and together they comprise the criminal law of Islam.

A number of introductory points should be revisited to set criminal laws of the *Shari'a* in their temporal context. First, Islam emerged from a lawless tribal society ruled by the sword. Secondly, it emerged at a time when women had no rights or protections – they were dependent on their male relatives or husbands for support which, when withdrawn,

left them to perish.¹ Third, drunkenness and debauchery had just had its influence on the fall of the Roman Empire. Fourth, this tribal era – known as *Jahiliyyah* – the period of darkness before Islam, had a polytheistic religious basis with no unity in worship - no sole focus to bring society together in obedience.

All of these factors concerning the nature of the tribal environment within which Islam sprouted are essential facts to consistently bear in mind. This is so because of how Islamic Law is now interpreted, in particular given the contemporary divide between fundamentalist or literalist and modernist or expansive theories of interpretation. The former sees the words of the *Qur'an* as having eternal inherent legitimacy. The latter takes a contextualised look at the values that required protection within seventh century tribal Arabia and acknowledges that the world has moved on from tribalism and violent punishments and that those values, if still requiring protection in modern society, can be protected according to the means of punishment that are available to create an obedient society in the twenty first century (so for example, facilities such as police forces and prisons that did not exist in the 7th century now eliminate the need for corporal punishment). A modernist interpretation of Islamic Criminal Law allows Islam to exist in harmony with the mores of a modern world whilst a fundamentalist interpretation that imposes seventh century rules of punishment leads to a jarring of the Islamic Criminal Law with the values of a twenty first century world.

Islamic Criminal Law is structured in a way that differs from any western system of law. Crimes and punishments are not identified according to their resulting harm but according to where they are mentioned in the sources and their punishment types. Criminal law in the *Shari'a* is found in the *mu'amalat* and *ibadat* rules that occur within the *wajib* and *haram* categories of actions - alternatively, the rules of individuals' interaction with other individuals and God under the mandatory and prohibited classifications of actions. Whilst in non-religious legal systems we have criminal sanctions - or punish - for reasons of rehabilitation, retribution, deterrence or social protection; under *Shari'a* the purpose of punishment is to protect its goals² and objectives,³ and, whilst non-religious legal systems

¹ Men could have up to one hundred wives in this tribal era and had no legal responsibility to maintain them.

² The three major goals enumerated by Abu Zahrah are the nurturing and development of the righteous individual, the establishment of justice and the realisation of benefit. For further discussion on the goals of *Shari'a* see Chapter Two.

have an end goal of the maintenance of an orderly society, this cannot be said for the Islamic legal system whose end goals are, over and above all else, the fulfilment of the will of God, but also, the creation of respect for God, the creation of a righteous society, and the paving of a path that will lead to a positive final judgement on the last day.

3. Crime (*jarima*) and Punishment (*uquba*)

The word '*jarima*' meaning offence, crime or sin⁴ is defined by Al-Mawardi as legal prohibitions imposed by Allah where disobeying his prohibitions entails punishments prescribed by him.⁵ *Uquba*, meaning punishment is used when a person incurs a punishment as a result of the sin.⁶ What is noticeably different comparing these definitions with definitions of crime and punishment in other legal systems is the inclusion of the word 'sin'. It's equation with 'crime' and 'offence' is at the kernel of criminal law in the *Shari'a*. What is central to *Shari'a* principles is adherence to the prescriptions and proscriptions of God and any breach of the *ibadat* prescriptions or proscriptions is therefore a sin first and foremost and secondly a crime.⁷

The complementary principles of stability and permanence of Islamic Law's basic tenets and dynamism of its subsidiary injunctions allows the system to bring its fixed statutes for the unchanging aspects of life and its general principles and universal rules for those aspects of life that are affected by social development, broadening horizons and advances in technology.⁸ Islamic crimes, categorised into their punishment types of *hudud* (prescribed/fixed punishments), *qisas* (retribution punishments) and *ta'zir* (discretionary punishments) whilst being the practical application of such complementary principles, are

³ Protection of religion, life, progeny, mind and property are the five objectives of *Shari'a*. For further discussion on the objectives see Chapter Two.

⁴ Hans Wehr, *A Dictionary of Modern Written Arabic* (Maktaba Lebanon 1980) 121.

⁵ Nik Rahim Nik Wajis, *The Crime of Hiraba in Islamic Law* (Glasgow Caledonian University 1996) 17.

⁶ Nasir bin Ibrahim Mehemeed, 'Criminal Justice in Islamic Shari'a: Concepts and Precepts' in Mohammad Abdel Haleem, Adel Omar Sherif, Kate Daniels (eds), *Criminal Justice in Islam – Judicial Procedure in the Shari'a* (IB Taurus 2003) 29-30.

⁷ We remember the *Qur'an* was never intended to be a legal document and was revealed as religious guidance to prepare for the judgment of God on the last day. It was only during the centuries following the Prophetic Period that principles and objectives were deduced from the revelations and the *ahadith* which contributed to the construction of a version of criminal law in Islam.

⁸ Al-Muala, 'Crime and Punishment in Islam: An Introduction' <www.islamreligion.com> accessed 25 May 2016. However, Chapter Seven discusses the idea of the *hudud* being fixed and infallible and how this may have more to do with medieval fiqhi interpretation than the original message of God.

also partially based on the distinction between the *ibadat* and *mu'amalat* rules⁹ with the former corresponding directly to *hudud* punishments and the latter to *qisas*.

The significance of this co-relation is the distinction between both sets of relationships explained as follows: Regarding the relationship with God governed by the *ibadat* rules, God is considered above deficiency and has no needs, therefore, as he suffers no loss or damage humanity has no place in compromising the vindication of God's rules¹⁰ - as divine value judgment ranks above human value judgment the uncompromisable prescriptions are accepted and understood to achieve their intended social and personal good.¹¹ With the relationships between individuals, governed by the *mu'amalat* rules, it is understood that individuals have needs and these can be fulfilled via the principle of just exchange (retribution) whilst also providing them with the opportunity to compromise the punishment via less harm-causing alternatives, namely, compensation and/or forgiveness.¹²

Crimes in the *Shari'a* correspond to their punishment types. *Hudud* crimes are those whose punishments are clearly set out in the *Qu'ran* or *Sunnah*. *Qisas* crimes are those whose punishments are also set out in the religious texts but for which the victim or his heirs may choose to exact retaliation, accept compensation, or forgive without the need for any punishment. *Ta'zir* crimes are discretionary in nature and responsibility lies with the *qadi* in choosing the correct punishment for the accused considering all relevant factors. We now consider these in turn.

3.1 Hudud Crimes

Hudud crimes are those for which a fixed punishment has been established in either the *Qur'an* by God or the *Sunnah* by the Prophet. The word itself translates as 'limits' meaning the limits drawn by God on the basis of their divine and explicit prohibition. They are the most serious category of offence, considered crimes against God or against the rights of God and society. Hence, each of the *hudud* crimes correspond directly with

⁹ For further discussion on *ibadat* and *mu'amalat* see Chapter One.

¹⁰ Baber Johansen, *Contingency in a Sacred Law: Legal and Ethical Norms in the Muslim Fiqh* (Brill 1999) 200 - 216.

¹¹ Abdullahi Ahmed An-Na'im, *Towards an Islamic Reformation: Civil Liberties, Human Rights and International Law* (Syracuse University Press 1993) 113.

¹² Johansen (n10) 200-216.

the five objectives of the *Shari'a*¹³ and operate to protect against any threats made thereto. Such crimes carry sanctions of severe physical punishment whose principal purpose is to deter recurrence for the individual and society as a whole, but subsidiary purposes include retribution against the wrongdoer and expiation of him or her after punishment has been inflicted.¹⁴

Punishments for *hudud* crimes are prescribed in the public interest, are mandatory, and, once reported cannot be pardoned by any authority.¹⁵ Similarly, upon conviction no discretion is available to the judge to reduce the punishment or prescribe an alternative. Bukhari states

*“What destroyed the nations preceding you, was that if a noble amongst them stole, they would forgive him, and if a poor person amongst them stole, they would inflict Allah’s legal punishment on him. By Allah, if Fatima, the daughter of Muhammad stole, I would cut off her hand”.*¹⁶

Hudud punishments, by their nature, were often carried out in public to fulfil their role in deterring recurrence¹⁷ although the irreversible nature of the punishment meant evidentiary requirements were prohibitively stringent ensuring convictions for *hudud* crimes only occur in cases where all ambiguity and doubt is fully removed. Each *hudud* crime must be proved by either the confession of the accused (which if retracted cannot be used in evidence) or the testimony of two male witnesses of good reputation. Neither circumstantial evidence (*qarina*) nor hearsay is permitted and the doctrine of uncertainty (*shubha*) – applies.¹⁸

As interpretation is a central theme of this thesis it is essential to note the importance of the interpretation of the *hudud* by the *fiqh* schools. During the centuries of the

¹³ For further discussion on the objectives of *Shari'a* – *Maqasid al Shari'a* see Chapter One.

¹⁴ FB Hakeem ‘The Concept of Punishment Under Shari’a’ in FB Hakeem et al.(eds) *Policing Muslim Communities: Comparative International Context* (Springer Science and Business Media 2012) 11.

¹⁵ Ibid. 13.

¹⁶ Sunnah, Sahih Al Bukhari, Hadith No. 4304.

¹⁷ In most modern Islamic states *hudud* punishments are not pursued. Exceptions occur such as Deera Square in Riyadh – nicknamed ‘Chop Chop Square’ - where these punishments remain a public spectacle though not on a frequent basis. The practices of extremist regimes who have returned to fundamentalism cannot be said to be a true reflection of the practices of modern Islamic Law.

¹⁸ Rudolph Peters, *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty First Century* (Cambridge University Press 2006) 22-23.

development of *fiqh*, as the direct connection with the Prophet grew dimmer in his absence, the legal focus turned to the interpretation of the revelations and traditions (see Chapter Two). This was essential in order to develop a dynamic legal system, but it also meant that interpretation of the *hudud* was different for each *fiqh* school despite the concept of God's law being completely closed to manmade change. An uncritical reverence of *fiqh* interpretations of the texts ensued to the extent that many modernist scholars claim the original spirit of the law was lost in *fiqhi* translation. This has given rise to confusion regarding the number of crimes, the substantive content of the crimes and the nature of their punishment.

The *hudud* crimes will now each be taken in turn for consideration and a particular method will be employed in their consideration. Firstly, each crime's origin and purpose in the Prophetic Period as set out in Chapter Two will be recalled in order to bring their temporal context to mind, given the importance of the theme of context to the thesis as a whole. The law regarding each crime will be subsequently set out and this will be followed by a note concerning their interpretation. Whilst each crime is set out individually there are connections to be made between them. The *hudud* revealed during the Meccan phase of the Prophetic Period were *zina* (adultery), *qadhaf* (accusations of unchaste behaviour) and *sariqah* (theft) – all intended to adjust society's moral compass and increase respect for women, the family, and property in a patriarchal, tribal society. Those revealed during the Medinan phase - *hirabah* (highway robbery), *baghi* (rebellion), *riddah* (apostasy) and *shurb-al-khamr* (consumption of alcohol) - were revealed in consideration of the changed nature of the Islamic community and worked to help a fledgling religious society survive against the temporary odds it faced. Whilst *shurb-al-khamr* served the purpose of ensuring a more alert community, the *hudud* of *hirabah*, *baghi*, and *riddah* are overlapping offences by reason of the fact that *hirabah* comprises a component of *baghi*. *Baghi* and *riddah* similarly overlap as these were two crimes that usually occurred together, with blasphemy often partially comprising *riddah* and sometimes both terms being used interchangeably.

Applying the method delineated above, the extent to which there is discord between the *Qur'an* and the *fiqh* rules becomes clear. In this regard, the changed conditions of modern society should once more be borne in mind –we no longer live in tribal society, modern countries have effective police forces and there are alternative, more modern and

socially acceptable modes of punishment available to punish breaches of the values Islam seeks to protect in its *maqasid*, or objectives. Equally, it is strongly arguable that the values the criminalisation of *hudud* sought to protect remain valid and capable of protection in a twenty first century context.

3.1.1 Zina - Adultery

We recall from Chapter Two that two major concerns in *Jahiliyyah* dealt with by the *Qur'an* were the position of women in society and their general status as objects of lust (further exacerbated by the practice of temporary marriage and lack of rights to maintenance post-divorce). Accordingly, the original purpose behind both *zina* and *qadhif* crimes was to dramatically increase respect for women in society.

Zina or adultery is prohibited under *Shari'a* at *Qur'an* 17:32 which states “*Nor come nigh to adultery: For it is a shameful deed and an evil, opening the road to other evils*”.¹⁹ The *Qur'an* at 24:2 imposes a punishment of lashes to be administered in public:

“The woman and the man guilty of adultery and fornication flog each of them with a hundred stripes: Let not compassion move you in their case, in a matter prescribed by God, if ye believe in God and the last day: and let a party of the Believers witness their punishment”.²⁰

The *zina* prohibition protects the *maqasid* objectives of progeny and reputation. If we recall the fact that the *Qur'an* radically changed the position of women and introduced the notion of a limited marriage (in *Jahiliyyah* up to one hundred wives could be taken but Islam reduced this to four – and only if they could be treated equally – otherwise just one), then the marriage institution was going to be a model for social stability, which is compromised by adultery. The evidentiary requirements to prove *zina* are as a result, higher than that of other *hudud* crimes. The testimony of four male witnesses of reputable character who must all have been present at the precise time of the sexual act and who must all have seen the act of penetration and can recount the act in detail is required to prove *zina* (no person in the history of *Shari'a* has ever been charged with

¹⁹ Holy Qur'an, Surah Al-Isra 17:32.

²⁰ Holy Qur'an, Surah An-Nur 24:2.

zina on the basis of this evidence).²¹ Not only this, but complainants attempting to have an individual convicted of *zina* invite the possibility of a counter crime upon themselves: if the evidence cannot substantiate the claim of *zina* and the accused are found not guilty, the accusers are guilty of defamation (*qadhf*) attracting a punishment of up to eighty lashes.²²

Zina attracts the punishment of flogging with one hundred lashes. Contradicting the *Qur'anic* definition, all four schools subdivide *zina* into both adultery and fornication distinguishing between the married and the unmarried but concur on the expansion of the punishment to stoning to death for adultery²³ and flogging with one hundred lashes and a year in exile for fornication.²⁴ They rely on such *ahadith* as Muslim 1690²⁵ and 1691²⁶ to support these punishments for fornicators and it has been justified as follows: since the fornicator sought easy pleasure without regard for *Shari'a*, he/she is made to suffer pain in order to recover his/her senses. An individual tends to lean more towards pleasure than towards pain and by pulling the self towards pain when it succumbs to prohibited pleasure, he/she re-establishes a certain equilibrium and avoids recklessness and folly.²⁷ The Hanbali school believes stoning and flogging should be combined but the Maliki, Shafii and Hanafi school believe stoning abrogated flogging.²⁸ The schools further vary

²¹ Gamil Mohammad Hussein, 'Basic Guarantees in the Islamic Criminal Justice System' in MA Abdel Haleem, Adel Omar Sharif, Kate Daniels (eds) *Criminal Justice in Islam: Judicial Procedure in the Shari'a* (IB Taurus 2003) 38.

²² Joseph Schacht, *An Introduction to Islamic Law* (Clarendon Press 1964) 179.

²³ Bassiouni (n23) 136. Bassiouni notes that stoning was a punishment first imposed by the Prophet during his time in Madinah imposed only on Jewish people under Jewish law which provided for this type of sanction. Its use was mistakenly transposed into Islam.

²⁴ Mohammad Hashim Kamali, 'Punishment in Islamic Law: A Critique of the Hudud Bill of Kelantan, Malaysia' *Arab Law Quarterly* Vol.13 Issue 3, 1998 226.

²⁵ Sunnah, Sahih Muslim, Hadith No. 1690. "Take from me. Verily Allah has ordained a way for them (the women who commit fornication): (When) a married man (commits adultery) with a married woman, and an unmarried male with an unmarried woman, then in case of married (persons) there is (a punishment) of one hundred lashes and then stoning (to death). And in case of unmarried persons, (the punishment) is one hundred lashes and exile for one year".

²⁶ Sunnah, Sahih Muslim, Hadith No. 1691. "Allah's Messenger. I have committed adultery. He (the Holy Prophet) turned away from him, He (again) came round facing him and said to him: Allah's Messenger, I have committed adultery. He (the Holy Prophet) turned away until he did that four times, and as he testified four times against his own self, Allah's Messenger (Peace be upon him) called him and said: Are you mad? He said: No. He (again) said: Are you married? He said: Yes. Thereupon Allah's Messenger (Peace be upon him) said: Take him and stone him. Ibn Shihab (one of the narrators) said: One who had heard Jabir b. 'Abdullah saying this informed me thus: I was one of those who stoned him. We stoned him at the place of prayer (either that of 'Id or a funeral). When the stones hurt him, he ran away. We caught him in the Harra and stoned him (to death)" <www.sunnah.com/muslim/29> accessed 26 May 2016.

²⁷ Abdullahi Ahmed An-Na'im, *Towards an Islamic Reformation: Civil Liberties, Human Rights and International Law* (Syracuse University Press 1993) 114.

²⁸ Robert Postawko, 'Towards an Islamic Critique of Capital Punishment' (2001) 1 *UCLA Journal of Islamic and Near Eastern Law* 288, 289.

substantially in their terms of exile, the impact of gender or marriage on the particular punishment, whether the perpetrators are Muslim or whether they are homosexual and the manner in which the stoning should be carried out.²⁹

3.1.2 Qadhf - Accusations of Unchaste Behaviour

The conditions in *Jahiliyyah* that prompted the revelation of *zina* are also responsible for the revelation of *qadhf*. *Qadhf* was forbidden in order to protect the good reputation of a woman after the Prophet's wife was accused of unchaste behaviour.

Qadhf is a defamation crime concerned with falsely accusing a person of *zina* and seeks to protect the objectives of progeny and reputation. The crime of defamation itself encompasses false accusations of fornication and impugning the legitimacy of a woman's child.³⁰ The *Qur'an* at 24:4 states "*And those who cast it up on women in wedlock, then bring not four witnesses, scourge them with eighty stripes, and do not accept any testimony of theirs, ever. They are ungodly*".³¹ It further states at 24:23-5

"Those who slander chaste, indiscrete but believing women are cursed in this life and in the hereafter: For them is a grievous penalty. On the day when their tongues, their hands and their feet will bear witness against them as to their actions, on that day God will pay them back all their just dues, and they will realise that God is the very truth, that makes all things manifest".³²

Whilst eighty lashes are prescribed as punishment, combined, these *ayats* provide for punishment in this life and in the hereafter.

All schools agree on the *Qur'anic* definition, but in some this crime has also been expanded by *fiqh* to include accusations of fornication, homosexuality and denial of parentage.³³ Further, and whereas the *Qur'an* clearly presents this crime as existing for

²⁹ Mark A. Gabriel, 'Reforming Hudud Ordinances to Reconcile Islamic Law with International Human Rights Law' Doctoral Thesis (University of Capetown 2016) 98.

³⁰ Matthew Lippman, 'Islamic Criminal Law and Procedure: Religious Fundamentalism versus Modern Law'. (1989) 12(1) Boston College International and Comparative Law Review 29, 40.

³¹ Holy Qur'an, Surah An-Nur 24:4.

³² Ibid 24:23-25

³³ Lippman (n30) 29, 42.

the protection of women, all *madhahib* prescribe this punishment in a gender neutral way. Additionally, they agree that the punishment for *qadhf* should only be applied if the victim requires it to be carried out – the *Qur'an* does not prescribe this.

3.1.3 Sariqah - Theft

The revelation forbidding *sariqah* was a direct result of both the level of poverty and the desperate state of tribal feuding in pre-Islamic society. *Sariqah*, or theft, is criminalised in both the *Qur'an* and the *Sunnah* and comprises the taking of property of another whose value is equal to the prescribed amount. The property must be taken from the custody of another in a secret manner and the thief must obtain full possession of the property.³⁴ At *Qur'an* 5:38-9 it is stated

*“As to the thief, male or female, cut off his or her hands: A punishment by way of example from God for their crime: And God is exalted in power. But if the thief repents after his crime, and amends his conduct: God turneth to him in forgiveness ...”*³⁵

Accordingly, the punishment is amputation - under certain circumstances it can be cross amputation of the hand and foot – and its severity is based on the threat it poses to the objectives of *Shari'a*. Thievery deprives an individual of his property and creates fear, distrust and apprehension in the community,³⁶ therefore, the objectives it protects are those of property and progeny/family. A qualification applies to stealing when it is committed out of need. This is said to originate in reports that Al'Khattab suspended amputation during a famine when people were forced to steal for survival.³⁷ There are also situations where *sariqah* will not be exposed to the *hudud* punishments and arise when the stolen property falls into a certain grouping of excluded items or to the identity of the accused and their relationship with the victim, for example, a direct family member, a guest or a slave.

³⁴ Ibid. 29, 38.

³⁵ Holy Qur'an, Surah Al-Ma'idah 5:38,39.

³⁶ M Siddiqui, *The Penal Law of Islam* (Adam Publishers 1979) 127.

³⁷ This historical occurrence is put forward in argument by those modernist scholars who argue for a moratorium on *hudud* punishments on the basis that an ideal Islamic society must exist in order to mete out these punishments. See Chapter Seven for further discussion on this issue.

All schools of thought agree on the definition of the crime, but they differ on the requisite value of the item³⁸ ranging from three *dirhams* for the Maliki and Hanabli schools to ten for the Hanafi school and a quarter *dinar* for the Shafi'i school. Regarding punishment the schools again expand the *Qur'anic* provision going beyond cutting off the right hand to cutting off the left foot for a criminal who offends for the second time. Beyond this, the *fiqh* schools further expand and disagree on punishment. The Hanafi school and some Hanbali scholars reject further amputations and request the stolen items are returned whilst the Maliki and Shafi'i schools and the remainder of the Hanbali scholars call for further amputations, and, on fifth or subsequent occasions, they resort to imprisonment.³⁹ This can be considered to further contravene the *Qur'an* insofar as *Qur'anic* commentary has noted that the reference to theft at the beginning of the provision is in the form of adjectives and not a single verb. It has been analogised that just as a person would not be described as generous because of a single act of giving, then a person would not be described as a thief by one single act of taking – therefore, the references to *sariq* and *sariqah* infer the punishment applies to recidivists only, and not to first time offenders.⁴⁰ In addition, there is no *Qur'anic* provision providing for resort to successive amputations and imprisonment.

3.1.4 Shurb al-Khamr – Consumption of Alcohol

Shurb al khamr was forbidden to increase alertness in warfare. This only became a crime in Islam gradually, as the need to protect the community from attack became greater. It was particular to the dangers afflicting a fledgling community with hostile elements in its environment. Introduced in degrees, *Qur'an* 4:43 states “*Oh ye who believe! Approach not prayers with a mind befogged until ye can understand all that ye say*”.⁴¹ At 2:219 it states “*They ask thee concerning wine and gambling. Say: In them is great sin, and some profit for men, but the sin is greater than the profit*”.⁴² A third *ayat* at 5:90/91 brought the ultimate forbiddance criminalising drinking alcohol entirely:

“O you who believe! Intoxicants and gambling, dedication of stones (Al-Ansab), and divination by arrows (Al-Azlam) are an abomination of

³⁸ Abdul Rahman al-Jaziri *Al-Fiqh ala al-Mazaheb al-Arbaa* (1986) 4 Darul Fikr 569.

³⁹ Gabriel (n29) 102.

⁴⁰ Kamali (n24) 221 citing Mohammad Abu Zahrah, *Al-Jarimah Wa'l-Uqubahfi'l-Fiqhal-Islami:al-Uqubah*, (Dar al Fikr al-'Arabi) 101-102.

⁴¹ Holy Qur'an, Surah An-Nisa 4:49.

⁴² Holy Qur'an, Suran Al-Baqarah 2:219.

Shaitan's handiwork. Eschew such abomination, That ye may prosper".
"Satan's plan is but to excite enmity and hatred between you with
intoxicants and gambling and hinder you from the remembrance of God
and from prayer. Will ye not then abstain?".⁴³

The *ahadith* elaborate the punishment for intoxicants: "*Whosoever drinks wine, whip him. If he repeats it for the fourth time, kill him. He (Jabir) says, A man was later brought to the Prophet (Peace and blessings be upon him) who had drunk wine for the fourth time. He beat him, but did not kill him*".⁴⁴ Another *hadith* provides "*Whatever intoxicates in large quantities, a little of it is haraam*".⁴⁵ The punishment for drinking alcohol is lashes - usually between forty and eighty. The crime is considered *hudud* as it threatens nearly all of the objectives of *Shari'a*. Firstly, it threatens the protection of reason, and if reason is impaired then any of the other objectives also come under threat.⁴⁶

Regarding interpretation, where the substantive content of the crime is concerned there is extensive expansion of the *Qur'anic* prescription to various matters including the type of fruit that is used to make the alcohol, the precise moment at which fermentation takes place or whether drinking itself, or reaching a state of drunkenness, actually comprises the content of the crime.⁴⁷ On this basis, the definition of the crime of *shurb* is not entirely clear.⁴⁸ The *Qur'an* does not prescribe a punishment for *shurb* but this is derived from a *hadith* prescribing lashes.⁴⁹ It is reported that Abu Bakr when confronted with *shurb* asked the companions about punishment who responded they were not aware of one precisely but that different punishments were imposed, these often being beatings. On this basis, the Prophet treated *shurb* as a *ta'zir* crime where discretion was invoked to decide punishment.⁵⁰ Therefore, the Maliki, Hanafi and Hanbali schools arguably contradict the *Qur'an* by setting the punishment at eighty lashes, (and the Shafi'i at forty).

⁴³ Holy Qur'an, Surah Al-Ma'idah 5:90, 91.

⁴⁴ Sunnah, Sahih Al Tirmidhi, Hadith No. 2572.

⁴⁵ Sunnah, Abu Dawud, Hadith No. 3673.

⁴⁶ Hussein (n21) 40.

⁴⁷ D. Peretz, R Moench & S. Mohsen, *Islam: Legacy of the Past, Challenge of the Future* (North River Press 1984) 108.

⁴⁸ Gabriel (n29) 105.

⁴⁹ Sahih Al Tirmidhi, Book of Legal Punishments Chapter 23 Hadith No. 2572 narrated by Abu Hurairah <www.ahadith.co.uk/chapter.php?cid=179&page=4&rows=10> accessed 28 May 2016. The hadith reports "Whosoever drinks wine, whip him. If he repeats it for the fourth time, kill him. He (Jabir) says, A man was later brought to the Prophet who had drunk wine for the fourth time. He beat him, but did not kill him".

⁵⁰ Kamali (n24) 217.

With the punishment arising not in the *Qur'an* but in a *hadith*, the whole concept of *shurb* being a *hadd* crime to begin with is open to question.⁵¹

3.1.5 Hirabah – Highway Robbery

The punishment for *hirabah* was revealed upon the discovery of shepherds' remains after bandits tortured them, killed them and stole their property. The revelation of *hirabah* attempted to outlaw the banditry that was a significant plight on the tribal landscape.

Hirabah, alternatively *Qat al-Tariq*, alternatively *Sariqah al-qubra* are translated respectively as armed robbery, highway robbery and great theft, all relating to and concerning the same type of crime and consisting of waging war against God and his Apostle and making or spreading corruption on earth. It finds its authority in the *Qur'an* at 5:33-4.

*“The punishment of those who wage war against God and His Apostle and strive with might and main for mischief through the land is: execution, or crucifixion, or the cutting off of hands and feet from the opposite sides, or exile from the land: That is their disgrace in this world, and a heavy punishment is theirs in the hereafter. Except for those who repent before they fall into your power; in that case, know that God is oft-forgiving, most merciful”.*⁵²

Hirabah (and its associated terms) are considered to violate all five objectives of *Shari'a* and on this basis carry the harshest of all punishments set out in the *Qur'an*.⁵³ For *hirabah* to occur there must be an act of terrorising people for the purposes of robbery or other purpose and the act of causing destruction in society, therefore, any crime containing these two elements may constitute *hirabah*. Robbery and terrorism fall under *hirabah* and evidentiary requirements are either confession without retraction or the evidence of two reputable witnesses.

⁵¹ Ahnad Fathi Bahnasi, *Al- 'Uqubahfi'l-Fiqhal-Islami*, (Dar al-Shuruq 1989) 123.

⁵² Holy *Qur'an*, Surah Al-Ma'idah 5:33, 34.

⁵³ For further discussion on *Maqasid al-Shari'a* (objectives of *Shari'a*) see Chapter One.

Regarding interpretation, the *fiqh* schools agree on the definition of carrying a weapon and frightening travellers on a public road, but, whilst the Hanafi school holds that it must occur outside a city, the remaining schools do not apply this qualification. Regarding the punishment, the *Qur'an* clearly lists execution, crucifixion, amputation of hands and feet from opposite sides and exile. Once more, *fiqh* is responsible for expansion of the punishment and the schools of thought differ in many areas including whether the victim was robbed or killed or both, whether the victim was a Muslim, whether the perpetrator was a man, a woman or a young boy, the manner in which the perpetrator is executed and the terms of repentance.⁵⁴

3.1.6 Baghi - Rebellion

Both *riddah* and *baghi* were forbidden to protect the *ummah* in terms of both its military strength and its faith⁵⁵ and reflected the need to preserve a fledgling community in order to guarantee its survival in an environment with imposing hostilities.

Baghi can be defined as an act of armed rebellion and analogous to an act of unjust and violent disobedience to the Muslim ruler in an Islamic state, but, it requires certain conditions to be satisfied. For *baghi* to be punishable there must be possession of power, use of force, a lack of justification for resorting to force and a physical act of armed rebellion.⁵⁶ *Baghi* is a violation of the *Shari'a* objective of protection of religion and is grounded in the *Qur'an* at 49:9 which states:

“And if two parties of the believers fight each other then bring reconciliation. And if one of them transgresses against the other, then fight against the one who transgresses until it returns to the ordinance of God. But if it returns then bring reconciliation between them according to the dictates of justice and to be fair. Indeed, God loves those who are fair”.⁵⁷

⁵⁴ Gabriel (n29) 107.

⁵⁵ *Riddah* and *Baghi* do not enjoy consensus between the *madhahib* as some *hudud* crimes and are only considered *hudud* by some schools.

⁵⁶ A. Al Dawoody, *The Islamic Law of War: Justifications and Regulations* (Palgrave and MacMillan 2011) 158, 159.

⁵⁷ Holy Qur'an, Surah Al-Fath 49:19.

Baghi is agreed between the schools to consist of waging war against Allah or his Messenger, by saying or deed, and, spreading corruption on earth.⁵⁸ This however is not set out in the *Qur'an* and the verse that is relied on to substantiate *baghi* as a *hadd* crime is a verse orientated towards peace making⁵⁹ with the purpose of this *hadd* considered to be reconciliation between the parties and not elimination of the rebellious.⁶⁰ Indeed it is noted that the verse speaks of disagreement between equals with no suggestion of a superior authority of any one of the parties – essentially, it does not address a situation in which a person revolts against a superior or in which one revolts against an established government, these concerns are of *fiqhi* origin⁶¹ and run contrary to the provisions of the *Qur'an*.

Whilst the *fiqhi* punishment for *baghi* is considered death by beheading or a lesser penalty,⁶² Muslim jurists established three preconditions for *baghi* which if not met, result in the accused not being punished even for destruction of life and property during the course of the rebellion. This affirms the absence of an absolute punishment for *baghi* in Islam. An automatic punishment of death by beheading is rather a mistake that is often made when *baghi* and *hirabah* are conflated, as *hirabah* is an offence that occurs as a component of rebellion.⁶³ Moreover, in the generally agreed definition that *baghi* comprises the waging of war by ‘saying or deed’ and that beheading is considered the punishment, the reference to ‘saying’ gives a new dimension to the crime and all four Sunni schools of thought agree that anyone who insults the Prophet has to be killed. This expansion of *baghi* explains the overlap with *riddah* and blasphemy, as all three usually comprised the one set of rebellious actions.

The reference to spreading corruption on earth within the definition of *baghi* is also interpreted variously, with the Maliki school interpreting the phrase as meaning armed rebellion against Muslim society by causing chaos and bloodshed of innocents including robbery and rape, or, as an assault against people’s honour by use of force for the purpose

⁵⁸ Gabriel (n29) 107.

⁵⁹ Holy Qur’an, Surah al-Hujurat 49:9 ‘And if two parties of the believers fight each other then bring reconciliation. And if one of them transgresses against the other, then fight against the one who transgresses until it returns to the ordinance of God. But if it returns then bring reconciliation between them according to the dictates of justice and to be fair. Indeed, God loves those who are fair’.

⁶⁰ Postawko (n28) 298.

⁶¹ Abou el-Fadl, *Rebellion and Violence in Islamic Law* (Cambridge University Press 2006) 38.

⁶² Bassiouni (n23) 134.

⁶³ Al Dawoody (n56) Chapter 3.

of stealing in a neighbourhood or attacking men's wives within their own territory.⁶⁴ As this latter interpretation describes *hirabah*, the confusion between *hirabah* and *baghi* once again becomes visible. Only the Maliki and some Hanbali scholars treat *baghi* as *huddud*. *Baghi* is considered by the other *madhahib* to be classified under the *ta'zir* category of crimes.

3.1.7 Riddah - Apostasy

As with *baghi*, *riddah* was forbidden to protect the *ummah* in terms of both its military strength and its faith and reflected the need to preserve a fledgling community in order to guarantee its survival.

The crime of *riddah* is considered one of the greatest sins or crimes a Muslim can commit⁶⁵ and it is so committed by voluntarily turning one's back on Islam including acts of converting to another religion or rejecting a tenet of Islam⁶⁶ or the worship of false idols. *Riddah* violates the objective of protection of religion and the *Qur'an* provides guidance on *riddah* at a number of *ayats*. At 2:217 it states “.....*And whosoever of you turns back from his religion and dies as a disbeliever, then his deeds will be lost in this life and in the Hereafter, and they will be the dwellers of the Fire. They will abide therein forever*”.⁶⁷ At 5:54 it states

“O you who believe! Whoever from among you turns back from his religion, Allah will bring a people whom He will love and they will love Him; humble towards the believers, stern towards the disbelievers, fighting in the Way of Allah, and never afraid of the blame of the blamers. That is the Grace of Allah which He bestows on whom He wills. And Allah is All-Sufficient for His creatures' needs, All-Knower”.⁶⁸

⁶⁴ Gabriel (n29) 109.

⁶⁵ David F. Forte, 'Apostasy and Blasphemy in Pakistan' (1994) 10 Connecticut Journal of International Law 44.

⁶⁶ Lippman (n30) 30. See also Noel J. Coulson, *A History of Islamic Law* (Edinburgh University Press 1964) 12.

⁶⁷ Holy Qur'an, Surah Al-Baqarah 2:217.

⁶⁸ Holy Qur'an, Surah Al-Ma'idah 5:54.

The *Qur'an* also states at 9:73 “O Prophet (Muhammad)! Strive hard against the disbelievers and the hypocrites, and be harsh against them, their abode is Hell, - and worst indeed is that destination”.⁶⁹ At 88:17-26 the *Qur'an* further states

“Do they not look at the camels, how they are created? And at the heaven, how it is raised? And at the mountains, how they are rooted and fixed firm? And at the earth, how it is spread out? So remind them (O Muhammad), you are only a one who reminds. You are not a dictator over them. Save the one who turns away and disbelieves. Then Allah will punish him with the greatest punishment. Verily, to us will be their return; then verily, for us will be their reckoning”.⁷⁰

There is support in the *hadith* for execution such as in the *hadith* “It is not permissible to take the life of a Muslim who bears testimony... but in one of the three cases: the married adulterer, a life for life, and the deserter of his Din (Islam), abandoning the community”.⁷¹ Bukhari 83:37⁷² and Bukhari 84:57⁷³ carry further clear references. Accordingly, the punishment for *riddah* is death. This is justified on the basis that under *Shari'a* Islam is a religion, a nationality and a state and rejecting Islam is tantamount to waging war against Allah, the Prophet Mohammad and the *ummah* or Islamic community.⁷⁴ However, the *Qur'an* clearly states that there is no compulsion in religion, and, the first clear mention of killing is not in the *Qur'an* but in the *ahadith*. Whether the *Qur'an* prescribes death for *riddah* may accordingly be a matter of interpretation. For a Muslim to be accused of *riddah* he or she must knowingly and wilfully have committed or abstained from committing an act or made a pronouncement which has the effect of making him or her turn back from the Islamic faith.⁷⁵ If a person is accused of *riddah* they have an opportunity to return to the Islamic fold by way of repentance (*tauba*), but if repentance is not forthcoming, in classical Islam, death is an inevitable punishment.

⁶⁹ Holy Qur'an, Surah At-Tawbah 9:73.

⁷⁰ Holy Qur'an, Surah Al-Ghashiyah 88:17-26.

⁷¹ Sunnah, Sahih Muslim, Hadith No. 4152.

⁷² Sunnah, Sahih Bukhari, Hadith No. 6899 “Allah's Apostle never killed anyone except in one of the following three situations: (1) A person who killed somebody unjustly, (2) a married person who committed illegal sexual intercourse and (3) a man who fought against Allah and His Apostle and deserted Islam and became an apostate.”

⁷³ Sunnah, Sahih Bukhari, Hadith No. 6922 states “[In the words of] Allah's Apostle, 'Whoever changed his Islamic religion, then kill him'”.

⁷⁴ Hussein (n21) 42.

⁷⁵ Ibid.

All four Sunni schools agree that *riddah* can be fulfilled by saying, doubt or deed and that the aspect of ‘saying’ can be fulfilled by insulting Allah or his Messenger or his angels.⁷⁶ This decisively leads to the crime of *riddah* being discharged by the utterance of blasphemous speech alone. It has been noted that in an assessment of cases of *riddah* during the Prophetic Period, apostasy was used synonymously with blasphemy as most, if not all the cases that involved apostasy, were interwoven with blasphemous attacks on Islam or the Prophet – so much so that the two offences became indistinguishable from one another.⁷⁷ This is quite an expansion of the *Qur’anic* provisions, considering the Prophet is known to have forgiven those who not just renounced Islam but also those who vilified and insulted him,⁷⁸ and works to conflate blasphemy with *hadd* crimes. Although blasphemy is considered a *ta’zir* crime,⁷⁹ when it is uttered by a Muslim it is still considered evidence of *riddah* and hence the *hadd* punishment applies. When it is uttered by a non-Muslim, it is then separated from *riddah*.⁸⁰ All schools of thought outside the Hanafi school agree blasphemy is punishable by death.⁸¹

Where punishment for *riddah* is concerned, the *Qur’an* imposes the penalty of eternal damnation⁸² but does not provide for punishment in this life.⁸³ Rather the death penalty for *riddah* finds its grounding in the *hadith* ‘whoever changed his Islamic religion kill him’.⁸⁴ The penalty for *riddah* was never implemented by the Prophet or his companions for peacefully rejecting Islam alone,⁸⁵ rather the death penalty was imposed for the political aspect of *riddah* under Mohammad’s authority as a political leader, often as a

⁷⁶ Gabriel (n29) 111.

⁷⁷ Syed Barakat Ahmad, ‘Conversion from Islam’ in Clifford Edmond Bosworth, Charles Issawi, Roger Savory and A.L. Udovitch (eds.) *The Islamic World: From Classical to Modern Times – Essays in Honour of Bernard Lewis* (Darwin Press 1989) 248.

⁷⁸ Declan O’Sullivan, ‘The Interpretation of the Qur’anic Text to Promote or Negate the Death Penalty for Apostates and Blasphemers’ (2001) 3(2) *Journal of Qur’anic Studies* 87.

⁷⁹ Sidi Khalil, *Maliki Law* F.H. Ruxton trans.(Hyperion Press 1980) 325-327.

⁸⁰ Forte (n65) 48.

⁸¹ W. Heffening, ‘Murtadd’ in CE Bosworth et al (eds) *The Encyclopedia of Islam* (Brill Academic Publishing 1992) 635.

⁸² Forte (n65) 44.

⁸³ Edna Boyle-Lewicki, ‘Need Worlds Collide: The Hudud Crimes of Islamic Law and International Human Rights’ (2000) 13(2) *New York International Law Review* 57.

⁸⁴ Sunnah, Sahih Al Bukhari Hadith No. 1242.

⁸⁵ S.A. Rahman, *The Punishment of Apostasy in Islam* (Institute of Islamic Culture 1978) 63. See also Postawko (n28) 292.

component of the crime of *baghi*.⁸⁶ Even so, he used discretion in his judgment showing that the Prophet treated *riddah* as a *ta'zir* crime.⁸⁷ Indeed the noted *hadith* is said to have occurred in circumstances where the perpetrator had waged war on Islam and not simply renounced his faith⁸⁸ - aligning with the contention that in the early days of Islam apostasy and treason, or *riddah* and *baghi*, were in fact synonymous.⁸⁹ All schools of thought agree on the definition of *riddah* and further agree that it warrants the death penalty. However, they variously disagree on many aspects concerning the application of the punishment including whether the call to repent is recommended or obligatory, with the Maliki school holding that an apostate who does not repent shall have his body dumped in the wilderness, whether a woman should receive the same penalty with the Hanafi school imposing imprisonment with thirty nine lashes a day until she either repents or dies, and, whether a minor should be put to death.⁹⁰

3.2 Hudud Consensus

Regarding *madhahib* or schools of thought, there is disagreement on the number of *hadd* crimes as to whether there are five, six or even seven. Firstly, there arises a dichotomy in thought regarding their valid origins concerning the equal footing or otherwise of the *Qur'an* and *Sunnah*. If you align with the proposition that *hudud* crimes must originate in the *Qur'an* (and the *Sunnah* cannot make laws - just elaborate on and clarify *Qur'anic* rules) the two arising in the *Sunnah* that are not explicitly mentioned in the *Qur'an* must be excluded, namely, *riddah* (apostasy) and *qadhif* (accusation of unchaste behaviour or defamation). This results in a common understanding that there are five, namely *shurb al'khamr* (drinking alcohol), *zina* (adultery), *sariqah* (theft), *baghi* (rebellion) and *hirabah* (highway robbery).⁹¹ Alternatively, if you align with the proposition that the *Sunnah* requires equal reverence to that of the *Qur'an* on the basis that the Prophet was divinely inspired and this secondary source comprises binding law, then these crimes should be included, bringing the number of *hudud* back up to seven.

⁸⁶ For a discussion regarding apostasy in this context between The UN and the Sudan see Mashood A Baderin, 'A Macroscopic Analysis of the Practice of Islamic State Parties to International Human Rights Treaties: Conflict or Congruence?' (2001) 1(2) Human Rights Law Review 295.

⁸⁷ O'Sullivan (n78) 87.

⁸⁸ David A. Jordan, 'The Dark Ages of Islam: Ijtihad, Apostasy and Human Rights in Contemporary Islamic Jurisprudence' (2003) 9(1) Washington and Lee Journal of Civil Rights and Social Justice 62.

⁸⁹ Asaf AA Fyzee, *Outlines of Mohammadan Law* (Oxford University Press 1964) 169-170.

⁹⁰ Gabriel (n29) 111, 112.

⁹¹ Bassiouni (n23) 135.

Despite this particular dichotomy, the schools of thought at the time applied their own considerations for deciding what crimes comprised the *hudud*. There is no complete consensus among the *madhahib* on *baghi* (armed rebellion) or *riddah* (apostasy) as *hudud*.⁹² and, if we remove those where there is no consensus the list of *hudud* crimes that are universally accepted by the *madhahib* now becomes *zina*, *qadhaf*, *sariqah*, *hirabah*, and *shurb-al-khamr* – with *qadhaf* being the only one from the *Sunnah*. The Maliki, Shafi'i and Hanbali schools curiously include an eighth option, namely intentional homicide and wounding, as a *hadd* crime but there is no scriptural basis for this.⁹³ However they also say this can only be punished at the command of the victim or his heirs (suggesting it is *hadd* in name only but operates as *ta'zir*). The Hana'fi school reserves *hudud* for what it considers strictly mandatory punishments only.⁹⁴

Considering the distinct nature of the *hudud* being 'the divine prescription of a specific punishment for a specific crime', we note that a punishment for *shurb al-khamr*, or drinking alcohol, cannot be found in the *Qur'an*,⁹⁵ and therefore can potentially be discounted as *hudud*. Depending on the dichotomy of thought in valid origins, combined with consensus and the fragile condition of *shurb*, this leaves the number of agreed *hudud* at four if excluding *shurb* due to a lack of punishment and three if also excluding *qadhaf* due to its origin in the *Sunnah*. To confuse matters further there is an understanding that the valid origins are both the *Qur'an* and the 'correct' *Sunnah*, which takes consensus back to five, but four if *shurb* is to remain discarded. Moreover, the rigidity of the *hudud* crimes as irrefutable rules is tested further when their number, anything between a minimal three and a potential eight does not directly align with a correct *hadith* that lists 'the seven most destructive sins' as: associating others with Allah; witchcraft; killing a soul whom Allah has forbidden us to kill except for a right that is due; consuming orphan's wealth; consuming *riba*; fleeing from the battlefield; and, slandering chaste, innocent women'.⁹⁶

As can be seen from all of the foregoing considerations of the *hudud*, despite their common understanding as mandatory and completely unchangeable law, there is

⁹² Ibid. 134.

⁹³ Rudolph Peters, 'Hudud' in *The Oxford Encyclopedia of the Islamic World* Oxford Islamic Studies Online <www.oxfordislamicstudies.com/article/opr/t236/e0322> Accessed 26th May, 2016.

⁹⁴ Ibid.

⁹⁵ Halim Rane, *Islam and Contemporary Civilisation* (Academic Monographs 2010) 87.

⁹⁶ *Sunnah*, Sahih Muslim Hadith No. 262; Sahih al-Bukhari Hadith No. 6857.

considerable diversity in the interpretation of their number, their origin, the elements of the crimes and what precisely comprises the correct punishment. Moreover, their exposure to traditional orthodox, fundamentalist or reformist or modernist interpretations means that interpretations of the *hudud* can be communicated to the non-Muslim community in a variety of ways. In this vein, the changed nature of society where there are twenty first century methods of policing and punishment available cannot be discounted, as this is key to their understanding in a modern world. This matter is taken up in more detail in Chapter Seven.

3.3 Qisas Crimes

Qisas (retaliation) crimes are the second category of Islamic crimes. The word itself is derived from the Arabic word ‘*qassa*’ meaning ‘follow his track in pursuit’.⁹⁷ *Qisas* crimes operate on the principle of retributive justice where the victim or victim’s family may seek, in retaliation for their loss, the damage inflicted upon the victim to be inflicted upon the accused. Again, the justification for *qisas* punishments harks back to tribal Arabia when revenge would be sought for the death of a tribesman with tribal pride often dictating the number of deaths that would be necessary to satisfactorily quench the thirst for retribution – often leading to blood feuds spanning generations. *Qisas* crimes provided for a reduced form of retaliation restricting the bloodshed to the taking of life of, or infliction of injury upon, the perpetrator only, changing the principle from that of ceaseless revenge (*thar*) against a clan to retaliation (*qisas*) on more justified grounds, namely, an eye for an eye and a tooth for a tooth.⁹⁸

Authority for *qisas* crimes is to be found in both the *Qur’an* and the *Sunnah*. The *Qur’an* states as 2:178/179

“O ye who believe, the law of equality is prescribed to you in cases of murder: The free for the free, the slave for the slave, the woman for the woman. But if any remission is made by the brother of the slain, then grant any reasonable demand, and compensate him with handsome gratitude. This is a concession and a mercy from your lord. After this whoever exceeds the limits shall be in grave penalty. In the law of

⁹⁷ Wehr (n4) 765.

⁹⁸ Hakeem (n14) 15.

*equality there is saving of life to you, o ye men of understanding; that ye may restrain yourselves”.*⁹⁹

At 2:194 it proclaims

*“The prohibited month for the prohibited month, and so for all things prohibited – there is the law of equality. If then anyone transgresses the prohibition against you, transgress ye likewise against him. But fear God and know that God is with those who restrain themselves”.*¹⁰⁰

At 5:45 the *Qur’an* further states

*“We revealed therein the Torah or the law revealed to Moses for them; ‘Life for life, eye for eye, nose for nose, ear for ear, tooth for tooth and wounds equal for equal’. But if anyone remits the retaliation by way of charity, it is an act of atonement for himself. And if any fail to judge by what God hath revealed, they are the unjust wrongdoers”.*¹⁰¹

Finally, the *Qur’an* states at 17:33 *“Nor take life which God has made sacred except for just cause. And if anyone is slain wrongfully, we have given his heir authority: But let him not exceed bounds in the matter of taking life; for he is helped by the Lord”.*¹⁰²

The *Qur’anic* proclamations authorising *qisas* punishments also evidence an alternative to retaliation where mercy may be shown by the victim or his heirs. This is revealed in *ayats* 2:178/9, 2:19 and 5:45 where although retaliation is permitted, the showing of mercy is promoted. Such mercy may be in the form of the victim or his family/heirs waiving the right to retaliation as an act of charity or accepting a monetary payment known as *diya* (blood money) in compensation for the wrong or loss suffered. *Qisas* crimes can be divided into two main categories, namely, homicide, and infliction of intentional or unintentional bodily harm that results in serious or permanent injury to the

⁹⁹ Holy Qur’an, Surah Al-Baqarah, 2:178, 179

¹⁰⁰ Ibid 2:194.

¹⁰¹ Holy Qur’an, Surah Al-Ma’idah 5:45.

¹⁰² Holy Qur’an, Surah Al-Isra 17:33.

victim.¹⁰³ The term '*qisas*' specifically relates to the homicide category where the compensation element is known as *diya* and the term '*qawad*' relates to the bodily injury category where the compensation is termed '*arash*'.¹⁰⁴

Crimes constituting *qisas* are intentional murder, semi-intentional murder, unintentional murder or murder by mistake, whilst those constituting *qawad* are intentional cutting off of limbs, unintentional cutting off of limbs and unintentional wounding.¹⁰⁵ Whilst the *Qur'an* is clear on retaliation for homicide it is deemed less so on retaliation for *qawad*, the law for which has mostly been developed through *ijma*, with the agreed criteria being deliberate rather than accidental injury. *Qisas* must be applied to the corresponding part of the body of the culprit as was injured on the victim and it must be practicable for the authorities to inflict it.¹⁰⁶ The *qisas* category of crimes are unquestionably victim centred as it is the victim who has the choice to pardon the culprit, ask for *diya* or *arash*, or request the enforcement of retaliatory injury.¹⁰⁷

3.4 Ta'zir Crimes

Ta'zir crimes are the third and final category of crimes in Islamic Law that serve a dual purpose of deterrence and reform. *Ta'zir* comes from the word '*azara*' meaning to censure, rebuke, reprimand or reprove¹⁰⁸ and has been defined as any transgression against God or man for which there is no *hadd* or *qisas* punishment prescribed,¹⁰⁹ in essence, operating as a residual category of punishments. These punishments can be supplemented for *hudud* punishments in extenuating circumstances such as cases of lack of evidence due to their strict procedural requirements¹¹⁰ or where the crime is among relatives.¹¹¹ It can also replace *qisas* punishments on occasions that the victim or his family choose their right to retaliation under which circumstances the authority may, considering the interests of society and the interests of non-repetition of prohibited

¹⁰³ Bassiouni (n23) 140.

¹⁰⁴ Hakeem (n14) 15.

¹⁰⁵ Hussein (n21) 44.

¹⁰⁶ Hakeem (n14) 15.

¹⁰⁷ Ibid.

¹⁰⁸ Wehr (n4) 610.

¹⁰⁹ Hakeem (n14) 16.

¹¹⁰ Mark Cammack, 'Islamic Law and Crime in Contemporary Courts' (2011) 4(1) Berkeley Journal of Middle Eastern & Islamic Law 6.

¹¹¹ Terence D. Miethe, Hong Lu, *Punishment: A Comparative Historical Perspective* (Cambridge University Press 2005) 172.

behaviour, apply a lighter punishment.¹¹² Although not outlined in the *Qur'an* specifically, *ta'zir* punishments are implied from the *Qur'anic* texts insofar as both the *Qur'an* and the *hadith* literature outline crimes with no corresponding punishment and accordingly same are left to the discretion of the *qadi*. Those *ayats* from which such implications are derived are *Qur'an* 42:16

*“And as for those who contend about God (defying His Lordship, or struggling against His Religion) after His call has been accepted (and His Religion recognized as true), their contention is void in their Lord's sight, and (His) wrath is upon them, and for them is a severe punishment”*¹¹³

and 4:16

“And as for the two who are guilty of indecency from among you, give them both a punishment; then if they repent and amend, turn aside from them; surely Allah is Oft-returning (to mercy), the Merciful”.¹¹⁴

Ta'zir crimes are those for which the legislative process has the greatest latitude. Based on *ijma* and developed through *qiyas* or alternative established juristic tools of adaptation¹¹⁵ the body of *fiqh* allows Islamic Law to adapt itself to changing society and cater for the criminalisation of certain types of conduct that have emerged as a consequence of scientific, societal and technological progression whilst ensuring the *qadi* is ultimately guided by the principles of *Shari'a* including those of legal capacity and legality.¹¹⁶ Numerous factors influence the punishment decisions in *ta'zir* cases such as the circumstances of the case and the circumstances of the criminal (*mujrim*) including his or her background, personality or inclination towards crime.¹¹⁷ Thus, punishments are individually tailored to the crime, the criminal and the level of protection society requires from the type of prohibited behaviour.¹¹⁸ Punishments available begin at the

¹¹² Hussein (n21) 44.

¹¹³ Holy Qur'an, Surah Ash-Shuraa 42:16.

¹¹⁴ Holy Qur'an, Surah An-Nisa 4:16.

¹¹⁵ For further discussion on supplemental sources of law see Chapter One.

¹¹⁶ Bassiouni (n23) 141, 144.

¹¹⁷ For further reading see Frank E Vogel, 'The Trial of Terrorists Under Classical Islamic Law' (2002) 43(1) Harvard International Law Journal 53, 60.

¹¹⁸ Abd Al-Malek Al-Saleh, 'The Right of the Individual to Personal Security in Islam' in M. Cherif Bassiouni *The Islamic Criminal Justice System* (Oceana Publications 1982) 60.

lower level of simple admonition and progress to flogging (*jald*), imprisonment (*habs*), exile (*nafi*) and death (*uqubat al iiedam*).

3.5 The Concept of Punishment in *Shari'a*

Whilst punishment, as in all societies, is considered a method of responding to wrongs, in the *Shari'a* the infliction of punishment for crime is also a technique for protecting its objectives and achieving justice. The *Qur'an* at 4:58 states “*God doth command you to render back your trusts to those to whom they are due; and when ye judge between man and man, that ye judge with justice*”.¹¹⁹ In this respect the *Shari'a* has checks in place via its criminal justice provisions to ensure that only the guilty are punished, namely, individual criminal responsibility, the principle of legality, the presumption of innocence, equality before the law, and, defence rights.

Punishment in Islam is perceived as a deterrent and a mercy for both the disobedient and the obedient. The theory provides that punishment is a mercy for the obedient as it protects them from the power of evil and transgression, helping them in obedience and saving them from the harm of the crime whilst simultaneously a mercy for the disobedient as it arrests their criminal tendencies and prevents the spread of corruption resulting from the disobedience.¹²⁰ This deterrence theory of punishment varies little from the deterrence theory of punishment in other legal systems up to a point. However, under *Shari'a* it is understood that as God seeks only good for his *ummah* punishment for the criminal's actions primarily serves to enhance his or her moral condition and progression along the path to becoming a righteous individual whilst simultaneously lightening the psychological ills that afflict the victim.¹²¹

Regarding the severity of punishments in the *Shari'a* two factors must first be acknowledged, namely, the tribal nature of society emerging from *Jahiliyyah* within which Islam grew up as a sphere of reference for the types of punishments both revealed by God and advised by Mohammad, and, the fact that there is provision for repentance for each *hudud* crime that will be further explored in Chapter Seven where the interpretation of the *hudud* will be addressed. There is however, an underlying rationale for the severity

¹¹⁹ Holy Qur'an, Surah An-Nisa 4:58.

¹²⁰ Mehemeed (n6) 32.

¹²¹ Ibid.

of corporal punishments which is multi-faceted: firstly, the scarring of physical punishment has a tangible effect on the criminal which heightens its effectiveness;¹²² secondly, the punishment creates an awareness for the criminal of his actions¹²³ and a development of compassion for his victim; thirdly, because of the harmful effect of crime on society it is deemed necessary to impose punitive measures sufficiently painful to deter the criminal from reoffending;¹²⁴ fourthly, the existence of these punishments is a reminder to society of the wrongfulness of the prohibited behaviour and the execution of the punishments is a reminder that they are not simply empty threats, which, if they were, may lead society into a situation of uncontrollable criminal activity;¹²⁵ and fifthly, the execution of these punishments in public greatly increases the number of people in society who can learn from the wrong done.

Punishments in the *Shari'a* can be divided into four categories: physical punishments (amputations, flogging, stoning, crucifixion); personal freedom restrictions (exile and imprisonment); fiscal punishments (*diya*, *arash* or *gharana* - a fine); and alternative punishments (warning, reprimand (*taubikh*) or rebuke). Whilst restrictions on freedom (excepting exile), fiscal punishments and warnings are akin to punishments in other legal systems it is the physical punishments that are more controversial in comparative criminal law.

The rationale for the harsh methods of inflicting the death penalty in the *Qur'an* (crucifixion or stoning) is straightforward when we are cognisant of the temporal context of the revelation of these punishments. However, when the death penalty is mooted for a *taz'ir* crime the schools of thought or *madhahib* vary in opinion. The Hanafis, Hanbalis and some Malikis believe the death penalty can be inflicted in cases of *ta'zir* with most Malikis and Shafi'is in disagreement. Curiously, stoning as a form of death penalty originated in Judaism and was accidentally transposed onto the *Shari'a* by reason of the fact that when the Prophet travelled to Medina the Judaic penal system there already utilised this form of punishment. The *Qur'an* prescribes only lashes for *zina* at 24:2:

¹²² Aly Aly Mansour, 'Hudud Crimes' in M. Cherif Bassiouni *The Islamic Criminal Justice System* (Oceana Publications 1982) 195.

¹²³ Wajis (n5) 230, 231.

¹²⁴ Ahmed abd al-'Aziz al-Alfi, 'Punishment in Islamic Law' in M. Cherif Bassiouni *The Islamic Criminal Justice System* (Oceana Publications London 1982) 230, 231.

¹²⁵ Wajis (n5) 230, 231.

*“The woman and the man guilty of adultery or fornication,- flog each of them with a hundred stripes: Let not compassion move you in their case, in a matter prescribed by Allah, if ye believe in Allah and the Last Day: and let a party of the Believers witness their punishment”.*¹²⁶

However, stoning is supported by various *ahadith*, particularly Bukhari¹²⁷ and Muslim’s¹²⁸ recording of Umar’s claim reported by Ibn ‘Abbas “....*Surely as Allah’s Apostle carried out the penalty of Rajam, and so did we after him*”.¹²⁹ Whilst there is juristic debate regarding the ability of *ahadith* to abrogate *Qur’anic* ayats, the ruling for stoning remains in place. Crucifixion is delineated in the *Qur’an* as punishment for those who wage war against Allah and his apostle – *hirabah*.¹³⁰ If the *Qadi* decides this punishment is appropriate for a *ta’zir* crime¹³¹ then the criminal will be given food and drink, permission to perform the prayer, and then will be crucified alive.¹³²

Flogging (*jald*) has been considered one of the *Shari’a*’s most effective weapons against recidivism¹³³ and is found in a number of *Qur’anic* ayats. It is the *Shari’a*’s basic punishment and is justified (in comparison with imprisonment) for the following reasons: the financial commitment of the state (insofar as flogging is concerned) is nil compared to the cost of imprisonment; social production does not decrease as the flogged criminal is free to return to work; the criminal’s family are not exposed to excessive financial pressures for the same reason; and, the criminal is not exposed to unhealthy influences that may arise from spending long periods in an environment where the inhabitants are a community of criminals.¹³⁴ The rationale for amputation is the prevention of recidivism by physical means. If the criminal reoffends and continues to have amputations inflicted upon him/her there will come a point where no more punishment will be necessary,

¹²⁶ Holy Qur’an, Surah An-Nur 24:2.

¹²⁷ Sunnah, Sahih Al Bukhari, Hadith No. 816

¹²⁸ Sunnah, Sahih Muslim, Hadith No. 4194

¹²⁹ Sunnah, Sahih Al Bukhari, Hadith No 6829.

¹³⁰ Holy Qur’an, Sura Al-Ma’idah 5:33 “*The recompense for those who wage violent transgression against God and His Messenger and who go forth spreading corruption in the Earth is that they should be killed or crucified or that their hands and feet should be cut off on alternate sides or that they should be sent into exile...*”.

Also see page Chapter Two regarding basis for crime of *Hirabah*.

¹³¹ For further information on how *ta’zir* punishments can be substituted for *hudud* punishments see Chapter Two.

¹³² Wajis (n5) 44.

¹³³ Ibid. 40.

¹³⁴ Ibid. 44.

though not all schools agree on successive amputations. Further, amputations maximise the deterrent effect - particularly as they are carried out in public - and are thought to have a greater impact on the obedient and the disobedient than the death penalty, fundamentally as a result of the criminal's mutilated limb visible in society as a reminder to potential offenders of what punishments lie ahead.¹³⁵

The matter of Shari'a punishments will be taken up again in Chapter Seven when Judaic Criminal Law will be explored in the context of a traditional religious law, akin to Islam, that has succeeded in reformulating its criminal provisions so that it retains its core principles, but, through a contextualising process, conditions the application of the criminal laws to fit the moral demands of contemporary society. For the purposes of this chapter it is sufficient to note that the punishments of Islamic Criminal Law were no different to alternative criminal laws that coexisted contemporaneously with it in the seventh century, given the societal norms and threats that required to be protected against.

4 The Islamic Penal and Judicial System

Having to this point detailed the body of Islamic Criminal Law and signalled it as a creature of its time, this section now aims to address the complexities of the scheme in order to illuminate the Islamic Criminal Law as something that was not simply a list of harsh punishments. The criminal law of the *Shari'a* is a body of law with the full support of both a complex structure that includes punishment as only one minimal element in a much broader scheme that has, as its greater focus, the matter of moral guidance. In addition, this minimal element of criminal provisions was also exposed to the hurdles of criminal justice protections that it was compelled to negotiate before any such punishments could be eventually carried out.

4.1 The Penal Structure

The supreme purpose of punishment in Islam is to secure the welfare of humanity by establishing a righteous society that allows a person to fulfil his every spiritual, intellectual, and material need and cultivate every aspect of his being.¹³⁶ The *Qur'an* at 57:25 states "*We have sent our Messengers with clear signs and have sent down with*

¹³⁵ Hisham M. Ramadan, *Islamic Law: From Classical to Contemporary* (Rowman Altamira 2006) 58.

¹³⁶ Al-Muala (n8).

them the book and the criterion so that man can establish justice. And we sent down iron of great strength and many benefits for man...”.¹³⁷ It further states at 4:26-28

“God wants to make things clear for you and to guide you to the ways of those before you and to forgive you. God is the all-knowing, the Wise. God wants to forgive you and wants those who follow their desires to turn wholeheartedly towards (what is right). God wants to lighten your burdens, and He has created man weak”.¹³⁸

Finally, at 16:90 it states *“God commands justice, righteousness, and spending on one’s relatives, and prohibits licentiousness, wrongdoing, and injustice...”.¹³⁹ As such a righteous society is built upon the goals, objectives and pillars of Islam it is a natural consequence that the penal system in Islam is constructed with those elements at its core. The three broad goals of Islam we recall are the nurturing and development of the righteous individual, the establishment of justice and the realisation of benefit (in the public interest).¹⁴⁰ The establishment of justice is clearly operational from the basic rights and guarantees for the accused, whilst the nurturing and development of the righteous individual and the realisation of benefit for the community as a whole, can be vividly observed via the various elements of the penal system. These goals of Islamic *Shari’a* are achieved through cognition of, and adherence to, those aspects of Islam and Islamic Law that promote its five objectives and the penal system is one component of *Shari’a* that is intensely focussed on those objectives. We recall these objectives are the preservation of religion, life, progeny, mind, and property.¹⁴¹*

In order to preserve the objectives of Islam, three mechanisms are utilised, namely, Islamic conscience, severe punishment and economic reform, further assisted by the Pillars of Islam, those being *shahada*, *salat*, *sawm*, *hajj* and *zakat*.¹⁴² Looking closely at each of the three mechanisms, each is designed to achieve a certain end - those ends being the reduction of crime, the reduction of the causes of crime and the reduction of recidivism. The focus on the Islamic conscience is a means to the end of reducing crime.

¹³⁷ Holy Qur’an, Surah Al-Hadid 57:25.

¹³⁸ Holy Qur’an, Surah An-Nisa 4:26-28.

¹³⁹ Holy Qur’an, Surah An-Nahl 16:90.

¹⁴⁰ For further discussion on the Goals of Islam see Chapter One.

¹⁴¹ For a more informed discussion on the Objectives of Islamic Law see Chapter One.

¹⁴² For a more informed discussion on the Pillars of Islam see Chapter One.

Such conscience is heavily influenced by the family setting, the educational system, the media and the moral environment of the community.¹⁴³ The theory is that the principles and values Islam promotes are absorbed inwardly thereby instilling in the individual a deeper spiritual understanding leading him or her away from vice and closer to virtue. With the absence of anything that could be described as a police force, the awareness that Allah is all-seeing and all-hearing metaphorically polices that conscience and combined, the internal values and awareness operate to prevent involvement in unlawful behaviour.

The focus on severe punishment is a means to the end of reducing recidivism, the theory being that if the punishment is harsh enough it will deter those punished from reoffending, and those who witness it, from offending at all. The focus on economic reform is a means to the end of reducing the causes of crime. *Zakat* is a tax paid by Muslims annually, the rate of which is often set individually¹⁴⁴ and is an attempt to distribute wealth more evenly through this economic reform.¹⁴⁵ As poverty has historically been a strong contributing factor to criminal involvement, the Prophet sought to alleviate this via tax contributions to aid the poor in order to improve their positions and conditions in life. This removed any underlying material need to engage in criminal behaviour and remove any tendency towards crime in general as the financial life supports were provided both morally and legally.

The mechanisms of Islamic conscience and severe punishment are utilised in the preservation of all *maqasid al-Shari'a*, or, objectives of Islamic Law, with severe punishment being implemented either via the technique of *hadd* or *qisas* depending upon the crime.¹⁴⁶ Observance of the Pillars of Islam complements the mechanisms of Islamic conscience and severe punishment with regard to the protection of religion and the

¹⁴³ Hakeem (n14) 11.

¹⁴⁴ Holy Qur'an, Sura Al-Isra 17:29 reveals "And neither allow thy hand to remain shackled to thy neck," nor stretch it forth to the utmost limit [of thy capacity], lest thou find thyself blamed [by thy dependents], or even destitute". A rate of 2.5% is common though this is of no theological significance.

¹⁴⁵ Hakeem (n14) 11.

¹⁴⁶ Whilst the protection of life is generally thought of in terms of punishment for murder we note here that murder or physical injury is a *qisas* crime between men, not a *hadd* crime prescribed by God. However, the protection of life as an objective remains protected via the technique of *hadd* as both *shurb al-khamr* and *hiraba* are considered to be violations of all five objectives. Therefore, though each *hadd* crime corresponds with an objective, *qisas* also plays a role in the protection of life.

protection of family or progeny. Economic reform via the conduit of payment of *zakat* complements those same mechanisms in the protection of property.¹⁴⁷

In setting out the objectives of the penal system we reaffirm the quintessential objective of the *Shari'a* that the will of God is fulfilled. Any further objectives arise only from subsequent human analysis and it is only from this human analysis that three main objectives of the Islamic Penal System are identifiable. These objectives are the protection of society from the dangers of crime, reformation of the criminal, and punishment as a recompense for the crime.¹⁴⁸ Regarding the protection of society from the dangers of crime, Islamic Law, as above, imposes serious punishments on the basis of deterrence. The *Qur'an* at 2:179 states “*There is (preservation of) life for you in retribution, O people of understanding, that you may become pious*”.¹⁴⁹ The *Qur'anic* obligation to publicly announce the punishment and to proceed to carry the punishment out in public with witnesses¹⁵⁰ propounds the notion of deterrence on the basis that those who personally witness the execution of the punishment will be further deterred from criminal behaviour. The overall desired effect is a reduction in crime and therefore a more peaceful and secure society.

Regarding the second objective of reforming the criminal we recall the *Qur'anic* focus on repentance which can theoretically, in certain circumstances, waive a fixed punishment.¹⁵¹ The *Qur'an* permits forgiveness of highway robbery at 5:34 – “....except for those who repent when you take hold of them, then know that God is the forgiving, most merciful”.¹⁵² The *Qur'an* further permits forgiveness of zina at 4:16 – “If they both repent and mend their ways, then leave them alone. Verily, God is the acceptor of repentance, the merciful”.¹⁵³ It similarly forgives theft at 5:39 – “Whoever repents after his wrongdoing and makes amends, then verily God will accept his repentance and verily God is the forgiving, the merciful”.¹⁵⁴ Whilst theoretically legally permissible, we do recall the Prophet's tradition that whatever makes its way to him must be punished.

¹⁴⁷ Hakeem (n14) 11.

¹⁴⁸ Al-Muala (n8).

¹⁴⁹ Holy Qur'an, Surah Al-Baqarah 2:179.

¹⁵⁰ Holy Qur'an, Surah An-Nur 24:2 “..And a group of believers should witness the punishment”.

¹⁵¹ Al-Muala (n8).

¹⁵² Holy Qur'an, Surah Al-Ma'idah 5:34.

¹⁵³ Holy Qur'an, Surah An-Nisa 4:16.

¹⁵⁴ Holy Qur'an, Surah Al-Ma'idah 5:39.

Accordingly, we see this repentance being taken into consideration more within the discretionary category of crimes (*ta'zir*) where the judge is obliged to consider what is best for the betterment of the criminal.¹⁵⁵

Finally, the third objective that the punishment should be a recompense for the crime comes into play where there is no repentance. He who chooses the path of evil as opposed to the favoured path of righteousness and threatens the security of society with his criminal actions should receive just recompense.¹⁵⁶ At 5:33 the *Qur'an* states

*“The recompense for those who wage violent transgression against God and His Messenger and who go forth spreading corruption in the Earth is that they should be killed or crucified or that their hands and feet should be cut off on alternate sides or that they should be sent into exile...”*¹⁵⁷

Further at 5:38 it states *“The thieves, male and female, cut off their hands as a recompense for what they have earned...”*¹⁵⁸

From the foregoing, three distinguishing features of the Islamic Penal System are illuminated clearly. Firstly, there is a return to the notion that law and religion are inseparable in Islam, the doctrine of *tawhid*, or the oneness of God. This is evidenced in the descriptions of the mechanisms and techniques of the penal scheme where they show a symbiotic relationship between law and religion, social security and faith, and, deterrence from crime and righteousness. The second distinguishing feature is that of how Islam invokes emotion to achieve its ends, promising success and salvation for the righteous and warning wrongdoers of an evil fate. It encourages criminals to renounce their ways in hope of divine mercy and in fear of divine punishment.¹⁵⁹ The third distinguishing feature of the penal system is its balanced outlook on the individual and society. Whilst the penal system protects and promotes a faithful community it simultaneously protects the individual by providing safeguards to leave no reason for

¹⁵⁵ Al-Muala (n8).

¹⁵⁶ Abdurrahman al-Muala 'Forms of Punishment in Islam'

<<http://www.islamreligion.com/articles/253/crime-and-punishment-in-islam-part-2/>> accessed 1 August 2016.

¹⁵⁷ Holy Qur'an, Surah Al-Ma'idah 5:33.

¹⁵⁸ Ibid 5:38

¹⁵⁹ Al-Muala (n156).

engaging in criminal behaviour and by offering opportunities to repent, with recourse to punishment as a last resort only.¹⁶⁰

4.2 Extent to Which IHR and *Shari'a* Criminal Law are Compatible

As the *ummah* expanded, a uniform approach to application of the criminal law was complicated by the fragmentation of Islamic society and the cultures of the countries Islam had spread to. Prevailing legal systems varied and aside from the rigid primary source provisions, the balance of the criminal law including procedures, evidence and punishments all adapted to local practices.¹⁶¹ Despite the evolutionary difficulties in attempting the fair application of Islamic Criminal Law, the concept of fairness and justice is fundamental to Islam and it was therefore only a matter of course that principles of justice developed in line with the law.¹⁶²

The concept of justice is an inherent part of Islamic Criminal Law and was revealed to the Prophet in the very early days of Islam.¹⁶³ The phrase ‘justice and equality’ – *al quest* - is reportedly mentioned sixteen times throughout the text of the *Qur'an*.¹⁶⁴ Indeed, Islamic *Shari'a* was quite before its time in its recognition of rights¹⁶⁵ and encompassed all the basic principles and guarantees of criminal justice before any other modern criminal justice systems.¹⁶⁶ The *Qur'an* at 21:42 states:

“On the day of judgment we shall set up scales of justice so that no one will be dealt unjustly in any way; even if someone has an act as small as a grain of master seed we will bring it to account and sufficient are we to settle the accounts”,

Whilst at 4:135 it states:

¹⁶⁰ Ibid.

¹⁶¹ Bassiouni (n23) 121.

¹⁶² Chapter Five details the concept of justice in Islam.

¹⁶³ Shahid M. Shahidullah, *Comparative Criminal Justice Systems: Global and Local Perspectives* (Jones & Bartlett Publishers 2012) 377.

¹⁶⁴ Al-Saleh (n118) 55-80.

¹⁶⁵ These were mostly articulated in the language of duties. See Chapter Five for a detailed discussion of rights and duties language.

¹⁶⁶ Hussein (n21) 35.

“O believers, stand firm for justice and bear true witness for the sake of Allah, even though it be against yourselves, your parents or your relatives. It does not matter whether the party is rich or poor”,

and at 5:41-43 it states *“If you do act as judge, judge.... with fairness, for Allah loves those who judge with fairness”*.

Central to this concept of justice in the *Qur'an* are the notions of fairness, equality, evidence, repentance, forgiveness and confession together with derivative notions of protection of the rights of privacy and protection of the rights of the vulnerable.¹⁶⁷ Indeed, the concepts of repentance, forgiveness and confession are more central than the infliction of punishment.¹⁶⁸ The *Qur'an* at 5:38-40 reads

“male or female, whoever is guilty of theft, cut off the hand of either of them as a punishment for their crime – this is exemplary punishment ordained by Allah..... But whoever repents after committing the crime and reforms his conduct – Allah will surely turn to him with forgiveness”,

whilst at 4:110 it reads *“And whoever does a wrong or wrongs himself but then seeks forgiveness of Allah will find Allah forgiving and merciful”*.

It is via these concepts in both the *Qur'an* and the *Sunnah* that procedural rules of criminal justice evolved.¹⁶⁹ If we look at criminal procedures chronologically and identify the four stages, i.e. investigation, prosecution, adjudication, and imprisonment, it becomes clear that the *Qur'an* provided for protections for the accused at each of these stages of the criminal process. The principle of honouring privacy and human dignity limits investigation techniques: *“Enter not houses other than your own, until you have asked permission and saluted those in them,”*¹⁷⁰ and *“spy not on each other”*.¹⁷¹ Further, the *Sunnah* carries reports of the second Rightly Guided Caliph ‘Umar’ declining to

¹⁶⁷ Abdul-Rahman al-Sheha, *Human Rights in Islam and Common Misconceptions* (Conveying Islamic Message Society 2007) 7.

¹⁶⁸ Shahidullah (n163) 379.

¹⁶⁹ Ibid 376.

¹⁷⁰ Holy Qur'an, Surah An-Nur 24:27.

¹⁷¹ Holy Qur'an, Surah Al-Hujurat 49:12.

pursue wrongdoings he witnessed whilst in a house that he did not seek permission to enter.¹⁷² At prosecution stage there are protections for the accused in the form of *Sunnah* reports evidencing the Prophet's reluctance to punish *hudud* offences - the most prominent being when he turned away from Ma'iz who impressed his confession on the Prophet on the advice of others despite the Prophet turning away from him to avoid hearing it.¹⁷³ A further attempt by the Prophet to promote the avoidance of prosecution is evident when he said "*Forgive the hudud in what is your own affair, for whatever hadd reaches me is obligatory*".¹⁷⁴

At the adjudication stage the principle of avoiding the *hudud* in cases of doubt (*shubha*) protects the accused and impels a host of procedural obstacles such as legal presumptions, testimonial hurdles or rules of evidence.¹⁷⁵ Finally, at the punishment stage protections are there for those who are imprisoned with an extraordinary precedent for *habeus corpus*. In Hanaf'i jurisprudence al Khassaf apparently included in his rules for judges the duty, upon assuming office, of visiting every detained person and speaking to them personally about their incarceration. If a prisoner believed he was being wrongly detained it was the *qadi's* responsibility to investigate the matter further.¹⁷⁶ Accordingly, from the simple broad statements of the *Qur'an* and the elaborations in the *Sunnah* the notion of criminal justice and individual protections for the accused are quite well established in classical Islamic Law.

Amongst the most important characteristics of Islamic criminal justice are its integrity, its simplicity, its prohibition on whatever is acquired through injustice, its conferring of rights, and, its tendency to enhance and complement secondary laws based on the revelation.¹⁷⁷ This can be seen from the most prominent of the basic principles and guarantees of justice in the *Shari'a* which include: the principle of guilt (criminal responsibility), the principle of legality, the presumption of innocence, equality before the

¹⁷² Sadiq Reza, 'Islam's Fourth Amendment: Search and Seizure in Islamic Doctrine and Muslim Practice', (2008) 40 Georgetown Journal of International Law 725-27.

¹⁷³ *Sunnah*, Sahih Al Bukhari Hadith No. 6824.

¹⁷⁴ *Sunnah*, Abu Dawud, Hadith No. 4376.

¹⁷⁵ Sadiq Reza, 'Due Process in Islamic Criminal Law' (2007) 46(1) George Washington International Law Review 21.

¹⁷⁶ Iman Khassaf, *Adab Al-Qadi (Rules for the Judge)* (Adam Publishers & Distributors 2005) 128-139. See also Safraz Bacchus, *The Concept of Justice in Islam* (Friesen Press 2014) 37.

¹⁷⁷ Mehemeed (n6) 29.

law, the right to human dignity, and defence rights, all of which are represented within IHR Law.

4.2.1 Criminal Responsibility

Criminal responsibility under Islamic Law will only attach if the individual has committed the illegal actions himself. This is clearly set out in the *Qur'an* at 6:164 “Every soul draws the meed of its acts on none but itself; no bearer of burdens may bear the burden of another”.¹⁷⁸ This principle of guilt is an inherent element of Islamic criminal justice with its roots in the Prophet’s attempt to stem the practices of *Jahiliyyah* when retaliation was not just against the culprit but against his family and tribe. The Prophet restricted the barbarism by limiting the responsibility to the persons who committed the crime.¹⁷⁹ Therefore, in Islamic Law no criminal responsibility can attach for the actions of another with very few exceptions.

The first exception is an individual’s role in aiding a crime;¹⁸⁰ the second is the Islamic equivalent of the common law chain of causation argument;¹⁸¹ and the third is the responsibility that attaches to the male relatives of the criminal in cases of negligent homicide and negligent bodily harm. This last exception arises where the *aqila* or male relatives of a family retain responsibility for *diya* or compensation in cases of unintentional homicide. Whilst it is purported that this is a duty based on family solidarity in Islam rather than a punishment for involvement in criminal activity¹⁸² it is noted that in the time of Umar even work colleagues comprised the *aqila* leading to the observation that its proper purpose is co-operation and support in respect of unintended

¹⁷⁸ Holy Qur’an, Surah Al-Isra 17:15 “Who receiveth guidance, receiveth it for his own benefit: Who goeth astray doth so to his own loss. No bearer of burdens can bear the burden of another...”.

Holy Qur’an, Surah Fatir 35:18. “Nor can the bearer of burdens bear another’s burden. If one heavily laden should call another to bear his load, not the least portion of it can be carried out, even though he be nearly related”. Holy Qur’an, Surah Fussilat 41:46. “Whoever works righteousness benefits his own soul, whoever works evil, it is against his own soul; nor is thy lord even unjust to his servants”. Sunnah, Abu Dawud, Hadith No. 4495.: “A soul is not held responsible for acts committed by his father or his brother”. See also Abdelwahab Bouhdiba, Muḥammad Ma’ruf Dawalibi, *The Individual and Society in Islam* (UNESCO 1998) 8.

¹⁷⁹ Sylvia Tellenbach, ‘Fair Trial Guarantees in Criminal Proceedings Under Islamic, Afghan Constitutional and International Law’ (2004) 64 Heidelberg Journal of International Law 933.

¹⁸⁰ Sylvia Tellenbach, ‘Islamic Criminal Law’ in Markus D. Dubber and Tatjana Hornle (eds) *The Oxford Handbook of Criminal Law* (Oxford University Publications 2014) 572.

¹⁸¹ Hiroyuki Yanagihashi ‘Socio-Economic Justice’ in Peri Bearman and Rudolph peters (eds), *The Ashgate Research Companion to Islamic Law* (Routledge 2016) 159. The Hanafi school restricts the chain of causation moreso than the other major *madhahib*.

¹⁸² Tellenbach, (n179) 931.

crime¹⁸³ - this is why no such responsibility arises for the *aqila* in cases of intentional homicide.

Qualifications on criminal responsibility provide for three exemptions: a child who has not reached puberty, an insane person until he becomes sane, and a sleeping person.¹⁸⁴ The age of criminal responsibility is not clear cut. The *Qur'an*, as before, gives loose guidance only,¹⁸⁵ indicating a combination of both puberty and perception of accountability. *Madhahib* differ on their considerations here. Jurists in general set the age of puberty at fifteen as the stages of childhood development run in seven year cycles.¹⁸⁶ Hanafi and Maliki jurists agree on the age of eighteen for the third stage of childhood development (*balig wa rashid*) from which stage the child is considered to know right from wrong and be criminally accountable for all categories of offence.¹⁸⁷ Abu Hanifa however lowers the age for girls to 17. The changes in age in more modern times are often the result of regime change and the modernist/fundamentalist divide.¹⁸⁸ More modern texts provide for further exemptions and justified defences including intoxication, necessity, duress, and self-defence.¹⁸⁹

¹⁸³ Mohammad Hashim Kamali, 'The Right to Personal Safety and the Principle of Legality in Islamic Shari'a' (2000) 39(2) *Islamic Studies* 262.

¹⁸⁴ Arif Ali Khan, Tauqir Mohammad Khan, *Encyclopedia of Islamic Law: Islamic Criminal Law* (Pentagon Press 2006) 121.

¹⁸⁵ Holy Qur'an, Sura An-Nisa 4:6. 'And test the orphans in your charge until they reach a marriageable age; then, if you find them to be mature of mind, hand over to them their possession and do not consume them by wasteful spending, and in haste ere they grow up'.

¹⁸⁶ Valentina Picciotto and Ardeshtir Atai, 'Criminal Law and the Rights of the Child: A Training Workshop Summary Paper' (British Institute of International and Comparative Law 2010) 2. 'Under Islamic Criminal Law, various stages of development are differentiated. The first stage, known as *sabiyy ghar mumayyiz* (meaning a child incapable to understand), spans from birth until the age of seven. The second stage, known as *sabiyy mummyyiz* (meaning a child with weak understanding), applies to individuals aged seven to fifteen. Thereafter, a person is in the third stage and is considered an adult with full understanding, i.e. *balig wa rashid*. Therefore, the age of criminal responsibility under Islamic Law is associated with a child's attainment of puberty, along with his or her capability of complete understanding'.

¹⁸⁷ Nisrine Abiad and Fakhanda Zia Mansoor *Criminal Law and the Rights of the Child in Muslim States: A Comparative and Analytical Perspective* (British Institute of International and Comparative Law 2010) 62.

¹⁸⁸ The CRIN (Child Rights International Network) have compiled a list of minimum ages of criminal responsibility for Asian countries. Some Muslim states have the threshold age as low as nine for girls – Pakistan states the appropriate age is seven. The Hudood Ordinances state liability for hudood punishments begins at the age of menstruation – attainment of the third stage of childhood development doesn't appear to have factored. Whilst the Pakistan Penal code states age seven (Ss 82-83), the Hudood Ordinances which override the PPC state children of all ages are responsible - technically putting the age of criminal responsibility at birth <<https://www.crin.org/en/home/ages/asia>> accessed 10 June 2016.

¹⁸⁹ Khalid A. Owaydhah, 'Justifications and Concept of Criminal Liability' in the Shari'a (2014) 3(2) *Humanities and Social Sciences Review* 55.

In International Human Rights Law, criminal responsibility arises at Article 11 of the UDHR.¹⁹⁰ This provides that an individual is presumed innocent until proven guilty ensuring criminal responsibility does not attach unless it is so proven in a court of law. As with Islam, there are circumstances that will exempt the accused from criminal responsibility. Whilst there is potential for variance here, all states will incorporate an age of criminal responsibility. The Convention on the Rights of the Child indicates that all states must set an age of criminal responsibility taking various factors into consideration,¹⁹¹ however, the recommendations of UNICEF are that the minimum age of criminal responsibility should be above the age of fourteen, and that those entering the criminal justice system below the age of eighteen should enjoy the protections of a juvenile justice scheme in line with international standards.¹⁹²

4.2.2 Principle of Legality

In essence this principle provides that no person can be punished for a crime that did not exist at the time of commission of the action. The principle of legality has a dual purpose with both protection against the abuse of power and security of the individual at its core.¹⁹³ In western societies we have established both the separation of church and state and the separation of powers that, combined, endorse and promote the legality principle. However, as the Prophet's actions incorporated all three branches of this tripartite system, Islamic Law does not therefore demand nor require similar independent entities, nor does it entertain secularism. Regardless, the principle of legality, incorporating the principle of non-retroactivity is a *qa'ida usuliyya* or basic principle of Islamic Law which has quite an established basis in the *Qur'an*.

Hudud and *qisas* offences represent the strictest and most stringent application of the principle of legality that has ever existed in human history.¹⁹⁴ The *Qur'an* at 7:15 states

¹⁹⁰ Universal Declaration of Human Rights (UDHR) Article 11.1 'Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law at a public trial at which he has had all the guarantees necessary for his defence' <<https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>> accessed 22 August 2017.

¹⁹¹ UN Convention on the Rights of the Child Article 40.3(a).

¹⁹² UNICEF 'Legal Minimum Ages and the Realisation of Adolescents' Rights' <https://www.unicef.org/lac/sites/unicef.org/lac/files/2018-07/20170111_UNICEF_LACRO_Min_age_ENG%281%29_0.pdf> accessed 20 July 2021.

¹⁹³ Tellenbach (n179) 930.

¹⁹⁴ Hussein (n21) 38.

*‘Be thou among those who have respite’.*¹⁹⁵ At 17:5 the *Qur’an* states: “We never punish until we have sent a messenger”, at 5:95 it states “Allah forgiveth whatever may have happened in the past, but who so relapseth, Allah will take retribution for him”, at 28:59 it states “Nor was thy Lord the one to destroy a population until he had sent to its centre a messenger, rehearsing to them our signs...”, at 4:165 “Messengers who gave good news as well as warning, that mankind after (the coming) of the messengers, should have no plea against Allah...”, at 8:38 it states “...If now they desist their past would be forgiven them; but if they persist the punishment of those before them is already a matter of warning for them”, and finally at 6:19 “What thing is most weighty in evidence?.... Say: The *Qur’an* hath been revealed to me by inspiration, that I may warn you and all whom it reaches...”. All of these *Qur’anic* provisions centre around the legality principle and its internal component of non-retroactivity.¹⁹⁶

One proviso does occur with the principle of legality in Islamic Law in relation to the *ta’zir* category of crimes. As no fixed punishment is set out in the *Qur’an* as it is for *hadd* and *qisas* crimes,¹⁹⁷ and the matter is left as a discretionary one for the judge, there is the issue of whether the crime is explicitly stated. “And let there be from you a nation who invite to goodness and enjoin right conduct and forbid indecency” at 3:104 is often quoted to give legitimacy to the principle of legality regarding *taz’ir* crimes, though it is argued this *ayat* is too vague and cannot reach the standard of precision the principle of legality demands.¹⁹⁸ Solutions have come in the form of modern codification but discretion remains a judicial power for *taz’ir* crimes not already contained within a code.

The principle of legality is a well-grounded general principle in IHR Law but - *‘nulleum crimen sine lege, nulla poena sine lege’* – has no direct translation in Islam.¹⁹⁹ The principle, though stated at Article 11.2 of the UDHR is given greater emphasis in the ICCPR at Article 15.1.²⁰⁰

¹⁹⁵ Bassiouni (n23) 126. Ali translation of this statement states that the accused must have been given the opportunity to know the law and thus, no punishment can be imposed without prior law.

¹⁹⁶ Kamali, (n183) 269; Mohammad Salim al-‘Awwa ‘The Basis of Islamic Penal Legislation’ in M. Cherif Bassiouni (ed) *The Islamic Criminal Justice System* (Oceana Publications 1982) 134.

¹⁹⁷ See 3 for classification of Crimes.

¹⁹⁸ Tellenbach (n179) 931.

¹⁹⁹ Ibid.

²⁰⁰ International Covenant on Civil and Political Rights (ICCPR) Art 15.1: No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed

4.2.3 Presumption of Innocence

The Presumption of Innocence is a natural consequence of the principle of legality and has a strong grounding in Islamic Law with a number of *ahadith* supporting the principle - not without disregard to the fixed penalty classification of crimes and their irreversible nature. Al Baihagi states “*Had men been believing only according to their allegations, some persons would have claimed the blood and properties belonging to others, but the accuser is bound to present positive proof*”.²⁰¹ The Prophet’s farewell sermon includes “*Your lives, your property and your honour are a sacred trust upon you until you meet your lord on the day of resurrection*”.²⁰² Al Baihagi also states “*Avoid condemning the muslim to hudud whenever you can, and when you can find a way out for the Muslim then release him for it. If the Imam errs it is better that he errs in favour of innocence than in favour of guilt*”.²⁰³ On the basis of *istishab*²⁰⁴ there is also that inference that what has existed continues until the contrary is proven. As man is regarded as originally innocent and pure, and *istishab* holds him innocent until proven otherwise.²⁰⁵ Moreover, the principle of *shubha* further enshrines the presumption of innocence. Akin to the benefit of doubt, *shubha* or resemblance, refers to ambiguity on the basis of illegal acts resembling legal ones and the difference between them not capable of being sufficiently proven - misconception essentially.²⁰⁶ In general, it is accepted that *shubha* applies to *hadd* and *qisas* crimes but not to *ta’zir*.²⁰⁷ In IHRL the presumption of innocence is stated at Article 11.1 and is restated in greater details at Article 14(2) of the ICCPR.²⁰⁸

than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby. <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> accessed 20 August 2017.

²⁰¹ M. Cherif Bassiouni, ‘Islamic Law – The Shari’a’ <<https://www.mei.edu/publications/islamic-law-shariah>> Accessed 20 July, 2021.

²⁰² Al-Saleh (n118) 67. See generally Tariq Ramadan, *In the Footsteps of the Prophet: Lessons for the Life of Mohammad* (Oxford University Press 2007); Karen Armstrong, *Mohammad: A Biography of the Prophet* (Phoenix 2001); Javeed Akhter. *The Seven Phases of Mohammad’s Life* (International Strategy and Policy Institute 2002).

²⁰³ Bassiouni (n201).

²⁰⁴ For further discussion on supplemental sources see Chapter One.

²⁰⁵ Hussein (n21) 45.

²⁰⁶ Luqman Zakariyah, *Legal Maxims in Islamic Criminal Law: Theory and Applications* (Brill 2015) 101. Mahmoud Ismail Saleh, *Dictionary of Islamic Words and Expressions* (Darussalam 2011) 218.

²⁰⁷ Al-‘Awwa (n196) 146.

²⁰⁸ ICCPR (n200) Art. 14(2): Everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to the law.

4.2.4 Equality Before the Law

In Islamic Law the principle of equality before the law is grounded in the *Qur'an* at 4:1 and 49:13. 4:1 states

“O mankind! Reverence your guardian lord who created you from a single person, created, of like nature, his mate and from them twain scattered like seeds countless men and women; -reverence Allah, through who ye demand your mutual rights, and reverence the wombs that bore you: for Allah ever watches over you”.

49:13 states *“Oh mankind we created you from a single pair of a male and a female and made you into nations and tribes that ye may know each other, not that ye may despise each other....”.*

Further, in his farewell sermon the Prophet stated *“Oh mankind you worship the same God, you have the same father. The Arab is not more worthy than the Persian and the red is not more deserving than the black except in Godliness”.*²⁰⁹ The second Caliph Umar in his first public announcement stated *“O people I swear by God that there is no man among you as powerful as he who is helpless until I restore his rights to him, and there is no man amongst you as helpless as he who is powerful until I restore what he had usurped to its rightful owner”.*²¹⁰

Despite these strong assertions as to equality before the law it should be noted that aspects of Islamic Law would suggest otherwise, such as that of the woman inheriting half a man's share, a woman's evidence worth half that of a man, or the lesser number of rights attaching to slaves.²¹¹ However, as noted above, when we discuss classical Islamic Law we are mindful of its temporal context and the absence of rights for these groups in society before the Prophet acknowledged them as deserving inclusions of humankind and began introducing the idea of attributing rights to them. We must also be mindful of the proviso on adopting legislation subject to the legitimate distinctions made pursuant to the

²⁰⁹ Bassiouni (n23) 129

²¹⁰ Ahmed Akgunduz, *Islamic Public Law: Documents on Practice from the Ottoman Archives* (IUR Press 2011) 41.

²¹¹ Yanagihashi (n181) 130.

need to preserve Islam.²¹² In IHR Law, equality before the law is stated at Article 10 of the UDHR²¹³ and in greater detail at Article 26 of the ICCPR.²¹⁴

4.2.5 Human Dignity

The *Qur'an* at ayat 17:70 reads “We have honoured the sons of Adam, 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”. At ayat 38:71-5 the revelation reads

“Behold!, the Lord said to the angels. I am about to create man from clay: When I have fashioned him in due proportion and breathed into him of My spirit, fall ye down in obeisance to him. Not so Iblis, he became one of those who reject faith. God said O Iblis, What prevents thee from prostrating thyself to one whom I have created with My hands? Art thou haughty? Or art thou one of the high ones?”

Further, at ayat 49.11 the *Qur'an* reads:

“O you who believe, men should not laugh at other men for it may be that they are better than them; and women should not laugh at other women for they may perhaps be better than them. Do not defame one another nor give one another nick names. After believing it is bad to give another a bad name. Those who do not repent behave wickedly.”

From these verses the clarity of both the value Mohammad intended to attach to the inherent honour and dignity of man, and the respect every man deserves from another, is indubitable. As man was created by God he is therefore a divine creation worthy of the protections conferred on him from above, so much so that the violation of the principle of integrity is in itself a crime. That is, under Islamic Law, if it is proved that a person has

²¹² Bassiouni (n23) 130.

²¹³ UDHR (n190) Article 10, ‘Everyone is entitled, in full equality, to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations, and of any criminal charge against him’.

²¹⁴ ICCPR (n200) Art. 26: ‘All persons are equal before the law, and are entitled without any discrimination to the equal protection of the law. In this respect the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’.

attacked the honour of another, then irrespective of whether the victim is able to prove himself a respectable and honourable person, the culprit will be punished.²¹⁵ In translating *Qur'anic* descriptions into rights such *ayats* as those above are the basis for the protection of a man's dignity, and, consequentially his privacy, amounting to the proscriptions on numerous actions of the authorities including arbitrary arrest and detention, spying, the application of duress, coercion or torture and other forms of interference in the private life of an individual. Any attempt to obtain evidence through any of the foregoing breaches of human dignity is illegally obtained, and, the benefits from same do not justify nor compensate for the injuries resulting from such a sacrifice of the most basic of human rights.²¹⁶

Where IHRL is concerned, human dignity is a core principle of the entire scheme upon which all rights are grounded and is clearly stated in the preamble to the UDHR.²¹⁷ Chapter Five will address human dignity in detail and comparatively analyse the concepts in both IHR and Islam.

4.2.6 Defence Rights

Defence rights evident in most modern criminal justice systems of the world are also present in Islamic criminal justice. The references to justice in the *Qur'an* and the *Sunnah* are the basis for most, if not all protections in Islamic criminal justice but in particular the following are those commonly quoted to support the array of defence rights: *Qur'an* 4:58:

*“God doth command you to render your trusts to those to whom they are due; and when ye judge between man and man, that ye judge with justice: Verily how excellent is the teaching which He giveth you! For God is He who heareth and seeth all things”.*²¹⁸

²¹⁵ Farhad Malekian, *Principles of Islamic International Criminal Law: A Comparative Search* (Brill 2011) 126.

²¹⁶ Adel Omar Sherif, ‘Generalities on Criminal Procedure’ in Mohammad Abdel Haleem, Adel Omar Sherif, Kate Daniels (eds) *Criminal Justice in Islam – Judicial Procedure in the Shari’a* (IB Taurus 2003) 8.

²¹⁷ UDHR (n190) Preamble, ¶ 1: Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.

²¹⁸ Holy Qur’an, Surah An-Nisa 4:58

At 5:8 the *Qur'an* reads:

*“O ye who believe stand out firmly for God as witnesses to fair dealing and let not the hatred of others make you swerve to wrong and depart from justice. Be just, for that is next to piety; and fear God. For God is well acquainted with all that ye do”.*²¹⁹

At 16:90 it reads *“God commands justice, the doing of good and liberality to kith and kin, and he forbids all shameful deeds and injustice and rebellion: he instructs you that ye may receive admonition”.*²²⁰ Finally, at 42:15 the revelation imposes an obligation directly upon the Prophet to judge justly – *“But say – I believe in the Book which God has sent down and I am commanded to judge justly between you”.*²²¹

These *ayats* substantiate defence rights such as the right to know the charges being made, the right to counsel, the right against self-incrimination, the right to speak or remain silent, the right to present evidence, the right to defend against any accusation, the right to legal advice, the right to an independent and impartial judge, the right to a public trial, the right to equal protection before the law and the right to a fair and speedy trial, amongst others. Defence rights were never considered separately in the *Qur'an*, nor were they in the early days of Islam; notwithstanding, these rights have not been found to be inconsistent in modern times and in formal court proceedings with any of the *Qur'anic* provisions; rather, they are perfectly in line with the concepts of justice and fairness revealed to the Prophet and elaborated on by him in his traditions. Defence rights in IHR are firstly set out at Article 10 UDHR²²² and further, and at length, at Article 14 of the ICCPR, particularly 14.3 to 14.7.²²³

²¹⁹ Holy Qur'an, Surah Al-Ma'idah 5:8.

²²⁰ Holy Qur'an, Surah An-Nahl 16:90.

²²¹ Holy Qur'an Surah Ash-Shuraa 42:15.

²²² UDHR (n190) Article 10.

²²³ ICCPR (n200) Article 14.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance

Generally, criminal justice in Islam reflects all those aspects of criminal justice recognised within IHR Law. Those not specifically addressed in the primary texts are caught under the umbrella of extensive provisions that promote justice and fairness both in the *Qur'an* and the *Sunnah* of the Prophet. Any discrepancies, for example perceived inequalities, must not fail to be considered in light of the temporal context of the revelations, the original position of vulnerable groups in society, and the importance of protecting a fledgling religious community against threats to its very existence. These conditions however were temporary. The world has moved on. Modern society largely views women as equal to men and slavery is long outlawed. Islam is a sizeable force internationally and is no longer in a position where its very existence hangs in the balance. In this sense, any discrepancies in the criminal justice provisions between IHR and Islam can be ironed out with a contextualised understanding of, or a modernist interpretation of Islamic Law.

5. Contradictions with Twenty First Century International Human Rights Law

This chapter has set out all of the relevant aspects of Islamic Criminal Law that impact the main thesis question - that question being 'why does the non-religious, western, secular world believe Islamic Criminal Law is not compatible with International Human Rights'? Of all the information detailed within this chapter, beginning with the specifics of crimes and punishments and their various understandings amongst the schools of

assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

thought, their rationalisation as methods of best protecting the *maqasid* in a tribal world, together with the presence of a contemporaneous scheme of Islamic criminal justice that ensured the dignity of the individual was respected at each stage of the criminal process, we can see that the entire body of Islamic Criminal Law sat comfortably within its seventh century landscape as a system of rules and punishments that reflected the norms of tribal society. Essentially, there weren't any aspects of Islamic Criminal Law that were problematic in their temporal context.

In the twenty first century however, the changed nature of society and its developed norms of acceptable social behaviour and methods of processing criminal behaviour have drastically changed from that of seventh century Arabia. Firstly, the secular world has sidelined God and relegated him to the private sphere of life on the reasoning that religious beliefs vary and could not therefore determine a set of protections applicable to all of humanity globally. International Human Rights and its inherence theory reflects this secular position. More than this, International Human Rights has developed to ensure that whilst the practice of religion is protected as a human right, it is qualified to the extent that whilst public morality may constitute grounds for the restriction of rights, religion cannot solely constitute public morality.

Secondly, the norms of twenty first century society dictate firstly that there are now social problems different to those of seventh century Arabia that constitute the greatest threats to society and so the categorisation of *hudud* as a static set of crimes that does not reflect this suggests an outdated scheme of perhaps irrelevant rules. For example, drinking alcohol and committing adultery whilst necessary to outlaw within the parameters of threats to Islam and vulnerable members of its community as a fledgling societal grouping in the seventh century, are not threats to society in this same way today and perhaps do not necessitate classification as the most serious set of unacceptable social behaviours attracting mandatory punishments.

Thirdly, with the development of police forces and the availability of prison facilities, the twenty first century rejects what was previously the norm but is now viewed as cruel and inhuman physical punishment. Harsh punishments in public are no longer required to serve the purpose of deterrence as there are ever present police forces whose sole purpose it is to remind society that they must obey the law. Harsh punishments in public for the

purposes of punishing the individual are also no longer required when prison facilities provide a humane alternative that does not inflict physical harm on the individual.

On this basis, there appear to be three interrelated aspects of Islamic Criminal Law that are problematic from an IHR perspective. First, as we have seen, the doctrine of *tawhid*, as addressed in Chapter One, dictates that every aspect and condition of human life comes from God and thus it is natural that the primary purpose of *Shari'a* criminal law is to further the will of God. On the other hand, as is discussed at Chapter 6, the UNHRC has rejected the idea that the values of a single religious tradition can form the whole of a nation's public morality. Secondly, and because of this, the types of action that, from an IHR perspective can legitimately be criminalised are those that have a negative impact on other individuals or society as a whole, whereas, in *Shari'a* it is enough, for an action to be a crime, that God commands that this be so.

Finally, the presence of God also has its impact on the suggested second problematic area of the draconian nature of the punishments. As these punishments are either divinely revealed or divinely inspired in the *Sunnah* of the Prophet, no human has the ability to alter the word of God and their mandatory nature is understood as precisely that. If IHR has developed according to the mores of a forward looking, progressive modern society that eschews brutality in favour of more socially acceptable humane punishment types such as incarceration, there is going to be friction between what is considered appropriate in the twenty first century and what God has revealed as the criminal rules for Islam that arose in the seventh century and are considered unchangeable. Equally, as is discussed in Chapter Seven, it is only when *Shari'a* is interpreted in a fundamentalist and literalist way that these concerns arise. In other words, it is perfectly possible to retain the spirit of the rules while rejecting the specific punishments that are prescribed for the crimes and that, arguably, are rooted in the needs and limitations of seventh century Arabian society.

6. Conclusion

Despite the view of *hudud* punishments as the divine word of God that is entirely unchangeable by humankind, there is great disagreement on the criminal rules between the *madhahib*, suggesting their meaning and application are open to interpretation. Additionally, the Islamic penal scheme is shown to have a far greater emphasis on moral

guidance with punishments acting as only a minimal component in a complicated structure but nonetheless supported by a body of criminal justice protections that have all the hallmarks of any body of criminal justice provisions today. Despite rationalising Islamic Criminal Law in this way and showing it to be a viable and valid scheme of criminal provisions and protections given a reformist interpretational approach, International Human Rights and Islamic Criminal Law nonetheless jar at two flashpoints of conflict – the matter of the presence of God, and, in the absence of consensus on interpretation, the harsh nature of the physical punishments.

The presence of God is problematic for IHR as it has relegated God to the private sphere of life and is an entirely secular moral edifice, whilst for Islam, the doctrine of *tawhid* dictates that all things without exception come from God and so the separation of God from certain aspects of human life is unthinkable. Regarding the issue of punishments, IHR developed in a forward looking, progressive and modern society where harsh physical punishments were not required in order to protect the values of society as more human methods of deterrence and punishment had developed, those being, policing and incarceration. In this sense, severe corporal punishment, understood as unchangeable as it is God's clear direction, jars with the moral rules of a secular scheme that has long employed more humane alternatives. The opposing natures of seventh and twenty first century punishments are a point of friction between IHR Law and Islamic Criminal Law.

Having now established at this mark in the thesis the validity of Islam as a legal system, and thus the validity and objectives of Islamic Criminal Law, Chapter Three has now brought Section One of this thesis to a close. Section Two will now divert to the representative organisations and an exploration of human rights values in the context of both IHR and Islam. The identification of the two issues causing most conflict will be reintroduced in Section Three.

PART TWO

Part Two comprises chapters four and five. It firstly identifies comparable rights instruments. These are generated by the international organisations representative of each world view, and established according to their respective impetuses that differ in historical circumstances and moral origins. It is here that the integrity of the International Human Rights claim to universal legitimacy is questioned. In looking to both the similarities and differences, an extensive comparative analysis then deciphers the presence or absence of an inherent incompatibility.

The outcome of this analysis is critical to the thesis question. International Human Rights claims incompatibility based on some Islamic crimes and punishments not aligning with modern penological principles that are sourced in modern human rights values. The penological principles of the criminal law of the *Shari'a* are sourced in Islamic human rights values. Accordingly, if the values are found to be compatible, with any distinctions non-fatal to that compatibility, this disproves the assertion of incompatibility and leads to a conclusion that there is nothing inherent that prevents the *values* and *concerns* underpinning Islamic Criminal Law being deemed compatible with the Universal Declaration of Human Rights

CHAPTER FOUR

INTERNATIONAL AND ISLAMIC PROTECTION OF HUMAN RIGHTS: COMPARATIVE ORGANISATIONS AND HUMAN RIGHTS DECLARATIONS

1. Introduction

The focus of this thesis is the perceived inherency of the clash between international human rights and Islamic Criminal Law. In this second section we move to consider whether this clash is actually inherent by considering the relationship between Islam and IHR generally.

Chapter Four seeks to explore the nature of the organisations that represent both the non-religious and Islamic value systems in the field of human rights law, and the instruments in which their protection of rights are promulgated, as this is the arena within which the clash between International Human Rights and Islam is now manifest. If, in other words, Islam and the International Bill of Rights are *inherently* incompatible, it would be logical to assume that this incompatibility would be evident within the instruments representing the organisations' values.

As such, Chapter Four will explore the characteristics of the United Nations (UN) and the Organisation of Islamic Co-operation (OIC) under two separate headings: the impetus for establishment and foundational values and precepts; and, the organisations' human rights instruments. In doing so we also consider the integrity of the UN claim to represent humanity in its global entirety. It is concluded that there are clear dividing lines between the two international organisations in terms of their approach to rights values and rights protections. Equally this by itself is not enough to demonstrate that Islam is *inherently* incompatible with IHR and thus in the second chapter of this section (Chapter Five) we address the extent to which the core values of the two ideologies either elide with, or are repugnant to each other.

2 International Organisations

International and Islamic Human Rights are represented by two organisations, namely the United Nations and the Organisation of Islamic Cooperation, the two largest international organisations in the world. The former now represents a non-religious moral standpoint on human rights law and the latter, a moral theological one. With approximately two billion Muslims in the world,¹ the Islamic standpoint is representative of about a quarter of the world population's approach to same, and the residue representative of the non-religious approach. Both organisations, in other words, have decidedly significant global influence. Both the Western and Islamic worlds underwent their own tragic histories from which transpired the establishment of their respective organisations. In turn, their histories prompted their agendas (manifesting as human rights instruments) and their agendas influence their approaches to matters of international concern. Consequently, the *raisons d'être*, foundational values, and human rights instruments differ for each system, highlighting any disparities between them.

A precursor of significance when accepting the narrative of one organisation as representative of the viewpoint of billions of people is the fact of diversity. In the Western world, diversity is quite visible, particularly considering the fact of popular democracy and freedom of assembly. There are a multitude of diverse perspectives within each western state of the non-religious world and to conclude a wholly unified viewpoint on such important cultural issues is not achievable within one state, and certainly not achievable across the entire Western world. The Islamic world is no different, and tremendously diverse.² Whilst all Muslims agree on the textual rules of the divine revelations, their interpretations differ depending on a multiplicity of factors including the Sunni/Shii'ah divide, prominence of particular *madhahib*, proximity to the Western world, nationality, the strength of the colonial legacy, the issue of poverty, secular education, governance type and many more. For these reasons, it is impossible to represent the viewpoint of each non-religious or Islamic community, thus, there must be resort to generalisations.

¹ [www.worldpopulationreview.com, <https://worldpopulationreview.com/countries/muslim-population-by-country/>](https://worldpopulationreview.com/countries/muslim-population-by-country/) accessed 20 July 2020.

² For a corrective insight on Islamic diversity see Ed Husain, *The House of Islam: A Global History* (Bloomsbury 2018).

Where the UN is concerned there is opportunity to enter reservations to elements of instruments or to fail to sign or ratify entire instruments given the fact of diversity, but the body of law is claimed to be generally representative of its member states, most significantly its Universal Declaration of Human Rights (UDHR). In the Islamic world there are two areas of common ground between OIC member states, namely, the classical position on Islamic values focussing on the sacred primary texts, and the Cairo Declaration of Human Rights in Islam (CDHRI). The CDHRI, with wide Islamic subscription, is similarly held to be generally representative of the Islamic world. Whilst there is no architecture in place for reservations as with IHR, the Declaration attempts to combine the idea of universal human rights with an insistence that they must be implemented in ways that respect local customs, including religious ones. The CDHRI is considered the most conclusive position of Muslim majority governments thus far.³ Where the common ground of classical Islam is concerned, this is so vast, and aged, that it does not lend itself to a ‘like with like’ comparison with the IHR scheme. The CDHRI on the other hand is contemporaneous with the UDHR and does so lend itself. Both are non-binding moral statements and these declarations will, for the purposes of this comparative analysis, form the focal point of the generalised values representative of each scheme of rights.

3 The United Nations

The discussion centred on the organisation that is the United Nations is undertaken with the goal of arriving at a clear understanding of what the organisation represents and whether that representation is indicative of what the UN claims it is indicative of – that is, an organisation representative of all peoples of all nations. In order to arrive at that end the factors that prompted its emergence and their impact on the moral values the scheme promotes, and, the value laden instruments of the organisation will be examined. An appraisal of the UDHR then ensues in an attempt to determine whether the declaration that purports to encompass the values of global humanity indeed does so, and, how that might impact its ability to claim true internationality.

³ Linda Hogan, *Keeping Faith with Human Rights* (Georgetown University Press 2015) 28.

3.1 Impetus, Establishment and Foundational Premises

The United Nations is the end-product of a number of previous events and endeavours that paved the way for its final establishment. Nationalism, imperialism and a disregard for human life caused WWI to kick-start the development of International Human Rights Law (IHRL) in its aftermath. The propulsion of women's movements, the foundation that was laid for self-determination and minority rights, and, the socialist calls for economic and social rights saw the establishment of the UN's predecessor, the League of Nations,⁴ established under the Treaty of Versailles in 1919.⁵ Although its preamble followed the historical sovereignty paradigm⁶ of international law, it is notable for establishing a system of minority protections following the break-up of the Ottoman Empire.⁷ As established, these systems failed to prevent WWII and the tens of millions of fatalities that resulted. Consequently, as the idealised history goes, the Holocaust, as well as murderous campaigns targeting Sinti and Roma, homosexuals, persons with disabilities and political opponents - planned with the use of modern bureaucracy and executed in an industrial manner by Nazi Germany - sparked a revolution in how the world perceived both relations between states and the treatment of individuals, thereby spawning a new world view of humanity. Alternatively, other historical records step away from the idealised historical account that roots itself in empathy for human suffering and describes the purpose of establishing the UN as a political strategy to avoid another conflict among states⁸ where the focus on the protection of humanity did not popularise until much later on.⁹

⁴ See generally Ruth Henig, *The League of Nations* (Haus Publishing 2010).

⁵ League of Nations, Treaty of Versailles 1919 <<https://www.un.org/unispal/document/auto-insert-199451/>> accessed 16 June 2021.

⁶ Ibid. The Preamble states: 'In order to promote international co-operation and to secure international peace and security by the acceptance of obligations not to resort to war, by the prescription of open, just, and honorable relations between nations, by the firm establishment of the undertakings of international law as the actual rule of conduct among governments, and by the maintenance of justice and a scrupulous respect for all treaty obligations in the dealings of organized peoples with one another, the powers signatory to this covenant adopt this constitution of the League of Nations'

Charles Hall Davis, 'Preamble to the Constitution of the League of Nations' (1919) 5(1) *The Virginia Law Register* 14.

⁷ For further discussion on the break-up of the Ottoman Empire see Chapter Two.

⁸ Mohammad S. Taskhiri, 'Essential Differences in Human Rights in the two Declarations' <https://www.al-islam.org/human-rights-study-universal-and-islamic-declarations-human-rights-muhammad-ali-taskhiri/essential> accessed 15 May 2017.

⁹ See generally Samuel Moyn and Jan Eckel, *The Breakthrough: Human Rights in the 1970s* (University of Pennsylvania Press 2013); Samuel Moyn, *Human Rights and the Uses of History* (Verso Books 2014); Samuel Moyn, *The Last Utopia: Human Rights in History* (Harvard University Press 2012); Samuel Moyn, 'From Communist to Muslim: European Human Rights, The Cold War and Religious Liberty' (2014) 113(1) *South Atlantic Quarterly* 63-86.

On June 12th, 1941, the Inter Allied Declaration of St. James' Palace was signed by representatives of Canada, Australia, New Zealand, the Union of South Africa and Great Britain together with the nine exiled governments housed in London - Belgium, Czechoslovakia, Greece, Luxembourg, Netherlands, Poland, Norway, Yugoslavia and General de Gaulle of France. The significance of the Declaration is the sentences still said to serve as the watchwords of peace:

*“The only true basis of enduring peace is the willing cooperation of free peoples in a world in which, relieved of the menace of aggression, all may enjoy economic and social security; It is our intention to work together, and with other free peoples, both in war and peace, to this end.”*¹⁰

In August of the same year, President Roosevelt and Prime Minister Churchill proposed a set of principles for international collaboration in maintaining peace and security entitled the ‘Atlantic Charter’ which by 1942 had support pledged to it by twenty six nations fighting against the Axis powers when they signed the Declaration of the United Nations. In 1943 at the Moscow and Tehran Conferences, the establishment of the organisation proper was agreed between the Soviet Union, the US, the UK and China, who together with France would go on to become the permanent members of the UN Security Council. After a number of international conferences, the United Nations Charter was unanimously adopted in April 1945 and ratified in January 1946 officially creating the organisation that is the United Nations,¹¹ whose objective was to offer an alternative new world order where others had failed. The 1945 UN Charter replaced the sovereignty paradigm of its League of Nations predecessor showing evolved foundational premises at Articles 1(3),¹² 55 and 56.¹³

Article 1(3)

“The purposes of the United Nations are.....To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging

¹⁰ United Nations, ‘United Nations Milestones’

<<http://www.un.org/en/sections/history/milestones19411950/index.html>> accessed 22 September 2018.

¹¹ Ibid.

¹² Charter of the United Nations (UN Charter), Article 1(3) <<https://www.un.org/en/about-us/un-charter/full-text>> accessed 22 September 2018.

¹³ Ibid. Articles 55, 56.

respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and...”

Article 55

“With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: a. higher standards of living, full employment, and conditions of economic and social progress and development; b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion”.

Article 56

“All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55”

These articles evidence the drafters’ perception of human rights protections as vital to a new international order conducive to peace and their perception of the UN as an institutional setting with strong enforcement powers for the development of the IHR regime¹⁴ based on the foundational premises of universality, individualism, autonomy, human dignity, and, equality.

3.2 The United Nations and Human Rights Law

The Universal Declaration of Human Rights - UDHR - together with the later, more detailed International Covenant on Civil and Political Rights (ICCPR)¹⁵ and International

¹⁴ Ilias Bantekas, Lutz Oette (eds.), *International Human Rights: Law and Practice* (Cambridge University Press 2016) 6-14.

¹⁵ International Covenant on Civil and Political Rights (ICCPR) adopted by the United Nations General Assembly with resolution 2200A (XXI) on 16 December 1966
<https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> accessed 10 August 2017.

Covenant on Economic Social and Cultural Rights (ICESCR)¹⁶ – comprise what is colloquially termed the International Bill of Rights.¹⁷ A taskforce of drafters from eight member states, namely, Australia, Chile, France, Lebanon, the USSR, the UK and the USA, appointed by the UN Human Rights Commission spent two years compiling and finalising the UDHR. Saudi Arabia, eventually abstained, criticising provisions in the declaration regarding freedom of religion.¹⁸

The Preamble to the Declaration gives the first insight into the central concept of universality.¹⁹ Article 1 dictates the secular nature of the document, Article 2 articulates the right to non-discrimination, Articles 3 to 20 encompass civil rights and liberties. These include: the right to life and liberty at Article 3, protection against slavery and torture at Articles 4 and 5 respectively, the right to recognition as a person before the law at Article 6, the right to equal protection of the law at Article 7, the right to a remedy for breach of fundamental rights at Article 8, protection from arbitrary arrest and detention at Article 9, the right to a fair trial at Article 10, criminal justice rights at Article 11, the right to privacy at Article 12, the right to freedom of movement at Article 13, the right to seek asylum at Article 14, the right to a nationality at Article 15, the right to marriage and protection of the family at Article 16, the right to property at Article 17, the right to freedom of thought, conscience and religion at Article 18, the right to freedom of expression at Article 19 and the right to association at Article 20. Article 21 details political rights whilst Articles 22 to 27 detail economic social and cultural rights. These include: the right to social security and autonomous development of personality at Article 22, the right to work and rest at Articles 23 and 24 respectively, the right to education at Article 26 and the right to participate in cultural life at Article 27. Whilst Article 28 outlines the right to an international order within which rights can be identified, Article 29 establishes duties and limitations on rights and Article 30 articulates the absence of a right to destroy rights by their very use.

¹⁶ International Covenant on Economic Social and Cultural Rights (ICESCR) <https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx> accessed 10 August 2017.

¹⁷ Universal Declaration of Human Rights (UDHR) <https://www.un.org/sites/un2.un.org/files/udhr.pdf> accessed 10 August 2017.

¹⁸ For further insight into the debate and discussion behind the wording of the articles of the Declaration see generally William A. Schabas (ed.), *The Universal Declaration of Human Rights: The Travaux Préparatoires* (Cambridge University Press 2013). See also Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (University of Pennsylvania Press 1999).

¹⁹ UDHR, Preamble, ‘...the inherent dignity..... of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world....’.

Member states' particularisms during the era of decolonisation and Cold War politics then led to the drafting of the two subsidiary documents as extensions of (and drawn from) the UDHR - the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR). The civil and political rights treaty encompassed such rights as the right to self-determination, life, liberty, security of person, privacy, fair trial, freedom of movement, religion, expression, assembly and association and prohibition of slavery and torture. The social and economic rights treaty encompassed the right to self-determination, work, social security, adequate standard of living, health, education and participation in cultural life.

Excepting minority and collective rights, all rights in the later treaties are represented in principled format in the UDHR.²⁰ Optional Protocol 1²¹ to the ICCPR spoke to monitoring and policing of member states by the right of complaint to the Committee, as did the Optional Protocol to the ICESCR²² whilst Optional Protocol 2²³ promoted the abolition of the death penalty. Political developments in the decades following the International Bill of Rights led to the recognition of differences and the occurrence of events that substantiated the requirement for further conventions. Resistance to decolonisation prompted ICERD in 1965 – International Convention on the Elimination of all forms of Racial Discrimination²⁴ and ICSPCA in 1973 – International Convention for the Suppression and Punishment of the Crime of Apartheid.²⁵ Conventions that followed include the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT, 1984)²⁶ and the International Convention for the

²⁰ Bantekas & Oette (n14) 17.

²¹ Optional Protocol to the ICCPR <<http://www.ohchr.org/Documents/ProfessionalInterest/ccpr-one.pdf>> accessed 25 May 2017.

²² Optional Protocol to the ICESCR

<<http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCESCR.aspx>> accessed 25 May 2017.

²³ Second Optional Protocol to the ICCPR

<<https://www.ohchr.org/en/professionalinterest/pages/2ndopccpr.aspx>> accessed 25 May 2017.

²⁴ International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), adopted and opened for signature by the United Nations General Assembly on 21 December 1965 and entered into force on 4 January 1969 <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx>> accessed 20 July 2017.

²⁵ International Convention on the Suppression and Punishment of the Crime of Apartheid (ICSPCA), adopted by the General Assembly on 30 November 1973.

<<https://treaties.un.org/doc/publication/unts/volume%201015/volume-1015-i-14861-english.pdf>> accessed 20 July 2017.

²⁶ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx>> accessed 22 July 2017.

Protection of all Persons Against Enforced Disappearance (CPED, 2006)²⁷ together with a number of minority and collective rights conventions, namely, the Convention on the Elimination of Discrimination Against Women (CEDAW, 1979),²⁸ the Convention on the Rights of the Child (CRC 1989),²⁹ the International Convention on the Protection of the Rights of Migrant Workers and Members of their Families (ICRMW 1990),³⁰ and the Convention on the Rights of Persons with Disabilities (CRPD 2006).³¹ The totality of these conventions comprises the protections afforded under the IHR system.

3.3 The UDHR as a Template for Rights Interpretation

The UDHR has been subject to much criticism and a prominent criticism is that it effectively represents only western values but presents these as universal. This criticism is significant. If the interpretation of human rights is undertaken through the prism of western values such as secularism, liberalism, and pluralism, then this undermines the integrity of the UDHR's claim to universal legitimacy (and not least because these values are not common to Islam). Thus Muslims, Hindus, Africans, non-Judeo-Christians, feminists, critical theorists and simply scholars of an inquiring bent of mind have all sought to expose UDHR bias and exclusivity.³²

Condemnations arise in various forms including: that 'human rights discourse is a code word for political imperialism, western individualism and global homogenisation';³³ 'human rights discourse is just one more instance of the unhealthy legacy of the enlightenment project in which the social embeddedness of value is denied';³⁴ 'human rights are a western imposition on the rest of the world';³⁵ 'themes of polycentrism and

²⁷ Convention for the Protection of all Persons Against Enforced Disappearance (CPED)
<<http://www.ohchr.org/EN/HRBodies/CED/Pages/ConventionCED.aspx>> accessed 22 July 2017.

²⁸ Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)
<<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CEDAW.aspx>> accessed 22 July 2017.

²⁹ Convention on the Rights of the Child (CRC)
<<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>> accessed 22 July 2017.

³⁰ International Convention on the Protection of the Rights of Migrant Workers and Members of Their Families (ICPRMW) <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CMW.aspx>> accessed 22 July 2017.

³¹ Convention on the Protection of Rights of Persons with Disabilities (CRPD)
<<http://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx>> accessed 22 July 2017.

³² Mutua Makau, Human Rights Policy Conference Speech, Belfer Center of the Kennedy School of Government, Harvard University 4 November, 1998.

³³ Linda Hogan (n3) 14.

³⁴ Ibid 38.

³⁵ Ibid 29.

pluralism deny their ecology which includes the reinvention of imperial hierarchies and transformations in capitalism that generally go under the heading of neo-liberalism’;³⁶ ‘the UDHR represents a secular understanding of the Judeo-Christian tradition and does not accord with the system of values recognised by Muslims’;³⁷ ‘the document is an instrument of neo-colonialism’;³⁸ ‘the declaration is an arrogant attempt at universalising a set of ideas and imposing them on three quarters of the world’s population’;³⁹ ‘the UDHR does not have its ideological origins in a common quest of man but in the Enlightenment and in European and American declarations of rights’;⁴⁰ the authors of the draft took into consideration only the standards recognised by western civilisation and ignored the ancient civilisations’;⁴¹ ‘the western bias constitutes a false universalism’;⁴² ‘the UDHR is based largely on western philosophical models, legal traditions and geopolitical imperatives’;⁴³ ‘human rights are an attempt at the globalisation of the European heritage’;⁴⁴ ‘human rights in the sense that westerners understand the terms are quite foreign to non-western culture’;⁴⁵ ‘there is no intelligible way to understand human rights without a Judeo-Christian religious understanding of the world’;⁴⁶ ‘human rights are another ploy to dominate Muslim societies by undermining their religiously based culture and value system’;⁴⁷ and, ‘human rights are morally imperialistic, culturally Eurocentric and insensitive to Muslim cultural values’.⁴⁸

This is quite a list, but three critical themes emerge from a distillation of it, namely (a) the UDHR’s western bias, (b) its Judeo-Christian origin, and, (c) its secular leanings – both

³⁶ Samuel Moyn, ‘The End of Human Rights History’ (2016) 233(1) Past and Present 321.

³⁷ Abdul Olayemi, Abdul Alabi, and Ahmad Buang, ‘Islamic Human Rights Law: A Critical Evaluation of the UIDHR & CDHRI in the Context of the UDHR’ (2015) 1(3) Journal of Islam, Law and Judiciary 31.

³⁸ Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (Random House 2001) 319.

³⁹ Makau (n32).

⁴⁰ T. Jeremy Gunn, ‘Do Human Rights Have a Secular, Individualistic and Anti-Islamic Bias?’ (2020) 149 (3) *Daedalus: The Journal of the American Academy of Arts and Sciences* 149.

⁴¹ United Nations Third Committee of the General Assembly, ‘Report of the 125th Meeting of the Third Committee’ (A/C.3/SR.125) 9 November 1948, 370 <<https://undocs.org/A/C.3/SR.125>> accessed 17 June 2021.

⁴² Gunn (n40) 150.

⁴³ Roger Normand and Sarah Zaidi, *Human Rights at the UN: The Political History of Universal Justice* (Indiana University Press 2008) 195.

⁴⁴ Mohamed Between, ‘The Fundamental Human Rights: An Islamic Perspective’ (2002) 6(1) *International Journal of Human Rights* 62.

⁴⁵ Jack Donnelly, *Universal Human Rights: In Theory and Practice* (Cornell University Press 2003) 303.

⁴⁶ Ari Kohen, ‘An Overlapping Consensus on Human Rights and Human Dignity’ in M. Goodale (ed.) *Human Rights at the Crossroads* (Oxford University Press 2013) 61.

⁴⁷ Abdulaziz Sachedina, *Islam and the Challenge of Human Rights* (Oxford University Press 2009) 5.

⁴⁸ *Ibid.* 7.

textual and in the interpretation process. Of course, these themes of disapproval have also been countered by scholars who have argued: that historical matters of foundations are unimportant to the progress of human rights;⁴⁹ that if an idea is good, surely it should not matter who had it first;⁵⁰ and, that it can be proven that there was non-western representation aplenty in the creation of the UDHR where everyone was given sufficient opportunity to participate.⁵¹ They also argue that authoritarian governments may protest because of self serving interests in not wanting to promote freedom amongst their people or because they believe human rights should be suppressed in the name of economic development or national security.⁵² This notwithstanding, allegations, even of the hypocritical variety, can be correct and the accusation of ideological imperialism was not a latecomer to the debate, in fact, it surfaced more or less at the time of drafting the declaration when the Saudi delegate stated:

‘the authors of the draft had, for the most part, taken into consideration only the standards recognised by Western civilization and had ignored more ancient civilisations which were past the experimental stage. . . . It was not for the Committee to proclaim the superiority of one civilisation over all others or to establish uniform standards for all the countries in the world.’⁵³

In looking both to the influences for its content and the circumstances of its creation, these themes will now be explored in an effort to establish whether the criticisms are legitimately substantiated.

Let us consider first the proposition that the UDHR is biased towards western, liberal values and consequently, against Islamic values. Liberalism is certainly a European philosophical tradition that became a distinct movement during the Age of Enlightenment in the seventeenth and eighteenth centuries. This liberal philosophical and economic movement encompassed and promoted capitalism, human reason, the pursuit of happiness in this life considering humanity an end in itself, greater toleration, secularism and

⁴⁹ Ibid. 5.

⁵⁰ Glendon (n38) 322.

⁵¹ Ibid 320.

⁵² Ibid 317. Glendon points to the objections of the Iranian representative on the fiftieth anniversary of the UDHR and to the protestations of Singapore in attempting to suppress human rights.

⁵³ UNGA Third Committee (n41) 370.

democracy, individual rights, and, the liberty or freedom of man. All of these values are integral to the UDHR but the question is whether this makes the UDHR a western document (and in particular, whether these values are at odds with those of Islam) or whether they are, in fact, of universal application.

As we saw in Chapter Two, to the extent that these values *were* received into Islamic societies, this was largely because they were imposed during the period of imperialism and colonisation which imposed facets of modernity and systems of law on the Islamic world that negatively impacted their religious culture and led to local legal systems unwillingly becoming fusions of western and Islamic laws.⁵⁴ The principal difficulty that the Islamic world had with the European liberal tradition is not with the idea of individual freedom *per se* but rather with its post-enlightenment view of the source of truth and the proper role of religion. As we have seen, the core doctrine of *tawhid* alone deems human reason insufficient to account for inalienable human rights, deems the separation of church and state impossible, deems individual rights to come only via the fulfilment of duties to the community, deems freedom to be within the confines of the boundaries set by God, and, whilst the pursuit of happiness in this life is not problematic, the Islamic focus is eschatological, using the moral guidance of Islam in this life to earn a place in the next.⁵⁵ These western liberal values (articulated in the language of human rights) at least to the extent that westerners understand them, are quite foreign to much non-western culture.⁵⁶ In particular, in Islam, a human being is not a compartmentalised individual who can separate, in any given moment, the spiritual from the temporal, therefore secular views that the proper role of religion is in some kind of private sphere is unfathomable. Furthermore, the emphasis in rights language on an autonomous individual whose independent moral standard transcends religious and cultural differences such that s/he can claim rights without considering the bonds of reciprocity runs contrary to the Islamic tradition's emphasis on relational aspects of human existence.⁵⁷

The philosophy of IHR then, as reflected in the UDHR, belongs to an elaboration of analytical thought where, quite simply, all of the postulates are significant in the western

⁵⁴ See Chapters Two and Seven for a further discussion on the impact of colonialism on the Islamic world, and the Islamic world's attitude to modernity.

⁵⁵ For a comparative analysis of values in both the International and Islamic human rights schemes see Chapter Five.

⁵⁶ Donnelly (n45) 303.

⁵⁷ Sachedina (n47) 7.

mentality,⁵⁸ but cannot be considered neutral.⁵⁹ The core grounding principles of the UDHR in other words, are not the creations of a traditional culture, nor are they common to all cultures.⁶⁰ Instead, they are of European heritage, and whereas they did travel outside the west, this was only on the heels of European conquerors.⁶¹ In this respect, the proceedings of the Vienna Declaration's statement that the universality of human rights was beyond question⁶² shows the Asian delegates' argument that there is an integral connection between moral values and the historical and social contexts in which they are embedded.⁶³ The Asian argument proceeds that the dominant liberal framework strives to separate values from such embeddedness⁶⁴ whilst the opposition argue that the liberal framework is sufficient and gives ample room to the free expression of various cultures.⁶⁵ Essentially, a truly liberal political compromise can only ever exist between identities that have actually incorporated, or at least accept, the liberal ideology.⁶⁶ Largely, the Islamic world has not done so, and it is precisely because of this that it must be understood that the philosophy of human rights is culturally marked.⁶⁷ Indeed, both 'sides', that is, the dogmatic western and Islamic stances on moral world views equally have to understand that each worldview comes from its own historical and cultural processes.⁶⁸

Let us turn to the second concern with the purportedly 'non-international' nature of the UDHR, namely, that it reflects exclusively Judeo-Christian values. It is true that, by the latter half of the twentieth century - the era in which international human rights treaties were first promulgated - the relationship between the Western world and Christianity was badly fractured and secular Europe was cutting ties with the church. Indeed it is arguable that traditional Christianity stood for values completely inimical to those we now

⁵⁸ Tariq Ramadan, *Islam, the West, and the Challenges of Modernity* (Kube Publishing 2009), 99.

⁵⁹ Gunn (n40) 150.

⁶⁰ Ann Elizabeth Mayer, 'Islam and Human Rights' in Abdullahi An-Na'im and Francis Deng (eds.) *Human Rights in Africa: Cross Cultural Perspectives* (The Brookings Institute 1990) 148.

⁶¹ Basam Tibi, 'The European Tradition of Human Rights and the Culture of Islam' in Amnesty International Reports *Human Rights in Africa: United Nations 1970-1990* (Amnesty International Publications 1990) 130, 131.

⁶² United Nations, Vienna Declaration and Programme of Action <https://www.ohchr.org/en/professionalinterest/pages/vienna.aspx> accessed 16 June 2021.

⁶³ Hogan (n3) 37.

⁶⁴ Ibid.

⁶⁵ Vincent Depaigne, 'Individualism, Human Rights and Identity' (2005) *Semantic Scholar* 9 <<https://soas-uk.academia.edu/VincentDepaigne>> accessed 1 June 2021.

⁶⁶ Ibid 11.

⁶⁷ Ramadan (n58) 99.

⁶⁸ Hogan (n3) 57.

associate with human rights as they are articulated in the UDHR,⁶⁹ and chose to align with IHR as a means of survival in the 1930s when totalitarian regimes left no room within them for the authority of the church.⁷⁰

Due largely to one Roman Catholic philosopher, Maritain, whose castigation of the language of rights in the 1930s was quickly transformed into a recasting of rights language as a new option for Christianity, a new paradigm emerged. This newly arranged narrative claimed that freedom from the ills of capitalist materialism, fascism, racism and communism could only be understood within the Catholic framework of the common good,⁷¹ and, gathered so much momentum, that it is now often claimed that there is no intelligible way to understand human rights without a Judeo-Christian religious understanding of the way the world connects.⁷² Maritain claimed the implications of natural law for rights language and when WWII exploded, Christian suffering in war and under occupation provided further credibility to this new human rights option.

Ultimately, without Christianity buying into and using the language of rights, commitment to the moral equality of human beings is unlikely to have come about,⁷³ and, with Christianity being such a dominant religion in the Western world, particularly Europe where the UN was established, everything that came from Europe at the time essentially came from a Christian foundation. The UDHR in other words, reflects values that were prized by cultures that were, historically, steeped in Christian thought, and one reason for its popularity - certainly at the outset - was that because it reflected these values it was supported by Christians and Christian churches.

Christianity then, was the dominant religion in a secularising and liberal world and hence its values would naturally play into the construction of International Human Rights language.⁷⁴ In order to survive the threat of militant socialist secularism, Christianity

⁶⁹ Samuel Moyn, *Christian Human Rights* (University of Pennsylvania Press 2015) 5, 7. Moyn points out this is not least due to Christianity's historical use of violence to serve justice, its powering of abolitionism in the nineteenth century, its tolerance and support for slavery, its political aspirations in worldly empires, and patriarchy as perhaps its fundamental commitment.

⁷⁰ Samuel Moyn, 'Jacques Maritain, Christian New Order and the Birth of Human Rights' <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1134345> 9, accessed 1 June 2021.

⁷¹ Ibid 15.

⁷² Kohen (n46) 61.

⁷³ Moyn (n69) 7.

⁷⁴ Ibid 11.

paradoxically relied on the concept of International Human Rights which, albeit secular in nature⁷⁵ at least protected the critical right to religious freedom and in any event reflected dominant western values which were themselves rooted in the Christian traditions of Europe. IHR and Christianity thus, historically, enjoyed a symbiotic relationship. It is simply not the case that an equivalent relationship could exist as between Islam and *these international* human rights.⁷⁶

If then, the accusations of western ideological and philosophical bias and Judeo-Christian origin have been credibly substantiated, what is the likelihood that these biases and origins could have been diluted during the drafting process in order to make way for a truly international instrument of pluralistic moral foundation? In order to discern this, it remains to examine the circumstances of its creation.

At the time of drafting, the true internationality of the Declaration was already being questioned. It was asked by the American Anthropological Association how the proposed Declaration could be applicable to all humans and avoid falling into the trap of being no more than '*a statement of the rights conceived only in terms of values prevalent in the countries of Western Europe and America*'.⁷⁷ At the time, the power base of the UN human rights machinery was skewed in favour of the larger western nations⁷⁸ and negotiations for the drafting of the Declaration did occur under the political, cultural and economic weight of these larger powers,⁷⁹ with practical disputes noted as being solved expediently on the basis of US power, and only when necessary with the vote.⁸⁰ Additionally, most of the rights contained within the draft were grounded in European and North American documents from countries with well established legal systems with existing constitutions⁸¹ - all eighteen drafts of the Declaration came from the democratic west and all but two were in English.⁸² Moreover, the drafters pursued a thorough going

⁷⁵ Samuel Moyn, 'From Communist to Muslim: European Human Rights, the Cold War, and Religious Liberty' (2014) 113(1) South Atlantic Quarterly 64.

⁷⁶ Sachedina (n47) 6.

⁷⁷ American Anthropological Association 'Statement on Human Rights' (1947) 49(2) American Anthropologist 543.

⁷⁸ Neville Cox, 'Understanding '*Je Suis Charlie*' (2016) 105(418) Studies: An Irish Quarterly 148.

⁷⁹ Hogan (n3) 19. See also Mary Ann Glendon 'The Forgotten Crucible: The Latin American Influence on the Universal Human Rights Idea' (2003) 16 Harvard Human Rights Journal 28.

⁸⁰ Normand & Zaidi (n43) 177; Gunn (n40) 150.

⁸¹ Glendon (n38) 322.

⁸² Alison Dundes Renteln, *International Human Rights: Universalism versus Relativism* (Sage Publications 1990) 30.

secularism and kept the language of the Declaration free from any religious idiom – they entirely severed God from nature and reason.⁸³ Given the established western ideological and philosophical biases, the Judeo-Christian origins, the wielding of western power during negotiations, the grounding of the draft in largely English documents that originated in the democratic west, and, the severing of God from reason, could it still have been possible to balance all of this with representation of and contributions from non-western nations?

It has been argued that there was representation aplenty from non-western nations despite the exclusion of Axis powers and those under colonial rule in Africa and Asia, with a wide variety of cultures represented in the Human Rights Commission and on the Third Committee: six members from Asia, Islamic culture predominant in nine and strong in two more, three countries with a large Buddhist population, four from Africa (two representing black Africa), numerous Latin American representative nations, and, six European communist bloc countries.⁸⁴ The UN only had fifty eight member states in 1948⁸⁵ and it is estimated that all of these were somehow involved in the process of debating and drafting the Declaration. These statistics certainly seem representative of a variety, but when alternatively articulated seem substantially less so: North and South America with twenty one countries represented 36% of the total, Europe with sixteen countries represented 27%, Asia with fourteen represented 24%, Africa with four represented 6% and the South Sea Islands with three represented 5%.⁸⁶ If we take the statistic that nine countries were predominantly Islamic, this translates to 5% Islamic representation whilst Europe and the Americas together, what is generally considered to comprise the Western world, made up 63% of member state representation. Statistics therefore show that the Islamic world, despite assertions of variety in representation, was substantially underrepresented in comparison to the Western world.

The argument that the UDHR only reflects western values is perhaps challenged by the reality that the chairman of the Third Committee gave ample opportunity for everyone to

⁸³ Sachedina (n47) 10.

⁸⁴ Philippe de la Chapelle, *La Declaration Universelle des Droits de l'Homme et de Catholicisme* (Librairie Général de Droit et de Jurisprudence 1967) 44.

⁸⁵ Now, in 2021 it has one hundred and ninety three member states.

⁸⁶ De la Chapelle (n84) 44.

participate in the lead up to the promulgation of the UDHR⁸⁷ and that there was little by way of Muslim objection with the exception of Saudi Arabia who abstained from the vote. This should not, however, be overstated. Firstly, despite little to no disagreement on the 'idea' of human rights, eight countries, including Saudi Arabia, abstained on the basis of interpretational difficulties. This was so significant that it should have been flagged at the time as a question mark over future congruence.⁸⁸ Secondly, despite there being little by way of Muslim objection, Muslim contributions appeared confusing as they displayed inconsistent attitudes on certain rights provisions. Some Islamic representatives objected to the provisions and some voted for the Declaration with no objections at all.⁸⁹ Those who did not object at all are considered not to have done so on the basis that they did not believe these provisions could ever be realised.⁹⁰ Muslim states at the time were less inclined to deem the Declaration religiously objectionable than they were to deem it problematic because of its unrealistic and utopian character which they found hard to imagine being implemented in their own countries, but also in western countries.⁹¹ Fundamentally, Islamic countries were not united as there was no common Islamic viewpoint.

Thirdly, the credentials of the Islamic representatives were an issue. Muslim participation was minimal insofar as there was no real effort to expound comprehensive Islamic doctrine to get the sense of the tradition's stance on different articles. The profile of Muslim representatives reveals that they were secularly educated⁹² with little or no training in the foundational texts of Islam, and therefore did not have the ability to adequately articulate the Islamic impulse that would have enriched the debates - particularly on issues like freedom of religion or expression. The Saudi representative, whilst taking a stance by abstaining from the vote, was a Lebanese Christian who lacked

⁸⁷ Glendon (n38) 320.

⁸⁸ Mashood A. Baderin, *International Human Rights and Islamic Law* (Oxford University Press 2003) 96. Those abstaining were Byelorussian SSR, Czechoslovakia, Poland, Saudi Arabia, South Africa, USSR, Ukrainian SSR, Yugoslavia.

⁸⁹ Recep Senturk, 'Sociology of Rights: 'I Am Therefore I Have Rights': Human Rights in Islam Between Universalistic and Communalistic Approaches' (2005) 2(1) Muslim World Journal of Human Rights 28.

⁹⁰ Abdullah Saeed, *Human Rights and Islam: An Introduction to Key Debates Between Islamic Law and International Human Rights Law* (Edward Elgar Publishing 2018) 62.

⁹¹ Ann Elizabeth Mayer, *Islam and Human Rights: Tradition and Politics* (Westview Press 2012) 21.

⁹² Virginia A. Leary, 'The Effect of Western Perspectives on International Human Rights Law' in Abdullahi An-Na'im and Francis Deng (eds.) *Human Rights in Africa: Cross Cultural Perspectives* (The Brookings Institute 1990) 20.

even the basic credentials to speak on theological aspects of Islam authoritatively.⁹³ All in all, having the opportunity to participate to the same extent as the next member state did not serve the Islamic world well; and certainly did not enrich the debates with established Islamic doctrine.

In concluding the assessment of the Islamic allegations of the UDHR being a wholly western document the argument can certainly be substantiated: the ideological and philosophical influences were all rooted in the Western world; if there were not specifically Judeo-Christian origins there was certainly a strong interconnected relationship if only due to the phenomenon originating in the Christian world where support for it, by default, was Christian support; western power influenced the negotiations; the document templates were largely in English originating in well established democratic western constitutional legal systems; the Western world had over twelve times more representation throughout the drafting and negotiations showing the Islamic world to be grossly underrepresented; at the time there was no united Islamic viewpoint; and, those representing the Islamic world had mostly been secularly educated and were unable to maximise their opportunity to contribute with established Islamic doctrine as they were not educated in this context. The lack of any serious Muslim participation is said to cast a long shadow of doubt over the political and cultural contours of the Declaration and reveals an indubitable western values bias.⁹⁴ Accordingly, the fact that there were no dissenting votes should not have taken for granted that complete consensus had been achieved⁹⁵ and any supposed international consensus in the original construction of human rights norms would therefore have to be considered an artificial one.⁹⁶

Only a short number of years later, in 1955, the Bandung Conference of Asian/African states took place. It was asserted the attendees had little in common but what their past relationship with the Western world had made them feel, and, that it was a meeting of the rejected who together imposed the first judgment on the Western world in terms of the

⁹³ Sachedina (n47) 10, 11.

⁹⁴ Ibid. 11.

⁹⁵ Dundes Renteln (n82) 30.

⁹⁶ Cox (n78) 148.

UDHR not being internationally representative.⁹⁷ Since its drafting, no genuinely alternative views have been allowed to factor into the development of human rights norms. Even more problematically, international human rights have been interpreted in a manner that has specified their meanings and their limitations in line with and based on western pluralist, secular and liberal values.⁹⁸ Hence, the major thrust of Islamic critique of the declaration relates not merely to its secular nature, but also to its underpinning philosophical and religious ideas.⁹⁹ This is hugely problematic. International Human Rights, if they are to merit that description, surely must be genuinely international in nature and if a religion that represents nearly a quarter of the world's population finds the approach of IHR to be ideologically unacceptable then this must surely mean that they are *not* international in nature.¹⁰⁰

4 Organisation of Islamic Cooperation

The UN's human rights opponent on the international stage also has both a system of international law (comprising the *Shari'a*) which transcends borders in its application to every member of the Islamic world, and minor human rights instruments. However, the purported inclusive approach of the universality of IHR is not shared by the Islamic vision. This approach applies an exclusive model of human rights applicable to those of the Islamic faith only and an organisational model with an agenda that sets its foundational values and human rights instruments apart from IHR. The exclusivity of the Islamic instrument is perhaps in conflict with the general Islamic claim that God intended all people on earth to be protected by his universal values, but, this is qualified by the necessary acceptance of the *shahada* – one must take a certain positive action to accept Islamic universality, unlike in the IHR system where no such positive action is required.¹⁰¹ Essentially, one must accept God. The discussion centred on the OIC is undertaken with two end goals in mind: the first, to gain a clear understanding of the status of its relationship with International Human Rights; and, the second is to establish

⁹⁷ Richard Wright, Gunnar Myrdal, Amritjit Singh, *The Colour Curtain: A Report on the Bandung Conference* (World Publishing 1956) 12.

⁹⁸ Cox (n78) 152. See Chapter Six for a broader discussion on the impact of the hardening of interpretations of human rights values.

⁹⁹ Sachedina (n47) 6.

¹⁰⁰ Neville Cox, 'Justifying Blasphemy Laws: Freedom of Expression, Public Morals and International Human Rights Law' (2020) 35(1) *Journal of Law and Religion* 60.

¹⁰¹ See Chapter Five for further discussion on religious and non-religious morality grounding the claim that rights are universal.

whether the condition of the relationship has any impact on the recognition of human rights principles. In order to arrive at these ends, the following matters are addressed: the factors that prompted the emergence of the OIC and their impact on the moral values the scheme promotes, and, the value laden instruments of the organisation.

4.1 Impetus, Establishment and Foundational Premises

Just as the UN, as an end result, was a collective endeavour of somewhat likeminded western states post series of tragic circumstances impacting humanity, the OIC is similarly an end result of a collective endeavour post series of tragic circumstances impacting Muslims. Historically, faith and strength were the core elements responsible for Islamic success. Throughout Islam, a faithful *ummah* was always connected with a strong *ummah* as two interlinking and inseparable elements of progress and success resorted to on occasions of vulnerability throughout the growth and development of Islamic Law.¹⁰²

The catalyst that was the Al-Aqsa Mosque fire¹⁰³ – a symbolic last straw in a decades long string of perceived attacks on Islamic identity – together with unified Islamic discontent at the Israeli situation, prompted an articulation of the many episodes of unwanted western interference in the Islamic world. These included: the seemingly accepted application of the Westphalian sovereignty concept; confused Arab/Islamic identities; erosion of Islamic values thanks to the upsurge in IHR popularity; and, economic and governance challenges post imperialism. This further prompted the establishment of a pan-Islamic central institution that would represent Muslim nations internationally. The OIC would seek to promote Islamic solidarity and cooperation by repelling further western dilution and criticism of their faith based culture and values in returning, once again, to the two core elements of progress relied upon since its beginnings - faith and strength - alternatively, resort to Islamic provisions to undilute their cultures of western influence, and, strength in numbers. For the first time since the fall of the Ottoman Empire this pan-Islamic central institution would be the guarantor of the

¹⁰² For further discussion on these developmental events see Chapter Two.

¹⁰³ The al-Aqsa Mosque, located on the Temple Mount by the Dome of the Rock in Jerusalem is believed to be where the prophet Mohammad ascended into heaven and is considered the third holiest site in Islam after Mecca and Medina. The fire, started by an Australian man, was believed to be an attack on Islam and believed by many Muslims to be somehow supported by the Israelis. See James Ciment and Kenneth Hill *Encyclopedia of Conflicts Since World War II* (Routledge 2012) 185.

global unity of the *ummah* and the means by which the *ummah* would once again gain global recognition.

The OIC was established between 1969 and 1972. In 1970 the first meeting of the Council of Foreign Ministers took place in Jeddah where it established a permanent secretariat. The first Charter of the OIC was adopted in 1972 and an amended version was adopted in 2008.¹⁰⁴ Notably, in setting out the history of its establishment, the OIC makes a clear statement regarding what it perceived as the most recent attack against the Islamic identity as being the foregoing event prompting its establishment, describing the Al Aqsa mosque fire as criminal arson.¹⁰⁵ The Organisation states it has the ‘*singular honour of galvanising the ummah into a unified body*’¹⁰⁶ and currently has fifty seven member states, most of which have a Muslim majority population.

Whereas its *raison d’etre* was to provide a unifying body for the Islamic world there was no question within the OIC of heralding in a return to an imperial Islam governed by a singular Caliphate. Old and new Islamic states appeared now settled with the sovereignty concept introduced after WWI. As a result, the foundational premises of the OIC reflect this intended avoidance.¹⁰⁷ Its charter clearly asserts a strong sovereignty paradigm in line with this ideology by declaring repetitively in its preamble its intention to “...*respect, safeguard and defend the national sovereignty, independence and territorial integrity of all Member States*”, and to “....*respect the right of self-determination and non-interference in domestic affairs; and to respect the sovereignty, independence and territorial integrity of each Member State*”.¹⁰⁸

The OIC significantly did not establish itself as an organisation intent on achieving an Islamic equivalency to IHR. Its Charter makes reference to numerous foundational premises, namely Islamic solidarity, development, prosperity, independence, sovereignty, intellectual intelligence and integration in the global economy. Whilst it does speak of

¹⁰⁴ Organisation of Islamic Cooperation, ‘History’
<https://www.oic-oci.org/page/?p_id=52&p_ref=26&lan=en> accessed 3 October 2018.

¹⁰⁵ Ibid.

¹⁰⁶ Ibid.

¹⁰⁷ On this theme of individual state power see Abdullah Saeed, *Human Rights and Islam: An Introduction to Key Debates Between Islamic Law and International Human Rights Law* (Edward Elgar 2018) 80.

¹⁰⁸ Charter of the Organisation of Islamic Conference (OIC Charter)
<http://www.oic-oci.org/page/?p_id=53&p_ref=27&lan=en> accessed 12 August, 2017.

human rights and fundamental freedoms, these latter items are qualified in its preamble where their deference to domestic constitutions and legal systems, and to *Shari'a*, is set out:

*“....to promote human rights and fundamental freedoms, good governance, rule of law, democracy and accountability in Member States in accordance with their constitutional and legal systems”.*¹⁰⁹

“...to preserve and promote the lofty Islamic values of peace, compassion, tolerance, equality, justice and human dignity”

“....to be guided by the noble Islamic values of unity and fraternity”

In this sense, the Charter, in stating these values, is simultaneously stating the values of Islamic Law¹¹⁰ (as law is derived from these same *Qur'anic* values) and, as a necessary corollary, the values to which the protection of human rights defer. Consequently, it has distanced itself from western values but succeeded in promoting the protection of human rights on the basis of its own, which, as is discussed in Chapter Five, overlap with those of the UN Charter where human dignity and equality are concerned, and autonomy is addressed in the Declaration itself. Moreover, as per IHR universalism and individualism, the words exclusivity and collectivism are not to be found in the text of the Charter but rather are discerned from its content and that of subsequent instruments - ‘exclusivity’ from the many references to ‘Muslim’¹¹¹ and ‘Islamic’,¹¹² and ‘collectivist’ from the many references to the concerns and interests of the ‘*ummah*’.¹¹³

It is true to say that there exists an element of disagreement when one attempts to decide whether the divine texts liberate individuals or subordinate them for the good of the

¹⁰⁹ Ibid.

¹¹⁰ We recall here the goals of the *Shari'a* enumerated by Abu Zahrah as being the nurturing and development of the righteous individual, the establishment of justice and the realisation of public benefit (prevention of harm) whilst the objectives as set out by al Ghazali are the preservation of religion, life, progeny, mind and property. For further discussion on the goals and objectives of Islam see Chapter One.

¹¹¹ Articles 7, 9, 10 and 27 of the OIC Charter reference Muslim children, families, communities, peoples and minorities.

¹¹² There are almost fifty utterances of the word ‘Islamic’ in the OIC Charter referring to Islamic teachings, values, concerns, symbols and organisations and the Islamic world, character, religion, heritage and culture.

¹¹³ References to the *ummah* are contained within the preamble and at Articles 1 and 3 of the OIC Charter.

ummah and there exists a dichotomy of thought on the matter. Necessarily, the Meccan revelations, in their attempts to free individuals from the ties of tribal custom in *Jahiliyyah*, are replete with moral guidelines that comprise the overarching themes of Islam, including the relevant themes of ‘the individual’ and ‘the individual in society’ as well as the ‘emergence of the Muslim community’. After the *hijra*, once governance became necessary commensurate with the growth of Islam, the revelations evolved into more targeted dicta dependent upon the particular circumstances that required divine guidance, and usually with the protection of the expanding *ummah* as the constant undercurrent. It is generally these Medinan revelations that lend support to the communitarian approach to Islamic rights, together with the focus on individual obligation throughout.¹¹⁴

In the *Quran*, there is little mention of ‘rights’ but of ‘right’, suggesting an inclination towards ‘right’ behaviour, duties, or obligations as opposed to individual rights of entitlement or privilege. Nonetheless, as ‘rights’ are perceived in IHR, there are, established within the divine texts identifiable ‘rights’ including: the right to life,¹¹⁵ freedom,¹¹⁶ personal safety,¹¹⁷ a basic standard of living,¹¹⁸ justice,¹¹⁹ equality,¹²⁰ property,¹²¹ privacy,¹²² and protection of honour,¹²³ freedom of conscience,¹²⁴ religion,¹²⁵

¹¹⁴ For a more detailed discussion on the nature of obligation in Islam see Chapter Five.

¹¹⁵ Holy Qur’an, Surah al-Ma’idah 5:32: “whoever kills a soul unless for a soul or for corruption [done] in the land - it is as if he had slain mankind entirely”.

¹¹⁶ Sunnah, Sahih Al Bukhari Hadith No. 2227.: “There are three categories of people against whom I shall myself be a plaintiff on the Day of Judgement. Of these three, one is he who enslaves a free man, then sells him and eats this money”

¹¹⁷ Holy Qur’an, Surah al-Ma’idah 5:32: “..And whoever saves one - it is as if he had saved mankind entirely...”

¹¹⁸ Holy Qur’an, Surah adh-Dhariyat 51:19: “And from their properties was given the right of the needy petitioner and the deprived”.

¹¹⁹ Holy Qur’an, Surah al-Hadid 57:25: “We sent aforetime our apostles with Clear Signs and sent down with them the Book and the Balance (of right and wrong), that men may stand forth in justice”. Surah an-Nisa 4:135: “O you who have believed, be persistently standing firm in justice, witnesses for Allah, even if it be against yourselves or parents and relatives. Whether one is rich or poor, Allah is more worthy of both. So follow not [personal] inclination, lest you not be just. And if you distort [your testimony] or refuse [to give it], then indeed Allah is ever, with what you do, Acquainted”.

¹²⁰ Holy Qur’an, Surah al-Hujurat 49:13: “O mankind, indeed We have created you from male and female and made you peoples and tribes that you may know one another. Indeed, the most noble of you in the sight of Allah is the most righteous of you. Indeed, Allah is Knowing and Acquainted”.

¹²¹ Holy Qur’an, Surah al-Baqarah 2:188 ‘And do not eat up your property among yourselves for vanities, nor use it as bait for the judges, with intent that ye may eat up wrongfully and knowingly a little of (other) people’s property’.

¹²² Holy Qur’an, Surah al-Hujurat 49:12 ‘O ye who believe! Avoid suspicion as much (as possible): for suspicion in some cases is a sin: And spy not on each other behind their backs’.

¹²³ Holy Qur’an, Surah al-Hujurat 49:11 ‘O ye who believe! Let not a folk deride a folk who may be better than they (are), not let women (deride) women who may be better than they are; neither defame one

association¹²⁶ and expression,¹²⁷ and freedom from arbitrary imprisonment¹²⁸ and tyranny.¹²⁹ Considering the foregoing and upon the determination that textually the revelations and traditions evidence a balancing of individual and communitarian rights and duties,¹³⁰ as can be equally seen within the text of the UDHR at Article 29 where the individual is viewed as an integral part of the community to which s/he has duties to fulfil, it remains merely to note that it has only been in the latter half of the twentieth century, beginning during the 1950s and 1960s, that a strong focus on communitarian values has been asserted by the Islamic world. This coincides with the growth of socialism and nationalism during the decades of decolonisation¹³¹ and the decades of re-establishing the Islamic identity in its traditionalist form.

Both sets of developments, that is, its exclusivity in submitting to the will of God and its communitarian focus, would prove significant in consideration of the claim to incompatibility of Islamic Criminal Law with IHR as each would contribute to the manner in which human rights values would later be interpreted.¹³² It could therefore be reasonably argued that this relatively recent return to the focus on the *ummah* trumping the individual, and the Islamic political and academic pursuit of the communitarian nature of rights, is an integral component of the most recent phase of Islamic regrouping, alternatively, the most recent attempt to fuse faith and strength in order to develop and stabilise the Islamic position on the international stage – now being termed Islamism.

another, nor insult one another by nicknames. Bad is the name of lewdness after faith. And whoso turneth not in repentance, such are evil-doers”.

¹²⁴ Holy Qur'an, Surah al-Baqarah 2:256 'Let there be no compulsion in religion'.

¹²⁵ Holy Qur'an, Surah al-An'am 6:108 'Reville not those unto whom they pray beside Allah'.

¹²⁶ Holy Qur'an, Surah al-Maidah 5:2 'Help ye one another in righteousness and piety, but help ye not one another in sin and rancour'.

¹²⁷ Holy Qur'an, Surah al-Tawbah 9:67 says of the unbelievers 'They enjoin the wrong, and they forbid the right' and says of the believers at Surah Al-Tawbah 9:71 'they enjoin the right and forbid the wrong'.

¹²⁸ Holy Qur'an, Surah al-An'am 6:164 'Each soul earneth only on its own account, nor doth any laden bear another's load. Then unto your Lord is your return and He will tell you that wherein ye differed'.

¹²⁹ Holy Qur'an, Surah an-Nisa 4:148 'Allah loveth not that evil should be noised abroad in public speech, except where injustice hath been done; for Allah is He who heareth and knoweth all things'.

¹³⁰ For further discussion on the rights of the individual, or, the manner in which the individual benefits as a result of duty fulfilment, see Chapter Five.

¹³¹ David L. Johnston, 'Islam and Human Rights: A Growing Rapprochement?' (2015) 74(1) American Journal of Economics and Sociology 8.

¹³² These developments in both the Western and Islamic worlds were ultimately precursors to the 1970s emergence of religious fundamentalism and an explosion in the use of human rights language internationally. See Chapter Six for the culmination of these events and their impact on the interpretation of human rights values.

Fundamentally, the articles in the OIC Charter evidence the drafters' acknowledgement of the responsibility to protect human rights, but, do so with decided deference to its own Islamic values. Building on the fact that only minor references to human rights protections occur within the text, it is prudent to note that no human rights instruments were created by the OIC until 1990. The establishment of the Organisation and the creation of the Cairo Declaration followed in the footsteps of other regional organisations who had sought to develop more localised versions of the UDHR that reflected their regional particularisms to a better extent than the UDHR and was a means to the end of preventing the potential application of customary secular law in the future.

The stronger acknowledgement of the Charter's drafters however, (unlike the drafters of the UN Charter who saw the UN scheme as vital to maintain peace) is their perception of the OIC as an institutional setting for the redevelopment of a global Islamic identity with the aim of reasserting itself as a reckonable force internationally. It would do this by unifying and strengthening its *ummah* via a panoply of methods including: the assertion of and strict adherence to the sovereignty principle; continued support of Muslim minorities in non-member states; dissemination and promotion of Islamic teachings; combatting defamation of Islam;¹³³ the consolidation of bonds of solidarity; the unification of efforts against challenges facing the Islamic world; and the empowerment of the Palestinian people to establish their sovereign state.¹³⁴ Ultimately, the *raison d'être* for the OIC and the UN did not match from the outset - each was established with a separate agenda. Unlike the plan for peace and the bureaucratic carnage that later spawned an empathetic new world view of humanity in the west, and the establishment of an organisation that would promote the protection of all people, the OIC was established solely to reassert the Islamic identity having grown intolerant of persistent western interference and chastisement.

4.2 The Organisation of Islamic Cooperation and Human Rights Law

The Organisation of Islamic Conference (now Cooperation), followed the trend of its regional contemporaries internationally and drafted the Cairo Declaration of Human Rights in Islam in 1990. However, this intergovernmental organisation's instrument was

¹³³ For further discussion on combatting defamation of Islam see Chapter Six.

¹³⁴ OIC Charter (n108) Article 1.

not the first representation of the human rights views of the Islamic world. The draft Charter on Human and Peoples Rights in the Arab World emerged in 1978 and over time evolved into what is now the Arab Charter on Human Rights 2004. In 1981 the Universal Islamic Declaration of Human Rights was prepared by the Islamic Council, affiliated with the Muslim World League. This 1981 declaration dealt with human rights in many areas including criminal cases, marriage, inheritance, divorce and economic activities, whilst also supporting freedom of religion based on traditional Islamic Law.¹³⁵ The Arab Charter however, represents a more localised organisation of Arab states and the Islamic Council Declaration is considered more representative of the fundamentalist Salafist or Wahabbist schools of Saudi Arabia. Accordingly, the Organisation of Islamic Cooperation is where focus is directed when seeking a comprehensive declaration more representative of the Islamic World in general.

In addition to the Cairo Declaration, since the inception of the OIC approximately fifty years ago, the Covenant on the Rights of the Child in Islam 2005¹³⁶ and the Plan of Action for Advancement of Women 2008¹³⁷ are the extent of endeavours by the organisation with human rights – though we must keep sight of the fact that the Organisation did not establish itself as a human rights administration. The CDHRI was adopted in Cairo on August 5th, 1990 by the 19th Islamic Conference of Foreign Ministers of the then forty-five member-states of the OIC. The Preamble to the Declaration gives insight into the concept of Islamic universality where it states

‘Believing that fundamental rights and universal freedoms in Islam are an integral part of the Islamic religion as they are binding divine commandments which are contained in the revealed books of God and were sent through the last of His Prophets to complete the preceding

¹³⁵ The Oxford Dictionary of Islam, John L. Esposito (ed.) Oxford Islamic Studies Online <<http://www.oxfordislamicstudies.com/article/opr/t125/e2435>> accessed 8 May 2018.

¹³⁶ OIC Covenant on the Rights of the Child in Islam June 2005 <<https://www.refworld.org/docid/44eaf0e4a.html>> accessed 5 December 2018.

¹³⁷ OIC Plan of Action for the Advancement of Women (OPA AW) <http://www1.oic-oci.org/english/conf/women/2nd/OPA AW_final_2010_en.pdf> accessed 5 December 2018.

*divine messages, thereby making their observance an act of worship and their neglect or violation an abominable sin...’*¹³⁸

Article 1 dictates the religious nature of the document and the religious morality underscoring human dignity, Article 2 articulates the right to life (though qualified), Article 3 articulates protections in times of armed conflict, Article 4 concerns the protection of honour, Article 5 protects marriage and the family, Article 6 ascribes gender specific roles and affirms equality of human dignity, Article 7 concerns the rights of the child, Article 8 articulates legitimate representation, Article 9 protects the right to an Islamic education, Article 10 protects the religion of Islam, Article 11 protects against slavery and colonisation, Article 12 protects the right to free movement and asylum, Articles 13 and 14 assert the right to work and earn a living, Articles 15 and 16 protect the right to property, Article 17 protects healthy ethical development and provides a guarantee of necessary physical and social care, Article 18 is significant insofar as it protects all five *maqasid al-shari’a*, or, objectives of Islam in protecting security of person, religion, family, honour and property,¹³⁹ Articles 19 and 20 address criminal justice rights, Article 21 prohibits the taking of hostages, Article 22 protects freedom of expression (though qualified), Article 23 prevents against abuse of authority and advocates public participation in political life. Article 24¹⁴⁰ of the CDHRI states that all the rights stipulated in the Declaration are subject to the Islamic *Shari’a* whilst Article 25¹⁴¹ establishes the *Shari’a* as the only source of reference for the protection of human rights in Islamic countries. Thus, whilst Article 24 is qualifying the rights, thereby removing their supposed inalienability; Article 25 is giving the Declaration supremacy over the UDHR.¹⁴²

¹³⁸ Cairo Declaration of Human Rights in Islam (CDHRI), Preamble <http://oic-iphrc.org/ckfinder/userfiles/files/FINAL%20OHRD%20CLEAN%20%20VERSION%2024_12_2020.pdf> accessed 17 June 2021.

¹³⁹ Chapter One sets out the objectives of Islam in further detail. See Chapter Seven for a discussion regarding the interpretation of *maqasid al-shari’a*.

¹⁴⁰ CDHRI (n138) Article 24: ‘All the rights and freedoms stipulated in this Declaration are subject to the Islamic Shari’a.’

¹⁴¹ Ibid. Article 25: ‘The Islamic Shari’a is the only source of reference for the explanation or clarification of any of the articles of this Declaration’.

¹⁴² David Littman, ‘Universal Human Rights and Human Rights in Islam’ (1999) Midstream 6 <http://www.dhimmitude.org/archive/universal_islam.html> accessed 18 April 2017.

4.3 The OIC and its Relationship with International Human Rights

The discussion centred on the OIC had two end goals in mind, those being an understanding of what the organisation represents in contrast to the UN, and whether this representation has any impact on the recognition of human rights principles. Having examined the factors that prompted the emergence of the OIC, their impact on the moral values the scheme promotes, and the instruments of the Organisation, those aims have now been fulfilled. Regarding the factors that prompted the emergence of the OIC it can reasonably be said that both organisations were borne of an acute concern for the future of humanity. This concern however emanated from different starting points. The UN intention was to prevent future conflict between states and the OIC intention was to preserve God's place in the protection of the *ummah*.

In creating its own regional declaration considering Islam's historical and ideological background, the Declaration accomplished this attempt to protect God as it fundamentally operated to prevent IHR becoming binding customary law in Islamic member state jurisdictions. This prevented the erosion of a coveted religious legal order and way of life. The OIC therefore can be said to represent two issues of importance to it. Firstly, it represents an attempt to set the Muslim world apart from IHR with the CDHRI working to ensure that God, the central authority of Islam, and his law, are not replaced by any scheme of manmade law. Secondly, it fills the space for international representation of Muslims given the lack of integrity in the claim of IHR that it encompasses the values of global humanity.

5. Conclusion

Despite some differences in the detail of some listed rights protections, the similarities between the *texts* of the UDHR and the CDHRI are significant. Both detail within their declarations broadly similar rights protections grounded in the similar human rights principles of human dignity, autonomy and equality. This is very important for this thesis because, to the extent that, as we have seen, the CDHRI expressly reflects *Shari'a* values, this suggests that the core ethic of *Shari'a* as a whole can be expressed in terms that are similar to those of the UDHR. In other words this suggests that there is no inherent incompatibility between Islam and IHR which in turn suggests that there need be no inherent incompatibility between Islamic Criminal Law and IHR Law. This is not to say

that it is impossible that the two are incompatible but rather that such incompatibility need not be inherent.

This is, however, a somewhat superficial conclusion that ignores the tensions between the Islamic world and the IHR movement as well as the reality that the Cairo Declaration was constructed expressly because of Islamic concern with the excessive westernisation of human rights. Thus, in Chapter Five, we turn to a deeper analysis of the manner in which the values of Islam and IHR both elide and are at odds

CHAPTER FIVE
HUMAN RIGHTS IN
INTERNATIONAL HUMAN RIGHTS LAW AND ISLAMIC LAW

1. Introduction

The core question in this thesis involves an evaluation of whether, as is commonly alleged, Islamic Criminal Law is inherently incompatible with International Human Rights Law.¹ As was discussed in Chapter Three, there are three elements of the former that generate this supposed incompatibility. First, criminal law in *Shari'a* is justified not by reference to its effects (for example the protection of individuals or society) but by reference to its source; thus the fact that God, through Muhammad, requires that a particular action be a crime is sufficient to justify its criminalisation. Second, there are some crimes within Islam that are not crimes in modern secular states, such as drinking alcohol, or adultery. Third, there is a concern with the standard of penalties especially for *hadd* crimes - both that they are disproportionate and also that they are cruel and unusual. These matters combined have prompted the assertion that Islamic Criminal Law is inconsistent with modern penological principles and modern human rights norms.²

As we saw in Chapter Four, however, contemporary Islam, through the OIC and the Cairo Declaration *does* endorse a human rights scheme that seems facially similar to the UDHR. Thus, in this chapter we seek to probe this facial similarity by considering the fundamental points both of similarity and of difference as between International Human Rights and Islam. In order to probe this facial similarity, the chapter comprises three sections. Section One looks to the similarities between the Islamic and International schemes of rights protection. In particular, it notes that both have broadly similar visions of justice and are premised on the same fundamental values of respect for human dignity, autonomy and equality, and both permit restrictions on rights where this is justified. Section Two turns to consider points of difference between the two. In particular, it notes

¹ Mohamed Elewa Badar, 'Is There a Place for Islamic Law within the Applicable Law of the International Criminal Court?' in Tallyn Gray (ed.) *Islam and International Criminal Law and Justice* (Torkel Opsahl Academic Epublisher) 2018, 210-211. See also Mashood Baderin, *International Human Rights and Islamic Law* (Oxford University Press 2003), 74.

² Ann Elizabeth Mayer, 'A Critique of An Na'im's Assessment of Islamic Criminal Justice' in Tore Lindholm and Kari Vogt (eds.), *Islamic Law Reform and Human Rights: Challenges and Rejoinders* (Nordic Human Rights Publications 1993) 37.

that both claim universal validity but have different views of the source of universal truth from which this truth is derived. In addition, the two systems differ on the matter of rights ownership – that is, whether rights are individual or community possessions.

Finally, in practice perhaps the biggest point of incompatibility concerns the question of the relevance, if any, of God and of religion in justifying a restriction on rights – that is, can rights be restricted because of a societal view that this is what God wishes. Section Three assesses whether, however, this is, actually, a real point of incompatibility or whether it is textually justified in the texts of both the CDHRI and the UDHR. If so, then at least in principle, Islamic Criminal Law can be seen as inherently compatible with the UDHR and there must exist other explanations (considered in Chapters Six and Seven) for the assertion that they are not.

SECTION ONE

Section One embarks on an indepth analysis of the scheme of human rights in both IHR and Islamic Law. This is in order to establish whether the fundamental values that overarch these schemes are compatible. Once this comparative analysis is complete Section One proceeds to assess whether or not, based on the same values being reflected in both schemes, they have a similar view of justice.

2. The Core Values of International Human Rights Law and of Islamic Law

There are certain core values that underpin the international rights system. These are human dignity – the respect that a human being deserves by virtue of his being human, autonomy – the freedom of the individual to make life choices according to his own frames of reference, and, equality – the observation of human dignity for all regardless of any differentiating characteristics. On taking each value in turn and exploring the concept and how it is acknowledged and expressed within the human rights instruments of both International Human Rights and Islamic Law, it will be seen that these values are reflected in the Islamic scheme of rights, just as they are in the secular.

2.1 The Concept of Human Dignity

The essentiality of human dignity as a foundational value and overarching principle of IHR can be more fully understood via a discussion surrounding human dignity as a concept and how it is identified within the instruments via recognition of the moral individual. Although the commonly accepted history of the impetus for the entire corpus of IHR Law was the grand scale violation of human dignity, it has been disputed that this connection was made directly after the war and that, in fact, it only made its connection with human rights law at a later stage.³ Despite this discrepancy, it remains crucial to fully communicate the concept of human dignity, particularly considering its responsibility for the phenomenological richness that has been invited into law through this gateway of human dignity violations.⁴

This is necessarily attributable to the value placed on humanity. Human rights, if realised, are intended to protect human beings from conditions that are not fit for beings of our sort,⁵ with the capacity for rationality having an essential association with human worth,⁶ thus, reflecting the recognition that human beings possess a special value intrinsic to their humanity - worthy of respect simply because they are human beings.⁷ Human dignity then, is generally understood as the respect human beings deserve to be shown by virtue of their humanity alone with no other attaching conditions. A working legal definition of the concept is generally understood as bearing four elements when it is defined as the 'inherent' and 'equal' 'worth' of 'every person'⁸. In this sense human dignity is rightly identified as a human value but it has also been described as a status:

³ Samuel Moyn argues that human rights were an attempt at an alternate world order, a principle over power utopia of anti-politics, when other such schemes were failing. Moyn claims Holocaust concern was an originally separate development to the emergence of human rights and is remarkable in how little the humanitarian norm featured in public consciousness during the 1940's and even up to the 1970's., but both found their connection to one another at a later time. It was simply the crisis of other political utopias rather than large scale human rights abuses that allowed the very neutrality of human rights to transcend political visions and succeed. See Samuel Moyn *The Last Utopia: Human Rights in History* (Harvard University Press 2012) 212-230.

⁴ Stephen Riley, *Human Dignity and Law: Legal and Philosophical Investigation* (Routledge 2017) 9.

⁵ Allen Buchannon, 'The Egalitarianism of Human Rights' in Roger Crisp (ed.), *Griffin on Human Rights* (Oxford University Press 2014) 90.

⁶ James R. May, Erin Daly, *Advanced Introduction to Human Dignity and Law* (Edward Elgar Publishing 2020) 57.

⁷ Centre for Bioethics and Human Dignity-Trinity International University, 'Human Dignity' <<https://cbhd.org/category/issues/human-dignity>> accessed 25 October 2019.

⁸ May & Daly (n6) 55.

‘human dignity... means the status of human beings entitling them to respect, a status which is first, and to be taken for granted. It refers to their highest value, or to the fact that they are a presupposition for value, as they are those to whom value makes sense.’⁹

A much earlier articulation of human dignity uses two kinds of value – ‘dignity’ and ‘price’ to describe the two sides of human nature with ‘dignity’ used as a label for an absolute inner worth which is a distinctively human or moral value, and price used as a label for a material world value.¹⁰ A human being in this early, influential and persuasive articulation is a creature with a worth or a dignity that is literally priceless – outside of the domain of instrumental value.¹¹ Indeed, so priceless is this inner worth that we are told *‘We have human rights not to the requisites for health but to those things ‘needed’ for a life of dignity, for a life ‘worthy’ of a human being, a life that cannot be enjoyed without these rights’.*¹² It would seem then that human rights exist to protect this concept of inherent human dignity,¹³ together with the other fundamental values of equality and autonomy. Moreover, the UDHR embodies this goal in its preamble in stating *‘human rights flow from the inherent dignity of the human person’.*¹⁴ It has even been suggested that the authority of the United Nations itself flows from the concept of human dignity.¹⁵ Thus, it has been stated that

*‘Human Rights has rooted itself entirely in human dignity and finds its complete justification in that idea. The content of human rights is defined by what is required by human dignity.... nothing less, and, perhaps nothing more’.*¹⁶

⁹ Mette Lebech, ‘What is Human Dignity?’ Maynooth University Research Archive Library <http://mural.maynoothuniversity.ie/392/1/Human_Dignity.pdf> 1. Accessed 23 October 2019. See generally Mette Lebech, *On The Problem of Human Dignity: A Hermeneutical and Phenomenological Investigation*, (Konigshausen & Neuman 2009). See also Stephen Riley, ‘Human Dignity and the Rule of Law’ (2015) 11(2) Utrecht Law Review 100.

¹⁰ Immanuel Kant, Mary J Gregor (trans./ed.), *The Metaphysics of Morals* (Cambridge University Press 1996) 230.

¹¹ Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press 2013) 128.

¹² Ibid. 17.

¹³ Andrew Heard, ‘Human Rights: Chimeras in Sheep’s Clothing’, Simon Fraser University Research Library <https://www.sfu.ca/~aheard/intro.html#N_12_> accessed 25 October 2019.

¹⁴ Universal Declaration of Human Rights Illustrated Booklet. <https://www.un.org/en/udhrbook/pdf/udhr_booklet_en_web.pdf> accessed 25 October 2019.

¹⁵ Matthew McManus, *Making Human Dignity Central to International Human Rights Law: A Critical Legal Argument* (University of Wales Press 2019) 37.

¹⁶ Louis Henkin, ‘Religion, Religions and Human Rights’ (1998) 26(2) *Journal of Religious Ethics* 231.

In practical terms, this value has theoretically and idealistically reached every single individual globally because *‘the modern notion of human dignity involves an upward equalisation of rank so that we now try to accord to every human being something of the dignity, rank and expectation of respect that was once only accorded to nobility’*¹⁷ – you are either human or you are not. In yet further practical terms, the concept of human dignity must be identified as not simply conceptual or academic, but tangible, and has made itself so through its accreditation with responsibility for the presence of moral considerations in lawmaking and the delivery of justice. To this end, human dignity is described as being the connection between the separate elements of morality and law, thus, allowing for the adjudication of human rights.¹⁸ This tangibility is the phenomenological richness of the law that human dignity has been credited with.

2.1.1 Human Dignity Within International Human Rights

The UDHR, in its preamble states *‘Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world...’*.¹⁹ At Article 1 the UDHR states that *‘all human beings are born free and equal in dignity and rights’*.²⁰ Further in this instrument Article 22 states *‘Everyone....has the right to social security and is entitled to realization...of the economic, social and cultural rights indispensable for his dignity and the free development of his personality’*.²¹ Article 23.3 states *‘Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity...’*.²² The ICCPR is claimed to have striking references to human dignity in its preamble that very much outdo those of the preamble to the UDHR²³ in stating

¹⁷ Jeremy Waldron, ‘Dignity, Rank and Rights’, The Tanner Lectures on Human Values 2009, 229. <https://tannerlectures.utah.edu/_documents/a-to-z/w/Waldron_09.pdf> accessed 22 October 2019.

¹⁸ Willy Moka-Mubelo, *Reconciling Law and Morality in Human Rights Discourse: Beyond the Habermasian Account of Human Rights* (Springer 2016) 119.

¹⁹ Universal Declaration of Human Rights (UDHR), Preamble ¶1, <<https://www.un.org/en/universal-declaration-human-rights/>> accessed 25th October, 2019.

²⁰ Ibid. Article 1.

²¹ Ibid. Article 22.

²² Ibid. Article 23.3.

²³ McManus (n15) 37.

*‘.....recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world..... recognizing that these rights derive from the inherent dignity of the human person....’.*²⁴

Article 10.1 of the ICCPR then states *‘All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person’.*²⁵

The ICESCR opens with a similar human dignity claim in its preamble and at Article 13 links education with the full development of personality and dignity which it states is necessary for the maintenance of peace. In this Article human dignity is upheld as the middle ground or connection between education and peace.²⁶

Human dignity, recognised and identified across IHR instruments, is upheld by the presence of the very basic rights that identify and acknowledge the moral person, namely, those initially set out in the UDHR at Articles 3, 4 and 5 protecting the right to life, liberty and security; protecting against slavery; and, protecting against torture or cruel, inhuman or degrading punishment respectively. Article 3 protects the right to *‘life, liberty and security of person’* and overlaps with Article 25 which states *‘Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security....’.*²⁷ Article 3 should also be read in conjunction with Articles 4, 5 and 9 which respectively protect freedom from *‘...slavery or servitude...’*,²⁸ *‘...torture or... cruel, inhuman or degrading treatment or punishment’*²⁹ and *‘arbitrary arrest, detention or exile’.*³⁰ The ICCPR at Article 6³¹ repeats the right to life and its

²⁴ International Covenant on Civil and Political Rights (ICCPR), Preamble ¶1

<<https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>> accessed 25 October 2019.

²⁵ Ibid. Article 10.1.

²⁶ International Covenant on Economic Social and Cultural Rights (ICESCR) Article 13: *‘....education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.* <<https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx>> accessed 25 October, 2019.

²⁷ UDHR Articles 3 and 25

²⁸ Ibid. Article 4

²⁹ Ibid. Article 5

³⁰ Ibid. Article 9

³¹ ICCPR (n24) Article 6.1: *‘Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life’.*

Second Optional Protocol is dedicated to abolition of the death penalty³² whilst the right to liberty and security of person is repeated at Article 9³³ UDHR Article 4 protection against slavery is developed in the ICCPR at Article 8³⁴ and expanded in specific ways in two further international conventions, namely, the 1951 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others³⁵ and the 1957 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery.³⁶ Where the right to freedom from torture or cruel and inhuman treatment at UDHR Article 5 is concerned this has been echoed at ICCPR Article 7³⁷ and expanded into the specific 1984 Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.³⁸

In summary, human dignity in the secular scheme is the recognition of unconditional respect due to human beings by virtue of their humanity alone. Not only this, but human dignity is so essential to the necessary protection of the IHR moral vision that it acts as the connecting link between the separate elements of morality and the law, making the protection of human dignity an integral component of justice. As a fundamental principle of a non-religious moral vision set out extensively throughout IHR instruments through

³² Second Optional Protocol to the ICCPR

<<https://www.ohchr.org/en/professionalinterest/pages/2ndopccpr.aspx>> accessed 26th October 2019.

³³ ICCPR (n24) Article 9.1: 'Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law'.

³⁴ ICCPR (n24) Article 8: 1 'No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited. 2. No one shall be held in servitude. 3. (a) No one shall be required to perform forced or compulsory labour; (b) Paragraph 3 (a) shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court; (c) For the purpose of this paragraph the term "forced or compulsory labour" shall not include: (i) Any work or service, not referred to in subparagraph (b), normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention; (ii) Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors; (iii) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community; (iv) Any work or service which forms part of normal civil obligations'.

³⁵ Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others 1951 <<https://www.ohchr.org/EN/ProfessionalInterest/Pages/TrafficInPersons.aspx>> accessed 26th October, 2019.

³⁶ Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery 1954.

<<https://www.ohchr.org/EN/ProfessionalInterest/Pages/SupplementaryConventionAbolitionOfSlavery.aspx>> accessed 26th October, 2019.

³⁷ ICCPR (n24) Article 7: 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation'.

³⁸ Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1984 <<https://www.ohchr.org/en/professionalinterest/pages/cat.aspx>> accessed 26th October, 2019.

the identification of the moral person, human dignity is given its validation in the various articles of the IHRL instruments.

2.1.2 Human Dignity Within Islam

Under the theory of *tawhid*, human dignity as an overarching principle and fundamental value attaches to humans by virtue of the grace of God. The Arabic word *karamat* is the translation of dignity, and the root of this Arabic word signifies honour, preference, elevation, abundance, freedom from want, and generosity – all the qualities that warrant recognition, appreciation and respect.³⁹ Moreover, in Islam, the primordial nature of humans – *fitra* – is recognised as based on such ethical principles where a human's happiness is dependent upon their actions. Accordingly, as an agent of wellbeing, every human's actions should be directed towards the wellbeing of others⁴⁰ - thus the protection of humanity and the value of human dignity are closely allied - the presupposed autonomy of the individual allows the freedom to grant the right to happiness to others; alternatively, the duty to ensure your actions do not affect the dignity of others. The *Qur'an* and the *Sunnah* both bear witness to the importance of the human person. At 2:30-2:34 the *Qur'an* addresses the status of man as God's vicegerent on earth as follows:

'Behold'..... 'I will create a vicegerent on earth'. They said 'Wilt thou place therein one who will make mischief therein and shed blood whilst we do celebrate thy praises and glorify thy holy name?' He said 'I know what ye know not'. And he taught Adam the nature of all things, then he placed them before the angels and said 'Tell me the nature of these if ye are right'. They said 'Glory to thee, of knowledge we have none save what thou hast taught us. In truth it is thou who art perfect in knowledge and wisdom'. He said 'O Adam tell them their natures'. When he had told them God said 'Did I not tell you that I

³⁹ Onur Muftugil, 'Human Dignity in Muslim Perspective: Building Bridges' (2017) 13(2) Journal of Global Ethics 160. See also Claire Brierley and Hanem El-Farahaty 'An Interdisciplinary Corpus-Based Analysis of the Translation of Karama/Dignity and its Collocates in Arabic/English Constitutions' (2019) 32 Journal of Specialised Translation 129, where the article states: The intrinsic meaning of the root k-r-m is: to be noble; to honour or revere or treat with deference; to call someone noble and high minded. We are primarily interested in the masdar form karama, where some of the associated meanings are: nobility, high-mindedness, noble-heartedness, generosity, magnanimity, liberality, munificence, honour, dignity, respect, esteem, standing, prestige, mark of honour, token of esteem, and favour.

⁴⁰ Mohammad Nekroumi, 'From the Rational Term of Being to the Theologico-Ethical Idea of Selfhood' in Rudiger Braun ed., *New Approaches to Human Dignity in the Context of Qur'anic Anthropology: The Quest for Humanity* (Cambridge Scholars Publishing 2017) 235-236.

*know the secrets of heaven and earth and I know what ye reveal and what ye conceal?’ And behold we said to the angels ‘Bow down to Adam, and they bowed down....’.*⁴¹

These verses indicate God’s intention that humanity in general is to be tasked with implementing his authority on earth.⁴² We also see from these verses the gift that God reserved for humanity – that of intelligence (or reason) where it states ‘*and he taught Adam the nature of all things...*’. In Islam, reason is a divine endowment of humanity and as a consequence of this, and of their shared humanity, human persons are capable of discerning moral law,⁴³ thus capable of fulfilling the role of God’s successive authority on earth. Indeed at 45:13 the *Qur’an* states ‘*and he has subjected to you whatever is in the heavens and whatever is on the earth – all from Him. Indeed in that are signs for a people who give thought*’.⁴⁴ This is reflective of the universal sacred reality, that is, the direction of God that the natural and written wisdom inform human wisdom in the execution of God’s moral law on earth.⁴⁵ Moreover, once God announced man as his vicegerent on earth and endowed him with reason, the angels bowed before Adam, illustrating the acceptance of man as superior to all other earthly creatures. In affirming this preference of man the *Qur’an* states at 17:70: ‘*And We have certainly honoured the children of Adam and carried them on the land and sea and provided for them of the good things and preferred them over much of what We have created, with [definite] preference*’.⁴⁶

Whilst the *Qur’an* is explicit in its value of humanity, it also creates the link between the written divinity and the *Sunnah* of the Prophet where at 21:107 it states ‘*...and we have not sent you o Muhammad except as a mercy to the worlds*’.⁴⁷ The *Sunnah* then bears witness to the importance of humanity pursuing its ongoing task of ensuring God’s law on earth is applied. A prominent *hadith* claims Mohammad stated ‘*I was sent by Allah to*

⁴¹ Holy Qur’an, Surah Al-Bakarah 2:30 - 2:34.

⁴² Riadh El-Droubie, ‘Authority and Freedom in Islam’ in *Freedom of Authority in Religions and Religious Education* Brian Gates ed. (Bloomsbury Publishing 2016) 44.

⁴³ Abdulaziz Sachedina, *Islam and the Challenge of Human Rights* (Oxford University Press 2009) 58.

⁴⁴ Holy Qur’an, Surah Al-Jathiya 45:13.

⁴⁵ John Herlihy, *Islam for Our Time: Inside the Traditional World of Islamic Spirituality* (Xlibris Corporation 2012) 40-41.

⁴⁶ Holy Qur’an, Surah Al-Isra 17:70.

⁴⁷ Holy Qur’an, Surah Al-Anbya 21:107.

*perfect good character*⁴⁸ whilst another claims ‘*Indeed, the most noble of you in the sight of Allah is the most righteous of you. Indeed, Allah is Knowing and Acquainted*’.⁴⁹ In the context of Islamic universality these *ahadith* are of particular significance insofar as they are very clear evidence of the inextricable link between religion and rights, the inseparable nature of God and law, and the application of God’s moral law to all of humanity. This is necessarily the practical application of the doctrine of *tawhid*.

Proceeding then to the concept of human dignity as a protrusion of the value of humanity, in Islam it is understood on two levels. Firstly there is the level where humans are endowed with a rational mind and can decide what is epistemically or morally true or false, or right or wrong.⁵⁰ This is the dignity divinely granted to every human being and acknowledged as an extraordinarily exceptional dignified status by virtue of *ayat* 17:70⁵¹ which describes human beings as honoured by God himself, not unlike the secular postulate that the dignified status of human beings is a first status to be taken for granted as humans are those to which value makes sense.⁵² Indeed, hermeneutically, the very sin of Iblis is his refusal to accept this exceptional dignified status of man.⁵³ The second level of dignity is that which is earned through autonomous action; alternatively, the function or dysfunction of that intellectual and moral rationality.⁵⁴ The *Qur’an* condemns behaviour that is less than the proper use of the divinely endowed rational faculties and this is how one’s dignity may be lost. In Islam, one’s actions must continuously justify the endowment of dignity and in this regard, righteousness and dignity are conceptually closely allied - righteousness is a matter of socially aware conduct⁵⁵ that amounts to fulfilling the duty to respect dignity which in turn enhances the status of the individual on the day of judgment.

⁴⁸ Sunnah, Sahih Al-Bukhari Hadith No. 5970.

⁴⁹ Holy Qur’an, Surah I-Hujurat 49:13.

⁵⁰ Mehmet Sait Recber, ‘Islam, The Enlightenment and the Justification of Human Dignity’ in Rudiger Braun ed., *New Approaches to Human Dignity in the Context of Qur’anic Anthropology: The Quest for Humanity* (Cambridge Scholars Publishing 2017) 257.

⁵¹ Holy Qur’an, Surah Al-Isra 17:70.

⁵² Lebech (n9A) 1; Lebech (n9B).

⁵³ Khaled Abou El-Fadl, ‘Reading the Signs: The Moral Compass of Transcendental Engagement’ in Mouhanad Khorchide/Klaus Van Stosch eds. *Challenges for Islamic Theology in Europe* (Herder 2012) 227.

⁵⁴ Recber (n50) 257.

⁵⁵ Muftugil (n39) 160.

An additional concept necessary for the full understanding of human dignity in Islam, or *karamat*, is that of inviolability, or *ismah*, particularly insofar as the treatment of same by early Islamic scholars is concerned, as their focus on the only qualification for an entitlement to rights as being human is so compatible with the non-religious viewpoint. Inviolability could be understood as a precursor expression for dignity in Islamic jurisprudence⁵⁶ and was valued by the Arabs even before Islam when four months of the year, and the *kaa'bah*, were considered inviolable for mostly economic reasons. The Prophet during his farewell sermon then controversially extended this inviolability to everyone, in every place, without exception, at all times, when he said:

*'O people, your lives and your property, until the very day you meet your Lord are as inviolable to each other as the inviolability of this holy day you are in now, this holy month you are in now, and this holy city you are in now. Have I conveyed the divine message? Oh Allah be my witness!'*⁵⁷

This inviolability or *ismah* has since been reasoned in various ways by various scholars throughout the centuries of Islamic jurisprudence. Sarakhsi, a Hanafi jurist in the eleventh/fifth century wrote that after the granting of reason to humans God granted the right to inviolability, freedom and property. Inviolability allowed humanity to carry out their mission to God, free will was required to action their life choices accordingly and property was necessary for human survival and success in their mission to God.⁵⁸ In the twelfth/sixth century another Hanafi jurist, Kasani, offered that humans' very existence alone is sufficient for the right to inviolability;⁵⁹ and a third Hanafi jurist of the same era, al-Marghinani, reasoned that the only requirement for the right to inviolability is being

⁵⁶ Mouez Khalfaoui 'Human Dignity and the Creativeness of Muslim Fiqh: Reflections on Classical and Contemporary Muslim Approaches to the Challenges of Equality Between Human Beings' in Rudiger Braun ed., *New Approaches to Human Dignity in the Context of Qur'anic Anthropology: The Quest for Humanity* (Cambridge Scholars Publishing 2017) 262.

⁵⁷ Recep Senturk, 'Human Rights and the Prophet' in Coeli FitzPatrick and Adam Hani Walker eds. *Mohammad in History, Thought and Culture: An Encyclopedia of the Prophet of God* Vol. 1 A-M (ABC-CLIO 2014) 268.

⁵⁸ Ibid. 333-334.

⁵⁹ Recep Senturk 'Human Rights in Islamic Jurisprudence' in Allen D. Hertzke ed. *The Future of Religious Freedom* (Oxford University Press 2013) 299 referencing Kasani, *Badayi al-Sanayi* 1417 (Dar al-Fikr 1996) VII, 349 in Kitab al-Siyar.

human, and it is granted to all humans without exception and enforced by the state.⁶⁰ In the fourteenth/eighth century Bukhari concurred with Sarakhsi that human rights are a prerequisite for carrying out God's divine trust⁶¹ and in the fifteenth/ninth century Ibn Humam reasoned that human inviolability was indeed a rational and not a scriptural issue.⁶² By the nineteenth/thirteenth century the change in language is noticeable when the terms inviolability and dignity are both used by ibn Abidin when he describes property as inviolable but humans as having dignity. At a time when the Islamic world was first facing the impact of western modernity he reasons that every child of Adam, even if he is an infidel, has the right to dignity in Islamic Law.⁶³

Moreover, in Islam, there is that which is open to interpretation/alteration and there is that which is not. Similar to the way in which *jus cogens* or peremptory norms operate in international law, the right to inviolability similarly operates to protect certain basic human rights in Islam that cannot be altered as they are required for the protection of basic human dignity. Of course, these inviolable rights align with the objectives of the *Shari'a* which we recall are the right to religion, life, progeny, intellect, and property.⁶⁴ Accordingly, dignity in Islam (together with autonomy and equality) is a primordial human attribute present by the grace of God as it is essential for humanity to persist and succeed in its trial on earth. As has been articulated in IHR that human rights exist solely to protect the concept of human dignity,⁶⁵ this has now been shown to also be a valid postulate in the Islamic system with human dignity said to constitute the central message of the entire *Qur'an*.⁶⁶ Indeed, in addition to *ayat* 17:70 noted above, the *Qur'an* particularly emphasises dignity in various other verses including 38:72 wherein the verse

⁶⁰ Senturk (n59) 300 referencing Abu al-Hasan Burhanaddin Ali ibn Abi Bakr Marghinani, *al-Hidayah Sharh Bidayah al-Mubtadi*, 1420 ed. Mohammad Mohammad Tamir and Hafiz Ashur Hafiz (Dar al-Salaam, 2000).

⁶¹ Ibid. 303-304 referencing Ala al-Din Abdulaziz ibn Ahmad al Bukhari, *Kashf al Asrar 'an Usul-I Fakhr al-Islam al-Bazdawi* 1417 ed. Muhammad al-Mutas'mbillah al-Baghdadi (Dar al-Kitab al-Arabi 1997) IV, 322.

⁶² Ibid. 303-304 referencing Kamal al-Din Mohammad ibn Abd al-Wahhab ibn Abd al-Hamid ibn Humam, *Sharh u-Fath al-Qadir* (al-matba'ah al-Kubra al-Amiriyyah 1315) IV, 356.

⁶³ Ibid. 303-304 referencing Ibn-Abidin *Rad al-Muhtar 'ala al-Durr al-Mukhtar Shahr Tanwir al-Absar* 1415 (Dar al-Kital al-Ilmiyyah 1994) IV 59, 159-165.

⁶⁴ Recep Senturk, 'Sociology of Rights: "I Am, Therefore I Have Rights": Human Rights in Islam Between Universalistic and Communalistic Perspectives' (2005) 2(1) Muslim World Journal of Human Rights 14-15. For further discussion on the objectives of Islam or *Maqasid-al-Shari'a* see Chapter One.

⁶⁵ Heard (n13).

⁶⁶ Abdulahi Ahmed An-Na'im, *Toward an Islamic Reformation: Civil Liberties, Human Rights and International Law* (Syracuse University Press 2019) 54. See also Sachedina (n43) 71.

‘I breathed from my spirit into him’⁶⁷ suggests a unique dignity created by God’s own spirit, affirmed at *ayat* 95:4 where it is declared ‘We have certainly created man in the best of stature’.⁶⁸ The *Sunnah* also variously emphasises dignity and this is particularly evident in the *ahadith* of al-Adab or The Book of Good Manners where guidance on dignity is abundant, including the commonly quoted *hadith* ‘The best among you are the best in character,’⁶⁹ summing up all guidance that autonomous choices should be made with social awareness, and righteously.

Finally, regarding reach and application of human dignity, as has been theorised in IHR regarding an upward equalisation of rank,⁷⁰ human dignity in Islam has also both theoretically and idealistically reached each individual on earth through a similar process. Islam provided a principled alternative to the western historical norm of aristocratic agrarian society⁷¹ where dignity was qualified, and instead offered an equalisation of rank to all in terms of dignity.⁷² The universality of Islam extends equal dignity to all human beings on earth as God addressed all people in his revelations. Regarding application, the value of human dignity evolves from a conceptual value to a tangible one, as per IHR, through its responsibility for the connection between morality and the law. After the Prophet’s death when many questions required answers, the people turned to the scholars of Islam, whose responses were grounded in religious morality, and not political affiliation.⁷³ These scholars were prestigious, righteous and honourable individuals deeply embedded within the ordinary lives of the public who engaged with them through the delivery of justice underscored by a religious morality. Thus, Islamic Law carries forward an historical mission to create a just community where all members are treated with respect regardless of their social status⁷⁴ and it is this same religious morality in the delivery of justice that underscores and enables the development and adjudication of human rights in Islam today.

⁶⁷ Holy Qur’an, Surah Sad 38:72.

⁶⁸ Holy Qur’an, Surah At-Tin 95:4

⁶⁹ *Sunnah*, Sahih al-Bukhari Hadith No. 6035.

⁷⁰ Waldron (n17).

⁷¹ Karen Armstrong, *Fields of Blood: Religion and the History of Violence* (Random House 2014) 197.

⁷² Michael Cook, *Ancient Religions, Modern Politics: The Islamic Case in Comparative Perspective* (Princeton University Press) 170.

⁷³ John Kelsay, *Arguing the Just War in Islam* (Harvard University Press 2007) 57.

⁷⁴ Muftugil (n39)160-162.

The importance of human dignity to the essence of Islam is reflected in the language of Islamic human rights. Fundamentally, just as the preamble to the UDHR embodies the goal of the protection of human dignity as the central purpose of IHR Law,⁷⁵ the CDHRI also articulates the central *Qur'anic* message of protection of dignity where it states in the preamble ‘....to protect man from exploitation and persecution, and to affirm his freedom and right to a dignified life in accordance with the Islamic Shari’ah’. Further, Article 1 states ‘....all men are equal in terms of basic human dignity...’; and Article 6 states ‘...woman is equal to man in human dignity...’. As with IHR, the concept of human dignity is conveyed through the identification of the moral person via the articles that protect life, liberty and security, protect against slavery, and, protect against cruel, inhuman or degrading punishment. But more than this, to preserve human dignity in Islam we must recall the concept of *ismah* (inviolability) and its application to the objectives of the *Shari’a*, or the *maqasid*. Therefore, to fully protect human dignity in Islam, the right to religion, life, progeny, intellect⁷⁶ and property must all be inviolable.

In turning to the identification of the moral person within the Islamic declaration, these protections are equally significant and include the right to life, liberty and security, and protection against slavery and torture. The CDHRI at Article 2 protects life, liberty and security in stating:

‘(a) Life is a God-given gift and the right to life is guaranteed to every human being...’.

(b) It is forbidden to resort to such means as may result in the genocidal annihilation of mankind.

(c) The preservation of human life throughout the term of time willed by God is a duty prescribed by Shari’a.

(d) Safety from bodily harm is a guaranteed right. It is the duty of the state to safeguard it, and it is prohibited to breach it without a Shari’a prescribed reason.⁷⁷

⁷⁵ Universal Declaration of Human Rights Illustrated Booklet.

<https://www.un.org/en/udhrbook/pdf/udhr_booklet_en_web.pdf accessed 25th October 2019.

⁷⁶ Intellect incorporates the freedom to make autonomous choices and the preservation of honour (dignity and honour are interconnected in Islamic jurisprudence).

⁷⁷ Cairo Declaration of Human Rights in Islam (CDHRI). Article 2.

Article 4 adds: *‘Every human being is entitled to inviolability and the protection of his good name and honour during his life and after his death..’*⁷⁸ whilst Article 18 further adds *‘Everyone shall have the right to live in security for himself, his religion, his dependents, his honour and his property...’*⁷⁹ Moreover, protection from slavery and torture are articulated at Articles 11(a) and 20 respectively, which state *‘Human beings are born free, and no one has the right to enslave, humiliate, oppress or exploit them, and there can be no subjugation but to God the Most-High’*,⁸⁰ and *‘...It is not permitted to subject him to physical or psychological torture or to any form of humiliation, cruelty or indignity...’*⁸¹

Recalling that in Islam there is also the concept of *Ismah* - the CDHRI exhibits the inviolability of the objectives or *maqasid al-shari’a* as follows: Article 2 regarding the right to life states

*‘...Life is a God-given gift and the right to life is guaranteed to every human being..., ...The preservation of human life throughout the term of time willed by Allah is a duty prescribed by Shari’a, and.... Safety from bodily harm is a guaranteed right...’*⁸²

Article 10 regarding the right to religion states *‘Islam is the religion of true unspoiled nature. It is prohibited to exercise any form of pressure on man or to exploit his poverty or ignorance in order to force him to change his religion to another religion or to atheism’*,⁸³ and Article 11 incorporating the right to intellect states

‘Human beings are born free, and no one has the right to enslave, humiliate, oppress or exploit them, and there can be no subjugation but to Allah the Almighty. (b) Colonialism of all types being one of the most evil forms of enslavement is totally prohibited’.⁸⁴

⁷⁸ Ibid. Article 4.

⁷⁹ Ibid. Article 18.

⁸⁰ Ibid. Article 11(a).

⁸¹ Ibid. Article 20.

⁸² Ibid. Article 2

⁸³ Ibid. Article 10

⁸⁴ Ibid. Article 11

Article 15 regarding the right to property states ‘Everyone shall have the right to own property acquired in a legitimate way, and shall be entitled to the rights of ownership without prejudice...’.⁸⁵ Article 16 regarding the right to intellect and property states

*Everyone shall have the right to enjoy the fruits of his scientific, literary, artistic or technical labour of which he is the author; and he shall have the right to the protection of his moral and material interests stemming therefrom’.*⁸⁶

Article 18 acutely protects the five inviolable rights and states ‘Everyone shall have the right to live in security for himself, his religion, his dependents, his honour and his property’.⁸⁷ Finally, Article 20 incorporating the rights to life, intellect and property states:

*‘It is not permitted without legitimate reason to arrest an individual, or restrict his freedom, to exile or to punish him. It is not permitted to subject him to physical or psychological torture or to any form of maltreatment, cruelty or indignity. Nor is it permitted to subject an individual to medical or scientific experiments without his consent or at the risk of his health or of his life....’.*⁸⁸

In summary, human dignity in the Islamic scheme is the recognition of respect due to human beings by virtue of their existence as a creation of God with responsibility for the betterment of society. Accordingly, all requirements for allowing humanity to succeed in this endeavour are deemed inviolable. Moreover, as human dignity is essential to the necessary protection of this religious moral vision, it acts in the Islamic scheme as the connection between morality and the law, with deep social justice roots carried through from its history of non-political, religious based community decision making. Thus, for Islamic Law, human dignity is an integral component of justice. Essentially, human dignity as a fundamental principle and overarching theme of rights in the Islamic scheme is acknowledged throughout the CDHRI in various articles identifying the moral person.

⁸⁵ Ibid. Article 15

⁸⁶ Ibid. Article 16

⁸⁷ Ibid. Article 18

⁸⁸ Ibid. Article 20

2.2 The Concept of Autonomy

Individual or personal autonomy⁸⁹ is an idea that is generally understood to refer to the capacity to be one's own person, to live one's life according to reasons and motives that are taken as one's own and not the product of manipulative or distorting external forces.⁹⁰ However, autonomy itself is braced to the underlying human condition. For autonomy to appear in IHR as a foundational value is to affirm the system's acknowledgement of the operation of the human subject at the core of the rights system – the human condition. This human condition could be described as how an individual draws on psychic frames of memory and desire, as well as wider cultural and social resources in fashioning the self.⁹¹ Such internal and external factors such as calculation, rationale, preferences, ego, or opportunities to act, influence the individual when faced with an issue to be resolved or a choice to be made. As individuals, we have a finite amount of time in which to live life and we seek to live in ways that make sense to us, that give our lives value and meaning, and a sense of our own personal identity.⁹² It is the human condition, drawing on those internal and external frames of reference, that determines those choices that ultimately fashion identities. Significantly, these wider cultural and social resources that constitute frames of reference for the individual represent the over-arching socio-moral ideals of the individual's community that will set the boundaries of acceptable behaviour.

2.2.1 Autonomy Within International Human Rights

This concept of the human condition is solidly reflected in the articles of the Bill of Rights. Articles 22, 26 and 29 of the UDHR specifically speak to personality. Article 22 states *'Everyone, as a member of society....is entitled to realization.... of the economic, social and cultural rights indispensable for his dignity and the free development of his personality'*.⁹³ In echoing the right of the individual to develop his or her personality Article 26(2) states *'Education shall be directed to the full development of the human*

⁸⁹ Although there are human rights conventions targeting self determination of collectives, this discussion centres on autonomy in the personal and individual context.

⁹⁰ John Christman, 'Autonomy in Moral and Political Philosophy', in Edward N. Zalta (ed), *Stanford Encyclopedia of Philosophy* (Spring 2018 Edition)

<<https://plato.stanford.edu/archives/spr2018/entries/autonomy-moral/>> accessed 10 September, 2019. See also Charles C. Helwig, Martin D. Ruck and Michelle Peterson-Badali 'Rights, Civil Liberties and Democracy' in Melanie Killen (ed), *Handbook of Moral Development* (Psychology Press 2013) 62.

⁹¹ Anthony Elliott, *Concepts of the Self* (Cambridge Polity Press 2001) 5.

⁹² Jill Marshall, *Human Rights Law and Personal Identity* (Routledge 2014) 6, 7.

⁹³ UDHR (n19) Article 22.

*personality...*⁹⁴ and is expanded in Article 13 ICESCR⁹⁵ whilst Article 29(1) adds ‘*Everyone has duties to the community in which alone the free and full development of his personality is possible*’⁹⁶ and Article 18 UDHR and Article 18 ICCPR affirm ‘*Everyone shall have the right to freedom of thought [and] conscience....*’.⁹⁷ These insertions in the rights instruments are all reflective of the secular understanding that human beings can, do and should develop their individual personalities according to their internal and external frames of reference.

Notwithstanding, the human condition is appropriately acknowledged as responsible for neutral and negative life choices as well as the positive. Human beings are both good and evil, and in promoting an autonomous life human rights instruments have been careful to encourage a harmonious and peaceful existence. Article 1 of the UDHR, in stating ‘*All human beings are born free and equal in dignity and rights - they are endowed with reason and conscience and should act towards one another in a spirit of brotherhood*’,⁹⁸ both pronounces on autonomy and illustrates the presence of the corresponding duty to respect the autonomy of others. Thus, paradoxically, autonomy is contingent upon the will of others and upon individuals’ choices having neutral or positive effects. Additionally, whilst such contingencies might be within the control of individuals and whilst an individual is the best expert on his or her own interests; it is the freedom to pursue those interests in light of personal values that is true autonomy – something that can only be spoken of when this freedom to make ethical decisions is guaranteed.⁹⁹

Whilst no institution has authority to interfere as a regulator of the internal ego,¹⁰⁰ this freedom, or autonomy, can be restricted by external obstacles such as state control,¹⁰¹ despite concrete opportunities to exercise autonomy being essential to foster human

⁹⁴ Ibid. Article 26.2.

⁹⁵ ICESCR (n26) Article 13.

⁹⁶ Ibid. Article 29.1.

⁹⁷ UDHR (n19) Article 18, ICCPR (n24) Article 18

⁹⁸ UDHR (n19) Article 1.

⁹⁹ Jaunius Gumbis, Vytaute Bacianskaite, and Jurgita Randakeviciute, ‘Do Human Rights Guarantee Autonomy?’ (2011) 62 Cuadernos Constitucionales de la Catedra Fabrique Furio Ceriol, University of Valencia 79-80.

¹⁰⁰ Gumbis (n99) 90.

¹⁰¹ Ibid. 77.

development.¹⁰² To this end, IHR, within its instruments, ensures individuals have recourse to act upon their autonomous choices. Firstly, that individuals' rights are actionable against the state reflects their autonomous nature, insofar as it illuminates the right to pursue goals and interests different from those of the state and its rulers.¹⁰³ In the event that external state factors prevent rights being exercised against the state it isn't forgotten that individuals have total control over their own minds and imaginations, and freedom of thought and expression can empower people to campaign for change - often the first step in many instances of an expansion of capacity to exercise rights not presently enjoyed.¹⁰⁴ Secondly, state subscription to IHR requires fulfilment of the responsibility to create an environment within which rights can be enjoyed and protected¹⁰⁵ and wherein the state pledges to abide by the five state duties, namely, respect for others, the creation of institutional machinery for the realisation of rights, protection of rights and prevention of violations, provision of goods and services to satisfy rights, and the promotion of rights. Thirdly, these UN instruments uphold autonomy through the provision of a framework of certain basic rights.

The basic rights contained within the instruments to ensure the opportunity to exercise autonomy and foster human development are those that recognise the individual as both a moral and legal person. The former being those rights previously addressed as underscoring human dignity and the latter being those that allow an individual to be treated as a person before the law. As the moral recognition has been attended to above regarding dignity, the legal person will be addressed here. Where the legal person is concerned, an individual must be formally acknowledged as a legal person and Articles 6 and 15 of the UDHR cater to this prerequisite. Article 6 plainly states '*Everyone has the right to recognition everywhere as a person before the law*'¹⁰⁶ whilst Article 15 states '*Everyone has the right to a nationality. No one shall be arbitrarily deprived of his*

¹⁰² Michele Graziadei, 'The Fault in Our Stars: Personal Autonomy, Philosophy and the Law' in Marie Claire Foblets, Michele Graziadei & Alison Dundes Renteln (eds) *Personal Autonomy in Plural Societies: A Principle and its Paradoxes* (Routledge 2017) 22, 23.

¹⁰³ Gumbis (n99) 13.

¹⁰⁴ Marshall (n92) 10.

¹⁰⁵ Elaine Dewhurst, Noelle Higgins, Los Watkins, *Principles of Irish Human Rights Law* (Clarus Press 2012) 2.

¹⁰⁶ UDHR (n19) Article 6.

*nationality nor denied the right to change his nationality’.*¹⁰⁷ Similar rights are reiterated in Article 16 ICCPR¹⁰⁸ and Article 24 ICRMW.¹⁰⁹

In summary IHR acknowledges, through validation of the human condition, that development of the human person is at its core. The system also acknowledges that individuals seek to live in ways that make sense to them and give meaning to their life, making personal choices based on their individual internal and external frames of reference; thus, developing their personal identity. Additionally, IHR acknowledges that it is the freedom to pursue certain choices in light of personal values that is true autonomy, though it comes with the proviso that human beings have a duty to act towards one another in a spirit of brotherhood, alternatively, to be mindful of the autonomy of others and not impinge upon it. Essentially, autonomy has been acknowledged as critical to the proper functioning of the secular rights system put in train to bring its moral vision to life.

2.2.2 Autonomy Within Islam

From an Islamic perspective, autonomy is a value that God attaches to the human person and as such is a value that must be protected in order to protect God’s creation. Again, it is the relationship between the creator and the created that commands the respect and preservation of personal moral autonomy. The value of autonomy endowed upon the human person is set out variously in the *Qur’an*. Some *Qur’anic* examples include *ayat* 10:99 which states ‘*And had your Lord willed, those on earth would have believed – all of them entirely. Then [O’ Mohammad] would you compel the people in order that they become believers?*’.¹¹⁰ This verse indicates God’s decision to endow the human person with a rational mind capable of choice; had he chosen to create everyone as a believer this would have defeated the wisdom that underlies the creation of mankind.¹¹¹ Further, at 2:256 the *Qur’an* states ‘*There shall be no compulsion in [acceptance of] religion. The*

¹⁰⁷ Ibid. Article 15.

¹⁰⁸ ICCPR (n24) Article 16: ‘Everyone shall have the right to recognition everywhere as a person before the law’.

¹⁰⁹ International Covenant on the Rights of Migrant Workers and their Families, Article 24 states ‘*Every migrant worker and every member of his or her family shall have the right to recognition everywhere as a person before the law*’ <<https://www.ohchr.org/EN/ProfessionalInterest/Pages/CMW.aspx>> accessed 10 October, 2019.

¹¹⁰ Holy Qur’an, Surah Yunus 10:99

¹¹¹ Syed Abul ‘Ala Maudoodi, *The Meaning of the Qur’an* Volume 5 (Islamic Publications) 59.

*right course has become distinct from the wrong...'.¹¹² This verse is indicative of God's intention that man should choose his own path. Most prominently at 33:72 the *Qur'an* proclaims 'and we offered the trust to the heavens and earth and they refused it – but bore it the man – indeed he is unjust, ignorant'.¹¹³ This verse has been interpreted to suggest that the heavens and the earth were afraid of the responsibility of being God's vicegerent on earth but man was willing to accept it – he was unjust to himself and ignorant of the responsibility, but, had the freedom to make that choice.¹¹⁴*

Freedom is another term often associated with autonomy¹¹⁵ and unlike the other monotheistic religions, in Islam, the human person is born free and unencumbered, known as *fitra*, and his freedom is secured as long as he does not deliberately do anything to deny himself this freedom¹¹⁶ - as with autonomy in IHR, it is not absolute. In Islam, freedom starts with servitude to God and so freedom is interpreted within the boundaries of God's law.¹¹⁷ In this respect we recall the first human being used his free will to disobey his creator,¹¹⁸ and so, as with the IHR concept of autonomy, Islam also acknowledges and respects the human condition and the moral conscience. Accordingly, the written divinity supplies an abundance of guidance on exercising that autonomy, so that the human person may retain and protect the freedom they were born with by making the correct moral choices.

Referring then, to *ayat* 33:72 above, we see that when read in conjunction with *ayat* 33:73, the authority, or trust, was granted to humanity so that humanity could be tested –

'[It was] so that Allah may punish the hypocrite men and hypocrite women and the men and women who associate others with Him and that Allah may accept repentance from the believing men and believing women. And ever is Allah Forgiving and Merciful'.¹¹⁹

¹¹² Holy Qur'an, Surah Al-Baqarah 2:256.

¹¹³ Holy Qur'an, Surah Al-Ahzab 33:72

¹¹⁴ Islam Awakened <<https://islamawakened.com/quran/33/72/>> accessed 30 July 2020.

¹¹⁵ Bruce Baum & Robert Nicholls, *Isaiah Berlin and the Politics of Freedom: 'Two Concepts of Liberty' 50 Years Later* (Routledge 2013), 91.

¹¹⁶ Dhiyab Ali Ayyush, *'Social Problems: An Islamic Perspective'* (Al-Liqā' Centre Publications 2001) 24.

¹¹⁷ Shahriar Zarshenaz, *Untitled essay in Inside Iran: A Special Survey*, Index on Censorship Mar. 1992, 11.

¹¹⁸ Abdulwahid van Bommell, 'Quality or Sanctity of Life' in Hendrik M. Vroom & Jerald D. Gort eds., *Holy Scriptures in Judaism, Christianity and Islam: Hermeneutics, Values and Society* (Rodopi 1997) 206.

¹¹⁹ Holy Qur'an, Surah Al-Ahzab 33:73.

As humanity is the only one of God's creations that does not respond instinctively to nature, the human person is endowed with a conscience, or rationality, and, employing the attitude of *taqwa*,¹²⁰ or piety, is expected to always be mindful of the sacred reality that is the written wisdom (God's Law), natural wisdom (nature including human nature) and human wisdom (rational thought) to make the correct moral decisions to properly effect God's law on earth. In Islam, this is effected by the combined operation of the 'commanding soul' (*Nafs-e-Ammara*), the 'self accusing soul' (*Nafs-e-Lawwama*) and love and faith in God. The 'commanding soul' represents natural animal instincts that lead humanity towards vice and is evidenced in the *Qur'an* at 12:53: '*Yet I do not hold myself to be free from weakness, for the Commanding Self is surely prone to enjoin evil...*';¹²¹ whilst the 'self accusing soul' represents the inner judgment of the moral status of our actions as evidenced in the *Qur'an* at 75:2: '*And I swear by and bring to witness the self-accusing soul...*'.¹²² The interplay of these components of conscience together with the third element of love and faith in God is intended to lead humanity to contentment and tranquility known as the 'soul at peace' (*Nafs-e-Mutma'innah*).¹²³

Moreover, the effectuating of God's law in this manner, that is, living a moral life, is made possible with the abundance of guidance in the written divinity. At 76:3 the *Qur'an* states '*surely we guided him along the way whether he be grateful or ungrateful*'.¹²⁴ Whilst there is abundant *Qur'anic* evidence of the recognition of human autonomy and the value of the moral conscience, the *Sunnah* also bears witness to the value God places upon the autonomy of the human person in telling his listeners on one occasion that there is no need to emulate his actions exactly, but to follow his tradition to enhance their wellbeing in a way that accords with their own daily lives.¹²⁵

¹²⁰ *Taq'wa* is an attitude of piety in all doings that makes God's business on the day of reckoning easy. The *Qur'an* at 64:16 states 'So fear Allah as much as you are able and listen and obey and spend [in the way of Allah]; it is better for your selves. And whoever is protected from the stinginess of his soul - it is those who will be the successful'. For further explanation of *taq'wa* see Abdur Rashid Siddiqi *Qur'anic Keywords: A Reference Guide* (Kube Publishing 2015) 242-243.

¹²¹ Holy *Qur'an*, Surah Yusuf 12:53.

¹²² Holy *Qur'an*, Surah Al-Qiyamah 75:2.

¹²³ For further explanation of the Islamic conscience see Ali Unal, *The Qur'an with Annotated Interpretation in Modern English* (Tughra Books 2006) 1345.

¹²⁴ Holy *Qur'an*, Surah Al-Insan 76:3.

¹²⁵ *Sunnah*, Sahih Al-Bhukari Hadith No. 5063. 'A group of three men came to the houses of the wives of the Prophet asking how the Prophet worshipped (Allah), and when they were informed about that, they considered their worship insufficient and said, "Where are we from the Prophet as his past and future sins have been forgiven." Then one of them said, "I will offer the prayer throughout the night forever." The

On the other hand, whereas autonomy within IHR is conceived of as serving the actor's interests this side of the grave, it will be remembered that Islam is an eschatological religion, thus it can be assumed that autonomy should be exercised to help prepare for the day of reckoning when every individual must stand before God.¹²⁶ In Islam, the day of reckoning is feared, as the written divinity supplies proof that God is all knowing. At 50:17-19 the *Qur'an* states

'when the two receivers (guardian angels) receive, seated on the right and the left, man does not utter any word except that which with him is an observer prepared to record and the intoxication of death will bring the truth...'.¹²⁷

Moreover, at 89:27-30 the *Qur'an* brings together the elements of the moral conscience and the result of the wise exercise of moral autonomy when it states

'As for the person who has been blessed with a contented and peaceful mind He will say to him 'O you soul at peace! Come back to your Lord well-pleased with Him and He well-pleased with you. Enter the fold of My chosen servants, and enter the Garden made by Me.'¹²⁸

Essentially, in Islam, the trust placed in humanity as God's vicegerent on earth is tested by the endowment of freedom, or autonomy, so that only those who sincerely effectuate God's law on earth will be received by him on the last day. As with individuals in the IHR system, individuals in Islam also have a finite amount of time in which to live life, seeking out ways to live that make sense, that give life meaning and value, and a sense of personal identity.¹²⁹ But, with Islam there is an additional dimension. Despite endeavouring to live a meaningful life, as freedom begins with servitude to God,

other said, "I will fast throughout the year and will not break my fast." The third said, "I will keep away from the women and will not marry forever." Allah's Messenger came to them and said, "Are you the same people who said so-and-so? By Allah, I am more submissive to Allah and more afraid of Him than you; yet I fast and break my fast, I do sleep and I also marry women...".

¹²⁶ Juan Eduardo Campo, *Encyclopedia of Islam* (Infobase Publishing 2009) 214.

¹²⁷ Holy Qur'an, Surah Qaf 50:17-19.

¹²⁸ Holy Qur'an, Surah Al-Fajr 89:27-30.

¹²⁹ Marshall (n92) 6,7.

humanity's moral conscience in navigating life will decide its eschatological fate – the end goal of autonomous decision making is to please God.

Let us then turn to consider how autonomy plays out in the language of Islamic human rights. As with IHR, the concept of autonomy and acknowledgement of the human condition are articulated in terms of freedom and personality development. Fundamentally, the preamble to the CDHRI asserts the value of autonomy in stating

*‘In contribution to the efforts of mankind to assert human rights, to protect man from exploitation and persecution, and to affirm his freedom and right to a dignified life in accordance with the Islamic Shari’ah’*¹³⁰

whilst Article 11(a) states *‘Human beings are born free, and no one has the right to enslave, humiliate, oppress or exploit them, and there can be no subjugation but to Allah the Almighty’*.¹³¹ Within the substantive articles, in line with IHR Articles 22, 26 and 29 of the UDHR and Article 13 ICESCR, the CDHRI also addresses the development of personality. Article 9(b) and 17(a) respectively state:

*‘Every human being has a right to receive both religious and worldly education from the various institutions of teaching, education and guidance, including the family, the school, the university, the media, etc., and in such an integrated and balanced manner that would develop human personality, strengthen man’s faith in Allah and promote man’s respect to and defence of both rights and obligations’*¹³²

‘Everyone shall have the right to live in a clean environment, away from vice and moral corruption, that would favour a healthy ethical development of his person and it is incumbent upon the State and society in general to afford that right’.¹³³

¹³⁰ CDHRI (n77) Preamble ¶2.

¹³¹ Ibid. Article 11(a).

¹³² Ibid. Article 9(b).

¹³³ Ibid. Article 17(a).

As with the IHR instruments, these insertions are reflective of the Islamic understanding that human beings can, do and should develop their individual personalities according to their relevant frames of reference, which, in the Islamic instance, is the existence of God. Remembering that the *Qur'an* and the *Sunnah* are the terms of reference for the interpretation of the CDHRI we see the *Qur'an* at 16:91 proclaims '*Indeed Allah enjoins justice, and the doing of good to others; and giving like kindred; and forbids indecency, and manifest evil, and wrongful transgression*'.¹³⁴ Accordingly, as with IHR, the human condition is appropriately acknowledged as responsible for neutral and negative life choices as well as the positive¹³⁵ and in promoting an autonomous life the CDHRI has also been careful to encourage this harmonious and peaceful existence with many references to the duty of society to participate with the state in the provision and protection of rights and freedoms so as to ensure an autonomous life for others.

The preamble asserts that: '*no one shall have the right as a matter of principle to abolish [rights] either in whole or in part or to violate or ignore them in as much as they are binding divine commands*'; and proceeds to state: '*the safeguarding of those fundamental rights and freedom is an individual responsibility of every person and a collective responsibility of the entire Ummah*'.¹³⁶ Substantively, the duty to respect others autonomy is reflected as the responsibility of society and individuals to help provide and protect the rights of others. This is apparent at Article 4 regarding the protection of the sanctity of the human being,¹³⁷ Article 5(a) regarding marriage,¹³⁸ Article 7 regarding nurturing children,¹³⁹ Article 9(a) regarding education,¹⁴⁰ Article 13 regarding provision of work¹⁴¹ and Article 17(a) and (b) regarding personal development.¹⁴²

¹³⁴ Holy Qur'an, Surah an-Nahl 16:91.

¹³⁵ For further discussion on moral guidance and the goals and objectives of Islam see Chapter One.

¹³⁶ CDHRI (n77) Preamble, ¶ 4.

¹³⁷ Ibid. Article 4 'Every human being is entitled to human sanctity and the protection of one's good name and honour during one's life and after one's death. The state and the society shall protect one's body and burial place from desecration'.

¹³⁸ Ibid. Article 5a 'The family is the foundation of society, and marriage is the basis of making a family. Men and women have the right to marriage, and no restrictions stemming from race, colour or nationality shall prevent them from exercising this right'.

¹³⁹ Ibid. Article 7 'As of the moment of birth, every child has rights due from the parents, the society and the state to be accorded proper nursing, education and material, hygienic and moral care. Both the fetus and the mother must be safeguarded and accorded special care. (b) Parents and those in such like capacity have the right to choose the type of education they desire for their children, provided they take into consideration the interest and future of the children in accordance with ethical values and the principles of the Shari'ah. (c) Both parents are entitled to certain rights from their children, and relatives are entitled to rights from their kin, in accordance with the tenets of the shari'ah'.

¹⁴⁰ Ibid. Article 9a 'The seeking of knowledge is an obligation and provision of education is the duty of the society and the State. The State shall ensure the availability of ways and means to acquire education and

As with IHR the acknowledgement of autonomy within human rights instruments is not enough in and of itself to guarantee the exercise of the value. There must be freedom to pursue our autonomous choices in a practical respect. The availability of the practical means to pursue autonomous choices is required to mobilise full autonomy, or, to go a step further, the availability to pursue those autonomous choices in light of personal values is required to mobilise true autonomy. The existence of God comprises such personal values and therefore affects personal choice in the Islamic system. Whilst the freedom to make ethical decisions is guaranteed and no institution has authority to interfere as a regulator of the internal ego,¹⁴³ this freedom and autonomy is, however, influenced firstly by God as an all knowing entity, whose guidance operates to help control the internal ego, and secondly, as with IHR, by external forces such as state control.

In summary, autonomy is an overarching theme and fundamental principle within the Islamic rights scheme. The existence of God as a basis for morality in the Islamic system does not interfere with the value placed on human autonomy but only provides alternate frames of reference for moral decision making. In Islam, every individual is born free and can remain so through good moral decision making guided by the written divinity. In order to mobilise true autonomy, human beings must be free to pursue their choices in light of personal values. In acknowledging the human condition, Islam proclaims that freedom starts with servitude to God and making good moral choices necessarily effects God's law on earth, preparing the individual for judgment day when their actions in effecting that law will decide their eschatological fate. The Islamic scheme thus acknowledges that human beings will make personal choices that give their life meaning and value, and in this acknowledgement the CDHRI advocates the development of personal identity and personality. However, the Islamic scheme also warns of the duty to

shall guarantee its diversity in the interest of the society so as to enable man to be acquainted with the religion of Islam and uncover the secrets of the Universe for the benefit of mankind.

¹⁴¹ Ibid. Article 13 'Work is a right guaranteed by the State and the Society for each person with capability to work. Everyone shall be free to choose the work that suits him best and which serves his interests as well as those of the society....'.

¹⁴² Ibid. Article 17 'Everyone shall have the right to live in a clean environment, away from vice and moral corruption, that would favour a healthy ethical development of his person and it is incumbent upon the State and society in general to afford that right.(b) Everyone shall have the right to medical and social care, and to all public amenities provided by society and the State within the limits of their available resources'.

¹⁴³ Gumbis (n99) 77-90.

ensure an autonomous life for others. Finally, autonomy becomes a lived value through the validation of the basic rights that recognise the legal and moral person throughout the CDHRI. As those rights that identify the moral person have previously been set out regarding human dignity in Islam, it remains only to note those identifying the legal person. Within the CDHRI, these rights occur at Article 8 where it is stated that ‘every human being has the right to enjoy a legitimate eligibility with all its prerogatives and obligations ...’ and at Article 1 where it is noted that ‘all human beings form one family whose members are united in their subordination to Allah’, and ‘all human beings are Allah’s subjects’.

2.3 The Concept of Equality

In setting out equality as a fundamental value and over arching principle and theme of the secular scheme of human rights, the connection with autonomy and human dignity should be noted. In discussing autonomy it was noted that same is contingent upon individuals not impinging on others’ rights to make their own personal life choices – treat others as you would like to be treated – a moral maxim suggesting we should treat each other equally, proposing, or presupposing, that we are in some sense equals.¹⁴⁴ In discussing human dignity it was noted that human dignity is the recognition that human beings possess a special value intrinsic to their humanity and as such are equally worthy of respect simply because they are humans, regardless of any protective characteristics. Accordingly, neither the principles of autonomy nor human dignity are complete in the IHR without their connection to equality and vice versa. Human dignity and autonomy are inextricably linked to equality in order to bring the IHR moral vision to life.

Conceptually, equality can have many guises. Equality could appear as consistent treatment, ensuring one rule applies to everyone or as equal opportunities affording everyone the same starting point competitively. It could also appear as equality of outcomes by injecting more where it is required or even as transformative equality through institutional obligations.¹⁴⁵ Despite the appropriateness of any of these variations on the conception of equality in the right circumstance, the need to resort to these conceptions comes at a time of policy considerations or law making, whereas, there is a

¹⁴⁴ Gumbis (n99) 81.

¹⁴⁵ Jarlath Clifford, ‘Equality’ in Dinah Shelton (ed.) *The Oxford Handbook of International Human Rights Law* (Oxford University Press 2013) 427-430. Also in Stephanie Farrior (ed.), *Equality and Non-Discrimination under International Law* (Routledge 2015) 10-14.

conception of equality that is generally accepted as the underscoring meaning in, as it were, a preambular context. In this sense, the concept of equality is most widely accepted as ‘treatment as an equal, not equal treatment’,¹⁴⁶ essentially, ‘equality of human dignity’ – which would place dignity as the trigger of the right to equality,¹⁴⁷ or, ‘equality as non-discrimination’, its closely related principle. Indeed equality and non-discrimination have been described as positive and negative statements of the same principle.¹⁴⁸ In this intended context, every person is a human being, which is all that is required to have inherent rights acknowledged, therefore, no one human being is more or less entitled to that acknowledgement and through that upward equalisation of rank, prejudice is removed and every person is equally entitled to an autonomous and dignified life regardless of any protective characteristics. Where visibility is concerned, equality is the fundamental value or overarching principle most vivid within the architecture of the instruments.

2.3.1 Equality Within International Human Rights

Given the failure of the incorporation of the equality principle into the Covenant of the League of Nations at the Paris Conference and another global war of unspeakable horror rooted in deliberate and systematised discriminatory practices embracing entire state structures,¹⁴⁹ when the opportunity for a second attempt to prevent repeated deliberate and systematic violations carried out on the basis of prejudice came about, measures to protect against such manifestations of prejudice were introduced through the incorporation of the principle of equality.¹⁵⁰ Accordingly, the UN Charter included the following at Article 1:

¹⁴⁶ www.equalrightstrust.org, ‘The Ideas of Equality and Non-Discrimination: Formal and Substantive Equality’ 7 <equalrightstrust.org/ertdocumentbank/The%20Ideas%20of%20Equality%20and%20Non-discrimination,%20Formal%20and%20Substantive%20Equality.pdf> accessed 3 November 2019.

¹⁴⁷ Sandra Fredman, *Discrimination Law* (Oxford University Press 2002) 18.

¹⁴⁸ Bertrand G. Ramcharan, ‘Equality and Non-Discrimination’ in Louis Henkin (ed.), *The International Bill of Rights: The Covenant on Civil and Political Rights* (Columbia University Press 1981) 252-253. Also in Stephanie Farrior (ed.), *Equality and Non-Discrimination under International Law* (Routledge 2015) 35-36.

¹⁴⁹ Office of the High Commission for Human Rights in Cooperation with the International Bar Association, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* (United Nations New York and Geneva 2003) 634.

¹⁵⁰ Stephanie Farrior, ed. *Equality and Non-Discrimination Under International Law* (Routledge 2017) i. Again Samuel Moyn differs in opinion on the impetus for the genesis of IHRL though it is admitted that the absence of an equality principle for the League of Nations influenced the inclusion of one for the United Nations that, it was hoped, would help produce a more successful outcome.

*‘The purposes of the United Nations are... To develop friendly relations among nations based on respect for the principle of **equal rights and self-determination of peoples**..... and to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging **respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion**,.....’*¹⁵¹

The first paragraph of the preamble to the UDHR states ‘Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world’ whilst the second states ‘Whereas the peoples of the United Nations have... reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women...’.¹⁵² Throughout the articles of the UDHR Article 1 states ‘All human beings are born free and equal in dignity and rights’¹⁵³ and equality is further mentioned regarding equality before the law at Article 7, equality in entitlement to a full and fair hearing at Article 10, equal marriage rights at Article 16, equal voting rights and access to public service at Article 21, equal pay for equal work at Article 23 and equal access to higher education at Article 26.¹⁵⁴

In the ICCPR the first paragraph of the preamble reiterates that of the UDHR whilst equal enjoyment of all ICCPR rights is protected at Article 3, equal criminal justice guarantees at Article 14, equal marriage rights at Article 23, equal rights to vote and access public services at Article 25 and equality before the law at Article 26.¹⁵⁵ The ICESCR, like the ICCPR, repeats in its preamble the recognition of the dignity and equal rights of all. At Article 3 equal enjoyment of all ICESCR rights is protected whilst Article 7 protects equal pay and equal working conditions and opportunities and Article 13 protects equal access to higher education.¹⁵⁶

¹⁵¹ UN Charter, Article 1 <<https://www.un.org/en/sections/un-charter/un-charter-full-text/>> accessed 1 November 2019.

¹⁵² UDHR(n19) Preamble ¶¶ 1 and 2.

¹⁵³ Ibid. Article 1

¹⁵⁴ UDHR (n19).

¹⁵⁵ ICCPR (n24).

¹⁵⁶ ICESCR (n26).

Equality, though not unsupported by the identification of the legal and moral person as is the case with human dignity and autonomy, gets its support from the prohibition of discrimination, and, despite the even scattering of acknowledgements of the equality principle across the international instruments, equality has the potential to fail without the support of this prohibition. To this end, there is an outright prohibition on discrimination in the instruments. The UDHR at Article 2 states

*‘Everyone is entitled to all the rights and freedoms set forth in this Declaration without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty’.*¹⁵⁷

Article 7 states *‘All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination’.*¹⁵⁸ Non-discrimination is prominent in the ICCPR where Article 2 states that each state party *‘undertakes to respect... the rights... in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’.*¹⁵⁹ Article 26 moves away from the Article 2 reference to rights within the Covenant to a prohibition of any discrimination whatsoever in stating:

*‘the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’.*¹⁶⁰

¹⁵⁷ UDHR (n19) Article 2.

¹⁵⁸ Ibid. Article 7.

¹⁵⁹ ICCPR (n24) Article 2.

¹⁶⁰ Ibid. Article 26.

Further, Article 20.2 of the ICCPR prohibits any ‘*advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence*’¹⁶¹ whilst Article 27 prohibits discrimination against minorities where it states ‘*persons belonging to such minorities shall not be denied the right... to enjoy their own culture, to profess and practice their own religion, or to use their own language*’.¹⁶² The ICESCR at Article 2.2 states ‘*the rights enunciated in the present Covenant will be exercised 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*’¹⁶³ and draws specific attention to non-discrimination in employment where it guarantees fair wages ‘*without distinction of any kind*’ and promotions based on ‘*no considerations other than seniority and competence*’.

With genocide being the ultimate negation of the right to equality and wholly based on prejudice¹⁶⁴ it seems appropriate that the Genocide Convention was the first to follow the UDHR, in direct response to wartime human rights violations.¹⁶⁵ Subsequent conventions, given that most human rights breaches are carried out on the basis of prejudice, evidence non-discrimination as a cross cutting concern. In addition to the above pronouncements in the Bill of Rights, the Convention on the Rights of the Child, the Convention on the Rights of all Migrant Workers and their Families and the Convention on the Rights of Persons with Disabilities each contain their own non-discrimination clause at Articles 2,¹⁶⁶ 7,¹⁶⁷ and 5¹⁶⁸ respectively. Moreover, non-

¹⁶¹ Ibid. Article 20.2.

¹⁶² Ibid. Article 27.

¹⁶³ ICESCR (n26) Article 2.2

¹⁶⁴ Office of the High Commission for Human Rights in Cooperation with the International Bar Association, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, United Nations New York and Geneva 2003, 637.

¹⁶⁵ Samuel Moyn argues that there is an inaccuracy in the hindsight paradigm that suggests the legal innovations such as the Nurembourg Trials and the Genocide Convention were facets of the same scheme that developed human rights. Indeed he argues that the main force behind the genocide convention, Raphael Lemkin, understood his genocide convention campaign to be at odds with the human rights campaign. See Samuel Moyn, *Human Rights and the Uses of History* (Verso Books 2014) 78-80. See also Dan Eshet, ‘Totally Unofficial: Raphael Lemkin and the Genocide Convention’ (Facing History and Ourselves National Foundation 2007). See also A.M. Rosenthal, ‘On My Mind: A Man Called Lemkin’ (New York Times) October 18th 1988.

¹⁶⁶ UN Convention on the Rights of the Child

<<https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>> accessed 5 December 2020.

¹⁶⁷ International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (this is in a note above).

¹⁶⁸ UN Convention on the Rights of Persons with Disabilities

<<https://www.ohchr.org/en/hrbodies/crpd/pages/conventionrightspersonswithdisabilities.aspx>> accessed 5 December 2020.

discrimination is the explicit objective of two treaties drafted in consideration of those with certain protective characteristics in order to prevent the continuation of discriminatory practices against them on grounds of race and gender, namely, the Convention on the Elimination of all Forms of Racial Discrimination and the Convention on the Elimination of all Forms of Discrimination against Women.

In summary, equality is a fundamental value and theme of IHR, and, a value humankind is endowed with by virtue of their humanity alone. It is inextricably linked with the values of human dignity and autonomy, with each one depending on the others for optimum rights protection. The concept is properly understood as equality of human dignity and is variously identifiable throughout the instruments via its corresponding principle of non-discrimination.

2.3.2 Equality Within Islam

As with human dignity and autonomy, equality is the third core moral value that God attaches to the human person, and, as with human dignity and autonomy, is a value that must be protected in order to protect God's creation. In Islam, it is at the point of creation that the right of equality attaches by reason of God creating all humans from the same source, thus, equal. There are in the *Qur'an* supposed variations in the precise source material from which humans are said to have been made¹⁶⁹ but this does not alter the Islamic premise that all humankind are created in the same way. To this end the variety of verses on creation find their chronological place in Al-Alaq wherein it states:

*He is the One Who created you from dust, then from a sperm-drop, then developed you into a clinging clot of blood, then He brings you forth as infants, so that you may reach your prime, and become old—though some of you may die sooner—reaching an appointed time, so perhaps you may understand Allah's power.*¹⁷⁰

¹⁶⁹ Holy Quran, Surah Ar-Rahman 55:14 asserts 'He created humankind from sounding clay like pottery'. At An-Nur 24:45 it asserts 'And Allah has created from water every living creature. Some of them crawl on their bellies, some walk on two legs, and some walk on four. Allah creates whatever He wills. Surely Allah is Most Capable of everything'. At Ar-Rum 20:30 it asserts 'One of His signs is that He created you from dust, then—behold!—you are human beings spreading over 'the earth' and at Al-Alaq 96:1-2 it asserts 'In the name of your Lord who created humans from a clinging clot'.

¹⁷⁰ Holy Qur'an, Surah Ghafir 40:67.

Moreover, in addition to being created in the same way the *Qur'an* adds that human persons are also of the same soul – ‘*O humanity! Be mindful of your Lord Who created you from a single soul, and from it He created its mate, and through both He spread countless men and women*’.¹⁷¹ Thus, the foundation of the principle of equality in Islam is in the nature of equal physical and spiritual origin. Equality in Islam then, is considered a birthright and whilst the verdict of Islamic discourse on observance of obligations is unequivocal, this translates to observing God-given equality as non-negotiable - similar to IHR inalienability¹⁷² - establishing equality as a firm core value in the Islamic system.

The accepted formulation of the equality conception in the Islamic scheme is that of equality as equal human dignity. In this sense, all human persons must fulfil their duty to refrain from acting in any way that might deny others their right to live a dignified and autonomous life. The *Qur'an* at 16:97 asserts ‘*Whoever does good, whether male or female, and is a believer, We will surely bless them with a good life, and We will certainly reward them according to the best of their deeds*’.¹⁷³ Here we see that all people without exception or distinction are entitled to retain the autonomy to live a righteous life and protect their dignity throughout their trial on earth, and, it is this concept of righteousness that links equality to human dignity.¹⁷⁴ For Islam therefore, just as with IHR, equality is necessary for the maintenance of autonomy and human dignity. Indeed in order for Islam to ensure the dignity and autonomy of individuals are equally respected, Maududi notes how it succeeds in making an important and significant foundational principle and core value a reality through the corresponding principle of non-discrimination¹⁷⁵ so that equality becomes a substantive right in and of itself. In explaining *ayat* 49:13 which states ‘*O'mankind we have created you from a male and a female, and made you into peoples and tribes so that you may recognise one another*’, Maududi articulates that the division of human beings into nations and races is for the sake of distinction and it is not for one nation to take pride in its superiority over another or treat different races or tribes with contempt or disgrace. As 49:13 continues ‘*...the noblest among you before God are the most heedful...*’, he explains that the superiority of one man over another is based on

¹⁷¹Holy Qur'an, Surah An-Nisa 4:1.

¹⁷² Omar Siddiqui, ‘Relativism Versus Universalism’ (2001) 18(1) American Journal of Islamic Social Sciences 75.

¹⁷³ Holy Qur'an, Surah An-Nahl 6:97.

¹⁷⁴ Muftugil (n39) 160.

¹⁷⁵ Abdul A'la Mawdudi, *Human Rights in Islam* (Islamic Publications Limited 1995) 19-20.

purity of character and high morals only, not race, colour or language, and, even at this level of superiority, one should not play Lord.¹⁷⁶ Indeed, if Mohammad - considered to be the most pious of all humankind - had no tendency towards superiority, then as a matter of course, no other human being should. At 3:97 the *Qur'an* states

'It is not appropriate for someone who Allah has blessed with the Scripture, wisdom, and prophethood to say to people, "Worship me instead of Allah." Rather, he would say, "Be devoted to the worship of your Lord alone—in accordance with what these prophets read in the Scripture and what they taught"'.¹⁷⁷

The *ahadith* of the *Sunnah* further support the principle of non-discrimination. A commonly quoted *hadith* states *"Surely people.... are equal like the teeth of a comb: there is no superiority of an Arab over a non-Arab and of the red over the black except on the basis of piety"*.¹⁷⁸ Another states *'Verily Allah does not look to your faces and your wealth but He looks to your heart and to your deeds'*.¹⁷⁹ Additional support for the principle is also to be found in the farewell sermon of the Prophet wherein he declared

'All mankind is from Adam and Eve, an Arab has no superiority over a non-Arab nor a non-Arab has any superiority over an Arab; also a white has no superiority over black nor does a black have any superiority over a white except by piety and good action'.

Completing the conception of equality in Islam is its connection with justice. Equality and justice in the Islamic system are strongly linked insofar as Islam puts a burden of justice on individuals as opposed to IHR where justice is attained through governmental or state intervention in unjust matters.¹⁸⁰ For Islam then, justice is a fundamental aspect of human rights, and, though equality and justice do not necessarily share the same

¹⁷⁶ Ibid. 20.

¹⁷⁷ Holy Qur'an, Surah Ali Imran 3:97.

¹⁷⁸ Arif Ali Khan, Tauqir Mohammed Khan, *Encyclopedia of Islamic Law: Criminal Law in Islam* (Pentagon Press 2006) 30.

¹⁷⁹ *Sunnah*, Sahih Muslim Hadith No. 2564c.

¹⁸⁰ Hossein Askari, Abbas Mirakhor, *Conceptions of Justice from Islam to the Present* (Springer 2019) 261.

meaning, equality is a mechanism through which justice can be achieved¹⁸¹ and through which the burden of dealing justly can be fulfilled.¹⁸² We recall the whole purpose of God's intervention in *Jahilliyah* was to bring justice to an unjust existence, and this is reflected in 57:25 of the *Qur'an* where it states:

'Indeed, We sent Our messengers with clear proofs, and with them We sent down the Scripture and the balance so that people may administer justice. And We sent down iron with its great might, benefits for humanity, and means for Allah to prove who is willing to stand up for Him and His messengers without seeing Him. Surely Allah is All-Powerful, Almighty'.¹⁸³

Moreover, this connection between equality and justice, or the use of equality as a mechanism to achieve justice, is validated in many *Qur'anic* verses including 5:8 which states *'And do not let hatred of any people dissuade you from dealing justly. Deal justly, for that is closer to God-consciousness'*¹⁸⁴ and 4:135 which states

'...be constantly upright with equity, witnesses for Allah, even if it be against yourselves or parents and nearest kin. In case of rich or poor, then Allah is the Best Patron for both. So do not ever follow prejudice, so as to do justice; and in case you twist or veer away, then surely Allah has been Ever-Cognizant of whatever you do'.¹⁸⁵

A final note on the conception of equality is necessary in order to address the aspect of equality in Islam that can arise as a divergence between IHR and the Islamic scheme, that is, gender equality.¹⁸⁶ To address gender equality in Islam it is useful to state the

¹⁸¹ A.A. Shamrahayu, A.O. Sambo, 'Right to Equality and Justice in International Islamic Instruments and the Shari'ah: An Evaluation' (2012) 6(11) Australian Journal of Basic and Applied Sciences.

¹⁸² Jacques Waardenburg, 'Human Rights, Human Dignity and Islam' (1991) 27 *Temenos Nordic Journal of Comparative Religion* 168.

¹⁸³ Holy Qur'an, Surah Al-Hadid 57:25.

¹⁸⁴ Holy Qur'an, Surah Al-Ma'idah 5:8.

¹⁸⁵ Holy Qur'an, Surah An-Nisa 4:135.

¹⁸⁶ A full exploration of gender equality is beyond the scope of this thesis but it is however prudent to note it as a controversial proposition of Islamic Law, and to also note that, as the law of God states, gender does not impact equality of human dignity. Additionally, the presence or absence of God is a determining factor in the approach of each system. In the Islamic scheme God recognises the differences between men and women and accepts the traditional roles of their gender in society whilst declaring them equally valuable to

principle of universality and its impact on interpretation.¹⁸⁷ Whilst IHR centres on personhood and the interpretation of rights as an assertion of individual will for the purposes of human flourishing, Islam centres on God and the interpretation of duties as submitting to God's will and his intentions for human existence.¹⁸⁸ As God is the universal source of all rights/duties and his divine law is complete and final, it must be observed. Therefore, whilst the secular world assesses the content of a rule for legitimacy, the Islamic world assesses its source. If God's law assigns certain roles to males and females then those roles are to be observed. Indeed it has been asserted that equality in Islam is a more genuine form of equality as it recognises the different roles of men and women and endeavours to bring a just balance between them.¹⁸⁹

The impact of universality on interpretation however does not affect equality between men and women in terms of human dignity (we recall in both the IHR and Islamic systems the accepted understanding of equality is equality of human dignity); as noted above, all of humankind is equal except in terms of piety. The *Qur'an* supports gender equality variously in stating:

'Your spouses are a garment for you as you are for them',¹⁹⁰ 'women have rights similar to those of men equitably, although men have a degree of responsibility above them',¹⁹¹ 'Whoever does good, whether male or female, and is a believer, we will surely bless them with a good life and we will certainly reward them according to the best of their deeds',¹⁹² 'The believers, both men and women, are guardians of one

God, whilst the secular scheme rooted in rationality does not concede gender roles as to do so would be contrary to the Western values that implore the setting aside of difference – so much so that the secular scheme seeks to completely obliterate gender roles to eliminate gender as a differentiating feature in society. Once more, the doctrine of *tawhid* dictates that everything comes from God and it is submission to his will and value in his eyes alone that is of utmost priority. On the obliteration of gender roles see Ronan McGreavy 'Women's Place is in the Home: Citizen's Assembly Again Tackles Thorny Issue' The Irish Times, 14 February 2021

<<https://www.irishtimes.com/news/ireland/irish-news/women-s-place-is-in-the-home-citizens-assembly-again-tackles-thorny-issue-1.4484706>> accessed 7 July 2021.

¹⁸⁷ Arif Jamal, 'The Impact of Definitional Issues on the Right of Freedom of Religion and Belief' in Silvio Ferrari ed. *Routledge Handbook of Law and Religion* (Routledge 2015) 101-102.

¹⁸⁸ Alison Dundes Renteln, *International Human Rights: Universalism versus Relativism* (Sage 1990) 83.

¹⁸⁹ Kathleen Cavanaugh 'Narrating Law' in Anver Emon, Mark Ellis & Benjamin Glahn (eds.) *Islamic Law and International Human Rights Law* (Oxford University Press 2012) 49.

¹⁹⁰ Holy Qur'an, Surah Al Baqarah 2:187

¹⁹¹ Holy Qur'an, Surah Al Baqarah 2:228.

¹⁹² Holy Qur'an, Surah An-Nahl 16:97

another’,¹⁹³ *‘I will never deny any of you – male or female – the reward of your deeds, both are equal in reward’*,¹⁹⁴ and, *‘Men will be rewarded according to their deeds and women equally according to theirs’*.¹⁹⁵

Having established the value of equality in Islam and illustrated its presence within God’s laws of the *Qur’an*, and the *Sunnah* of the Prophet, together with articulating its translation from theoretical to practical through the principle of non-discrimination, it is useful to now turn to the rights instruments for evidence of the translation of equality into the language of Islamic human rights. Though not distinctly mentioned in a preambular context within the CDHRI, equality of human dignity and non-discrimination are clearly articulated in Article 1 which reads:

‘All men are equal in terms of basic human dignity and basic obligations and responsibilities, without any discrimination on the basis of race, colour, language, belief, sex, religion, political affiliation, social status or other considerations’.¹⁹⁶

Article 1 proceeds to state *‘no-one has superiority over another except on the basis of piety and good deeds’*,¹⁹⁷ clearly reflecting the divine revelations. Equality is further plainly articulated at Article 19 regarding equality before the law and again at Article 6 regarding gender equality (and illustrating the impact of universalism on interpretation) where the declaration states *‘woman is equal to man in human dignity, and has her own rights to enjoy as well as duties to perform, and has her own civil entity and financial independence, and the right to retain her name and lineage’*.¹⁹⁸

Through the use of colloquialisms such as ‘everyone’, ‘all individuals’ or ‘each person’, equality is further comprised within the articulations of the right to life at Article 2, sanctity and protection of name and honour at Article 4, marriage at Article 5, protection of the family at Article 7, legitimate representation at Article 8, education at Article 9, the right to work and earn a legitimate living at Articles 13 and 14, ownership of property at

¹⁹³ Holy Qur’an, Surah Tawbah 9:71.

¹⁹⁴ Holy Qur’an, Surah Ali Imran 3:195

¹⁹⁵ Holy Qur’an, Surah An-Nisa 4:32

¹⁹⁶ CDHRI (n77) Article 1

¹⁹⁷ Ibid.

¹⁹⁸ Ibid. Article 6.

Article 15, the right to enjoy the fruits of your own labour at Article 16, the right to a clean environment and medical care at Article 17, equal protection of the five objectives of Islam, and to privacy at Article 18, freedom of expression at Article 22, and, the right to participate in your country's public affairs at Article 23.¹⁹⁹

In summary, the universal source of equality in Islam is God and it is bestowed on humankind as a non-negotiable birthright, deserving of protection in order to protect God's creation, as with human dignity and autonomy in the same scheme. Equality flows from the nature of equal creation in Islam and the accepted formulation of the concept of equality is that of equal human dignity. Equality in the Islamic scheme is strongly linked to justice, for which there is a social responsibility for the *ummah*. Additionally, within the *ummah*, Islamic equality acknowledges gender roles for males and females where their *Qur'*anically prescribed responsibilities may be different, but are valued equally. Islamic universality dictates that humankind submits to God's intentions for human existence and to this end gender roles are observed. Notwithstanding, as the conception of equality is that of equal human dignity, prescribed gender roles do not impact humankind eschatologically, as individuals will be judged in terms of piety only. The fundamental value of equality is identifiable in various articles of the CDHRI and effected through the corresponding principle of non-discrimination, the use of identifiable colloquialisms and the operation of equality as a substantive right in and of itself.

3. The Prevailing Vision of Justice

In summary then, the core values underpinning International Human Rights – dignity, autonomy and equality - are also central to Islam. That being the case, it can be strongly argued that Islam and IHR share a broadly similar view of justice (albeit that of course, they may disagree on how this justice plays out in particular fact scenarios). If justice can generally be described as mutually agreed principles for the coordination and structure of social interaction that would benefit all who are subject to them, and, that what those principles are will depend on the society,²⁰⁰ then each scheme can satisfy these criteria. A legal dictionary definition of justice suggests justice is the determination of rights

¹⁹⁹ CDHRI (n77).

²⁰⁰ www.theihs.org. The Institute for Human Studies at George Washington University. <<https://theihs.org/initiatives/ppe/justice/what-is-justice-2/>> accessed February 20, 2021.

according to the rules of law or equity.²⁰¹ In this regard, in both the CDHRI and the UDHR, each system has, using the same fundamental principles, determined the rights required for the protection of humanity. Another contention is that justice is concerned with access to our rights entitlements where the principles of those rights offer a minimally acceptable standard of treatment.²⁰² Once again, in the analysis of both the CDHRI and the UDHR above, the principles of the rights are apparent and aligned, and access to rights is effected through certain basic values and rights. Finally, Rawls first principle of justice asserts the idea of justice as being where each person has the same infeasible claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all.²⁰³ Once more, the in-depth analysis of both the CDHRI and the UDHR has evidenced the basic rights found in one, to also be found in the other. Accordingly, subscribers to each declaration must concede the same protections can be found in both; alternatively, each is an adequate scheme of equal basic liberties, and subscribers to each can make such an infeasible claim. Unless, that is, the understanding of justice in Islamic Law differs from these non-religious formulations.

From the Islamic perspective, justice or *adalah* is an act of piety that reaches back to the *maqasid al Shari'a* – the objectives of Islam – put into practice by the categorisations of actions considered rights and wrongs, or *wajib* and *haram*.²⁰⁴ At 5:9 the *Qur'an* commands '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 swerve to wrong and depart from justice. Be just; that is next to piety'.²⁰⁵ Justice is considered in Islam to be a form of trust imposed on humankind²⁰⁶ as God's vicegerent on earth and complete submission to God's universal laws is the manner in which justice will be done. It is for this reason that the obligations and prohibitions of the *maqasid al Shari'a* are unquestionably accepted. It is taken for granted that all obligatory acts must be just since they are the expression of God's will for humanity, and that all prohibited acts are unjust on the grounds that the

²⁰¹ www.merriamwebster.com. Merriam Webster Law Dictionary

<<https://www.merriam-webster.com/dictionary/justice>> accessed February 20, 2021.

²⁰² Melissa Labonte, Kurt Mills, *Human Rights and Justice: Philosophical, Economic and Social Perspectives* (Routledge 2018) 5.

²⁰³ Leif Wenar, 'John Rawls' in *Stanford Encyclopedia of Philosophy* (Spring 2017 Edition), Edward N. Zalta (ed.) <<https://plato.stanford.edu/archives/spr2017/entries/rawls/>> accessed 20 February 2021.

²⁰⁴ For further discussion on the goals and objectives of Islam see Chapter One.

²⁰⁵ Holy Qur'an, Surah Al-Ma'idah 5:9.

²⁰⁶ Shafi'i Abdul Azeez Bello, 'The Role of Justice in Islam' 2012 *Social Science Research Network* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2183623> accessed February 22, 2021.

revelation cannot possibly inflict an injustice on believers.²⁰⁷ At 3:53 the *Qur'an* states '*They prayed to Allah - Our Lord, we believe in your revelations and follow the messenger, so count us among those who bear witness*'.²⁰⁸ From the Islamic perspective, justice is carrying out the will of God with complete submission to his guidance for humanity. His guidance for humanity is centred in leading a moral life and leading a moral life is fulfilled by extending the values of dignity, autonomy and equality through the mechanism of rights and duties.

As Rawls notes, '*those who hold different conceptions of justice can still agree that institutions are just when no arbitrary distinctions are made between persons in assigning the basic rights and duties*'.²⁰⁹ This appears exemplified in comparing the religious and non-religious formulations of justice in the international institutions' rights instruments. Through the analysis of the CDHRI of the OIC and the UDHR of the UN, it is evident, that though they hold alternative conceptions of the origin of justice, the Islamic composition of justice is broadly similar to that of IHR. Within IHR, the preamble to the UDHR declares '*Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world*'.²¹⁰ Essentially, in the Islamic scheme, justice is considered to mean *harmony of equality and dignity, and rejection of discrimination where the question of predestination is tied directly to divine justice*.²¹¹ With the exception of the source of morality, the prevailing visions of justice align.

4. Rights Limitations

We turn now to the matter of rights limitations. From the perspective of this thesis this is of paramount importance (a) because any criminal law represents a restriction on autonomy and (b) because, as we have seen, at the heart of the supposed incompatibility between Islamic Criminal Law and human rights is the fact that, in the former, rights are limited purely because this is what God is perceived to require. Thus, the question we address is whether this is permitted by IHR (in which case it marks another point of

²⁰⁷ Ibid.

²⁰⁸ Holy Qur'an, Surah Ali-Imran, 3:53.

²⁰⁹ John Rawls, *A Theory of Justice* (Harvard University Press 2009) 5.

²¹⁰ UDHR (n19) Preamble ¶1.

²¹¹ Mohammad Reza Akhbarian Kashani, 'An Overview of the Dimensions and Pillars of Justice in Islam', (2017) 9(3) *Review of European Studies* 3-4.

similarity between the two ideologies) or prohibited thereby (in which case it is a point of difference).

4.1 Relationship Between the Community and Restricting Rights in IHRL

IHR holds the individual as its primary focus. Chapter Four looked to the impetus for the establishment of the UN and the same impetuses contribute to its individualistic approach to rights.²¹² Initially prompted by nationalism, imperialism and a disregard for human life up to WWI, they were substantially added to by the effects of colonialism, the Holocaust, and murderous campaigns targeting groups for their individual characteristics. Humanity had been tyrannised and the individual persecuted in campaigns planned with the use of modern bureaucracy. It is commonly accepted that at this point the world's moral conscience had been shocked and a new world view of humanity was spawned.²¹³ This, however, was not the only contributor to the individualistic UDHR paradigm. Enlightenment theory became hostile towards carriers of authority other than the individual's own intellect and had shrugged off myth, superstition and traditions; thus, it had shrugged off God and placed its faith in the awakening of the individual's intellectual powers.²¹⁴ Consequentially, the fact that humankind's dignity had been steamrolled by global atrocities,²¹⁵ the fact that (among other phenomena) colonialism had graded the value of some humans compared to others,²¹⁶ and the fact that the Age of Enlightenment with its geographical centre in the European West was driving a campaign for autonomous thought and action in human experience,²¹⁷ all combined to create the perfect storm for a conclusion that dignity, equality and autonomy needed to be restored to the

²¹² For further discussion on the impetus for the establishment of a system of freedoms and protections for individual human beings see Chapter Four.

²¹³ Referring to Samuel Moyn, once more, his account differs insofar as historically there is a considerable lapse of time between the horrors of WWII and the acknowledgement of their impact on humanity, thus, inclination towards promoting individual human rights. Society now refers to the holocaust as the turning point in humanity's conscience whereas the history books suggest Lemkin, the driving force behind the Genocide Convention, was essentially alone in his endeavour and felt a disconnect between that and the human rights campaign generally. See generally Samuel Moyn, *Human Rights and the Uses of History* (Verso Books 2014).

²¹⁴ William Bristow, 'Enlightenment' in Edward N. Zalta (ed.) *The Stanford Encyclopedia of Philosophy* (2017) available at <<https://plato.stanford.edu/cgi-bin/encyclopedia/archinfo.cgi?entry=enlightenment>> accessed 26 February, 2021.

²¹⁵ Morton Winston, *The Philosophy of Human Rights* (Wadsworth 1989) 37.

²¹⁶ Charles E. Hurst, *Social Inequality: Forms, Causes and Consequences* (Allyn & Bacon 1992) 250-255.

²¹⁷ Massimo Iovane, 'The Universality of Human Rights and the International Protection of Cultural Diversity: Some Theoretical and Practical Considerations' (2007) 14 International Journal on Minority and Group Rights 231, 234. See also James V. Spickard, 'Human Rights, Religious Conflict and Globalisation – Ultimate Values in a New World Order' (1999) 1(1) UNESCO MOST Journal on Cultural Pluralism 6 <<http://www.unesco.org/most/v11n1spi.htm>> accessed 18 February 18 2021.

individual who deserved to have his/her inherent values respected, and, this at the exclusion of any characteristics other than their being human. This veneration of the individual is designed to enable him/her to flourish and develop²¹⁸ in a society that must organise itself to serve the individual.²¹⁹

The UDHR, at a mere glance, illuminates the presumption of the individual as the key unit in society. After claiming at Article 1 that all humans are born free and equal in dignity and rights, and proceeding to set out the various freedoms and protections guaranteed to individuals, whilst noting that some of these depend upon social life, Article 28 then dictates that the social order must be one in which the rights and freedoms of the individual can be fully realised.²²⁰ In this declaration, the language makes society the individual's servant.²²¹ This strong individualistic paradigm was not without criticism in the document's drafting stages and beyond. The Haitian representative argued that Article 3 was too greatly influenced by individualism²²² and a Belgian representative agreed.²²³ A representative of the Soviet Union argued that generally the UDHR was unduly individualistic and did not consider man's role as a worker and thus unrealistic.²²⁴ A Cuban representative argued there was insufficient emphasis on duties and too much emphasis on the individualistic side of humankind's character²²⁵ whilst the Yugoslavian representative (who later abstained from the vote on the same basis) argued that it isolated the individual and considered him/her independently of the social conditions and forces that acted upon his/her social status.²²⁶ Beyond the drafting stages individualism continued, and still continues, to be one of the major arguments against its universality:

'The overriding emphasis on the autonomy of the individual with an independent moral standard that transcends religious and cultural

²¹⁸ Abdulazziz Sachedina, 'The Clash of Universalisms: Religious and Secular in Human Rights' (2007) 49 *The Hedgehog Review* 53-54.

²¹⁹ United Nations, Report of the Third Committee - Plenary Meeting, A/PV.183 (December 10, 1948), 879, available at <<https://undocs.org/A/PV.181>>, accessed March 1, 2021

²²⁰ UDHR, Article 28.

²²¹ James V. Spickard, 'Human Rights, Religious Conflict and Globalisation – Ultimate Values in a New World Order' (1999) 1(1) *UNESCO MOST Journal on Cultural Pluralism* 6. <<http://www.unesco.org/most/v1n1spi.htm>> accessed 18 February 18 2021.

²²² United Nations, Report of the Third Committee 105th Meeting, A/C.3/SR.105 (October 18, 1948), 172.

²²³ *Ibid.* 174.

²²⁴ United Nations, Report of the Third Committee 178th Meeting, A/C.3/SR.178 (December 6, 1948), 876.

²²⁵ United Nations, Report of the Third Committee 155th Meeting, A/C.3/SR.155 (November 24, 1948), 665.

²²⁶ United Nations, Report of the Third Committee - Plenary Meeting, A/PV.183 (December 10, 1948), 879, available at <<https://undocs.org/A/PV.181>> accessed March 1, 2021.

differences to claim rights without considering the bonds of reciprocity runs contrary to the Islamic tradition's emphasis on the community and relational aspects of human existence'.²²⁷

Despite these criticisms it should be stated that whilst the overriding emphasis is certainly that of individualism over communitarianism, the UDHR has not completely isolated the individual from his social environment and does not show a complete disregard for community either. Article 1 implores individuals to ‘*act towards one another in a spirit of brotherhood*’²²⁸ whilst Article 29(1) states ‘*Everyone has duties to the community in which alone the free and full development of his personality is possible*’.²²⁹ Though the language of duties and the community pales in comparison to the language of rights and the individual, it is a fact that the text situates the individual within the meaningful context of his larger community, and, further, goes so far as to state that it is within this community context alone that s/he can fully develop. In fact, it is within the community context that all of these broad principles supporting human flourishing are balanced; whilst most rights are, regardless of these broad principles, not absolute, the basis on which they may be limited is that of breaching a baseline acceptable standard of social behaviour – that is – competing public concerns. Outside of the religious context, it has been asserted that society and community are essential for the benefit of rights as it is within this context that they are utilised; indeed they would lose their significance if individuals lived in isolation.²³⁰

The relationship between rights and the community has now been shown within IHR to be fundamentally individualistic in nature with an acknowledgement of the broader community as that within which the individual fully prospers.²³¹ What then, does this mean in terms of rights limitation in International Human Rights Law? Article 29(1) is key in developing that relationship and linking the individual with rights limitation insofar as it makes that connection to the broader community to which the individual has obligations.

²²⁷ Sachedina (n43) 11.

²²⁸ UDHR (n9) Article 1.

²²⁹ Ibid. Article 29(1).

²³⁰ Samuel Stoljar, *An Analysis of Rights* (MacMillan Press 1984) 88.

²³¹ Joseph Raz, *The Morality of Freedom* (Clarendon Press 1986) 124-127.

*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.*²³²

Additionally, the ICCPR, regarding, for example, freedom of thought, conscience and religion at Article 18(3) provides that ‘Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect **public** safety, order, health, or **morals** or the fundamental rights and freedoms of others’.²³³

What the relationship between rights and the community means in terms of rights limitations can be answered in saying that despite the individualistic centrality of IHR, there is still provision in the text of the International Bill of Rights for rights to be limited in the name of the greater *moral* good as well as of other competing public concerns.²³⁴ In Chapter Six we consider one important gloss that the UNHRC has placed on this (that a nation’s public morality cannot be drawn from a single religious tradition), but it is argued that this is not justified by reference to the text of the document – that is, that it is not inherent within the International Bill of Rights..

4.2 Relationship Between the Community and Restricting Rights in Islam

In the Islamic scheme of rights the community as opposed to the individual is the primary focus and there are a number of factors that contribute to this. These include: the moral requisites of society at the emergence of Islam; the approach of the Islamic philosophers, the content of the divine texts and the doctrine of *tawhid*; and, the history of Islam itself. As we saw in Chapter Four, during the Meccan phase of Islam in an attempt to free individuals from tribal *Jahiliyyah* the moral themes of humanity as individuals, humanity in the context of society and the emergence of the Muslim community were

²³² UDHR (n19) Article 29(2) (emphasis added). See also Henry Steiner and Phillip Alston, *International Human Rights in Context: Law, Politics, Morals: Text and Materials* (Oxford University Press 2000) 152-153.

²³³ ICCPR (n24) Article 18(3) (emphasis added).

²³⁴ For further exploration of the grounds for justifying a claim to restrict rights in the name of public morality see Chapter Six.

established.²³⁵ Social justice was the link that connected each of these themes to the extent that the obligation of individuals to follow God's law in acting justly towards those s/he encountered socially ended in the establishment and maintenance of a distinguished moral community. Applying this process to the Islamic rights scheme, the individual is the means and the maintained moral community is the end.

Two concepts considered in Chapter One are of particular importance here, namely *maqasid al-Shari'a* (objectives of Islamic Law) and *maslaha mursala* (public benefit). The goals of Islamic Law are the development of the righteous individual, the establishment of justice, and, the realisation of public benefit. In order to realise these goals the five *maqasid* were established,²³⁶ and laws either promoting them or preventing harm to them fell into the domain of *maslaha mursala*. The *Qur'an* at 5:48 declares 'To each among you we have prescribed a law and an open way'²³⁷ and this object and purpose, or *maqasid*, scheme is the philosophical interpretation of this open way using the viewpoint of public benefit to ensure consistency in the application of God's law,²³⁸ intended for the protection of the interests of humankind.²³⁹ Laws from the viewpoint of *maslaha mursala* are separated into a trio of levels, namely necessities, needs, and refinements, and it is the category of laws deemed 'necessities'²⁴⁰ that establish human rights, such that, for example, killing is harmful to the public so it is a necessity to prevent it in the form of an obligation to the individual not to kill. In this way, the public community benefits from a just action and the individual has consequentially earned the right to life. Accordingly, the *maqasid* principle is what provides a proper contextual approach for advancing the benevolent scope of Islamic law²⁴¹ and translating the necessities for public benefit into human rights language.²⁴² The community based approach of the philosophers follows precisely the direction of the *Qur'an* at 5:48.

²³⁵ For further discussion on the conditions pertaining at the emergence of Islam see Chapter Two. For further discussion on the impact of these conditions on the international organisation now representing Islam globally see Chapter Four.

²³⁶ The protection of religion, life, progeny, intellect and property are the five identified objectives of Islam or *maqasid al-shari'a*.

²³⁷ Holy Qur'an, Surah Al-Ma'idah 5:48.

²³⁸ Muhammad Khalid Masud, *Shatibi's Philosophy of Islamic Law* (Islamic Research Institute 1995) 151.

²³⁹ Wael B. Hallaq, *A History of Islamic Legal Theories* (Cambridge University Press 1997) 181.

²⁴⁰ For discussion on the remaining subcategories of rulings see Chapter One.

²⁴¹ Mashood A. Baderin, 'Islamic Socio-Legal Norms and International Criminal Justice in Context: Advancing an Object and Purpose cum Maqasid Approach' in Tallyn Gray (ed.) *Islam and International Criminal Law and Justice* (Torkel Opsahl Academic Epubisher 2018) 53.

²⁴² Mohammad Hashim Kamali, 'Maqasid al-Shari'a: The Objectives of Islamic Law' (1999) 38(2) *Islamic Studies* 229.

Moreover, the doctrine of *tawhid*²⁴³ dictates that everything comes from God as he alone knows best. If God intended the submission of the individual to his will, and his will, as set out in the divine texts, entails human obligation to act justly in the maintenance of a moral society, then this must be observed. Thus, for many Muslims, to separate themselves from their community as an isolated entity is an alien concept,²⁴⁴ but, to think of themselves as an organ in a body where each must respond to the actions of the other is conceptually more familiar.²⁴⁵ Finally, regarding the history of Islam itself, we recall that after the *hijra*, the Meccan revelations that inspired moral behaviour evolved to a governance theme as the *ummah* grew. From this point, usually, the divine guidance had the protection of the expanding *ummah* as a constant undercurrent. Given the trajectory of Islam, and the developmental incidents that sought to redirect or suppress it, it is these Medinan community orientated revelations that have lent support to the Islamic world in each attempt to mend and survive,²⁴⁶ thus, it is the human rights view through the communitarian prism that has gained more public traction.

In contrast to the Enlightenment philosophers who began with the nature of the individual, Muslim philosophers began with the nature of the community²⁴⁷ as influenced by the *Qur'an*. Unlike in the west where respect for the inherent values of the individual by virtue of his/her simply being human required restoration because of unacceptable bureaucratic action, for Islam, the absence of a workable moral code permeated tribal life completely and entire societies required a moral change because God revealed this to be so. The values of dignity, autonomy and equality were attributed by God to humankind by virtue of their being his creation. In this way, these values transcend individuals to reach the moral value of the community²⁴⁸ in a society where the individual must subordinate himself/herself to the greater good of the community and the will of God. The more recent developmental incidents between the Islamic and Western worlds have

²⁴³ For further discussion on the doctrine of *tawhid* see Chapter One.

²⁴⁴ Bernard Freamon, 'Slavery, Freedom and the Doctrine of Consensus in Islamic Jurisprudence' (1998) 11(1) Harvard Human Rights Journal 14.

²⁴⁵ Ebrahim El-Khouly, 'Islam and the Pillars of its Faith' in Salem Azzam (ed.), *Islam and Contemporary Society* (Longman in Association with the Islamic Council of Europe 1982) 51.

²⁴⁶ For further discussion on these developmental incidents that impacted the position of the Islamic world today see Chapter Two. For further discussion on the developmental incidents insofar as they impacted the stance of the OIC see Chapter Four.

²⁴⁷ Spickard (n221) 6.

²⁴⁸ Michael Perry, 'The Morality of Human Rights – A Non- Religious Ground?' (2005) 27(1) Dublin University Law Journal 28.

only served to entrench the aspiration of the OIC to preserve the traditional values of Islam along this communitarian paradigm in its human rights scheme.

In turning next to the CDHRI for evidence of this communitarian paradigm it can be seen in the preamble that the *ummah* is the starting point insofar as it states ‘*realizing the civilizing and historical role of the Islamic ummah which Allah made as the best community and which gave humanity a universal and well-balanced civilisation...*’,²⁴⁹ and further states ‘*the safeguarding of those fundamental rights and freedoms is an individual responsibility of every person and a collective responsibility of the entire ummah*’.²⁵⁰ Article 1 then states ‘*All human beings form one family whose members are united by their subordination to Allah...*’.²⁵¹ Additionally, a theme of the CDHRI is its deference to the *Shari’a* where in the preamble it states ‘*In contribution to the efforts of mankind to assert human rights..... and to affirm his freedom and right to a dignified life in accordance with the Islamic Shari’a*’.²⁵²

Moreover, the right to life at Article 2,²⁵³ the right to education at Article 7,²⁵⁴ the right to free movement at Article 12,²⁵⁵ the right to the enjoyment of autonomous endeavours at Article 16,²⁵⁶ the right to freedom of expression at Article 22,²⁵⁷ and, the right to participate in public affairs at Article 23²⁵⁸ all individually defer to the provisions of the Islamic *Shari’a*. Article 24 reaffirms this deference theme in stating ‘*All the rights and freedoms stipulated in this Declaration are subject to the Islamic Shari’a*’²⁵⁹ whilst Article 25 declares the *Shari’a* as the only reference point for the explanation of any

²⁴⁹ CDHRI (n77), Preamble ¶1.

²⁵⁰ Ibid. Preamble ¶4.

²⁵¹ Ibid. Article 1.

²⁵² Ibid. Preamble, ¶2.

²⁵³ Ibid. Article 2 ‘...it is prohibited to take away life except for a Shari’ah prescribed reason’.

²⁵⁴ Ibid. Article 7 ‘Parents and those in such like capacity have the right to choose the type of education they desire for their children, provided they take into consideration the interest and future of the children in accordance with ethical values and the principles of the Shari’ah’.

²⁵⁵ Ibid. Article 12 ‘Every man shall have the right, within the framework of the Shari’ah, to free movement’.

²⁵⁶ Ibid. Article 16 ‘Everyone shall have the right to enjoy the fruits of his scientific, literary, artistic or technical labour of which he is the author; and he shall have the right to the protection of his moral and material interests stemming therefrom, provided it is not contrary to the principles of the Shari’ah’.

²⁵⁷ Ibid. Article 22(a) ‘Everyone shall have the right to express his opinion freely in such manner as would not be contrary to the principles of the Shari’ah’.

²⁵⁸ Ibid. Article 23 ‘Everyone shall have the right to participate, directly or indirectly in the administration of his country’s public affairs. He shall also have the right to assume public office in accordance with the provisions of Shari’ah’.

²⁵⁹ Ibid. Article 24.

article.²⁶⁰ These statements, together with deference to the *Shari'a* for the extent to which all human rights can be exercised (knowing now the place of community within Islamic Law), serve to further evidence the community unit as the priority in the Islamic rights scheme.

As demonstrated that IHR did not abandon the place of community in the grand scheme of human rights, it has also been demonstrated that the Islamic scheme does not abandon the individual, and this is illustrated throughout the CDHRI at each reference to a conferred right, notwithstanding the language of duties, the *ummah*, and God. The relationship between rights and the community has now been shown in the Islamic system to be fundamentally communitarian in nature, though it has a strong acknowledgment of the individual who is the starting point of the goals of the *Shari'a*. The development of the 'righteous individual' results in the formation of a 'just society' which results in 'public benefit' – the communitarian end is thus achieved.

So, what do these relationships mean in terms of rights limitation? Whilst the individual is far from an alien concept in Islam, the priority role of the *ummah* evidenced above can restrict the individual from asserting himself²⁶¹ and this permits rights restrictions in the Islamic scheme. Within IHR, a corollary of the individualistic paradigm is 'minimal' deference to restriction of rights on the basis of a greater moral good. In the Islamic scheme, a corollary of the communitarian paradigm is 'far greater' deference to the greater moral good. The difference of course being that for Islam, public morality is a religious morality rooted in God and these rights are restricted to serve that religious moral vision. The Islamic reasoning for these restrictions resorts to the notion of privacy.

Privacy is considered the most comprehensive of all Islamic rights,²⁶² thus, the distinction between what is private and what is public in Islam is key here. Actions within the scope of privacy may not be brought into the public domain unless there is a compelling reason

²⁶⁰ Ibid. Article 25 'The Islamic Shari'ah is the only source of reference for the explanation or clarification of any of the articles of this Declaration.

²⁶¹ Vincent Depaigne, 'Individualism, Human Rights and Identity' 2005 Semantic Scholar 3. <<https://soas-uk.academia.edu/VincentDepaigne>> accessed 3 March, 2021.

²⁶² Mohamed Berween, 'The Fundamental Human Rights: An Islamic Perspective' (2002) 6(1) The International Journal of Human Rights 72.

to do so;²⁶³ the public domain is the sphere of influence for governmental authority and is transparent to all citizens,²⁶⁴ accordingly privacy may only be restricted if private actions have an impact on the public sphere, thus public morality, thus priority of the community/*ummah*. By way of example, this reasoning can be translated easily where freedom of expression is concerned. For Islam the objectives of the right to freedom of expression are the discovery of truth and upholding human dignity,²⁶⁵ and, to balance these, God mandates that humankind must be apposite in speech and s/he does not accommodate the spread of evil or obscenity²⁶⁶ - '*Allah does not like negative thoughts to be voiced, except by those who have been wronged*';²⁶⁷ accordingly freedom of speech is restricted. Expressions that breach this right, and therefore amount to restrictions being put in place, are specifically set out in the *Qur'an* and include blasphemy. As the public derives no benefit from blasphemous speech but rather is harmed by it, there is a necessity to prohibit it, translated as a restriction on the right to freedom of expression in the interests of public morality. The connection with *maslaha mursala* is very clear and evident.

One final exemplification of the relationship between the community and the restriction of rights in Islam is that which was asserted in opposition to certain draft articles of the UDHR. At the time of drafting, the importance of the values of marriage and religion were made by Muslim representatives as it is around these particular values that Islam builds its sense of community.²⁶⁸ Saudi Arabia's representative objected to draft Articles 16 and 18, respectively, equal rights in marriage and religious liberty, on the basis of their divergence with Islamic values.²⁶⁹ He argued that domestic laws should govern these matters and that equal marriage rights should be replaced with '*full rights as defined in the marriage laws of their country*'.²⁷⁰ Whilst Saudi Arabia ultimately abstained from the

²⁶³ Mariam Sherwani, 'The Right to Privacy Under International Law and Islamic Law: A Comparative Legal Analysis' (2018) 1(1) Kardan Journal of Social Sciences and Humanities 35. See also Mohamed Berween 'The Fundamental Human Rights: An Islamic Perspective' (2002)6(1) The International Journal of Human Rights 73.

²⁶⁴ Mohsen Kadivar, 'An Introduction to the Public and Private Debate in Islam' (2003) 70(3) Social Research: An International Quarterly 662.

²⁶⁵ Mohammad Hashim Kamali, *Freedom of Expression in Islam* (Islamic Texts Society 1997) 8.

²⁶⁶ Baderin (n1)491.

²⁶⁷ Holy Quran, Surah An-Nisa 4:148.

²⁶⁸ Spickard (n221) 6.

²⁶⁹ Abdulaziz Sachedina et al., *Human Rights and the Conflict of Cultures* (University of South Carolina Press 1988) 33-52.

²⁷⁰ United Nations Report of the Third Session of the General Assembly Third Committee December 21, 1948, Summary Records of Meetings Part 1. 890 – 892.

final vote for the UDHR, the Islamic world's subsequent progression to a regional scheme that developed its own priorities of submission to God and subordination to the community evidences these particular values in the CDHRI. Article 5 states '*the family is the foundation of marriage and marriage is the basis of making a family*'.²⁷¹ Article 10 states '*..it is prohibited to exercise any form of pressure on man or to exploit his poverty or ignorance in order to force him to change his religion to another religion or to atheism*'.²⁷² Adding deference to the *Shari'a* it can be furthered that the *Shari'a* imposes marriage restrictions and restrictions on changing one's religion to protect the *ummah*, thus, marriage and religion are two issues that may not be entirely left to individual choice.²⁷³ The key point here, is that because of the doctrine of *tawhid* it is accepted that individualism is forsaken for the greater public good and complete submission to God's moral law.²⁷⁴

Accordingly, within the Islamic scheme, and despite the strong acknowledgement of the individual and his/her entitlement to live an autonomous life with equal dignity, it is recognised that there must be deference to the greater moral good, thus, there must be rights limitations. As was noted for IHRL regarding rights limitation, what may or may not justify a claim to such deference may be viewed differently in each system, and this is the subject to which Chapter Six will turn. For the purposes of this chapter, it suffices to acknowledge that Islamic Law also permits restrictions on rights for reasons of public morality.

Rawls theory of a just society sets out three conditions to be fulfilled, those being, settled rights, settled freedoms and tolerating rights restrictions only when it is necessary to avoid a greater injustice. The first two conditions having already been satisfied, condition number three it is asserted has now also been fulfilled. By virtue of both schemes converging on rights limitation for the greater public good, both the Islamic and IHR

²⁷¹ CDHRI (n77) Article 5.

²⁷² Ibid. Article 10.

²⁷³ Spickard (n221) 6.

²⁷⁴ Further articles of the CDHRI also work to protect the *ummah* as a whole including the use of any information that may corrupt or weaken the *ummah* at Article 22, the choice of education for children at Article 7 and the direction that knowledge and education should be orientated towards strengthening faith at Article 9.

schemes can be said to deliver human rights packages that fulfil all the conditions for the maintenance of a just society.²⁷⁵

In summary, both Islamic law and IHR envision the idea of individual rights being restricted in light of legitimate social goals, including, critically, the protection of the moral fabric of society.²⁷⁶ In this respect, the schemes neither promote absolute freedom nor complete oppression, and both seek to draw a balance in order to protect humanity by restricting rights only where necessary in the interests of the greater moral good. This issue becomes central in the compatibility assessment when in Chapter Six it will be seen that the greater moral good, or public morality, is exposed to interpretation based on the critical point of distinction, that is, the presence or absence of God.

What this means is that, on this critical issue of rights limitations, there is no inherent incompatibility as between Islamic Law and IHR. In the former scheme God conditions freedom and employs restrictions in the interests of public morality. In the latter scheme, there is a textual possibility for the limitation of rights in the interests of public morality also.

SECTION TWO

In summary, in section one it has been concluded that there are multiple points of ideological similarity as between Islamic Law and IHR. They are both grounded on the same values of concern with dignity, autonomy and equality. In consequence, they share ideological views of justice. Finally, both permit rights to be restricted *inter alia* in the name of public morality. Section Two now proceeds to explore those features of IHR and Islamic Law that are dissimilar, namely, (a) the nature and source of the purportedly objective truth that grounds the universality of the respective ideologies, (b) the ownership of rights, and, (c) the differing moral languages employed.

²⁷⁵ Rawls (n209) 4.

²⁷⁶ Fredric Megret, 'International Human Rights Law Theory' in Alexander Orakhelashvili (ed.) *Research Handbook on the Theory and History of International Law* (Edward Elgar 2011) p205-206.

5. Morality and the Source of Universal Truth

Both Islam and IHR contain allegedly universal moral claims. However, there is a difference in the source of morality that grounds these claims. What it is about each vision that substantiates and separates their moral claims to universality, ultimately leading to a rejection, by both, of each other will now be explored - the key issue of the presence of absence of God.

5.1 Islamic Source of Universal Truth

The sole origin of morality in Islam is God - best understood through the overarching Islamic doctrine of *tawhid*.²⁷⁷ The theory of *tawhid* provides that all things without exception come from God and that in his oneness and uniqueness he is both creator and maintainer of the universe. This defining *tawhid* doctrine of Islam is used as an organising principle for human society and the basis of religious knowledge, history, metaphysics, aesthetics and ethics, as well as social, economic and world order.²⁷⁸ Considering it was the skewed moral compass of tribal society that prompted God's initial intervention, morality - the core intertwining of good and evil at the heart of the individual and the necessary components of the human condition that essentially determine eschatological fate - could not derive from any other source but God. Thus, when we speak of protecting human rights – the outward portrayal of inner morality – in Islam, we are speaking of protecting rights validated by the *tawhid* doctrine and originating from God who intervened to protect society from itself in the seventh century. Illustratively, we recall Maudoodi, who gives the clearest, if not somewhat blunt, description of how the theory of *tawhid* validates human rights in Islam compared to the modern secular Western world:

.....these rights have been granted by God, ...not by any king.....or legislative assembly, [as these] can be withdrawn in the same manner in which they are conferred. The same is the case with.....dictators.... But since in Islam rights have been conferred by God, no legislative assembly in the world or any government on earth has the right or authority to make any amendment or change in the rights conferred by God. No one

²⁷⁷ For further discussion on the doctrine of *tawhid* see Chapter One.

²⁷⁸ John L. Esposito, 'Tawhid' Oxford Islamic Studies Online
<<http://www.oxfordislamicstudies.com/article/opr/t125/e2356>> accessed 12 April 2017.

*has the right to abrogate them or withdraw them. Nor are they the basic human rights which are conferred on paper for the sake of show and exhibition and denied in actual life when the show is over. Nor are they like philosophical concepts which have no sanctions behind them. The charter and the proclamations and the resolutions of the United Nations cannot be compared with the rights sanctioned by God because the former is not applicable on anybody while the latter is applicable on every Believer..... The rights which have been sanctioned by God are permanent, perpetual and eternal”.*²⁷⁹

That is not to say that the Islamic moral vision deems the human person as incapable of reason. Where Islam is concerned, there is no denial of man’s ability to use natural reason in moral decision making (provided this is carried out in accordance with the divine wisdom), and whilst this affirmation is posited by modern progressive Islamic scholars on the basis of *maslaha mursala* or public interest,²⁸⁰ it was similarly historically and philosophically so posited by pre-modern Islamic natural law theorists.²⁸¹ Whether for reasons of the moral properties of the world being divinely inspired, or, the normative good being in place by virtue of the grace of God alone, man is entitled to fuse fact and value, or, knowledge and morality to engage in assertions based in human reason.²⁸²

Despite this, the magnetic draw of any supernatural deity adjusts the moral perspective purely from the perspective of belief, and for Islam, this belief system holds a firm contention that morality, as all other life functions, despite the divinely inspired reason of man, can come from no other source than God himself. The doctrine of *tawhid* runs so deep that every discussion on law or morality proceeds from it and it is the single reason why religion cannot be separated from law, politics or morality²⁸³ - hence, it cannot be separated from human rights. The CDHRI is self evident in this respect as the theme of deference to the *Shari’a* is integral to its architecture.²⁸⁴ Conversely, the IHR vision of

²⁷⁹ Maudoodi (n175) 12.

²⁸⁰ For further discussion on *maslaha mursala* see Chapter Two.

²⁸¹ For further discussion on the topic of human reason as a source of Islamic Law see Chapter One.

²⁸² Anver Emon, *Islamic Natural Law Theories* (Oxford University Press 2010) 111.

²⁸³ Mohammad Hashim Kamali, ‘Source, Nature and Objectives of *Shari’ah*’ (1989) 33 *The Islamic Quarterly* 218.

²⁸⁴ This deference to the *Shari’a* was explored in Section One of this chapter under ‘rights limitations’.

morality insists that any form of supernatural deity must be separated from morality, hence, separated from human rights.

5.1.1 God as the Source of Islamic Rights

The primary sources of Islamic Law emphasise that core Islamic values are conferred on human beings by God, the universal source of Islamic principles and values.²⁸⁵ The Islamic belief is that individuals submit to God as he created and rules the entire universe and they must show their appreciation of his creation and his law through submission.²⁸⁶ The *Qur'an* at 2:164 states:

*Indeed in the creation of the heavens and the earth, and the alternation of the night and the day, and the ships which sail through the sea with that which benefits people, and what Allah has sent down from the heavens of rain giving life thereby to the earth after its lifelessness and dispersing therein every moving creature, and his directing of the winds and the clouds controlled between the heaven and the earth are signs for a people who use reason...*²⁸⁷

At 4:147 the *Qur'an* states 'Why should Allah punish you if you give thanks and be faithful? And Allah is appreciative, all -knowing'.²⁸⁸ Such and similar verses of the *Qur'an*²⁸⁹ suggest that humankind was the ultimate goal of creation. Because of this, all things that have been created are for the benefit of humankind whilst human beings themselves were created to firstly acknowledge the universe and praise and worship God, secondly to understand and appreciate the signs in the universe for a better and proper recognition of God, and, thirdly to lead a life in consideration of these signs in fulfilment of this divine purpose.²⁹⁰ A *hadith qudsi*²⁹¹ revealed to the Prophet David is often used to

²⁸⁵ Jason Morgan Foster, 'Third Generation Rights: What Islamic Law Can Teach the Human Rights Movement' (2005) 8 Yale Human Rights and Development Law Journal 77. See also Shaheen Sardar Ali 'The Conceptual Foundations of Human Rights: A Comparative Perspective' (1997) 3(2) *European Public Law* 270.

²⁸⁶ Mohammed Jafar Amir Mahallati (ed.) *Friendship in Islamic Ethics and World Politics* (University of Michigan Press 2019) 253. See also Frank Griffel, *Al-Ghazali's Philosophical Theology* (Oxford University Press 2009) 222.

²⁸⁷ Holy Qur'an, Surah Al-Baqarah 2:164.

²⁸⁸ Holy Qur'an, Sura al-Nisa 4:147

²⁸⁹ See also Holy Qur'an 3:190 for a similar verse explaining creation.

²⁹⁰ Cenap Cakmak ed., *Islam: A Worldwide Encyclopedia* Volume 1 (ABC CLIO 2017) 329-330.

further affirm the divine purpose and states *‘I was a Treasure unknown then I desired to be known so I created a creation to which I made Myself known; then they knew Me’*. On the basis of such revelations, God is the ultimate power to whom all humans should submit and his law is superior to all others.²⁹² The *Qur’an* at 3:78 states

‘And indeed, there is among them a party who alter the Scripture with their tongues so you may think it is from the Scripture, but it is not from the Scripture. And they say, ‘This is from Allah’, but it is not from Allah. And they speak untruth about Allah while they know’.

The universality of Islam is thus explained: There is a sacred reality consisting of revelation, the universe and man; respectively, written wisdom, natural wisdom and human wisdom. These, all being direct reflections of the divinity, deliver the true nature of the sacred reality²⁹³ and it is this that reflects the universality of Islam. Insofar as God created the universe and all of humankind, the written wisdom, or God’s law, is addressed to all of humankind universally to maintain the sacred reality. When God asks for gratitude from humankind it is understood that humankind accepts God and the superiority of his law, submits to him, and expresses gratitude through living a pious life guided by the signs in the natural and written wisdom:

*‘O mankind, indeed We have created you from male and female and made you peoples and tribes that you may know one another. Indeed, the most noble of you in the sight of Allah is the most righteous of you. Indeed, Allah is Knowing and Acquainted’.*²⁹⁴

With Islamic universality the first step for the individual, the first pillar of Islam is the *shahadah*,²⁹⁵ the unquestioning acceptance of God as creator of the universe and of his

²⁹¹ A *hadith qudsi* is a sub-category of *hadith* describing a revelation of God not necessarily attributable to God’s revelations to Mohammad, but to perhaps other, previous prophets. As they cannot be linked by *isnad* to Mohammad they are known to be sound by spiritual unveiling. This *hadith qudsi* is deemed true by virtue of *Quran* 51:56 which states *‘And I did not create the jinn and mankind only to worship me’*. See Muhyiddin ibn ‘Arabi, *Divine Sayings: 101 Hadith Qudsi – The Mishkat Al-Anwar of Ibn ‘Arabi* (Anqa Publishing 2008) 99.

²⁹² Bernard Freamon (n244) 14-15.

²⁹³ John Herlihy (n45) 40-41.

²⁹⁴ Holy *Qur’an*, Surah al-Hujurat 49:3.

²⁹⁵ For further discussion on the Pillars of Islam see Chapter One.

law as universal - in essence - the acceptance of the universality of Islam. For many Muslims, the complete submission to God and the acceptance of these undisputable facts of universality form the basis of, and guide, their entire existence.

Linked to the Islamic vision of universal truth is the concept of communalism. The communalist theory found support across the leading schools of thought, or *madhahib*, outside of the Hanafist school and maintained that the universality of God's law applied to believers of Islam only. This argument was tainted with historical developments that attached to war and peace and the division of the world into *Dar al Harb* (House of War) and *Dar al Islam* (House of Islam). The communalists believed the *Qur'anic* revelations on fighting unbelievers supplanted the unbelievers' right to dignity or inviolability, and therefore the universality of God's law applied only to the *ummah*. The universalists however, who reigned historically from the Hanafi *madhab*, theorised conversely that the inviolability of human dignity pertains to the fact of being a human only, and that this also creates a legal basis for the protection of all basic human rights. The Hanafist universalists contention is that fighting unbelievers was contextual, referring to a historical time when the nascent Muslim community fought the Meccan Pagans in order to establish themselves in the area. Given that the communalist position is historical, with little to no current application, the universalist theory is the prominent theory, garnering much support outside of its original Hanafist scholars, including eminent scholars from the Shafi'i, Maliki and Hanbali schools and now numerous Muslim commentators who agree that universalism is an expression of God's grace as a natural and absolute right of every human person as of the moment of birth.²⁹⁶

How then does the Islamic conception of universal truth being rooted in God (and thus *Shari'a*, as the self-expression of God being inherently 'true') play out in the Islamic conception of human rights? Article 1 of the CDHRI stresses the link between rights and God by stating that '*All human beings form one family whose members are united by their subordination to Allah and descent from Adam*'.²⁹⁷ However, it is sensible to look to the manifestations of religious morality in the preamble as this seeks to provide the moral

²⁹⁶ Mohammad Hashim Kamali, 'Human Dignity in Islam and its Impact on Society' New Straits Times October 25, 2017. For an extensive discussion on the universality of Islamic human rights see generally Mohammad Hashim Kamali *The Dignity of Man: An Islamic Perspective* (Islamic Texts Society 2002).

²⁹⁷ CDHRI (n77) Article 1.

grounding for the remainder of the instrument. Similarly the relevance of *tawhid* theory is established in the preamble which states

*‘fundamental rights and freedoms according to Islam are an integral part of the Islamic religion..... in as much as they are binding divine commands, which are contained in the Revealed Books of Allah and which were sent through the last of His Prophets’.*²⁹⁸

If the preamble of the UDHR aspires to individual liberty, the CDHRI preamble speaks of the individual’s need for guidance and his responsibility to God and the community. Firstly, it states *‘convinced that mankind..... is still and shall remain in dire need of faith to support its civilisations as well as a self motivating force to guard its rights’.*²⁹⁹ Secondly, it makes reference to the ranking of the individual below the eschatological and communitarian concerns of Islam in adding that *‘harmony is established between the hereunder and the hereafter’* and that *‘knowledge is combined with faith to fulfil the expectations from this community’.*³⁰⁰ Like the UDHR, the CDHRI also makes a common avowal of foundational values in seeking to *‘affirm [the] freedom and right to a dignified life in accordance with the Islamic Shari’a’.*³⁰¹ Finally, in asserting its universality the CDHRI claims *‘to guide all of humanity which is confused because of different and conflicting beliefs and ideologies’.*³⁰² On the basis of detailing the universality claim of the religious system of rights, and, evidencing the decidedly religious morality that grounds this universality claim, it can be reasonably concluded that there is a clear rejection of any vision of universal rights sourced in anything other than God.

5.2 International Human Rights’ Source of Universal Truth

As we have seen, IHR is a manifestly non-religious or secular ideology. That being the case, the ‘truth’ that renders it allegedly universal cannot be God - rather it is the concept of humanity - best understood through the inherence theory. From the perspective of IHR, human nature is securely part of the natural order and has its own immanent

²⁹⁸ Ibid. Preamble ¶4.

²⁹⁹ Ibid. Preamble ¶3.

³⁰⁰ Ibid. Preamble ¶1.

³⁰¹ Ibid. Preamble ¶2.

³⁰² Ibid. Preamble ¶1.

rationality.³⁰³ This inherence theory claims that individual human rights are considered an ‘entitlement’ of every person, simply by virtue of being human – alternatively – rights are inherent to all human beings, whatever our nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status to which we are all equally entitled without discrimination. There is no point at which we become entitled to these rights, rather the entitlement is more adequately described as an entitlement to have acknowledged our inherent rights that were always present within our human selves. These inherent rights are inalienable and universal³⁰⁴ and are all interrelated, interdependent and indivisible.³⁰⁵

Where Islamic rights are validated by the theory of *tawhid*, in IHR there are a variety of theories attempting to validate its purportedly universal humanitarian underpinnings³⁰⁶ including the substantive theory (based on moral values or foundational postulates),³⁰⁷ the formal theory (arising from constructive, pragmatic, discourse), the subaltern theory (human rights as distinctive practice borne out of struggle), the post-modern theory (based upon empathy for others) or the political theory (encompassing socialist or liberal notions of human rights). Some commentators argue the theories’ relevance for a comprehensive understanding of human rights origins and validity³⁰⁸ and others claim their insignificance, as regardless of the theory applied, it is agreed they are inherent. In essence, whilst there may be incompatible views, it is possible to agree on certain norms of human behaviour whilst disagreeing on why they are the right norms and be content in that consensus, undisturbed by profound underlying differences in belief.³⁰⁹

³⁰³ Basil Mitchell, *Morality, Religious and Secular: The Dilemma of the Traditional Conscience* (Clarendon Press 1980) 85.

³⁰⁴ United Nations Office of the High Commissioner, ‘What are Human Rights?’ <<http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx>> accessed 10 April 2017.

³⁰⁵ United Nations Office of the High Commissioner, ‘What is a Human Right?’ <<http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx>> accessed 10 April 2017.

³⁰⁶ Robert Murray Thomas, *Moral Development Theories – Secular and Religious – A Comparative Study* (Greenwood Publishing Group 1997). Chapters 3 to 9 discuss thirteen varieties of secular moral theory namely the specialised theories of Ego Development, Delinquency, Compassionate Caring, Information Integration and Empathy together with the Composite Theory, Marxist Conceptions, Psychoanalysis, Social Learning / Social Cognition Theory, Cognitive Structuralism and the Attribution Theory.

³⁰⁷ The substantive theory of inherent human rights based on moral values is the prominent theory directly comparable to the moral foundations of Islamic human rights and thus the focus theory utilised here.

³⁰⁸ Ilias Bantekas and Lutz Oette eds, *International Human Rights: Law and Practice* (Cambridge University Press 2016) 5.

³⁰⁹ Charles Taylor, ‘Conditions of an Unforced Consensus on Human Rights’ in Bauer and Bell, *The East Asian Challenge for Human Rights* (Cambridge University Press 1999) 124.

The relevance of the inherence theory is illustrated in the drafting of Article 1 of the UDHR. Article 1 simply states that ‘*all human beings are born free and equal in dignity and rights and are endowed with reason and conscience*’.³¹⁰ Noticeably absent is any elaboration as to why humans have these rights, just a simple statement that they do. Secularism provided the drafters with an opportunity to overlook differences in belief and unite in inherence. Progressing on that basis, when we speak of protecting human rights – the outward portrayal of inner morality, in IHR, we are speaking of protecting rights validated by the inherence theory grounded in secular morality.

5.2.1 Secular Morality Grounding the Claim that Rights are Universal

The claim that rights are universal is at the core of the International Bill of Rights. It is purportedly a vision transcending time, location and culture³¹¹ that emphasises our inherent human commonality³¹² and all-inclusiveness within the human race.³¹³ It is noted in the heading of the UDHR as ‘*a common standard of achievement for all peoples and all nations*’.³¹⁴ Non-religious universality claims to be a global concern that symbolises the collective human aspiration to make power accountable, governance progressively more just, and states incrementally more ethical.³¹⁵ To this end, the drafters of the UDHR unequivocally linked destitution and exclusion with discrimination and unequal access to resources and opportunities; and understood that social and cultural stigmatisation precluded full participation in public life, including the ability to influence policies and obtain justice.³¹⁶ By claiming human rights as universal there would be potential, via such means, to tackle exclusion and destitution on a global scale relying on the core values of equality, autonomy and human dignity for all. The key issue however, is that this claim to universality is secular by nature.

The records of the UDHR drafting committee highlight the difficulties that arose in the drafting of Article 1 that sought to conclude the source of morality, thus the nature of its

³¹⁰ UDHR (n19) Article 1.

³¹¹ Bantekas & Oette (n308) 31.

³¹² Donnelly (n12) 57-60.

³¹³ Theo Van Boven ‘Fifty Years Universal Declaration of Human Rights – Balance and Challenges of the International Protection of Human Rights,’ in Peter Baehr, Cees Flinterman, Mignon Senders eds., *Innovation and Inspiration: Fifty Years of the Universal Declaration of Human Rights*, Royal Netherlands Academy of Arts and Sciences Amsterdam, 1999, 9.

³¹⁴ Universal Declaration of Human Rights Illustrated Booklet (n75).

³¹⁵ Upendra Baxi, *The Future of Human Rights* (Oxford University Press 2008) 59-95.

³¹⁶ Navanethem Pillay, ‘Are Human Rights Universal?’ UN Chronicle Vol. XLV No. 2 & 3 2008 available at <https://unchronicle.un.org/article/are-human-rights-universal>, accessed 9 May, 2019.

universal claims. Discussions extended to a full week on this one article,³¹⁷ such was the import and significance of the moral underscoring of the entire Declaration. A number of members of the drafting committee disagreed on the source of morality and argued for an inclusion referencing God.³¹⁸ Ultimately Article 1 rejected any such inclusion and omitted any mention of rights by nature, or rights by God. The moral underscoring and source of human rights in the UDHR was to have utterly secular foundations, and, as a corollary of rejecting God, the claim to universality would be established as also utterly secular.³¹⁹ The Saudi delegate argued that the statement that all men are endowed with reason and conscience was not and never had been true³²⁰ and such was the strength of his opposition that on the basis of the language of Article 1, Saudi abstained from the final vote on the declaration.³²¹ Critically, as the nature of the Saudi objection exemplifies, the secular and religious visions of morality, both laying claim to universality, may thus reject each other.

The humanity based moral underpinnings of the UDHR are further asserted where the preamble references the inherence theory of secular rights in stating ‘*recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world*’.³²² It further asserts its aspirations to individual liberty in stating that ‘*a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people*’.³²³ Moreover, it claims common avowal to its foundational values on this secular grounding where it declares ‘*....the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women*’,³²⁴ before cementing the succeeding rights within the declaration as universally applicable in

³¹⁷ Mary Ann Glendon, *A World Made New* (Random House Publishing 2001) 112.

³¹⁸ *Ibid.* 140, 216, 236.

³¹⁹ Michael Ignatieff, *Human Rights as Politics and Idolatry* (Princeton University Press 2011) 77. See also Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (University of Pennsylvania Press 1999) 286, 287.

³²⁰ United Nations General Assembly, Report of the Third Committee, 99th Meeting, 11 October 1948, 122.

³²¹ Glendon (n317) 112.

³²² UDHR (n19) Preamble ¶1.

³²³ *Ibid.* Preamble ¶2.

³²⁴ *Ibid.* Preamble ¶5.

proclaiming ‘*this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations*’.³²⁵

Despite an initial suggestion that Article 1 was designed for peoples to apply their own reason for why human kind were attributed these rights,³²⁶ decades after the publication of the UDHR, if indeed there may have been any residual confusion on the strict secular nature of the Bill of Rights, General Comment No. 22 (GC22) and General Comment No. 34 (GC34) of the UNHCR very clearly and executively laid the matter to rest, and reinforced the strict non-religious nature of the universality claim. GC22, regarding Article 18 of the ICCPR (freedom of thought, conscience and religion) asserts that a nation’s public morals could never derive exclusively from a single social, philosophical, or religious tradition.³²⁷ GC34 relates to Article 19, ICCPR regarding freedom of expression, but more particularly, Article 19(3) relates to occasions where freedom of expression may be restricted and lists one such occasion as being in the interest of the protection of public morals. GC34 mentions the protection of public morals restriction minimally, and only insofar as it reiterates the assertion in GC22, that public morals could never be derived from, among others thing, a single religion.³²⁸ On the basis of detailing the universality claim of IHR, and, evidencing the decidedly non-religious morality that grounds this universality claim, reaffirmed with great clarity in the general comments of the UNHRC, it can be reasonably argued that there is a clear rejection of any vision of universal rights sourced in religious morality.³²⁹

5.3 Impact of Divergent Approaches to Universal Truth

The two ideologies under consideration, Islam and IHR, then, both claim to be universally true but for different reasons – one religious and the other secular.³³⁰ Because neither the inherent human possession of rights nor the existence of God can be proven as objectively true, there is no possible way of deciding objectively whether one system of moral

³²⁵ Ibid. Preamble ¶8.

³²⁶ Eleanor Roosevelt, ‘Making Rights Come Alive’ in Allida Black (ed.) *What I Hope to Leave Behind: The Essential Essays of Eleanor Roosevelt* (Carlson 1995) 559.

³²⁷ UN Human Rights Committee (UNHCR), CCPR General Comment No. 22, The Right to Freedom of Thought, Conscience and Religion (Art. 18), UN Doc. CCPR/ C/21/Rev/Add.4 (1993), ¶8.

³²⁸ UNHRC, CCPR General Comment No. 34, Freedoms of Opinion and Expression (Article 19), UN Doc. CCPR/C/GC/34 ¶32.

³²⁹ This matter of adamant secularism will be explored in further detail in Chapter Six.

³³⁰ Neville Cox, ‘Blasphemy Holocaust Denial and the Control of Profoundly Unacceptable Speech’, (2014) 62(3) American Journal of Comparative Law 764.

universality has primacy over the other. Each system is validated within the confines of its own legal community.³³¹ Islam sees its truths as so self evident as to permit no room for debate or objection from the secular west, whilst the secular west sees the UDHR in exactly the same way.

Questions may, of course, reasonably be asked as to whether an allegedly ‘international’ legal ideology like IHR should adopt a particular (and non-religious) stance on the nature of the truth that supposedly underpins it given that, in doing so, it implicitly rejects the alternative view of truth that is shared, at least nominally, by nearly a quarter of the world’s population.³³² IHR should find it exceedingly difficult, with integrity, to claim itself as truly international if it does not accommodate a respectable number of Islamic states and a vast proportion of the world’s population whose morality is sourced in God. It is tempting to suggest that IHR is, in effect, claiming moral primacy over all competing worldviews including the Islamic worldview, and is asserting the highly controversial proposition that a secular yardstick can be used to measure the legitimacy, even, of the law of God.³³³

For present purposes, however, it is arguable that this major point of distinction between Islam and IHR is rather more symbolic than substantive. After all, as we saw in Section One the core moral values underpinning the two human rights systems (dignity, autonomy and equality) are the same, and they share similar views of justice. In other words whereas the different views as to the source of truth are a point of significant distinction between the two ideologies, they play out sufficiently similarly in practice, that this is not, of itself, a reason to regard Islam and IHR as inherently incompatible.

6. Ownership of Rights

Another theme of divergence between the Islamic and IHR systems occurs in the area of rights ownership. Although the impact of rights protections are ultimately the same, the matter of rights ownership affects the manner in which rights occur. To this end, how the ownership of rights in each system lies with the moral source, on what basis the state

³³¹ For further discussion on validation of controversial legal propositions see Chapter One.

³³² Neville Cox, ‘Justifying Blasphemy Laws: Freedom of Expression, Public Morals, and International Human Rights Law’ (2020) 35(1) Journal of Law and Religion 60.

³³³ Ibid.

assumes responsibility for enjoyment of rights and, ultimately, how ownership of rights prompts the bifurcation of moral languages into that of rights and duties will now be explored in turn.

6.1 Ownership of Rights within International Human Rights

Ownership of rights in this scheme directly connects with the inherence theory of morality that dictates ownership of rights to be with the individual. As humans are rational beings endowed with the innate ability to reason, they are capable of setting their own moral standards. Therefore, human beings are capable of identifying their own rights. These rights are humans' entitlement by virtue of their humanity without discrimination and are always present within the human self. Accordingly, human rights belong primarily³³⁴ to the individual. This is self evident in the instruments of IHR where the expressions 'human beings', 'everyone' or 'every individual' are utilised and the Preamble begins with the expression that 'All human beings are born free and equal in dignity and rights'. They are not given, nor can they be taken away by the state or any other entity, with these rights attributes commonly referred to as being imprescriptible and inalienable.³³⁵ However, having individual ownership of human rights does not suggest that human beings are individually responsible for the protection of those rights, as to suggest such a responsibility would be to suggest individuals have the ability and power to protect them. In this respect, despite the state not having ownership of individuals' human rights, or indeed the ability to give or take them away, human rights do concern the relationship between the individual and the state. IHR operates on the premise that states are tasked with protecting rights, and tasked with creating a society where each individual can enjoy and freely exercise the rights that he or she individually owns, to the full.³³⁶

By subscribing to UN international human rights instruments member states acknowledge their responsibility to provide, sometimes qualified by reservations, a society for such

³³⁴ Certain rights are considered to belong to groups of individuals rather than the individuals themselves such as the right to self determination and the right to development. See for example H. Weston Burns 'Human Rights', *Encyclopaedia Britannica* available at <https://www.britannica.com/topic/human-rights>; Jones, P. 'Group Rights' *Stanford Encyclopaedia of Philosophy* available at <https://plato.stanford.edu/entries/rights-group/> accessed 20 May, 2019.

³³⁵ Dewhurst et al. (n105) 2.

³³⁶ Morsink (n319) 281. See also Abdullah Saeed, *Human Rights in Islam: An Introduction to Key Debates Between Islamic Law and International Human Rights Law* (Edward Elgar 2018) 44.

enjoyment and exercise³³⁷ and so must act to effect the proper implementation, protection and validation of human rights. To this end, state responsibility to create such a society for the full enjoyment and exercise of rights can be said to be achieved through the provision of five human rights services, alternatively, the fulfilment of five human rights ‘duties’ now imposed on the state. Firstly, the duty to respect the rights of others; secondly, the duty to create institutional machinery that is essential for the realisation of rights such as the machinery to ensure free and fair elections; thirdly, the duty to protect rights and prevent violations, usually manifesting as the provision of a police force and the creation of a civil and criminal legal system; fourthly, the duty to provide goods and services to satisfy rights such as the right to housing and healthcare; and, fifthly, the duty to promote human rights.³³⁸ That the state is tasked with substantial resource commitment to the promotion and protection of individual owned human rights is testimony to the profound turnaround, in the space of a century, in the global attitude towards the value of human life. From states taking advantage of the scope of sovereignty in the way they chose to treat their citizens and ownership of rights lying with the state in the early limited extent of public international law / humanitarian law, the extent of the responsibility now shouldered by subscribing states in assuring the proper protection and promotion of human rights is indicative of the weight of international consensus that the status of rights ownership in IHR is a human centric business.

6.2 Ownership of Rights within Islam

As the ownership of human rights in IHR directly connects with the secular theory of morality, inherence; so too does the ownership of rights in the Islamic system directly connect with the Islamic theory of morality, *tawhid*. Whilst in IHR there is no ‘attribution’ of rights by any individual or group to humans, rather, an acknowledgement that they are and have always been inherent, where Islamic Law is concerned rights are attributed to humans, and they are attributed by God. By virtue of the *tawhid* theory, as physical life and faculties are the provisions of God who by his grace bestowed them upon humans, it is not for us to decide the aim and purpose of our own existence or to

³³⁷ Human Rights and Equality Commission Ireland ‘Human Rights Explained’ 7, 8.

<https://www.ihrec.ie/download/pdf/ihrec_human_rights_explained.pdf> accessed 20 May, 2019.

³³⁸ On the categorisation of state duties see Steiner et al. (n232) 187-189. See also Henry Shue, *Basic Rights: Subsistence, Affluence and US Foreign Policy* (Princeton University Press 1996) and G. J. H. van Hoof ‘The Legal Nature of Economic, Social and Cultural Rights: A Rebuttal of Some Traditional Views’ in P. Alston and K. Tomasevski (eds.), *The Right to Food* (Martinus Nijhoff 1984) 97 – 110.

prescribe the limits of his worldly authority – this right rests with God alone.³³⁹ As rights serve as the basis for special claims against those in relation to whom the right is held, the right holder, or the right owner, is in control of the right and manages the use of it, thereby the consequences of having it.³⁴⁰ Where Islam is concerned, God is the right owner, therefore it is he who controls or manages the right. He does this by demanding compliance with a duty, thereby controlling the consequences, which is the benefit that duty compliance brings to individuals and the community, alternatively, the rights that duty compliance brings to the individual and the community. As individuals receive the will of God or their duties towards God through the medium of *risala* or prophethood, the *Qur'an* and the *Sunnah*, as products of *risala*, bestow upon human beings any rights that God wishes them to have, via the extrapolation of duty terms to rights terms.

Human rights in Islam then are owned by God and are the privilege of God because ultimate authority lies with him.³⁴¹ It is when the obligations, commandments or duties (defined by the *Shari'a*) are met by individuals, that corollary rights and freedoms are conferred³⁴² which benefit the individual and the *ummah*. Essentially, in the Islamic religious texts, as with other religious texts, there is the idea of right in terms of rectitude, or duty to do what is morally right, as opposed to right in terms of entitlement. As religions are inherently interpretive, even though the texts may fail to include the word 'rights', this distinction is not detrimental as the divine injunctions 'not to do', once 'not done', imply a right of the person they are 'not to be done' upon. Both the religious motivation and the human rights extrapolation remain regardless of the wording of the literal text.³⁴³ Any corollary benefits or rights for the individual derive their force from this connection. As practice is the measure of piety, adherence to God's will ensures human rights are lived as well as believed.

³³⁹ Maudoodi (n175) 12.

³⁴⁰ Jack Donnelly, 'Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights' (1982) 76(2) *The American Political Science Review* 305.

³⁴¹ Majid Khadduri. 'Human Rights in Islam' (1946) 24(3) *The Annals of the American Academy of Political and Social Science* 79.

³⁴² Abdul Aziz Said, 'Precepts and Practice of Human Rights in Islam' (1979) 1 *Universal Human Rights* 73-74.

³⁴³ Irene Oh, *The Rights of God: Islam, Human Rights and Comparative Ethics* (Georgetown Community Press 2007) 27.

In order to effect the practice then, unless there is practical recognition of rights the idea will remain empty verbiage³⁴⁴ and so this is why, as well as a religious duty set out in the *Shari'a* for the Muslim to fulfil, it is also the task of the state to protect the rights of its citizens³⁴⁵ which have arisen only by virtue of the fulfilment of duty to God. Not unlike IHR, despite the state not having ownership of human rights or indeed the ability to give or take them away, human rights in Islam operate on the premise that the state has responsibility for enforcing the principles of the *Shari'a*. Through such enforcement, its citizens are protected and social justice is achieved, creating a society where the state alleviates the conditions that hinder individuals in their pursuit of happiness.³⁴⁶ Essentially, the state, in ensuring compliance with the *Shari'a*, ensures the corollary benefits are enjoyed by humankind. By subscribing to the OIC and its human rights instruments, member states acknowledge their responsibility to provide a society where the *ummah* and its members individually can carry out their duties and enjoy their rights.

6.3 Impact of Divergent Rights Ownership

Critically, as the source of morality in each system is essentially the owner of rights, this distinguishes one system from the other insofar as the manner in which rights occur is dependent upon who has ultimate control over them. It is apparent that regardless of rights ownership, responsibility for the protection of rights does not lie solely with the right holder but that rather significant responsibility lies with the state in ensuring individuals exist within an environment that is conducive to either the enjoyment of rights or the fulfilment of duties - enjoining a corollary 'right' benefit. Ultimately, the most direct impact of the divergent matter of rights ownership is its influence on the dialect of moral language chosen by each system to best reflect its moral origins.

7. The Language of Human Rights

The divergent aspect of rights ownership illustrated how God is the ultimate rights holder in the Islamic scheme of moral protections and it is his rights that must be fulfilled. It was noted that the corresponding duty of humankind to fulfil God's right over man, or

³⁴⁴ Rashid Ahmad Jullundhri, 'Human Rights and Islam', in *Understanding Human Rights: An Interdisciplinary and Interfaith Study*, Alan D. Falconer (ed.) (Dublin: Irish School of Ecumenics 1980) 34.

³⁴⁵ Robert Traer, 'Human Rights in Islam' (1989) 28(2) *Islamic Studies* 119. See also Saeed (n336) 116.

³⁴⁶ Abdul Aziz Said, 'Human Rights in Islamic Perspectives' in Adamantia Polis and Peter Schwab eds. *Human Rights: Cultural and Ideological Perspectives* (Praeger 1979) 87.

haqq Allah, is how benefit is realised by the individual or the community, and, how that benefit can be termed as a right by extrapolating the duty language of the religious texts into rights language. Rights ownership also illustrated how the individual human being is the ultimate rights holder in IHR and it is the individual's rights that must be fulfilled. In this scheme benefit is realised by the autonomous assertion of rights. This discussion focuses on the language of rights and duties and how their use in each system can be seen to substantiate a further divergent aspect. In this respect the language of rights and duties will be discussed in terms of how they can be labelled to reflect their purpose, how each language benefits the system it is utilised within, and whether there is ultimately any difference in the ends these languages seek to achieve.

7.1 Alternative Languages of Rights and Duties

The rights versus duties debate is not a new one and has been the subject of philosophical and legal debate since at least the time of Aristotle.³⁴⁷ Rights and duties, it is argued, have a distinct correlation.³⁴⁸ IHR very clearly sets out a succinct list of rights in the UDHR (expanded in subsequent covenants). The Islamic world, in its attempt to construct a 'rights' edifice of equivalent nature, likewise clearly delineates a succinct list in the CDHRI. However, though both documents utilise the term 'rights', the word is more appropriate to the non-religious than the religious scheme. In the Islamic world's attempt to construct a human rights scheme, of which the CDHRI is its comparable articulation of values, scholars have scrutinised the Islamic sources identifying the human rights found therein.³⁴⁹ In so doing however, it has been noted that the CDHRI as a rights document may appear rather contrived. Virtually all of the identified rights are articulated as duties of rulers and individuals - the 'right' to freedom of expression is articulated as a 'duty' to speak the truth and the 'right' to justice is a 'duty' of rulers to establish justice.³⁵⁰ Certainly, the *Qur'an* has little mention of 'rights' in terms of claims or privileges, but instead there are numerous mentions of 'right' in terms of right behaviour. Further, in this attempt to construct its own scheme of rights, it has been asserted continuously by the Islamic community that the very basic concepts and

³⁴⁷ Kwame Gyan, 'The Duty (Responsibility) of the Individual in the African Charter on Human and Peoples' Rights as it Relates to International Human Rights' (2000/2002) 21 University of Ghana Law Journal 156.

³⁴⁸ Ibid, 159. See also Ali (n285) 271.

³⁴⁹ J. Mark Halstead, 'Islamic Values: A Distinctive Framework for Moral Education?' (2007) 36(3) Journal of Moral Education 289.

³⁵⁰ Donnelly (n340) 305.

principles IHR seeks to advance had from the very beginning been embodied in Islamic Law.³⁵¹ Taking it then to be the case that the basic concepts and principles are claimed to be the same, and that the values and ideals expressed through IHR are not indeed exclusive to it and can also be found in the language of duty and responsibility,³⁵² it is better to describe rights and duties as not ends in themselves, but means to ends. Alternatively, the languages of rights and duties are simply tools for professing values, or, mechanisms for communicating moral rules.³⁵³

7.2 Benefits of the Chosen Language

The fact that rights and duties languages are alternative methods of achieving the same end lends itself to the question of *why* each system uses a different language to communicate the same values. In this respect, rights and duties have certain connotations particular to their genesis. Where rights are concerned, certain characteristics orbit the term which lend themselves to the formulation of a language that facilitates the dictates of a secular community. This rights language, though used in the Islamic world in an attempt to communicate its moral values via a globalised medium,³⁵⁴ or via modern parlance, does not translate directly into the language of the Islamic holy works³⁵⁵ where the term ‘duties’ and the characteristics that orbit it better lend themselves to a language that facilitates the dictates of a religious community. Thus, the two orthodoxies differ in mechanics only, and this, as a result of their different normative starting points,³⁵⁶ or, the origin of morality in each scheme.

For IHR, the starting point is the individual and IHR dictates that moral rules should be applied to protect individual interests and maximise their wellbeing.³⁵⁷ The individual is

³⁵¹ Ahmed bin Abdunabi Makki, representative of Oman to the Third Committee of the General Assembly, speech of 25 October 1979, UN document number A/C.3/34/SR.27.

³⁵² Steiner et al. (n232) 511.

³⁵³ For discussion on whether rights versus duties debate is redundant see the following: Mohammad Hashim Kamali ‘Fundamental Rights of the Individual: An Analysis of Haqq (Right) in Islamic Law’ (1993) 10(3) *American Journal of Social Sciences* 364; Samuel J. Stoljar, *An Analysis of Rights* (MacMillan 1984); and, Mashood A Baderin, ‘Human Rights and Islamic Law: The Myth of Discord’ *European Human Rights Law Review* 174.

³⁵⁴ Martin Prozeski, ‘Is the Concept of Human Rights Logically Permissible in Theistic Religion?’ (1989) 2(2) *Journal for the Study of Religion* 17, 26.

³⁵⁵ Khalid M. Ishaque, ‘Human Rights in Islamic Law’ (1974) 30(12) *Review of the International Commission of Jurists* 9.

³⁵⁶ Neville Cox, ‘The Clash of Unprovable Universalisms: International Human Rights Law and Islamic Law’ (2013) 2(2) *Oxford Journal of Law and Religion* 20. See also

³⁵⁷ Joel Feinberg, *Rights, Justice and the Bounds of Liberty: Essays in Social Philosophy* (Princeton University Press 1980) 140-141.

the source of morality and his values are inherent,³⁵⁸ independent of any granting authority or deity. By virtue of the centrality of the individual and the inherence of the individual's values, determined by independent reason, these rights can be exercised according to individual preferences,³⁵⁹ and, the language of rights accommodates these preferences or differences as it is more concerned with accommodating individual needs than it is with community or state wellbeing.³⁶⁰ Moreover, the individual can assert his or her preferences without feeling any guilt for non-conformity with public opinion.³⁶¹ Hence, the role of the individual in IHR is assertive. The individual within IHR utilises his rights against others and the authority to achieve for himself what he believes he is entitled to.³⁶² In this scheme, individuals perceive what is morally decent by recognising what rights they have.³⁶³ The language of rights then, with its characteristics of inherence, individualism and assertiveness, is suited to IHR as it promotes the centrality of human personhood.³⁶⁴

For the Islamic scheme the starting point is God and it dictates that the moral rules should be applied for the protection of God's will. As human rights are just a part of an overall God centred framework in which a Muslim is not simply an individual but a servant of God, priority is given to his duties to God.³⁶⁵ God's will, we recall, sets out rules for the relationships between the individual and God (*ibadat* rules), and between individuals (*mu'amalat* rules).³⁶⁶ Thus, Islamic moral rules centralise God and the community,³⁶⁷ with the individual benefitting as a consequence of the symbiotic nature of duty fulfilment by others, or, the *Qur'anic* emphasis on mutual expectations and relations

³⁵⁸ Ayten Gundogdu, *Rightlessness in an Age of Rights: Hannah Arendt and the Contemporary Struggles of Migrants* (Oxford University Press 2015) 100.

³⁵⁹ Paul Kurtz, 'On Human Values' (2006) *Science and Spirit* 35-37.

³⁶⁰ Ahmed Balto, 'Re-evaluating the Supposed Clash between Islamic Law and International Human Rights Law: The Impact of God as a Nation's Public Morality' Doctoral Thesis submitted to Trinity College Dublin 2017, 81.

³⁶¹ Feinberg (n357) 25-27.

³⁶² Kenneth Minogue, 'Individualism and Its Contemporary Fate' (2012) 17(2) *The Independent Review* 257, 261-262.

³⁶³ Bernard Gert, *Morality: A New Justification of the Moral Rules* (Oxford University Press 1988) 113-114.

³⁶⁴ Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (Routledge 1997) 209-210.

³⁶⁵ Saeed (n336) 66.

³⁶⁶ Chapter One explores the religious framework of Islamic Law in further detail.

³⁶⁷ Nader Hashemi, *Islam, Secularism and Liberal Democracy: Towards a Democratic Theory for Muslim Societies* (Oxford University Press 2009) 119-121. It is noted that the historical Islamic texts that have relevance for human rights are all grounded in obligation to God first, society in general second and the individual last. These documents include the Peace Contract with the Nadjranites, The Madinah Charter, and the Farewell Speech. In this regard see Halit Calis, 'Islam and Human Rights: An Obligation Prioritised Society Model' (2013) 36(4) *Hamdard Islamicus* 43.

fostered by common descent.³⁶⁸ The overriding emphasis on the autonomy of the individual with an independent moral standard that transcends religious and cultural differences to claim rights without considering the bonds of reciprocity runs contrary to the Islamic tradition's emphasis on the community and relational aspect of human existence.³⁶⁹ For Islam, rights are a consequence of human obligation, not their antecedent.³⁷⁰

In this way, the individual is recognised, but as a member of the larger community. The source of Islamic morality is wholly God and the core principles or values of Islamic morality are ascribed to individuals by God alone.³⁷¹ By virtue of the centrality of God and ascription of the individual's values determined by the grace of God alone, the idea of rights exercised according to individual preferences or against God as the ultimate authority is contrary to the spirit of Islam.³⁷² This is so because God's emphasis on the community³⁷³ demands the interests of others are prioritised over the interests of the self.³⁷⁴ In Islam, as the universe and human life are created by God who is all knowing, he is the only one who should be obeyed, and humankind should listen to him regarding how best to live decent lives.³⁷⁵ Accordingly, Muslims are regularly enjoined, on the basis of divine command, to abide by the core values of the scheme³⁷⁶ and submit to the will of the all-knowing deity utterly. This point is made succinctly in the *Qur'an* at 2:62 where God reveals that '*Whoever believes in Allah and the last day, and does what is good, shall receive their reward from their Lord. They shall have nothing to fear...*'.³⁷⁷ Fundamentally, individuals apply the moral rules regardless of whether they comprehend the rationale³⁷⁸ as those who submit to the divine will of God are guaranteed inner peace.³⁷⁹

³⁶⁸ Sachedina (n43) 71.

³⁶⁹ Ibid. 35.

³⁷⁰ Seyyed Hossein Nasr, 'The Concept and Reality of Freedom in Islam and Islamic Civilisation' in Alan S. Rosenbaum (ed), *The Philosophy of Human Rights* (Greenwood Press 1980) 96.

³⁷¹ Ann Elizabeth Mayer, 'Universal Versus Islamic Human Rights: A Clash of Cultures or a Clash with a Construct?' (1994) 15(2) Michigan Journal of International Law 331.

³⁷² Halstead (n349) 289.

³⁷³ God's emphasis on the community or the *ummah* is evident historically and the origins of this emphasis can be seen in Chapter Two.

³⁷⁴ Rolf Hille, 'Human Rights in Islam: Is the Clash of Civilisations Already Pre-Programmed?' (2006) 30(4) Evangelical Review of Theology 359.

³⁷⁵ Balto (n360) 88.

³⁷⁶ Donnelly (n340) 306, 307.

³⁷⁷ Holy Qur'an, Surah Al – Baqarah 2:62.

³⁷⁸ Feinberg (n357) 136.

³⁷⁹ Syed Husein M. Jafri, 'Morality and Conduct of Life in Islam' (1979) 2(5) Hamdard Islamicus 7.

The language of duties accommodates divine command and complete submission as it is more concerned with devotion to the will of God and the protection of his community than it is with accommodating individual interests or preferences. Hence, the role of the individual in the Islamic human rights scheme is entirely submissive. The individual within Islam fulfils his duties to God and the community, not to derive a benefit for himself, but to comply with the will of God. To attempt to utilise rights against God as the ultimate authority is unimaginable as it is completely illogical that something could both originate from God and be used against him.³⁸⁰ In this scheme, the individual in Islam perceives what is morally decent by recognising his duties. The language of duties then, with its characteristics of *tawhid*, communitarianism and submission is suited to the Islamic system as it promotes the centrality of God.³⁸¹

7.3 Rights and Duties as Counterpoints of One Another

Having established that the basic concepts and principles of human dignity, equality and autonomy are present in both IHR and the Islamic human rights orthodoxies and are not exclusive to either one, and, that rights and duties are not moral ends in themselves but rather alternate mechanisms for the delivery of those principles; it was discovered that these rights and duties languages work to suitably advance the centrality of their separate moral genesis, that is, the centrality of the individual in IHR and the centrality of God in Islam. Whilst these languages are utilised to empower the orthodoxies to stay true to their moral sources, it can however be said that the language of duties is not alien to IHR, nor is the language of rights alien to Islam. This is so by reason of the fact that rights and duties are the counterpoints of one another. Scholars have variously commented:

*‘is there any difference in how a right..... is enforceable if not by placing a corresponding duty on the object of the duty’;*³⁸²

*‘a claim right imposes an obligation on other people and/or on social institutions’;*³⁸³

³⁸⁰ Majid Khadduri (trans), *Al-Shafi'i's Risala: Treatise on the Foundations of Islamic Jurisprudence* (Islamic Texts Society 1987) 2-5.

³⁸¹ Robert Cover, ‘Obligation: A Jewish Jurisprudence of the Social Order’ (1987) 5 *Journal of Law and Religion* 71-72.

³⁸² Ali (n285) 270.

*‘there is no claim-right holder without a co-relative duty bearer’;*³⁸⁴ ‘

*the claim or enjoyment of a right made the imposition or performance of a duty imperative’;*³⁸⁵ and,

*‘every right implies corresponding or correlative duties in order to see that right respected, protected or fulfilled’.*³⁸⁶

The recognition of duties in IHR is illustrated at Article 29 of the UDHR where it states *‘Everyone has duties to the community in which alone the free will and full development of his personality is possible’*,³⁸⁷ though this is qualified by the overarching assertion in the preamble that *‘freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people’* – trumping duty to the community with individual aspiration. Where the recognition of rights in Islamic Law is concerned this cannot be said to be drawn from the language of the *Qur’an*, as the language of the *Qur’an* speaks in terms of duties. Although the term *‘haqq’* which can be translated as ‘right’ is used frequently, it is more appropriately translated in its *Qur’anic* contexts as words such as truth, duty, constancy and justice.³⁸⁸ When Islamic scholars use the term *haqq* or *huquq* to establish the rights set out in the divine texts they clearly have the counterpoint obligations in mind.³⁸⁹ This said, rights in the sense of a legitimate expectation based on the moral duties of others are in harmony with Islam, and the term is used in this sense in the *Qur’an* and the *hadith*.³⁹⁰

Overall, rights in the sense of assertive individualistic claim rights are unfamiliar in the Islamic scheme. The IHR language of rights underemphasises the accruing of responsibilities that comes with claims to entitlements³⁹¹ but Islamic theology, metaphysics and natural law allow Islam to acknowledge human rights without

³⁸³ Brian Orend, *Human Rights: Concept and Context* (Broadview Press 2002) 21.

³⁸⁴ Ibid.

³⁸⁵ Gyan (n347) 156.

³⁸⁶ Samuel Moyn, ‘Rights vs. Duties: Reclaiming Civil Balance’ (2016) 41(3) Boston Review 42.

³⁸⁷ UDHR (n19), Article 29.

³⁸⁸ Balto (n360) 88.

³⁸⁹ Halstead (n349) 289.

³⁹⁰ Ibid. 289.

³⁹¹ Sachedina (n43) 35.

disregarding those responsibilities or duties.³⁹² It does so by recognising rights as the counterpoint of duties and it is on this basis the CDHRI is entitled to utilise rights language in the text of its declaration, and indeed does so. However, the document as a whole, in this sense, appears quite contrived. Likewise, whilst there is duty based precedent in IHR, it chooses not to use duty based language. As duty based language generally has its foundations in religious ideology advancing the centrality of God, IHR must reject anything that inhibits the assertive acts of individuals³⁹³ so that it may stay true to its own moral origin.

7.4 Impact of Divergent Rights Languages

Whilst rights are not alien to the Islamic system by virtue of recognising the counterpoint of duties, and duties are not alien to IHR by virtue of recognising the individual as part of a larger community responsible for his or her full development, IHR is loathe to conceding duty language to protect the individualistic nature of its moral origin. Conversely, the Islamic system has not refused to engage in rights language, but does so to the extent that it recognises rights as the corollary benefit of the fulfilment of duty. Despite this engagement, the ‘rights’ contained within the CDHRI are variously overwhelmed by the restrictions that follow them and to this extent the use of rights language therein seems rather unnatural. This said, when rights and duties can be determined as the counterpoint of one another the mechanism utilised to realise the benefit does not impact the outcome – the priority is that such benefit is ultimately realised. Just as it has so far proven impossible to argue the primacy of God over the individual, it is equally impossible to assert primacy of language in effecting moral values. Both rights languages ultimately benefit the individual in the same way. In other words, again, this does not suggest an inherent incompatibility between Islam and IHR.

8. Compatibility of Islamic Criminal Law and International Human Rights Law

In considering the combined similarities and distinguishing features between the two ideologies it is observed that the similarities are immeasurably more important. It is true that, in Islam, but not in IHR, religious morality exists as a moral baseline to ground

³⁹² Halstead (n349) 289.

³⁹³ John Milbank, ‘The Gift of Ruling: Secularisation and Political Authority’ (2004) 85(996) New Blackfriars 220-222.

human rights and as God is the owner of rights in Islam, it is he who controls the nature in which they occur, and his law can be more effectively delivered through the use of duty language rather than rights language; this simultaneously ensures complete submission to God whilst protecting him as the moral origin of rights/duties. On the other hand, far more importantly, both schemes are firmly grounded in human dignity, autonomy and equality, share a similar conception of justice, and, permit rights to be restricted in the name of public morality. Thus, in Section Three it is suggested that the similarities between the two ideologies very considerably outweigh the differences.

SECTION THREE

Section One has argued that the two systems of human rights are based on the same values. Section Two argues that although they are the same values, they differ on their source of morality, ownership of rights and the role of duties. Section Three will very briefly argue that the differences are non-substantive in practice and thus the similarities are more important.

9. Similarities as Trumps

On the basis of the compatible features of the schemes it has been established that fundamentally IHR and Islamic Law both deliver effective rights protections and have a broadly similar view of justice that includes the restriction of rights in the interests of public morality. It is imperative that the values that underscore the rights protections are noted as not only simple values shared by two schemes of rights, but that they are coinciding fundamental necessities for the protection of humanity in the two major global moral visions that impact the thrust of the world's population. This means that there is genuine international consensus on the values necessary for optimum human flourishing. On this basis it is submitted that the compatibility in their foundations outweighs any distinctions, and further, that these distinctions are distinctions in detail only, not in essence.

Differing moral origins do not obliterate these values, on the contrary they remain steadfast in each scheme. An inability to claim objective truth must establish both truths

as equally valid. Given the rules for establishing legitimacy of laws in Chapter One we recall that validity lies in the concord of the interpretive community, that once established must be accepted as viable in the wider scheme of things. Ownership of rights lying with differing entities does not prevent their implementation. Whether rights are owned and asserted by God or owned and asserted by the individual they are implemented for the benefit of the individual. Communication of protections through alternate language media does not change their outcome. Their intended results, that is, optimum human flourishing for the individual, are the same. Thus, the differences between the two systems can be frankly deemed non-substantive in practice.

This leads to the conclusion that as the distinctions are distinctions in details or symbolism only, it is the similarities that are immeasurably more important. The similarities greatly outweigh the differences because they establish compatibility between Islamic Law and International Human Rights.

10. Conclusion

What, then, does this mean for the question of whether Islamic Criminal Law and IHR are inherently incompatible? It is strongly arguable that, for the reasons outlined above, Islam *per se* is not incompatible with IHR. As we have seen, the values of human dignity, autonomy and equality are equally identified as the most fundamental and essential values required for a moral and just society in each scheme. Both systems acknowledge the relationship between rights, the individual and the community, and identify with the concept of limiting rights in the interest of public morality. The grounds of compatibility are intact and there is nothing to suggest there must be an automatic rejection of any one system by the other.

It is less clear, however, whether Islamic Criminal Law is inherently incompatible with IHR. As we saw, the three reasons why it is alleged to be so are (a) because it justifies the criminalisation of certain actions purely on the basis that this is what God wants (b) because relatedly, it criminalises things like alcohol consumption, apostasy and adultery which are legal in the west and (c) because its *hadd* punishments can be seen both as draconian and cruel and unusual. All of these are reasonable concerns. On the other hand, they may not necessarily point to *inherent* clashes between Islamic Criminal Law and

IHR, but rather such clashes may turn on the manner in which either ideology is interpreted. To take points (a) and (b) it will be remembered that the International Bill of Rights permits rights to be restricted in the name of public morality. Thus it is only by interpreting the concept of public morality in human rights treaties as *excluding* God, that these become a point of contention between the two ideologies. To take point (c) it is undoubtedly the case that punishments such as death by stoning, amputation and crucifixion *are* incompatible with IHR, but critically it is only by interpreting *Shari'a* in a manner that is both fundamentalist and literalist and also decontextualised, that one can conclude that such punishments are still required by Islam in the 21st century.

What this suggests is that the actual incompatibility between *Shari'a* and IHR is not inherent but rather the product of the extent to which elements within both systems have approached the business of interpreting their codes (and, in doing so, have doubled down on protecting their perceived moral origins). Thus, the UNHRC has hardened its approach to interpretation of public morality to the extent that they have excluded God as an element of it – an issue considered in Chapter Six. By contrast, unrepresentative elements in the Islamic world have adopted a fundamentalist approach to the interpretation of the criminal laws to the extent that a literalist approach to the *hudud* has been reasserted in the twenty first century – an issue considered in Chapter Seven.

PART THREE

Part Three comprises the final chapters, six and seven, of this thesis and addresses the issues thrown up at the cross section of Sections One and Two heretofore. It has at this point been determined that an inherent incompatibility between Islamic Criminal Law and International Human Rights is absent. Part Three proposes that to the extent there still is an issue of incompatibility between the issues identified at the culmination of Part One and IHR, that this incompatibility lies in the matter of interpretation, both on the part of the UN Human Rights Committee on the matter of God, and on the part of the fundamentalist stream of Islamism on the matter of harsh punishments.

Where interpretation on the part of Islam is concerned, the incompatibility of the draconian and disproportionate punishments only arises if the words of the *Qur'an* are taken literally, but, this can be overcome. Part Three progresses to detailing the modernist approach to interpretation that removes the incompatibility of the *hudud* with International Human Rights. It finally turns to the law of Judaism, used comparatively, to address two matters. Firstly, the manner in which both schemes, Judaism and Islam, were reflective of criminal punishment norms of the seventh century. Secondly, the manner in which Talmudic Law has been re-contextualised for the modern world. The state of Israel is illuminated as a precedent for the reformulation of a traditional religion that aligns with the externalities of Islam in the twenty first century.

CHAPTER SIX
THE GOD ISSUE:
THE UNHRC AND INTERPRETATION OF THE
CONCEPT OF PUBLIC MORALITY

1. Introduction

Chapter Five concluded that in terms of similarities and distinctions the similarities between the IHR and Islamic schemes of rights outweigh the differences and the schemes are accordingly compatible, thus despite assertions, the criminal law is *not* incompatible with IHR. This prompted the final vital question that asks: to the extent there *still is* a perception of an inherent clash between International Human Rights and Islamic Criminal Law despite the principles of IHRL and *Shari'a* being actually very similar, why does this clash exist? The thesis suggests that what is at play is not an incompatibility of values but an incompatibility of interpretations of those values.

As we saw in Chapter Three, the *Shari'a* is deeply concerned with human dignity and well-being through its provisions for due process and fair procedures (and thus it is notable that the operation of the highly controversial blasphemy laws in Pakistan¹ manifest a violation not merely of human rights standards of fair procedures but also of *Shari'a* itself). In other words, at its core, the values enshrined in Islamic Criminal Law are also human rights values. As we also saw, there are two aspects of Islamic Criminal Law that are far more problematic from a human rights standpoint. Firstly, and whereas there are multiple 'purposes' behind these rules that would also underpin a secular view of criminal justice (deterrence, rehabilitation and so on), the fundamental purpose is to give effect to the will of God. Clearly this is significantly out of line with modern 'western' values but is inevitable in a society whose values are entirely non-secular. This explains certainly the existence of one or possibly two *hudud* crimes (adultery (*zina*) and, if it is a *hadd* crime, apostasy (*riddah*)). Secondly, if the rules are applied literally then the prescribed punishments are, by contemporary standards, draconian, disproportionate and medieval in nature. But there is a large body of Islamic thought that rejects such literalism and claims the *Qur'an* must be constantly re-interpreted to give effect to the

¹ Neville Cox, 'Justifying Blasphemy Laws: Freedom of Expression, Public Morals and International Human Rights Law' (2020) 35(1) Journal of Law and Religion 33-61.

five core values or *maqasid al-Shari'a* (protection of life, religion, intellect, property and progeny) having regard to the context and externalities that each new generation will face.

Accordingly, the main points of division between *Shari'a* criminal law and IHR are (a) the significance of God as an element of the public morality of the relevant state and (b) the words of the *Qur'an* when taken literally. In both Chapters Six and Seven it is argued that the principal reason for the alleged incompatibility between Islamic Criminal Law and IHR is the existence of fundamentalist viewpoints on both sides. The issue of fundamentalism in the interpretation of *Shari'a* is obvious (though the tendency of many in the west, quite wrongly, to regard the most draconian forms of Islamic fundamentalism as representative of Islam is deeply problematic). Less obviously, however, the United Nations Human Rights Committee, with little textual basis for doing so has, over the last twenty years, taken a profoundly fundamentalist approach to the legitimacy of religion within a state structure, reasoning that a nation's public morality can never be based on a single religious tradition. It has, accordingly, developed a stream of IHR interpretation that this thesis labels Fundamentalist Secularism. Thus, just as Islamic Fundamentalism can render Islamic Criminal Law non-human rights compliant under (b) above, so also Secular Fundamentalism can do the same under (a) above. Both Chapters Six and Seven will address these issues. Chapter Six will address Issue A: the Secular fundamentalist interpretation of the role of God in the formulation of a nation's public morality. Chapter Seven will address Issue B: the Islamic Fundamentalist interpretation of the words of the *Qur'an*.

2. UNHRC Secular Fundamentalist Interpretation of Public Morality

Article 18 of the ICCPR caters to freedom of thought, conscience and religion and provides, at 18(3), for the restriction of the right as follows:

*Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect **public** safety, order, health, or **morals** or the fundamental rights and freedoms of others.²*

² International Covenant on Civil and Political Rights (ICCPR) Article 18.

Revision and analysis of Article 18 culminated in 1993 in the explanatory General Comment No. 22 of the UN Human Rights Committee (UNHRC). General Comments are the means by which a human rights expert body distils its considered views on an issue which arises out of provisions of the treaty and presents those views in the context of a formal statement.³ The UNHRC general comments are provided for in Article 40 of the ICCPR and the Committee intends for them to constitute authoritative legal analysis⁴ and carry considerable legal authority.⁵ This being the case, the validity of Article 18 here is its reference to restriction of the right on grounds of public morals and the manner in which General Comment 22 essentially promulgates a singular interpretation of public morals. This in turn, by virtue of Article 19 relating to Freedom of Expression, has a profound impact on the relationship between the Islamic Scheme and International Human Rights which will be illustrated below. The promulgation of the UNHRC interpretation of public morals likely sought, on the basis of the principle of non-discrimination, to protect minority religions from state action that might marginalise or repress them, as its formulation of what constitutes public morals is described as being both truly public and broadly inclusive,⁶ however, it was to have a profound negative outcome for the Islamic scheme of human rights. General Comment No. 22, states:

*‘...the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations on the freedom to manifest a religion or belief for the purpose of protecting morals must be based on principles **not deriving exclusively from a single tradition**’⁷*
(emphasis added).

³ Philip Alston, ‘The Historical Origins of General Comments in Human Rights Law’ in Laurence Boisson De Charzournes and Vera Gowlland-Debas (eds.) *The International Legal System in Quest of Equity and Universality* (Martinus Nijhoff 2001) 764.

⁴ UN Human Rights Committee, Summary Record of the 2,674th Meeting, 23 October 2009, CCPR/C/SR.2674, ¶ 2.

⁵ UN Human Rights Committee, ‘General Comments Adopted by the Human Rights Committee under Article 40, paragraph 4, of the International Covenant on Civil and Political Rights’, 19 May 1989, CCPR/C/21/Rev.1.

⁶ David Little, ‘Religion, Human Rights and Public Reason: The Role and Limits of a Secular Rationale’ in John Witte Jr. and M. Christian Green, *Religion and Human Rights: An Introduction* (Oxford University Press 2011) 139.

⁷ UN Human Rights Committee, General Comment No. 22 (UNHRC GC22), The Right to Freedom of Thought, Conscience and Religion (Art. 18), UN Doc. CCPR/C/21/Rev.1/Add.4 (1993).

General Comment No. 22, in this one sweeping statement, despite its likely intentions, operated to marginalise the entire Islamic world by stating with finality, and without due explanation, that public morals could never be comprised of one single tradition; and this despite the presumably well intentioned non-discriminatory wording above. Paragraph 8 of General Comment No. 22 thus set the textual grounding for the gradual assumption of a fundamentalist interpretational stance on the part of the UN human rights machinery and, inter alia, had the repercussion of delegitimising religious morality and augmenting a secular interpretation of human rights as the prevalent one.

Regarding the first repercussion of delegitimising religious public morals, General Comment No 22 can be seen to signify the extent to which a previous stance regarding public morals has been left behind for an evolved approach. This evolved approach sees General Comment No. 22 running contrary to the intention of the drafters regarding morality when the content of Article 1 of the UDHR was debated and the sensitivities of philosophical origins flagged. According to Eleanor Roosevelt, Article 1 was purportedly designed for peoples to apply their own reason for why humankind were attributed the stated values.⁸ The report of the UNESCO philosophical investigation at the time of drafting the UDHR reveals they had uncovered the eggshells the drafters were walking on. They discovered that amongst various cultures there was indeed a semblance of uniformity in what many states held dear in terms of basic moral principles and notions of rights and duties, and the philosophers' committee relied on this to generally conclude that agreement on a declaration was not beyond the bounds of possibility. In doing so however, they also called the drafters to caution in reporting *'those common convictions are stated in terms of different philosophical principles and on the background of divergent political and economic systems'*.⁹

Whilst the report concluded that agreement could be reached concerning rights that follow from the fundamental right to live, it seems they harboured no illusion about how deep, or otherwise, the agreement they discovered went.¹⁰ Jacques Maritain's now

⁸ Eleanor Roosevelt, 'Making Human Rights Come Alive' in Allida Black ed. *What I Hope to Leave Behind: The Essential Essays of Eleanor Roosevelt* (Carlson 1995) 559.

⁹ Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (Random House 2001) 121, citing Alexander Bogomolov, 'Report on the Human Rights Commission Session, December 31st 1947 (Moscow: Russian Centre for Documents on Modern History) Fund of Secretariat of A. Vishinsky, Drawer 21-b, folder 48 file 37, at 55.

¹⁰ Glendon (n9) 122.

infamous quip summarises the deep seated philosophical differences in the varied moral origins of human rights principles – ‘Yes, we agree about the rights, but on condition no one asks us why’. It appears that if the UN had framed the UDHR in religious language or symbolism it would not have been able to achieve the level of international support that was necessary for it to be finally adopted by the General Assembly in 1948.¹¹ At the time of Article 1 debate, metaphysical controversies, it was decided, were to be left to individual conscientious deliberation under the protection of freedom of religion or belief.¹² General Comment No. 22, in stating that a single religion cannot constitute, or constitute in its totality, a public morality, whilst not removing the right to metaphysical deliberation under freedom of religion, does remove the right to rely on the outcome of such metaphysical deliberation for the restriction of rights, should such an outcome be grounded in a single religious tradition. Thus, General Comment No. 22 either renders the true intention of the drafters now meaningless or the suggested legitimacy of individual contemplation of moral origins at the time a mere platitude.

Regarding the second repercussion of General Comment No. 22, that is, that it operated to augment the UNHRC interpretation of public morality to the prevalent interpretation, Paragraph 8 is an interpretation of public morality rooted in the secular value of pluralism. This is clearly not a problem in a secular document, but where it becomes a problem is when that interpretation is imposed on non-secular communities, in which case it runs contrary to a religious understanding of public morality where every aspect of being is derived from one divine source without question, and utter submission to this fact is unshakeable.¹³ Given the UNHRC’s view of general comments’ representation of considerable legal authority Paragraph 8 excludes alternatives to its pluralistic conception that allows any *combination* of a given list to comprise a public morality, but not a *single* one, and delivers its pluralistic conception as considerably legally authoritative. We recall the conclusion in Chapter Four that since the drafting of the UDHR, no genuinely alternative views have been allowed to factor into the development of human rights norms and the way in which broad human rights principles have been interpreted has been by giving them far more specific meanings in line with and based on western secular

¹¹ Abdullah Saeed, *Human Rights and Islam: An Introduction to Key Debates Between Islamic Law and International Human Rights Law* (Edward Elgar 2018) 146.

¹² Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (University of Pennsylvania Press 1999) 287, 289.

¹³ Chapter One details the Doctrine of Tawhid whilst Chapter Five exemplifies how Islamic values are defined by it.

liberal values. It can now be seen that the global concept of public morality has been so interpreted by the UNHRC.

Moreover, and by way of example, the sidelining of alternative views in the development of human rights norms can be seen in the reversal by the UNHRC of an early usage of a margin of appreciation logic where public morality is in issue. In 1982, *Hertzberg v. Finland*¹⁴ saw the UNHRC expressly utilise the margin of appreciation in considering public morals wherein it stated ‘...public morals differ widely, there is no universally applicable moral standard. Consequently.... a certain margin of discretion must be accorded to the responsible national authorities’. Despite its outing in this case, the margin of appreciation was subsequently expressly rejected only two years after General Comment No. 22 in *Ilmari Lansman et al v. Finland* in 1995,¹⁵ and, it has not been used since.¹⁶ General Comment No. 22 ensures it will not be used in the future as it contradicts with finality the HRC’s statement in *Hertzberg*. To the extent that it may still be possible to have a set definition of public morality as per General Comment No. 22 and still allow for margin of appreciation logic, the relevant issue is the insistence upon an interpretation of public morality that is rooted in pluralism and the exclusion of viable alternatives in the operation of the Committee’s business.

Despite the secularist paradigm of the UN from the outset, to the extent that early secular positions may have allowed wiggle room for a conception of religious morality to ground interpretations of rights for individuals (as can be seen from the drafters acute awareness of difference and the use of margin of appreciation logic regarding public morality within the UNHRC) each of these progressions within the IHR machinery of the UN exemplify movement across a trajectory from a passive secularism in early accommodations of alternatives to a more aggressive style of secularism which, crucially, contributes to the hardened attitude, or the fundamentalist secularism, now assumed. The UNHRC has ultimately presented its interpretation of public morality rooted in secular values as a decided and prevalent global conception of morals (a remarkable feat given that a

¹⁴ *Hertzberg v. Finland*, Communication No 61/1979, ¶ 10.3.

¹⁵ *Ilmari Lansman et al v. Finland* (511/92) 2 IHRR 287 (1995).

¹⁶ Mashood A. Baderin, ‘A Macroscopic Analysis of the Practice of Islamic State Parties to International Human Rights Treaties: Conflict or Congruence?’ (2001) 1(2) Human Rights Law Review 303.

European conception cannot even be agreed upon,¹⁷ and its statement in Hertzberg) and this is the matter with which many Muslims take greatest issue.¹⁸ Generally, Islamic state parties do not object to the idea of human rights but they do take issue with the interpretation of human rights norms that they claim do not take Islamic values into consideration¹⁹, alternatively, the Islamic world does not contest the universality of human rights, that is, that they apply to everyone, everywhere, all of the time; but does contest the universalism in their secular truth.²⁰ Therefore, the argument is not with human rights as set out in the UDHR *per se*, it is with the perceived aggressive insistence on using secular values as the ‘correct’ tools of interpretation²¹ and the corollary that succeeding instruments and the specificities of same are interpreted along the same western liberal lines,²² So, why is this the main bone of contention for Islam?

As noted that General Comment No. 22 set the textual grounding for the evolved and more aggressive secular stance on human rights, in particular the bias in the wording of Paragraph 8,²³ this biased wording bears relevance to the thesis question. This is because opposition to certain aspects of Islamic Law, for example Islamic criminal punishments,²⁴ derives from the manner in which IHR has since been interpreted and developed in line with secular, liberal, western thought that is presented by IHR supporters as having both universal moral status and global application.²⁵ The clash of moral ideologies is always more brightly illuminated at flash points of conflict between secular and traditional Islamic interpretations of certain propositions of law,²⁶ and this is mostly due to sheer sincerity in the belief in the moral code that underlies it and conviction in the universal truth of the proposition. Thus, the extent to which these fundamental and irrefutable moral convictions will have a formative impact on public moralities will affect the

¹⁷ *Handyside v. United Kingdom* [1976] Eur. Ct. H.R. 5493/72 at ¶ 48. See also Roberto Perrone, ‘Public Morals and the European Convention on Human Rights’ (2014) 47(3) *Israel Law Review* 361-378.

¹⁸ Abdulaziz Sachedina, *Islam and the Challenge of Human Rights* (Oxford University Press 2009) 5-6.

¹⁹ Baderin (n16) 267. Neville Cox, ‘The Clash of Unprovable Universalisms – International Human Rights Law and Islamic Law’ (2013) 2(2) *Oxford Journal of Law and Religion* 310.

²⁰ Baderin (n16) 303.

²¹ Aside from the text of Article 1 declaring the secular nature of the document and the origin of rights, the framework has broad appeal.

²² Neville Cox, ‘Understanding *Je Suis Charlie*’ (2016) 105 (418) *Studies: An Irish Quarterly Review* 152.

²³ Cox (n1) 46.

²⁴ Concluding Observations of the HRC: UN Doc. CCPR/C/79/Add.85 (1997) at para.9 (Sudan); UN Doc. CCPR/C/79/Add.45 (1994) at ¶ 9 (Libya); and UN Doc. CCPR/C/79/Add.25 (1993) at ¶ 11 (Iran).

²⁵ Cox (n22) 150.

²⁶ Jeroen Temperman, ‘Freedom of Expression and Religious Sensitivities in Pluralist Societies: Facing the Challenge of Extreme Speech’ (2011) 3 *BYU Law Review* 729.

assertions of the rightness or wrongness of any such flash point of conflict.²⁷ Consequentially, where these flash points are concerned the Islamic scheme will vehemently assert its position as universally right and the secular position as universally wrong, and vice versa.

Any bias in the wording of human rights instruments (supposedly universal in moral status and of global application) can only result in an assertion of the superior validity of the moral convictions of those articulating the bias – in this case, the UN. The move along a trajectory towards a combative secularism or an aggressive secular interpretation of all things ‘human rights’, or even fundamentalist secularism only serves to repress, or potentially antagonise, those sincerely committed to the unreserved and absolute universal truth of their alternate but equally viable and valid moral code that derives from God. To this end the UNHRC, representing IHR, issued General Comment No. 34 in 2011 relating to freedom of expression²⁸ - a flash point of conflict between the Islamic and IHR schemes given that Islamic religious morality prescribes the need to protect God as a matter of first priority, and given that secular morality proscribes the inclusion of God in any rationalisation of human rights.

This polarity in fundamental positions regarding the relevance or irrelevance of God is seriously problematic for Islamic Criminal Law. As noted that the fundamental purpose of Islamic Criminal Law is to give effect to the will of God, it can now be seen, given this polarity, that this is significantly out of line with the modern western values of IHR, but is entirely inevitable in a society whose values are not secular, but religious. If, then, Islamic Criminal Law, the grounding moral values of which are core human rights values, gives effect to the will of God as its primary purpose, and International Human Rights says that God is not a legitimate ground for the basis of moral values, then IHR is essentially stating that Islamic Criminal Law is illegitimate. Not only this, but if the will of God is illegitimate, then the entire corpus of Islamic Law is also illegitimate. In contrast to the terms of validity established in Chapter One, the UNHRC in its Secular Fundamentalism, has unilaterally delegitimised an entire body of law that almost two billion people globally are centred around.

²⁷ Cox (n19) 309.

²⁸ United Nations Human Rights Committee, General Comment No. 34, (UNHRC GC34) Freedom of Opinion and Expression, CCPR C/GC/34 <<http://www2.ohchr.org/english/bodies/hrc/docs/GC34.pdf>> accessed 28 June 2021.

This concern has particular application where the right to freedom of expression is concerned. General Comment No. 34, in part, dealt with the circumstances under which freedom of expression may be restricted according to Article 19(3). Article 19 provides:

- 1. Everyone shall have the right to hold opinions without interference.*
- 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*
- 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:*
 - (a) For respect of the rights or reputations of others;*
 - (b) For the **protection of** national security or of public order (ordre public), or of **public health or morals**²⁹ (emphasis added).*

Article 19(3) thus constituted a portal to true internationalisation of IHR values - which lists public morals as valid grounds for restriction of the right and which should, according to the text of the ICCPR, allow the Islamic scheme, as a matter of its first priority, to protect God in the manner prescribed by Islamic religious morality. The UNHRC attitude towards religion in Paragraph 8 of General Comment 22 however, in its assertion of secular values as the prevalent interpretive language, permitted General Comment 34 to follow suit and use its composition of public morals relating to the restriction of the right to freedom of thought, conscience and religion, as that which should be used to address restriction of freedom of expression also. Paragraph 32 of General Comment 34 refers to the options from which any combination may comprise public morals provided it is not a single one, and consequently, states that any limitations on freedom of expression must be based on this permitted composition. Paragraph 32 states:

²⁹ ICCPR (n2) Article 19.

*‘The Committee observed in general comment No. 22, that “the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations... for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition”. Any such limitations must be understood in the light of universality of human rights and the principle of non-discrimination’.*³⁰

As Article 19(3) represented a portal to communication between the schemes on the basis of permitting a public morality to restrict rights, thereby enabling the consideration of religious values, and, thereby an opportunity to protect against irreverence towards God, General Comment 22 licensed Comment 34 to shut down with curt executive conclusiveness the potential to restrict freedom of expression on grounds of religious public morals, as a single religious tradition, hence Islam, could no longer substantiate public morality.

As established in Chapter One and furthered in Chapter Five, each moral ideology is as valid as the other as neither can be proven as objectively true or false. Therefore, each public morality suffers from the same plight of being, equally, either true or false, or right or wrong. Different societies develop different systems, but every matured system reveals the ways in which the society from which it sprang endeavours to protect what it honours.³¹ Thus, whilst in secular society opposition to grossly offensive hate speech may be the ultimate contravention of public morality to the extent that the desire to protect against irreverence to God does not rate against it in what is considered fundamental to public morality, the opposite may be true for Islamic society where God is unquestionably superior to man and it is his protection from irreverence, not man’s protection from hate speech, that constitutes what is fundamental to public morality.³² On this reasoning, either option for what most grossly contravenes a standard of public morality is also equally valid.

This friction at the flashpoint of the right to freedom of expression and its significance to both sides has not managed to remain contained within the dialogue of the representative

³⁰ UNHRC GC34 (n28) ¶32.

³¹ Baderin (n16) 266.

³² Cox (n22) 153.

organisations. Indeed it has spilled into the public fray with fundamentalist activism on both sides and one perceived truth acting in protest against another perceived truth in an attempt to suppress that other as that which is wrong.³³ Active solidarity of the secular public has been exhibited to the extent that the hegemonic nature of the western narrative of liberal secularism is perceived as being publicly reinforced,³⁴ but, to this end, Islamic fundamentalism, or radicalism, may be largely responsible for the relatively recent public acts of solidarity in secular fundamentalism..

The tension within Islam currently, described as the Battle for the Soul of Islam³⁵ is the competition for the right to speak on behalf of Islam, or the right to represent a perceived Islamic truth, and the violence of *jihadi* fundamentalist Islamists is part of the struggle between sub-interpretive communities for this right.³⁶ It is the fundamentalist Islamist's interpretations of how the objectives of Islam are best served that do not accept that the perfect word of God could ever be merged with something of a manmade lesser status, such as IHR.³⁷ This radical or puritan position has effectively compromised orthodox Islamic traditionalism as puritan Muslims' interpretations of Islamic Law have been amplified above those of the silent majority. Additionally, the *Qur'anic* paradigm of unity in the *ummah* can make many Muslims reluctant to admit a schism, not least because being divisive lends itself to suggestions of *fitna* (sedition) that, for historical reasons, fills pious Muslims with woe.³⁸

Ultimately, the impact of the violent acts of fundamental Islamists (such as the Twin Towers bombings), and perhaps the reluctance of the *ummah* to distinguish themselves as disconnected from radical interpretations of the *Qur'an*, has prompted observers to conflate fundamentalist Islamism with orthodox traditionalism.³⁹ The secular fusion of

³³ Ingrid Melander and Tom Heneghan 'Charlie Hebdo Survivors Edition Sells out in Minutes' *Reuters News Now* January 14 2015 <<https://www.reuters.com/article/us-france-shooting-idUSKBN0KN0RQ20150114>> accessed 10 April 2021.

³⁴ Sachedina (n18) 190; See generally Eide, E., Kunelius, R., & Phillips, A. *Transnational Media Events: The Mohammed Cartoons and the Imagined Clash of Civilizations* (Coronet Books 2008) but for example see pages 245 and 270.

³⁵ Khaled Abou El Fadl, *The Great Theft: Wrestling Islam from the Extremists* (Harper Collins 2009) 26, 36.

³⁶ Khaled Abou El Fadl 'The Culture of Ugliness in Modern Islam and Reengaging Morality' (2002) 2(1) *UCLA Journal of Islamic and Near Eastern Law* 49.

³⁷ Cox (n19) 311.

³⁸ El Fadl (n35) 24, 26, 36.

³⁹ Karen Armstrong, *The Lost Art of Scripture: Rescuing the Sacred Texts* (Penguin Random House 2019) 248.

all stripes of Muslims has led to the construction of a stereotype⁴⁰ that essentially downgrades all Muslims to the rank of terrorists and leads the observing western secularist to fail to differentiate between the interpretations of *Qur'anic* values that guide the silent majority of Muslims and the interpretations of *Qur'anic* values that guide radical Islamists in legitimising their violent actions.⁴¹ The stereotype has become institutionalised in the secular scheme to the extent that General Comment 34 executively closes the portal to communication between the Islamic and secular human rights schemes.

In conclusion of the journey across the spectrum from passive secularism to a more hard line and aggressive assertion of secular values, or fundamentalist secularism, as the dominant interpretation of all human rights concepts by the machinery of the UN, there are at this juncture four significant points to note. Firstly, closing the portal of communication affirms this move to a combative secularism and is an official declaration of secular values as dominant, and the correct standard by which all actions, everywhere, should be measured. Secondly, if the largest organisation in the world, that as one of the purposes for its establishment seeks to rationalise and protect human rights, officially suppresses an alternative public moral vision, this textual proclamation of dominant ideology is nothing less than permissive towards active displays of a fundamentalist secular public solidarity. Thirdly, the upshot of this textual proclamation is the inadvertent admission of international human rights as something that is not in fact truly international - in issuing both General Comment No's 22 and 34, IHR has, to all intents and purposes, self sabotaged its own claim to universality.

Finally, these actions of the UNHRC regarding freedom of expression and the manner in which it can or cannot be restricted, impacts the manner in which Islamic Criminal Law is understood by non-Muslims. To this end, the extent to which any biased wording imposes a dominant frame of reference or particular interpretational parameters, in this case a frame of reference and set of interpretational parameters comprised of secular values, impacts the manner in which any flash points of conflict are interpreted. Islamic Criminal Law, more specifically the *hudud* punishments, is one such flash point of conflict. The extent to which the OIC felt the impact of this evolved and more robust

⁴⁰ El Fadl (n36) 37.

⁴¹ El Fadl (n35) 24.

secularism on the part of the UN and sought to address it, was equalled by the extent to which the UN sought to defend it.

2.1 Defamation of Religions Debate within the UN

To illustrate the manner in which the above withdrawal from a potential communicative position to a hardened defensive stance affects the relationship between IHR and Islam as represented by the OIC, and how these now staunchly opposing groundings of public morality affect the ability of both schemes to communicate effectively on the matter of rights, the defamation of religion debate within the UN will be addressed as an example of the practical application of these defended views. This clash of stances that sought to protect the most fundamental aspects of both moral ideologies - the individual versus God - played out in the UN particularly between 1999 and 2011 when the OIC campaign for 'defamation of Islam' took hold and the UN, presented with options for inclusion, defaulted to its staunchly secular determination.

Between 1999 and 2011 the clash of universalisms featured in UN resolutions further to the OIC campaign for Defamation of Islam⁴² to be enshrined as a negative obligation - a step towards mounting an international defence of Islam from perceived western or secular attacks. However, there was concern about the narrow focus on Islam alone, and immediately, so that one religion would not be preferred over another, the debate moved to centring on defamation of religion.⁴³ At this point Germany pointed out that a high degree of uncertainty remained regardless of the move and that consensus on a resolution should not hide that fact, adding that they did not attach any legal meaning to 'defamation' as it was used in the title.⁴⁴ Despite the idea of criminalising defamation of

⁴² U.N. Econ. & Soc. Council [ESOSOC], Commission on Human Rights [CHR], Draft Res.: Racism, Racial Discrimination, Xenophobia and all Forms of Discrimination, U.N. Doc. E/CN.4/1999/L.40 (April 30, 1999) <file:///C:/Users/User/Downloads/E_CN-4_1999_L-40_Rev-1-EN.pdf> accessed 28 June 2021.

⁴³ ECOSOC, CHR Summary Record of the 61st Meeting, paragraphs 3, 6, U.N. Doc. E/CN.4/1999/SR.61 (April 29, 1999) <file:///C:/Users/User/Downloads/E_CN-4_1999_SR-61-EN%20(1).pdf> accessed 28 June 2021. German and Japanese representatives expressed concern about the draft resolution's narrow focus on Islam.

⁴⁴ ECOSOC, CHR Summary Record of the 62nd Meeting, U.N. Doc E/CN.4/1999/SR.62 (Apr. 30 1999) <file:///C:/Users/User/Downloads/E_CN.4_1999_SR.62-EN%20(1).pdf> accessed 28 June 2021. Neither was a definition of 'defamation of religion' ever put forward throughout the decade long debate - see Robert C. Blitt 'Should New Bills of Rights Address Emerging International Human Rights Norms? The Challenge of Defamation of Religion' (2010) 9(1) North Western Journal of Human Rights 16. See also: HRC Annual Report of the UNHRC and Reports of the Office of the High Commissioner and the Secretary General: 'Study of the UNHRC Compiling Existing Legislations and Jurisprudence Concerning Defamation of and Contempt for Religions' 5 September 2008, 3. UN Doc A/HRC/27/23; and, Saeed (n11) 231-234.

religion being flawed in a number of ways,⁴⁵ and there being staunchly opposing blocs on the matter, the Arab bloc succeeded in renewing the resolution year after year and succeeded in having its content surpass preambulatory references and appear in more operative paragraphs of UN resolutions.⁴⁶ By 2009, OIC confidence in the journey towards the inclusion of Islamic universalism within IHR Law via their defamation of religion campaign saw them declare that a new international norm of defamation of religion had been observed and repeatedly supported by a majority of UN member states that transcended the OIC, and, that any denial of these facts constituted a contradiction of the established position of the international community.⁴⁷ At this juncture it would appear the debate, from the OIC perspective, had tipped in their favour.

The Clash of Universalisms debate had been pivoting with stark opposition between those voting for and against the annual resolutions. With the central divergence between the two systems being that of the assertive versus the submissive role of the individual, a crucial point in proceedings had arrived and the options available for the path forward were twofold: an option to extend universality to accommodate something beyond the assertive individual, and an option to maintain the secular status quo. Regarding the first option, the articles of the conventions certainly evidence the ability of IHR to protect more than the individual. Article 19 of the ICCPR articulating the right to freedom of expression permitted protection of public morals as a valid ground for restriction of the right. The Islamic equivalent – Article 22 of the Cairo Declaration,⁴⁸ provides for freedom of expression provided it is not contrary to *Shari'a* principles and contains a

⁴⁵ Robert C. Blitt, 'Defamation of Religion – Rumours of Its Death are Greatly Exaggerated' (2011) 62(2) Case Western Reserve Law Review 354-355.

⁴⁶ Robert C. Blitt, 'The Bottom up Journey of 'Defamation of Religion from Muslim States to the United Nations: A Case Study of the Migration of Anti-Constitutional Ideas' in Sarat, A.(ed) *Studies in Law, Politics and Society: Special Issue on Human Rights: New Possibilities/New Problems* (Emerald Books 2011) 121-211.

⁴⁷ Organisation of Islamic Cooperation (OIC) Second Report of the OIC Observatory on Islamophobia, OIC Doc. OIC-CS-2ndOBS-REP-FINAL (May 10, 2009) <https://ww1.oic-oci.org/uploads/file/Islamphobia/Islamophobia_rep_May_23_25_2009.pdf> accessed 28 June 2021.

⁴⁸ Cairo Declaration of Human Rights In Islam (CDHRI) Article 22.

- (a) Everyone shall have the right to express his opinion freely in such manner as would not be contrary to the principles of the Shari'a.
- (b) Everyone shall have the right to advocate what is right, and propagate what is good, and warn against what is wrong and evil according to the norms of Islamic Shari'ah.
- (c) Information is a vital necessity to society. It may not be exploited or misused in such a way as may violate sanctities and the dignity of Prophets, undermine moral and ethical Values or disintegrate, corrupt or harm society or weaken its faith.
- (d) It is not permitted to excite nationalistic or doctrinal hatred or to do anything that may be an incitement to any form of racial discrimination.

limiting clause to protect against public morals. From both instruments there is evident compatibility in the parallel provisions for freedom of expression and its limitation on grounds of public morals. From the secular instruments it is clear that protection of the assertive individual is not the only focus of IHR and as evidenced by Article 19(3)b ICCPR, IHR had the capacity to protect public morals with the accommodation plainly available to limit freedom of expression in the manner the Islamic world requested.

Regarding the second option and maintaining the secular status quo, Article 20 ICCPR applies:

Article 20.1. Any propaganda for war shall be prohibited by law. 2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Article 20 ICCPR states religious hatred constituting incitement shall be prohibited. It is independent of the limitations imposed in Article 19 but it is also agreed they must be read in conjunction.⁴⁹ Accordingly, the accommodation is there at Article 20 ICCPR for defamation of religion to be taken under the umbrella of hate speech, thereby disposing with the requirement for defamation of religion obligations.

Despite OIC confidence, the preferred option was to maintain the secular status quo and from late 2008 onwards the UN made an overt change in their treatment of defamation of religion insofar as the language used to treat the issue suddenly evolved to ‘incitement to religious hatred’,⁵⁰ prompted by this resort to Article 20; it had a profound impact on proceedings. Interest was also waning and the 2009 UN General Assembly defamation of religion resolution⁵¹ passed by more of a plurality than a majority with eighty votes for,

⁴⁹ Karl Josef Partsch, ‘Freedom of Conscience and Expression, and Political Freedoms’, in Louis Henkin (ed) *The International Bill of Rights: The Covenant on Civil and Political Rights* (Columbia University Press, 1981) 227.

⁵⁰ United Nations General Assembly, Report on Racism, Racial Discrimination, Xenophobia and Related Forms of Intolerance: Follow-up to and Implementation of the Durban Declaration and Program of Action, UN Doc. A/HRC/9/12 (Sept. 2, 2008), ¶ 45 <file:///C:/Users/User/Downloads/A_HRC_9_12-EN.pdf> accessed 28 June 2021.

⁵¹ United Nations General Assembly Resolution 64/156, U.N. Doc. A/RES/64/156 (Mar. 8, 2010), now UN Doc. A/64/439/Add.2 (Part II) <<https://digitallibrary.un.org/record/673297?ln=en>> accessed 28 June 2021.

sixty one against and forty two abstentions.⁵² By 2011, with the adoption of Resolution 16/18, the UN focus had shifted from protection of ‘beliefs’ to ‘believers’ – from defamation of Islam to incitement to religious hatred. The UN had succeeded in making a return to the critical focus of secular universality and IHR – the individual.⁵³

The Human Rights Committee had not only articulated a reminder that reservations must not contravene the object and purpose of a convention, but that despite freedom of expression not being specifically listed as a non-derogable right at Article 4 ICCPR, that there were indeed elements of it that could not be made the subject of lawful derogation, and that freedom of opinion was one such element since it can never become necessary in a state of emergency to do so.⁵⁴ At least one element of freedom of expression was being flagged as a potential peremptory norm. The decade long debate had resulted in the UN retaining its original conception of universal truth with the assertive individual at its core⁵⁵ and the return to this critical secular focus was thereafter variously extolled.⁵⁶ The direct engagement of the OIC with the UN in its attempt to have Islamic universality accommodated by tackling the focal point of the clash - free speech versus blasphemy and defamation of religion – did not ultimately resolve the battle of unprovable truths. The claim that Resolution 16/18 came as an initiative of the OIC⁵⁷ is *prima facie* factual, however, the consensus forged for 16/18 was fragile⁵⁸ and OIC commentary at the time was clear in its disappointment that defamation of religion had gone by the wayside. In

⁵² United Nations Department of Public Information, ‘General Assembly Adopts 56 Resolutions, 9 Decisions

Recommended by Third Committee on Broad Range of Human Rights, Social, Cultural Issues’ UN Doc. GA/10905 (Dec. 18, 2009) <<https://www.un.org/press/en/2009/ga10905.doc.htm>> accessed 28 June 2021. Those voting ‘for’ included OIC States, the Russian Federation, China and various African and Asian states. Those voting ‘against’ included Australia, United States, EU States and others. See Annex VIII, UN Doc. GA/10905.

⁵³ GC34 (n28).

⁵⁴ Ibid. ¶15.

⁵⁵ United Nations, 7th Meeting of the Istanbul Process ‘Combatting Religious Intolerance: Building Inclusive and Resilient Societies and Pushing Back Against Incitement to Hatred and Violence Concept Note’ <<https://www.universal-rights.org/wp-content/uploads/2019/11/Istanbul-Process-concept-note.pdf>> accessed 28 June 2021.

⁵⁶ Heiner Bielefeldt, Frank La Rue, & Githu Muigai, OHCHR Expert Workshops on the Prohibition of Incitement to National, Racial or Religious Hatred, Office of the High Commissioner for Human Rights, 6-7 April 2011, 8 <<http://www.ohchr.org/Documents/Issues/Religion/JointSRsubmissionforNairobiworkshop.pdf>> accessed 28 June 2021.

⁵⁷ Mohamed Saeed M. Eltayeb, ‘From Rabat to Istanbul: Combating Advocacy of Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence’ in W. Cole Durham Jr., Donlu D. Thayer (eds) *Religion Pluralism and Reconciling Difference* (Routledge 2018) 88.

⁵⁸ Sejal Parmar ‘The Rabat Plan of Action: A Global Blueprint for Combating Hate Speech’ (2014) 1 European Human Rights Law Review 24.

attempting to keep it alive the OIC stated their view of 16/18 as part of a continuum that included the previous defamation of religion resolutions;⁵⁹ that the perception that supporting defamation of religion would throttle one's right to freedom of expression was a myth; and, that Resolution 16/18 does not replace the existing text which 'criminalises' attacks on religion.⁶⁰

The OIC official endeavour on the international stage for Islamic legitimacy and inclusive universality essentially ended with the approval of Resolution 16/18 in 2011. Despite attempts to retain the validity of their previous achievements, not only were the original objectives of the OIC regarding blasphemy and defamation of religion not going to come to fruition, but the subsequent Rabat Plan of Action⁶¹ which sought to conceptualise Article 20(2) ICCPR and realise the ideals of the Istanbul Process⁶² explicitly sought to influence the removal of any defamation of religion or blasphemy laws that may have been in existence from member state domestic legislation, based on the premise that such laws are antithetical to international human rights.⁶³ This particular conceptualisation of Article 20.2 promotes religious tolerance within the IHR framework and ensures that blasphemy, defamation of religion or any type of religious insult remains external to the

⁵⁹ Heiner Bielefeldt, Nazilla Ghanea-Hercock, Michael Weiner *Freedom of Religion or Belief: An International Law Commentary* (Oxford University Press 2016) 496.

⁶⁰ Blitt (n45) 362, 363.

⁶¹ For a general overview of the Rabat Plan of Action and associated report see Annual report of the United Nations High Commissioner for Human Rights
<https://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat_draft_outcome.pdf> accessed 20 June 2020.

⁶² For a general overview of the Istanbul Process and associated reports see <<https://www.universal-rights.org/programmes/beyond-the-council/technologies/>> accessed 20 June, 2020.

⁶³ Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred ¶17 <https://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat_draft_outcome.pdf> accessed 28 June 2021. See also Report of the Special Rapporteur on freedom of religion or belief, Asma Jahangir, and the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Doudou Diène, further to Human Rights Council decision 1/107 on incitement to racial and religious hatred and the promotion of tolerance, UN Doc. A/HRC/2/3, 20 September 2006, ¶36-42

<<https://digitallibrary.un.org/record/583355?ln=en>>; and EU Guidelines on the Promotion and Protection of Freedom of Religion or Belief (adopted by the Foreign Affairs Council Meeting, Luxembourg, June 2013) <https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/137585.pdf> accessed 28 June 2021. Paragraph 32 states that at all appropriate times the EU will advocate the position that laws that criminalise blasphemy restrict expression concerning religious or other beliefs; that they are often applied so as to persecute, mistreat, or intimidate persons belonging to religious or other minorities, and that they can have a serious inhibiting effect on freedom of expression and on freedom of religion or belief; and recommend the decriminalisation of such offences. See also Parliamentary Assembly of the Council of Europe, Res 1510 (2006) Freedom of Expression and Respect for Religious Beliefs ¶3: "[...] blasphemy laws should not be used to curtail freedom of expression and thought"
<<https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17457&lang=en>> accessed 28 June 2021.

In contrast, for a justification of blasphemy laws see Cox, (n1) 33-61.

ambit of the Article's protection. The incitement clause is concerned only with whether or not an audience is provoked to commit acts of discrimination, hostility or violence against a target group and blasphemy does not reach this threshold requirement.⁶⁴ The lingering sentiments of the UN on the entire issue are firstly to deplore defamation of religion but deny an entitlement to violently retaliate against it⁶⁵ and secondly to repeat that there is no such thing as defamation of religion in the international law context, only incitement on the basis of religion. Moreover, to move with the notion of defamation of religion, for secular IHR, would mean states would have to regulate the beliefs of individuals and arbitrate between various belief systems – hence state imposed limitations on freedom of expression. If the freedom to critically examine belief systems or religions was curtailed, this would have a significant impact on vital debates that need to take place between and within religious communities as they attempt to preserve or reform existing ideas, values, norms and practices.⁶⁶ Essentially, all debates on all religions would be asphyxiated which would be detrimental to the mandate of freedom of religion and detrimental to the concept of secular human rights as a whole.⁶⁷

The defamation of religion debate is key to understanding how the UNHRC hardened the secular bias within IHR Law. When presented with options that had the potential to open up IHR to true international inclusivity that would encompass the Islamic world, the UN made a conscious decision not to do this. Although General Comment No. 22 may have initially been drafted with non-discrimination in mind, the repercussions were vocalised. General Comment No. 34, therefore, is argued to be a conscious choice on the part of the UN human rights machinery. A conduit for communication between the two systems was effectively closed by resorting to Article 20 rather than allowing a single religion to form the basis of public morality. General Comment No. 34, which ultimately sealed this decision, derived from General Comment No. 22, *not* from a treaty of international

⁶⁴ Jeroen Temperman, *Religious Hatred and International Law: The Prohibition of Incitement to Violence or Discrimination* (Cambridge University Press 2015) 193.

⁶⁵ Statement attributable to the spokesperson for the Secretary General on Attack Against United States Consulate in Benghazi, Libya, 12th September, 2012, <<https://www.un.org/sg/en/content/sg/statement/2012-09-12/statement-attributable-spokesperson-secretary-general-attack-against>> accessed 19 December 2019. See also www.unama.org UNAMA News 'UNAMA Deplores Defamation of Religion But Reiterates Nothing Can Justify Violence', 13 September 2012, <<https://unama.unmissions.org/unama-deplores-defamation-religion-reiterates-nothing-can-justify-violence>> accessed 19 December, 2019.

⁶⁶ Saeed (n11) 233.

⁶⁷ United Nations, Highlights of Daily Press Briefing, 21st April, 2009 <<https://www.un.org/en/durbanreview2009/coverage/pdf/Highlights%20of%20daily%20briefing%2021%20April.pdf>> accessed 6 January 2020.

consensus. There is no provision in treaty law that precludes God as an aspect of public morality, hence no provision that excludes God as a motivation for law, and, hence, no provision that precludes the validity of a defamation of religion law. The fact that defamation of religion was, regardless, deemed invalid is reflective of a cultural view of fundamentalism within International Human Rights.

3. Interpretation and Alleged Incompatibility Between *Shari'a* and IHR

This thesis set out to investigate the assertion that Islamic Criminal Law and International Human Rights are genuinely and inherently incompatible. The discoveries made in previous chapters allowed Chapter Six to assert at its outset that the points of incompatibility have been deduced to comprise two specific issues. The first issue is the God motivation for law and the second issue is the rigidity of the *hudud* and the draconian nature of punishments.

Regarding the God motivation for the law it can now be fully appreciated, from all that has been established in previous chapters, that God is of paramount concern in Islamic Law. The doctrine of *tawhid* declares all things to come from God, and, as a necessary corollary, declares that the law also comes from God. This is in stark contrast to IHR where God is not involved in the influence for, or creation, maintenance and execution of the law. Indeed all religious beliefs are relegated to the private sphere of life.

Where the first point of incompatibility, that is, where the God motivation for the law is concerned, it has been established that there is nothing within the text of the ICCPR that categorically excludes a God motivation for the law. General Comments 22 and 34 are interpretations of Articles 18 and 19 of the ICCPR respectively, and they categorically deny the ability of a single religion to comprise public morality where valid grounds for restriction of rights are addressed. Accordingly, with no textual grounding within the treaty law for this denial of a God motivation for law, this does little but reflect a secular fundamentalism in the interpretation of International Human Rights by the UNHRC.

Options for interpretation existed and portals for communication between the two schemes were available, one with the ability to truly internationalise IHR. However, the UNHRC chose to interpret the ICCPR in the staunchly secular manner that it did. As a

result, the assertion of incompatibility between International Human Rights and Islamic Criminal Law as inherent, in terms of the first issue that is the validity of God as a motivation for the law, or as a basis for a nation's public morality is concerned, is indeed not an inherent problem. Rather, it is a matter of resort to a fundamentalist interpretation on the part of the UNHRC. The clash, on this issue, is all about interpretation.

4. Conclusion

General Comment 22, perhaps inadvertently, marginalised the entire Islamic world by stating that public morals could never be comprised of a single tradition. Although it may have had non-discrimination in mind, the repercussions were vocalised, suggesting Comment 34 was nothing less than a conscious choice on the part of the UNHRC that shut down the portal to communication at Article 19. Public morals based on western secular pluralist liberal values were asserted as a decided and prevalent global conception of morals, alternatively, the correct tools of interpretation - suggesting all future instruments should be so interpreted. The direction taken by the Rabat Plan of Action evidences this and it is this militantly secular approach to human rights that makes it difficult for Muslims to establish a comfortable place for it in Muslim society.⁶⁸

With UN insistence upon its ideology as dominant and correct, any perception of the rightness or wrongness of actions that comprise flash points of conflict are going to affect the manner in which aspects of Islamic Criminal Law are perceived globally. The UN, in delegitimising God as a single basis for a conception of public morality, unilaterally delegitimised the entire body of Islamic Law, including its criminal laws, and did so despite the terms of validity established in Chapter One. However, in making this proclamation of primacy and superiority, the UNHRC did inadvertently admit that IHR is a scheme of law that is not, in fact, truly international. Its claim to represent humanity globally now credibly lacks integrity. With no textual basis in treaty law whatsoever for precluding God as a basis for public morality, the machinery of the UN has done little to avoid the legitimate critique of there being a cultural view of fundamentalism within International Human Rights.

⁶⁸ Saeed (n11) 320.

Chapter Seven will further address the issue of interpretation and move to the second identified incompatibility between IHR Law and Islamic Criminal Law addressed in the introduction hereto. This second issue, the literal interpretation of the words of the *Qur'an*, indicates that a fundamentalism on the part of the UNHRC when interpreting the role of God may be mirrored by a fundamentalism on the part of Islam when interpreting the criminal rules of the *Shari'a*.

CHAPTER SEVEN

THE PUNISHMENT ISSUE: **FUNDAMENTALISM AND LITERALISM IN THE** **INTERPRETATION OF THE *SHARI'A***

1. Introduction

Having explored the notion of fundamentalism within the International Human Rights organisation of the UN in order to address the first incompatibility issue of the God motivation for law, we can recall that the second identified issue connected with the incompatibility of Islamic Criminal Law and International Human Rights is the harshness and cruel and unusual nature of the penalties laid down in the *Shari'a* for *hadd* crimes. However, as was noted in Chapter Three, the application of these penalties is dependent upon the manner in which the criminal rules are interpreted. The incompatibility arises purely if you need literalism to interpret the *Shari'a* and there is a substantial body of Islamic thought that says you do not. This contextualised approach to the rules argues that you can protect the core values of Islam and simultaneously consider the externalities of the twenty first century. Indeed, Chapter Two evidenced the operation of this approach to one extent or another throughout every era of development of Islamic Law from the Prophetic Period to the end of the Ottoman Empire, before colonialism destructively gripped the Islamic world.

Chapter Seven now focuses on the second identified issue of draconian punishments. It looks first to the manner in which fundamentalist approaches to their interpretation have resulted in this perception of incompatibility. It then turns to the alternative approach of reformist or modernist Islamic theory that has the potential to nullify the incompatibility. In exploring and comparing the criminal rules of Judaism, the modern state of Israel is then introduced as a reformulation precedent for the manner in which traditional religious values can remain a mainstay of a religious community whilst co-existing harmoniously with the externalities of the twenty first century world.

2. Islamic Approaches to Interpretation

Largely (but not solely) because of colonialism, interpretation of Islamic Law is politically complicated and fraught with the difficulties of a world in which there is such diversity, and accordingly, little by way of consistency in the theory and application of Islamic Law. We recall from Chapter Four that the OIC have not established a standardised version of Islamic Law to which each member subscribes; instead the focus is on the sovereignty of each Islamic state individually, leaving interpretation and application to the governance bodies, whose agendas may or may not align with the expectations of the body politic. In order to more fully identify with the difficulties an absence of uniformity in interpretation poses for the main thesis question, a return to Chapter One aids in putting the entire matter back into perspective by recalling the origins of the interpretive approaches.

Chapter One noted that the Islamic moral principles and *Shari'a* rules aim to achieve the goals of Islam, that is, the nurturing and development of the righteous individual, the establishment of justice, and the realisation of public benefit. To achieve these goals there are five objectives that guide rulings, namely: the protection of religion; life; progeny; mind; and property. These objectives are called *maqasid al-shari'a*. In making rules, jurists must look first to the *Qur'an*, then to the *Sunnah* of the Prophet, and after this to the interpretations of the divine sources by man – *fiqh*. Any rulings put in place must be oriented towards promoting these five objectives or preventing a harm to them and the further one goes from the *Qur'an* in the order of authoritative sources, the greater the chance of prioritising humankind's word over God. The *surahs* of the *Qur'an* are rarely overburdened with detail and it is this principled format that gives the *Qur'an* its flexibility to adapt to changing society using the rules and principles in line with the objectives. Chapter One also noted the difference between the Meccan and Medinan revelations, that is, that more than half were revealed in Mecca focussing on philosophical and theological moral guidance whilst the remainder were revealed in Medina where most of the legal matters were revealed during Mohammad's unexpected move to state governance. Chapter One further set out what law is for Islam, and how it is interpreted. Law was described as a hermeneutic exploration and interpretation of revelation through reason, with that interpretation being via Islamic hermeneutics – a

circular and unending process making one approach to interpretation as valid as any other.

These basic determinations of Chapter One are of great significance as they underlie what is happening with the interpretation of Islamic Law today and its responsibility for the perception of incompatibility with IHR. To this end, Chapter Two set out all of the developments of Islamic Law from its inception that culminated in differentiation between the competing approaches to the manner in which Islamic Law should be interpreted in the twenty first century, both of which resort to periods of development in the early centuries of Islam. Accordingly, for the purposes of the thesis question, there are two ways of interpreting Islamic Law. One method is the highly literal approach of the puritans, or fundamentalists, that resort to *fiqh* texts of the late Umayyad, early Abbasid era to justify imposing seventh century rules, and the second method is the approach of the modernists that is more about principles and resorts to the Prophetic Period, particularly the Meccan phase of this period when the moral principles of Islam were established by the Prophet.

The first method, in noting the basic determinations of Chapter One above, is that method that has largely moved away from the *Qur'an* in the order of authoritative sources and relies heavily on man-made *taqlid fiqh* texts. After the closing of the gates of *ijtihad* interpretations of the *Qur'an* and the *Sunnah* were often in line with the political needs of the time and *Qur'anic* verses were interpreted out of context to support these needs. These *fiqh* texts occurred within the limits of the interpretive field at the time, in which environment particular ideas of literalness prevailed. Meanings were attached to certain verses that did not reflect their spirit or purpose⁶⁹ and, as a result, these meanings formed part of a communication theory that survived a millennium⁷⁰ and which serves the fundamentalist discipline well. It is this method that leads to claims of incompatibility with IHR.

⁶⁹ For a clear distinction between varieties of salafi interpretation and a useful infographic on where these approaches sit on the spectrum between text and reason see Tariq Ramadan, *Western Muslims and the Future of Islam* (Oxford University Press 2004) 23-31.

⁷⁰ Robert Gleave, *Islam and Literalism: Literal Meaning and Interpretation in Islamic Legal Theory* (Edinburgh University Press 2012) 28.

The second method is that which retains a reliance on the *Qur'an*, in particular a reliance on the Meccan revelations where the focus is on philosophical and theological moral guidance and the use of principles that are flexible and capable of adapting to changing society in order to protect the objectives of Islam.⁷¹ This second '*maqasid*' approach claims an ability to align with IHR. In once again looking to the basic determination of Chapter One regarding hermeneutics it can be seen that each of these engagements with the texts in order to discover truth are equally valid, therefore, for each sub interpretive community, each interpretation is also valid. In looking to the determinations of Chapter Two it can be seen that each interpretive community believes their approach to interpreting Islam is the optimum way to preserve Islam and protect the *ummah* in the twenty first century.

3. Fundamentalist Interpretation of Islamic Law

It has been articulated that all religious fundamentalisms follow a particular trajectory. They are embattled spiritualities developing in response to a perceived crisis engaging in a conflict with enemies whose secularist policies seem inimical to religion itself. They do not regard this as a political struggle, but experience it as a cosmic war between the forces of good and evil. They fear annihilation and try to fortify their beleaguered identity by means of a selective retrieval of certain doctrines and practices of the past. They refine the fundamentals of their doctrine to create an ideology that provides the faithful with a plan of action and they fight back in an attempt to re-sacralise an increasingly sceptical world, not usually with violence, but in the form of a cultural, ritualised or scholarly riposte.⁷² In the case of Islam this attempt to re-sacralise would be the attainment of the perfect *ummah* akin to those who lived at the time of the Prophet and his rightly guided caliphs. This would be achieved by living according to the exact rules that then pertained, including the resurrection of seventh century criminal punishments – brought about by the use of scriptural literalism.

⁷¹ For a clear understanding of the *maqasid* approach to interpretation see Mohammad Hashim Kamali, *Actualization (Taf'il) of the Higher Purposes (Maqasid) of Shari'ah* (International Institute of Islamic Thought 2020).

⁷² Martin E. Marty and R. Scott Appleby, 'Conclusion: An Interim Report on a Hypothetical Family' in Martin E. Marty and R. Scott Appleby (eds) *Fundamentalisms Observed* (University of Chicago Press 1994) 814-842.

It is this scriptural literalism that substantially underlines the incompatibility assertion, as it is often this literalism, or *harfiyyah*, that justifies the remainder of the ideological aspects that conflict with the regular functioning of modern society. In returning to the five principles of Salafi *jihadism* noted in Chapter Two, the manner in which literal proof texts grounding the ideology jar with both the context in which they originated and the context in which they are now applied can now be illuminated. The first principle, *Ghuraba*, is noted as grounded in a *hadith* that prophesises the return of Islam to something strange, and blesses these strangers. This literal reading however denies the impact of contrasting texts such as that which states ‘*Be aware of extremism in religion, for it is extremism that destroyed those who went before you*’⁷³ and the oft cited ‘*Let there be no compulsion in religion*’.⁷⁴ The second principle of *al-wala wa al-bara* is ideological only and has no basis in the Salafi period, though certain *Qur’anic* verses are resorted to in order to frame it in *Quran’ic* terms.⁷⁵ These include verses 5:51 and 60:1 which state:

*‘O you who have believed, do not take the Jews and the Christians as allies. They are [in fact] allies of one another. And whoever is an ally to them among you - then indeed, he is [one] of them. Indeed, Allah guides not the wrongdoing people’.*⁷⁶

‘O believers! Do not take My enemies and yours as trusted allies, showing them affection even though they deny what has come to you of the truth. They drove the Messenger and yourselves out of Mecca’, simply for your belief in Allah, your Lord. If you ‘truly’ emigrated¹ to struggle in My cause and seek My pleasure, ‘then do not take them as allies,’ disclosing secrets ‘of the believers’ to the pagans out of affection for them, when I know best whatever you conceal and whatever you

⁷³ Another version of this *hadith* reads ‘Be on your guard against committing oppression, for oppression is a darkness on the Day of Resurrection, and be on your guard against stinginess for stinginess destroyed those who were before you, as it incited them to shed blood and make lawful what was unlawful for them’. *Sunnah, Sahih Muslim*, Book 45 *Hadith* No. 74.

⁷⁴ Holy *Qur’an*, Surah Al-Baqarah 2:256.

⁷⁵ Joas Wagemakers, ‘Framing the ‘Threat to Islam’: Al-Wala Wa Al-Bara in Salafi Discourse’ (2008) 30(4) *Arab Law Quarterly* 5.

⁷⁶ Holy *Qur’an*, Surah al-Ma’idah 5:51.

*reveal. And whoever of you does this has truly strayed from the Right Way’.*⁷⁷

Once more, the context is disregarded. These *ayats* were revealed in Medina when Islam was attempting to establish itself as a fledgling community and protect itself from the impact of alternative religious practices in close proximity that might pose a threat to its very existence if some Muslims were to switch allegiance. This context is no longer relevant. Moreover, it disregards innumerable verses of the *Qur’an* that speak to inclusion and respect for other religions including verses 109:1-6 and 49:13 which state:

*‘Say: O unbelievers, I worship not what you worship and you are not worshipping what I worship nor am I worshipping what you have worshiped, neither are you worshipping what I worship. To you your religion and to me my religion’.*⁷⁸

*O mankind! We created you from a single (pair) of a male and a female, and made you into nations and tribes, that ye may know each other (not that ye may despise (each other). Verily the most honoured of you in the sight of Allah is (he who is) the most righteous of you.*⁷⁹

The third principle of *takfir* is the declaration of a Muslim as an unbeliever and is a reinterpretation of its original usage. During the Meccan half of the Prophetic Period the message of *jihad* focussed on propagating Islam against a prevailing order more or less characterised by idolatry, paganism and polytheism. Those who engaged in these behaviours were termed *kafir* – unbelievers – as they had not yet found the path to God.⁸⁰ Muslims would engage in *jihad* that during this time meant proselytism. The connotations of *jihad* however evolved to an active *jihad* in the Medinan period when the small community required protection in order to ensure its survival. It is within the Medinan revelations that verses can be found legitimising killing and it is to these that fundamentalists turn, to ground their interpretation of *takfir* as a licence to kill.

⁷⁷ Holy Qur’an, Surah al-Mumtahana 60:1.

⁷⁸ Holy Qur’an, Surah al-Kafirun 109:1-6.

⁷⁹ Holy Qur’an, Surah al-Hujurat 49:13.

⁸⁰ Robert Rabil, ‘Contextualising Jihad and Takfir in the Sunni Conceptual Framework’ <<https://www.washingtoninstitute.org/policy-analysis/contextualizing-jihad-and-takfir-sunni-conceptual-framework>> accessed 4 July 2021.

The fourth principle of *hakimiyyah*, or the establishment of a caliphate on earth, is derived from the Kharijite attempt to assert itself as the purest group of Muslims and break away from the mainstream deeming them essentially not Islamic enough. This principle is in contrast to every reference to the unity of the *ummah* throughout the *Qur'an* and once more 49:3, as quoted above, counteracts the resort to break-away puritanism. In any event, the requirement for a caliphate is dismissed by those who claim that any government that protects the *maqasid* is a *Shari'a* compliant government. The fifth and final principle of considering all Muslims to be living in *dar-al-harb*, or the abode of war, is a reinterpretation of a juristic term used to demarcate lands in which Muslims were persecuted from territory under Muslim jurisdiction. Fundamentalists resort to the imperialist use of the term that was used to justify expansion under the guise of increasing the abode of *dar-al-Islam*. The interpretation relied upon had already been taken out of context by imperialists but in the modern world where empires do not threaten to subjugate entire populations en masse, the notion of offensive warfare is largely defunct.⁸¹

3.1 Fundamentalism and its Relationship with Colonialism

Up to the point of colonialism, despite modernisation and invention, Europe was still grounded in a conservative ethos. It was only when *logos* replaced *mythos*, or when modernisation replaced the backward looking mythical way of life with a future orientated rationalism, that Muslims would begin to find Europe alien to them and perceive the Western world as damaging.⁸² From the point of emergence from colonialism, traditionalist Islamic orthodoxy and the relationship with the west fused into a single Islamic campaign. A sense of purpose in re-establishing the Islamic world as a significant global force with a viable and valid system of laws of its own crystallised when Arab groups took to the stage with an international voice through the establishment of the OIC in 1969. Given the absence of authentic or unified Islamic input during the drafting phase of the UDHR,⁸³ the western secular nature and Judaeo-Christian

⁸¹ Ed Husain, *The House of Islam* (Bloomsbury 2018) 148, 149.

⁸² Karen Armstrong, *The Battle for God: Fundamentalism in Judaism, Christianity and Islam* (Harper Collins 2001) 38.

⁸³ See Chapter Four for further discussion on this issue.

underpinnings of the document itself,⁸⁴ the momentum of human rights language that rapidly gathered pace in the 1970s,⁸⁵ and the acknowledgement that human rights were being developed and interpreted in an utterly secular fashion by the content of paragraph 8 of General Comment No. 22, it could not be described as astonishing that secularism, as a product of the Western world that could once more endanger Islam, for many Muslims, became something that needed to be protected against. This, not least because the Islamic world had been further isolated and held to a moral standard that held no credibility for them.

In the decades between the drafting of the UDHR and the release of General Comment No. 22, *Qur'anic* interpretation took a fundamentalist turn, due in large part to the work of Egyptian scholar Sayyid Qutb⁸⁶ whose contributions to fundamentalism are set out in Chapter Two. Western secularism and International Human Rights as a product of same would go on to be accused of being prejudicially anti-religious and politically hegemonic.⁸⁷ Indeed the dangers of a western secular assumption of superior virtue were perhaps not so coincidentally articulated in the same year as General Comment No. 22 when certain U.S. statements and demands concerning human rights were addressed as follows:

*I sense it in the anxious inquiries as to whether the “human rights record” of this or that government is found, upon lofty inquiry, to be adequate or inadequate from our standpoint. I sense it in our inclination to rate other governments, independently of their remaining practices, outstandingly on the basis of our judgment of their performance in this one particular field.*⁸⁸

⁸⁴ Khaled Abou El Fadl, ‘Islam and the Challenge of Democratic Commitment’ in Elizabeth M. Bucar and Barbra Barnett (eds) *Does Human Rights Need God?* (Wm. B. Eerdmans 2005) 94. Also see Chapter Four for further discussion on this issue.

⁸⁵ Samuel Moyn, *Human Right and the Uses of History* (Verso Books 2014) 82-83. See also Samuel Moyn, *The Last Utopia: Human Rights in History* (Harvard University Press 2012) 155.

⁸⁶ Ana Belen Soage, ‘Islamism and Modernity: The Political Thought of Sayyid Qutb’ (2009) 10(2) *Totalitarian Movements & Political Religions* 189-203.

⁸⁷ Abdulaziz Sachedina, *Islam and the Challenge of Human Rights* (Oxford University Press, 2009), 11.

⁸⁸ George F. Kennan, *Around the Cragged Hill: A Personal and Political Philosophy* (Norton 1993) 72.

Moreover, it has also been articulated that to this day, the eastern traditions feel obliged to explain themselves to the modern west, which now sets the norm,⁸⁹ and that secular human rights ideology is perfectly designed to cloak the military humanism of empire.⁹⁰ The vulnerability of Islam, due to the perceived victimisation of it by the west goes a long way towards explaining Muslim sensitivity to western insult, of which moral imperialism could be accused of comprising. There is a western tendency to exaggerate any aggressive passages in the Islamic scriptures beyond the explanations that are given for similarly aggressive passages in the Judeo-Christian scriptures of the dominant west. The Islamic passages are understood as more intrinsically violent and primitive rather than simply an element in the complexity of any faith, whose scriptures reflect human nature and inevitably contain both violent and irenic passages.⁹¹ This said, a significant body of opinion within Islam sees it as the only belief system that has the courage to stand out against the western dominance of orthodox international thought.⁹²

The Internal Battle for the Soul of Islam, that is, the battle for the right to speak for the truth of Islam internationally whether that is a modernist truth, a traditionalist truth or a radical truth, has skewed the campaign to assert Islam as a viable moral code grounding a valid system of laws, as the acts of those who speak a radical truth have clouded the western perception of Islam and contributed to the creation of an Islamic stereotype that holds the characteristics of extremism. It is within this context of the intertwining relationship of the Islamic and Western worlds that the evolution of fundamentalist interpretations of the sources occurred and returns were made to the ideal of a past and perfect society replicating that of seventh century Arabia, including the imposition of seventh century methods of criminal punishment. It is also within this context that an exaggerated focus developed in the secular world on the existence of these punishments as a reason for denying the viability of a religious public morality grounding a valid legal system.

⁸⁹ Karen Armstrong, *The Lost Art of Scripture* (Penguin Random House 2019) 387.

⁹⁰ David Rieff, *At the Point of A Gun: Democratic Dreams and Armed Intervention* (New York 2006) 9.

⁹¹ Armstrong (n21) 387.

⁹² Neville Cox, 'Blasphemy, Holocaust Denial and the Control of Profoundly Unacceptable Speech' (2014) 62(3) *The American Journal of Comparative Law* 766.

Fundamentalist interpretation of Islamic Law largely developed as a response to this western colonialist interference⁹³ and had its predecessors as set out in Chapter Two, whose concepts incrementally combined and culminated in the fundamentalist interpretation of today.⁹⁴ Whilst early fundamentalists were progressive, and colonial reformers were symbolic of attempts to contextualise Islam with modernity, when modernity failed the Islamic world some of those most drastically affected proposed reform theories not expected to materialise for quite some time. With a feeling of nowhere left to go, some late and post colonial reformers out of frustration at the plight of many ordinary Muslims and fear of the vulnerability of Islam picked up these theories. In reducing the complexities and contradictions of Islam to the ideological discourse of scriptural literalism they combined the revival and purification concepts of ibn-Taymiyyah, the internal rejectionist concept and imitation of seventh century rules of Al-Wahhab, the re-contextualised concepts of *Jahiliyyah* and *jihad* of Maududi, and for some, the charted course to a pure enclave of Muslims and readiness to battle of Qutb.⁹⁵

Simultaneously, attempts to introduce Islamisation processes in response to colonialism had begun and could not have been an unexpected turn of events given the impact of colonialism. In fact, these processes were widely supported by the ordinary people on the back of powerful ideological discourse opposing colonialism.⁹⁶ However, fundamentalism began to influence these processes, made possible because the impact of the Western world saw the *ulama* challenged and enter decline whilst the *Shari'a* became a matter of public concern and national politics. The *ulama* no longer had an intellectual monopoly and *Shari'a* came under the control of the state.⁹⁷ The penal codes became a product of parliamentary decision making, exposed to the whims of power politics. In this regard, scriptural literalism entered the process, reintroducing seventh century criminal punishments as a strong anti-western statement not least because the criminal

⁹³ Mohammed Ayoob and Danielle Nicole Lussier, *The Many Faces of Political Islam: Religion and Politics in Muslim Societies* (University of Michigan Press 2020) 6.

⁹⁴ See Chapter Two for the development of fundamentalism in Islamic Law and the theories of the early influencers of the ideology.

⁹⁵ Other early contributors to fundamentalism include Ayatollah Khomeini and Ayatollah Motahhari in Iran, Mustafe al'Siba'i from Syria and Abbasi Madani, Shaikh Nahnah and Ali Belhaj from Algeria. See Mansoor Moadell, *Islamic Modernism, Nationalism and Fundamentalism: Episode and Discourse* (University of Chicago Press 2005) 5.

⁹⁶ Rudolph Peters, *Crime and Punishment in Islamic Criminal Law: Theory and Practice from the Sixteenth to the Twenty-First Century* (Cambridge University Press 2005), 14.

⁹⁷ Ruud Peters, 'The Enforcement of God's Law: The Shari'ah in the Present World of Islam' in Philip Olstien, Jamila M. Nasir and Franz Kogelmann, *Comparative Perspectives on Shari'ah in Nigeria* (Spectrum Books 2005) 129-130.

law is that which is most at variance with western values. Thus, reasserting the *hudud* punishments had, and continues to have, a highly symbolic value regarded by some Muslims as a litmus test for true Islamisation of a legal system.⁹⁸ Those who subscribe are in the minority, mostly political and ideological elites, and it is the ordinary people who are on the receiving end of the penal laws, having innocently supported the processes at their inception.⁹⁹

The impact of the fundamentalist interpretations on the moral message of Islam is made all the more possible because the traditional Islamic institution of the caliphate no longer exists to serve its purpose of marginalising fundamentalist groups and labelling them as heretical aberrations to the Islamic message.¹⁰⁰ The fundamentalists were essentially enabled in disregarding the historical *maqasid* approach to interpretation and developing a ‘*changed contextual approach*’.¹⁰¹ On the foundations of the medieval *ulema* who thwarted the natural development of *Qur’anic* thought¹⁰² by looking to the Prophet as a legalist, they chose to overlook the fact that Mohammad was primarily a moral reformer. Fundamentalists, like Qutb, selected *hadith* sources often deemed weak and unreliable rather than looking to the *Sunnah*, or actions, of the Prophet which were promoted as a more trustworthy and reliable source by alternative colonial era critics.¹⁰³ In choosing to cling to the legalistic form of the past in dealing with the destructive impact of colonialism, they consequentially, and crucially, further lost touch with the *Qur’an*.¹⁰⁴ The isolation of verses from their context for use as authoritative texts would be a violation of the process of Islamic legal theory,¹⁰⁵ hence, the fundamentalist approach to

⁹⁸ Ibid. 107-108.

⁹⁹ Shaheen Sardar Ali, Satwant Kaur Heer, ‘What is the Measure of Universality? Critical Reflections on Islamic Criminal Law and Muslim State Practice vis-a-vis the Rome Statute and the International Criminal Court’ in Tallyn Gray (ed) *Islam and International Criminal Law and Justice* (Torkel Opsahl Academic EPublisher 2018) 175, 182.

¹⁰⁰ Khaled Abou El-Fadl, ‘The Culture of Ugliness in Modern Islam and Reengaging Morality’ (2002) 2(1) UCLA Journal of Islamic and Near Eastern Law 68.

¹⁰¹ Mashood A. Baderin, ‘Islamic Socio-Legal Norms and International Criminal Justice in Context: Advancing an Object and Purpose cum Maqasid Approach’ in Tallyn Gray (ed.) *Islam and International Criminal Law and Justice* (Torkel Opsahl Academic EPublisher 2018) 53.

¹⁰² Armstrong (n21) 389.

¹⁰³ Ibid.

¹⁰⁴ Fazlur Rahman, *Islam and Modernity: Transformation of an Intellectual Tradition* (University of Chicago Press 1984) 147.

¹⁰⁵ Shannon Dunn and Rosemary B. Kellison, ‘At the Intersection of Scripture and Law: Qur’an 4:34 and Violence Against Women’ (2010) 26(2) Journal of Feminist Studies in Religion 12. See also SAA Maududi *Islamic Law and Constitution* (Kazi Publications 1955) 52, 55.

interpretation is described as a very new Islamic response that appears to allow change, but under the insistence that nothing fundamental is changing.¹⁰⁶

The battle for the soul of Islam, or, the battle for ownership of Islamic truth, frustrates its global representation. Thus, the drive to reassert the Islamic world as a response to colonialism, the somewhat unrestrained politicisation of Islam, and the resort to scriptural literalism, has created a situation where anachronistic provisions are being imposed on modern situations, not least in the flashpoint area of *hudud* punishments in Islamic Criminal Law. This literal approach to interpretation of Islamic Law, propelled by the impact of colonialism on the Islamic world and utilising selected proof texts regardless of their context and regardless of the complexities of the *Shari'a*, is that which insists upon the imposition of seventh century punishments as an essential component of the attempt to best preserve Islam, and guide the *ummah* in the twenty first century. It is in stark contrast to the alternative modernist approach that will be addressed in the latter part of this chapter.

4. Interpretation of Islamic Criminal Law in Context

From the range of elements that characterise Islamic fundamentalism, it is the resort to scriptural literalism that prompts the introduction of seventh century rules - therefore seventh century criminal punishments. Two points are firstly relevant, those being, that rules that applied in seventh century society could never have anticipated the conditions of twenty first century society and are therefore anachronistic, and, Mohammad was primarily a moral reformer and not the legalist the *madhahib* wish to portray him as. The attempts to decide all matters of law by medieval scholars in their compilations of rules derived from the *Qur'an* and the *Sunnah* became the go-to texts once the gates of *ijtihad* closed, and, from that point forward these *fiqhi* texts of the various *madhahib* garnered uncritical reverence that would stay with them until this present day. So much so, that to a greater extent than otherwise, it is these *fiqhi* interpretations of the seventh century rules that are resorted to in order to discover or interpret the law, and not the Meccan moral principles and themes that informed the *maqasid al-shari'a* and have the potential to be applied to the conditions of the twenty first century.

¹⁰⁶ Peter Beyer, *Religion and Globalisation* (Sage 1994) 10.

What follows is an exploration of how the moral purposes of Islam or the *maqasid al-sharia* were once complemented by the *hudud* in the context of their original revelation but have been displaced by reliance on the scriptural literalism of the texts and how this impact of the *fiqh* texts has resulted in taking the *hudud* grossly out of context, ultimately resulting in an interpretation and representation of Islam that supplies the grounds for IHR criticism of the kind asserted in the main thesis question, that is, that Islamic Criminal Law particularly, is not compatible with International Human Rights. The following sections will explain how the move away from the Meccan moral principles that sought to protect the *maqasid* came to complicate the understanding of Islamic Criminal Law in particular.

4.1 Hudud Punishments in Context

As this thesis focuses on the criticism of *Shari'a* criminal law not squaring with the requirements of International Human Rights, in particular the *hudud* punishments, the key to this criticism has now been turned given the delineation of the changed contextual approach of fundamentalist scriptural literalism, or fundamentalist interpretation. *Ijtihad* ended (though not according to all Muslims) because it was believed that all possible scenarios had been addressed and resolved permanently and the refusal to reinterpret scriptures is what has created the inflexibility insofar as attempts to apply anachronistic provisions to modern situations are concerned. Situations occurring today could not possibly have been envisaged a thousand years ago, and criminal proscriptions often described as draconian¹⁰⁷ which remain valid because of their being God's divine law, are considered particularly anachronistic. The fundamentalist decontextualisation of the *hudud* is largely responsible for the criticism of Islamic Criminal Law being misaligned with IHR Law. In this respect, recalling the *maqasid* and paying heed to the temporal context of the divine revelations by underscoring the social setting that pertained in seventh century Arabia makes it possible to align the *hudud* with the *maqasid*, but only within the specific context of seventh century Arabia. Engaging in this contextual exegesis will illuminate the extent to which the application of these punishments in modern society has been removed from their original purposeful context.

¹⁰⁷ David A. Jordan, 'The Dark Ages of Islam: Ijtihad, Apostasy and Human Rights in Contemporary Islamic Jurisprudence' (2003) 9(1) Washington and Lee Journal of Civil Rights and Social Justice 59-60.

4.1.1 Maqasid al-Shari'a

As the *hudud* in their original context sought to promote the objectives of Islam, or *maqasid-al-shari'a*, it is useful to recall the concept of the *maqasid* before relating the *hudud* to them. As was detailed in Chapter One, Islam has three set goals, namely, the nurturing of the righteous individual, the delivery of justice, and, the realisation of benefit. To achieve these goals a principle known as *maslaha* which comprises the promotion of human welfare and the prevention of harm is deployed. This principle of *maslaha* is considered the most viable means of bringing the ideals of Islam closer to realisation for all times as whilst it represents collective wellbeing – *maslaha al-ummah*, its reach extends to individual benefit – *maslaha shakhsiyyah* and so ensures the protection of human rights.¹⁰⁸ Islam seeks to protect and effect its objectives, *maqasid al-Shari'a*, through the guidance of the *Qur'an* using the viewpoint of *maslaha* to decide laws that either protect these *maqasid* or prevent harm to them. The *maqasid al sharia* we recall from Chapter One are the protection of religion, life, progeny, intellect and property and they represent the aspects of being that are most in need of protection in order for society to live a fulfilled and righteous life. We recall further from Chapter One that the *Qur'an* at 5:48 declares 'To each among you we have prescribed a law and an open way'¹⁰⁹ and that the *maqasid* scheme represents this 'open way' whereby the viewpoint of *maslaha* ensures consistency in the application of God's law.¹¹⁰ Guided by the principle of *maslaha*, the *maqasid* are what many scholars believe provide a 'proper contextual approach' for advancing the benevolent scope of Islamic Law in its interpretation.¹¹¹

4.1.2 Recalibrating the Moral Compass in Seventh Century Arabia

Chapter Two extensively charts the growth and development of Islamic Law, and, recalling the conditions of tribal Arabia at the dawn of Islam is a necessary prerequisite to an appreciation of the *hudud*.¹¹² Briefly, civilisation was nomadic and governance, legal rule and criminal justice had only developed to an extent that could be maintained within a moving society.¹¹³ Arabs often lived in abject poverty which prompted stealing - often

¹⁰⁸ Mashood A. Baderin, *International Human Rights and Islamic Law* (Oxford University Press 2003) 164.

¹⁰⁹ Holy Qur'an, Surah Al-Ma'idah 5:48.

¹¹⁰ Muhammad Khalid Masud, *Shatibi's Philosophy of Islamic Law* (Islamic Research Institute 1995) 151.

¹¹¹ Baderin (n33) 53.

¹¹² For a detailed account of the landscape of tribal Arabia at the dawn of Islam from social, legal, political, economic, and religious perspectives see Chapter Two.

¹¹³ Herbert Joseph Muller, *The Loom of History* (Harper 1958) 271.

leading to generational blood feuds consumed by *tha'r*. Bedouin society had no obligation to submit to orders from anyone¹¹⁴ and on the eve of Islam tribal clashes had reached an unsustainable level. Politically, clashes between the Roman and Persian empires took advantage of Arabia due to its strategic trading position and both interfered in Arabian affairs.¹¹⁵ Religion comprised a spectrum of faiths and there was not one sole focus to bring the entirety of society together. The economy was centralised with commercial custom enforced between the traders themselves. Usury and money lending was the trade of the business classes whilst slavery was commonplace.¹¹⁶ Extortionate rates of interest were imposed on those engaging in the caravan or logistics trade - as this was essential to the economy¹¹⁷ usury was the principle means of oppression.¹¹⁸

Where the development of law was concerned, land law and agricultural contracts had developed, but family relationships, inheritance and penal law remained dominated by ancient tribal systems.¹¹⁹ Socially, Arabia was a male dominated society and in nomadic society where the strong dominated the weak, women were oppressed. They could not inherit, choose a husband or divorce him,¹²⁰ whilst a woman's most important assets were her purity to further the patriarchal blood line for inheritance and the dowry she could bring to their new tribe upon marriage.¹²¹ There was no limit to the amount of wives a tribesman could take and no responsibility to maintain them. In a society where prostitution was a common occupation in the absence of male support, and sexual relations were an unregulated aspect of society, there was compulsion in drinking, gambling and debauchery.

¹¹⁴ Carl Brockelmann, *History of the Islamic Peoples* in Joel Carmichael and Moshe Perlmann (trans.) *Orientalism: Early Sources* Volume XI (Routledge 2000) 3-5. See generally: Philip Khuri Hitti, *The Arab Heritage* (Greenwood Press 1985) 25-53; and Joseph Schacht, 'Pre-Islamic Background and Early Development of Jurisprudence' in Majid Khadduri, Herbert J. Liebesny (eds) *Law in the Middle East Vol I: The Origin and Development of Islamic Law* (The Law Book Exchange 2010) 29.

¹¹⁵ Fred M. Donner, 'Muhammad and the Islamic Caliphate 570-1258 C.E.' in John Esposito (ed.), *The Oxford History of Islam* (Oxford University Press 1999) 1-4.

¹¹⁶ Sayyid Ali Ashgar Razwy, *A Restatement of the History of Islam and Muslims* (Lulu Press 2014) 16.

¹¹⁷ Evgenii Aleksandrovich Beliaev, *Arabs, Islam and the Arab Caliphate in the Early Middle Ages* (Praeger 1969) 90.

¹¹⁸ Ibid.

¹¹⁹ Schacht (n46) 29.

¹²⁰ Muslim Women's League, 'Women in Pre-Islamic Arabia' September, 1995
<http://www.mwusa.org/topics/history/herstory.html>> accessed 10 December, 2020.

¹²¹ John L. Esposito and Natana J. DeLong Bas, *Women in Muslim Family Law: Contemporary Issues in the Middle East* (Syracuse University Press 2001) 13.

Mohammad appears to have been gravely preoccupied with the state of the world at this time - the *jahilli* recklessness, arrogance and egotism that were morally destructive could only lead to ruin¹²² and the family unit was not solid. *Jahiliyyah* was essentially anarchic and uncivilised and the landscape economically, legally, socially, politically and for some religiously, could not be sustained in the manner it existed, as each component of a properly functioning society was spiralling out of control. The very first revelation of Islam epitomises the deplorable conditions of Mohammad's political, social, economic, religious and legal environment that catalysed change:

*Recite in the name of your Lord who created
From an embryo created a human
The human being is a tyrant
He thinks his possessions make him secure
To your Lord is the return of everything*¹²³

As the *maqasid al-shari'a* are considered to be those things necessary for the proper functioning of human life, there is now clarity in the purpose of the *hudud* given that they align directly with the protection of the *maqasid*.¹²⁴ Thus, if the *maqasid* are in jeopardy, the proper functioning of human life is in jeopardy. Accordingly, the *hudud* directly align with the most problematic issues in the morally dysfunctional society of seventh century Arabia. In this vein, it can be seen from the above that personal vendetta and the tribal urge for revenge needed to be controlled¹²⁵ so the emphasis was on the objectivity of justice independent of tribal interests. The *hudud* serves this objectivity of justice by taking the law regarding a certain number of crimes out of the scope of tribal justice, thus, conveying a message that they are not open to pardon, negotiation or compromise.¹²⁶ The ability to convey this message however was limited and a number of factors pertain. Firstly, methods of communication were primitive; secondly, the nature of tribal life was nomadic; and thirdly, and critically, there was no national, regional or local governance outside of tribal justice.

¹²² Armstrong (n21) 234.

¹²³ Holy Qur'an, Surah Al Alaq 96:1, 6-8.

¹²⁴ We recall the *maqasid* were a later jurisprudential realisation in an attempt to purposively categorise the revelations, they were not directly revealed by God but help to explain the intentions of his revelations.

¹²⁵ From Chapter Three it can be seen that this is the scope of *qisas* crimes.

¹²⁶ Mohammad Hashim Kamali, 'Punishment in Islamic Law: A Critique of the Hudud Bill of Kelantan, Malaysia' (1998) 13(3) Arab Law Quarterly 225.

This last factor is crucial as it encompasses three significant issues that culminate in the necessary resort to harsh punishment. Firstly, there were no police forces to monitor and control society; secondly, there were no investigative methods of obtaining truth; and thirdly, it was an era long before the inception of incarceration - prisons did not exist.¹²⁷ Therefore, harsh punishments were a prerequisite for the delivery of effective justice in tribal Arabia in order to restore the proper functioning of human life, and, the proper functioning of society in the manner envisaged by the *maqasid*. As will be seen, harsh punishments were not the sole endeavour of Islam and in comparatively analysing the *hudud* with the Judaic penal scheme they will both be seen to strike similar chords in terms of physical punishment, with the punishment of stoning being taken directly from Judaic society and perhaps with the Judaic scheme surpassing Islam in terms of severity.¹²⁸ Further, these punishments were imagined at a time of tribalism when violence was a societal norm, which makes acquiescing to the fact of their original usage less morally troublesome considering the candid fact that at some point in history every culture valued, or at least tolerated, various forms of bodily violation.¹²⁹

The *hudud* crimes and punishments, representing the worst problems of *Jahiliyyah* and being taken out of the scope of tribal justice therefore entailed a punishment that regardless of the nomadic feature of tribal life, limited means of communications, and absence of police, investigative mechanisms and prisons, delivered a clear and distinct message that these behaviours would no longer be tolerated in society.

4.1.3 The Hudud and the Maqasid

Looking to each of the *hudud* individually we can appreciate that these legal rules governing the *hudud* had ‘occasions of revelation’ and a historical context¹³⁰ that establish a solid understanding of the true intention behind the decision to punish and the punishment itself based on prevailing conditions. *Zina* (adultery and fornication) and *qadhif* (false accusations of *zina*) had as their original purpose the dramatic increase of respect for women in society and the protection of the family unit. *Zina*, it was thought, was responsible for family conflict, jealousy, illegitimate children and the spreading of

¹²⁷ Razwy (n48) 16.

¹²⁸ This comparison will be addressed at section 6 herein.

¹²⁹ Moyn (n17) 4.

¹³⁰ Rahman (n36) 17.

disease.¹³¹ In this sense, *zina* jeopardised life, family, and mind (encompassing reputation), whilst *qadhaf* jeopardised reputation. If the importance of family structure and respect for women were going to be central to the enhanced moral standard of a society, the law would have to be based on strict laws governing familial relationships. Forbidding *sariqah* (theft) was a direct result of both the level of poverty and the desperate state of tribal feuding. *Sariqah* together with *zakat* would work together to enhance the financial stability of society by reducing the need to steal and strictly punishing occasions of it. *Sariqah*, by creating distrust and apprehension and depriving people of property jeopardised the *maqasid* of family/progeny and property/wealth.¹³² *Shurb al khamr* (drinking alcohol) was eventually forbidden to increase alertness in warfare at a time when a new faith community was struggling to establish itself in an often hostile environment. *Shurb*, it was considered, jeopardised all five *maqasid*, as if the mind was impaired, so too were all other objectives.¹³³

Hirabah (highway robbery or banditry) was concerned with preventing highway robbery that plagued the trade caravans but was also interconnected with torturous attacks on Muslims by those feigning commitment to Islam. *Hirabah* jeopardised both life and wealth in terms of the *maqasid*. Both *riddah* (apostasy) and *baghi* (rebellion) were forbidden to protect the *ummah* in terms of both its military strength and its faith, once more due to the *ummah*'s need to protect itself from decimation and survive as a new religious community. When these crimes occurred, they usually occurred together. *Riddah* was a strong threat to the continuance of Islam and the newly established Islamic state had no firm basis to defend itself from the constant hostility thrust upon it.¹³⁴ As a crime, *riddah* was usually caught up with political betrayal as when the Prophet died, many allied tribes reverted to their previously espoused polytheistic paganism and a stern punishment was required to discourage others from apostatising.¹³⁵ Indeed in the early

¹³¹ Noel J. Coulson, *A History of Islamic Law* (Edinburgh University Press 1964) 12.

¹³² M Siddiqui, *The Penal Law of Islam* (Adam Publishers 1979) 127.

¹³³ Gamil Mohammad Hussein, 'Basic Guarantees in the Islamic Criminal Justice System' in MA Abdel Haleem, Adel Omar Sharif, Kate Daniels (eds) *Criminal Justice in Islam: Judicial Procedure in the Shari'ah* (IB Taurus 2003) 40.

¹³⁴ Syed Barakat Ahmad, 'Conversion from Islam' in Clifford Edmond Bosworth, Charles Issawi, Roger Savory and A.L. Udovitch (eds.) *The Islamic World: From Classical to Modern Times – Essays in Honour of Bernard Lewis* (Darwin Press 1989) 248.

¹³⁵ Jordan (n39) 61-92. See also David F. Forte, 'Apostasy and Blasphemy in Pakistan' (1994) 10 Connecticut Journal of International Law 44.

days of Islam apostasy and treason were synonymous¹³⁶ and *riddah* and *baghi* were considered *hudud* crimes because they jeopardised the *ummah* as a whole, therefore, the entire religion of Islam.

Allowing then for the harsh punishments to be considered apposite for the particular issues that were immorally ravaging society generally in seventh century Arabia, it can be conceded that the punishments of the *Shari'a*, given the fundamentalist position that they worked to order a perfect Islamic society, were successful in protecting the *maqasid*, at least for a considerable period of time. However, where the fundamentalist position diverges from the *hudud* rules is in their direct imposition alone, relying on the *fiqhi* proof texts in isolation from the *Qur'anic* holistic approach. The fundamentalist scriptural literalism interpretation appears to confuse, sideline, or discard in their totality, critical technical and jurisprudential matters concerning the *hudud* that firstly, largely prevent their usage or ensure they are utilised as a last resort measure only, and secondly, that obfuscate the very idea of the *hudud* as fixed, non-negotiable and unavoidable.

Again, we must bear in mind that the reason the *hudud* punishments supported the *maqasid* in the early centuries of Islam and were entirely appropriate for the societal conditions within which they were imagined and applied, was because the facilities available today simply did not exist. Corporal punishment was a mainstay of most penal systems of this tribal era because there were no police forces to fulfil the aim of deterrence from crime. Similarly there were no prisons to incarcerate those guilty of crimes as punishment for their illegal actions. As both police forces and prisons are now present and functional in largely every society globally there exists no call for inflicting corporal punishments for the purposes of deterrence and punishment. More humane methods for fulfilling these purposes can now be employed, thus, more humane methods of protecting the *maqasid* can now be employed. In other words, these punishments no longer support the *maqasid* and may even frustrate them.

4.2 The Impact of Fiqh

One of the prominent criticisms of fundamentalist interpretation is the resort to a dependence on *ahadith*, clinging to a sterile orthodoxy (removing the complexities and

¹³⁶ Asaf Ali Asghar Fyzee, *Outlines of Muhammadan Law* (Oxford University Press 1974) 169-170.

contradictions of Islam). This occurs in order to compensate for feelings of defeatism, disempowerment and alienation and is partnered with a distinct sense of self-righteousness *vis-a-vis* the non-descript other, whether that other is the west, non-believers in general, so-called heretical Muslims or even Muslim women. Where the frustration essentially occurs, is in the tendency to minimise the role of the interpreter and exaggerate the role of the text.¹³⁷ The occasions of revelation and the historical context of the *Qur'an* are of chief concern because they combine the role of the interpreter and the role of the text. Minimising the role of the interpreter leaves an isolated legal rule. Commentators in the era of *fiqh* development, though aware of the situational context, are said to have never realised the full importance of it, either in terms of the historical significance or in terms of understanding the whole point of the injunctions, particularly the latter.¹³⁸ This lack of awareness of the full importance of context resulted in the enunciation of universal legal rules that were possibly only relevant to their particular circumstances of establishment, which does not pose a problem if the injunction reflects the situational value underlying it, but, if it does not, and relies on the literal wording only, then this is problematic.¹³⁹

The crucial moment in determining the way forward came in the eighth century, up to which point early scholars had enjoyed a great deal of freedom in interpretation because there were no rules. However, al-Shafii's success in having the Prophetic traditions accepted as a basis for interpretation could be described as charting interpretation off its *Qur'anic* course. An uncritical reverence for the *ahadith* over the *Qur'an* and the *Sunnah*, would over time promote ideas that had absolutely no scriptural basis¹⁴⁰ when the practice of *ijtihad* came to be denigrated and slavish following of the results of early jurists' thought typified the study of law.¹⁴¹ Essentially, the prominent jurists of the schools of thought, or *madhahib*, had developed such authority over the interpretation and application of Islamic Law that the view emerged that these venerated founders of the *fiqh* schools had completed all the necessary tasks of legal analysis and defined all the major intellectual structures of the law, thus, reinterpretation was discouraged in favour of

¹³⁷ Khaled Abou El Fadl, *The Great Theft: Wrestling Islam from the Extremists* (Harper Collins 2009) 107.

¹³⁸ Rahman (n36) 17-18.

¹³⁹ Ibid.

¹⁴⁰ Armstrong (n21) 390.

¹⁴¹ Forte (n67) 66.

a faithful following of these static texts.¹⁴² Therefore, as noted in Chapter One, it is not accurate to argue that Islamic Law is divine guidance without any element of human input – the jurisprudence was very much developed by scholars within various contexts, and, although Islamic Law is closely connected to the teachings of the Qur'an and the Sunnah, the entire body of Islamic Law, particularly the *fiqh* texts, should not be considered equivalent to God's commandments, and revered in that manner.¹⁴³

The key to understanding the injunctions it has been suggested, was to understand them in their own context and to extrapolate the principles that lay behind the *Qur'anic* injunctions or the *Sunnah* of the Prophet, but this was never fully realised and reliance on wording dominated the Islamic commentary from the eighth century onwards.¹⁴⁴ The fundamentalist focus on the wording of selected rules of *fiqh* has caused a number of issues with the interpretation of the *hudud* including their understanding as purely punitive sanctions, their fixed and infallible nature in terms of their number, substance, and prescribed punishments, and, the removal of the *hudud* safeguards that has an impact on the delivery of justice, an embedded theme of the *Qur'an* and goal of Islam.

4.2.1 Hudud as Purely Punitive Sanctions

Hudud as the commonly understood description of the category of crimes that command divinely ordered mandatory physical punishment for violations of the rights of God is a *fiqhi* interpretation of the term. The term '*Hudud Allah*' in the *Qur'an*, is a phrase used to indicate the limits of both moral and legal behaviour to distinguish the *halal* from the *haram*, alternatively, the acceptable from the unacceptable. 'Punishment' however does signify a limit and can be subsumed within the meaning of the words *hudud*, or *hadd*.¹⁴⁵ Of the fourteen utterances of *hudud* in the *Qur'an*, six occur in one passage alone pertaining to divorce, and of those, none refer to punishment, but to guidance in observing the fairness and correct procedures of the divorce according to good custom. As custom evolves, this is not in tune with the idea of a fixed and invariable position.¹⁴⁶

¹⁴² Abdullah Saeed, *Human Rights and Islam: An Introduction to Key Debates Between Islamic Law and International Human Rights Law* (Edward Elgar 2018) 29.

¹⁴³ Saeed (n74) 91.

¹⁴⁴ Rahman (n36) 17-18. See also Gleave (n2) 2.

¹⁴⁵ Mohammad Hashim Kamali, *Crime and Punishment in Islamic Law: A Fresh Interpretation* (Oxford University Press 2019) 21-24.

¹⁴⁶ Fazlur Rahman, 'The Concept of Hadd in Islamic Law' (1965) 4 *Islamic Studies* 237.

The remaining utterances occur in further separate passages including: spying Bedouins as the tribe most unaware of the limits of God at 9:97;¹⁴⁷ a promise of great reward for the righteous at 9:112;¹⁴⁸ proper marital relations at 2:187¹⁴⁹ and 65:1;¹⁵⁰ inheritance and kindness to orphans and the needy at 4:13-4;¹⁵¹ and, atonement for non-observance of the rules of divorce at 58:3-5.¹⁵² In verses 9:112, 2:187 and 65:1 the consequences of both conformity with and disobedience of the limits are postponed to the afterlife indicating greater concern with moral righteousness than enforcing its limits through the modality of fixed punishments. Where 58:3 is concerned, three options of self-imposed punishment that comprise fasting, releasing a slave, and feeding the poor are prescribed. The punishment does not suggest any involvement of the court or other authorities and the options for punishments suggest there is discretion permitted in line with the conditions of the transgressor of the limits.¹⁵³

The *fiqh* definition of the *hudud* evidences a basic development from the original *Qur'anic* usage of the word and defines a *hadd*, or the *hudud*, as a fixed and unchangeable punishment for a violation of the rights of God, or *haqq Allah*.¹⁵⁴ However, on this analysis of the *Qur'anic* use of the term '*hudud*', it is not necessarily meant to consist of punishments, mandatory or otherwise, but to imply a broad set of

¹⁴⁷ Holy Qur'an, Surah al-Tawbah 9:97 'The Bedouins are most intense in disbelief and hypocrisy and most disposed not to know the limits that God has revealed to his Messenger, and Allah is most knowing, wise'.

¹⁴⁸ Holy Qur'an, Surah al-Tawbah 9:112 'Those who repent, worship and praise God, those who fast and bow down and prostrate, and those who enjoin good and forbid evil and preserve the limits of God and give good news to the believers'.

¹⁴⁹ Holy Quran, Surah al-Baqarah 2:187 'It has been made permissible for you the night preceding fasting to go to your wives. They are a clothing for you and you are a clothing for them. Allah knows that you used to deceive yourselves so he accepted your repentance and forgave you. So now, have relations with them and seek that which Allah has decreed for you. And eat and drink until the white thread of dawn becomes distinct to you from the black thread, then complete the fast until the night. And do not have relations with them as long as you are staying for worship in the mosques. These are the limits of Allah, so do not approach them. Thus does Allah make clear his verses to the people that they become righteous'.

¹⁵⁰ Holy Qur'an Surah at-Talaq 65:1 'When you Muslims divorce women, divorce them for their waiting period and keep count of their waiting period and fear Allah, your Lord. DO not turn them out of their houses or they should not leave their houses unless they are committing a clear immorality and those are the limits set by Allah and whoever transgresses the limits of Allah has certainly wronged himself...'

¹⁵¹ Holy Qur'an, Surah an-Nisa 4:13-4 The details of inheritance provisions and provisions for the needy and orphans is succeeded by the text '...these are the limits of God, whoever obeys Allah and his messenger he will grant them entry into paradise under which the rivers flow and this is a great success. But whosoever disobeys God and his messenger and violates his limits he will make them enter fire wherein he shall reside and this is for him a humiliating torment'.

¹⁵² Holy Qur'an, Surah al-Mujadalah 58:3-5 The text after setting out the options for punishment is succeeded by '...these are God's limits and appointed for disbelievers is painful torture'. As the revelation already prescribes options for punishment the painful torture logically refers to the impact of those punishments.

¹⁵³ Kamali (n77) 21-27.

¹⁵⁴ Ibid. 26-7.

moral and legal principles that Muslims should strive to observe.¹⁵⁵ Accordingly, an alternative interpretation that relies on the early usage and understanding of ‘*hudud*’ can provide an interpretation in line with the view of the Prophet Mohammad as a moral reformer rather than a legalist alone.

4.2.2 *Hudud* as Fixed and Infallible

One of the greater difficulties with the fundamentalist scriptural literalism interpretation and its focus on *fiqh* is the extent to which these selected legalistic *fiqh* rules either expand or contradict the *Qur’anic* provisions themselves. The fundamentalist assertion is that the *hudud* are beyond reproach as they are divinely ordered - they are the rights of God himself, or *haqq Allah* - and on this basis they cannot be adjusted or denied. This position has been formally stated in the UN by some Islamic states of fundamentalist persuasion.¹⁵⁶ Their application is therefore necessary to the ordering of society in precisely the manner that God intended. In making this fundamentalist assertion the reality that is the extent of *fiqhi* disagreement is not acknowledged.

As crucially noted above, as *fiqh* dominated the Islamic discourse from the eighth century onwards, a trajectory ensued where there developed an uncritical reverence for the *ahadith* over the *Qur’an* and the *Sunnah*, with the process of *fiqh* extrapolating their meaning and over time ideas being promoted with absolutely no scriptural basis.¹⁵⁷ Islamic orthodoxy however is traditionalist and conservative, protecting its heritage and history as a necessary component of protecting Islam. Orthodox scholars defend the rules and regulations of Islamic jurisprudence as for them, they have become part of the *Shari’a* to the extent that many orthodox Muslims consider any modernist or moderate interpretation an assault on the divine order, and upon *Allah* himself,¹⁵⁸ making the acceptance of the *hudud* orthodox Islamic truth. Despite this, the aforesaid trajectory can be followed with the fundamentalist interpretation of the *hudud* in reliance on *fiqhi* rules as proof texts as there is great disagreement on all aspects of the *hudud* including their number, their substantive content and their exact punishment despite the shared

¹⁵⁵ Ibid.

¹⁵⁶ Mashood A. Baderin, ‘A Macroscopic Analysis of the Practice of Muslim State Parties to International Human Rights Treaties: Conflict or Congruence?’ (2001) 1 Human Rights Law Review Vol. 289.

¹⁵⁷ Armstrong (n21) 390.

¹⁵⁸ Mark A. Gabriel, ‘Reforming Hudud Ordinances to Reconcile Islamic Law with International Human Rights Law’ Doctoral Thesis (University of Capetown 2016) 36.

understanding of the *hudud* ordinances as a specific and perfect set of divinely prescribed crimes and punishments.¹⁵⁹

It can be recalled from Chapter Three regarding the number of *hudud* punishments that many factors give rise to disagreement on their number including whether the *Qur'an* and *Sunnah* are given equivalent status, where there is consensus, and whether *shurb al-khamr* fits the criteria of divinely prescribed punishments. Regarding their substantive content we recall there is great discord between the schools on the precise definition of the crimes and there have been exercises in both narrowing and expanding the scope of the crimes to the extent that the original provision and its context has been at best marginalised and at worst discarded. Where punishments are concerned there is also considerable and significant disagreement that greatly impacts the welfare of the accused. Illustratively, where *sariqah* is concerned one school of thought believes recidivists for the crime of theft should not have further amputations but another insists there should be continuous amputations until all limbs have been amputated whilst in consideration of *baghi* the elements of it that usually comprise rebellion, apostasy and blasphemy, have become so intermeshed that all four *Sunni* schools believe that anyone who insults the Prophet must be killed. Accordingly, given the extent of divergence in the interpretations of the *hudud* between the schools of thought it, becomes more difficult to claim with any significant level of integrity that the *hudud fiqhi* proof texts are absolute and hard and fast rules.¹⁶⁰

What God intended by the *hudud* it seems, cannot be universally determined. As noted in Chapter One, the further one goes from the *Qur'an* in the order of authoritative sources to find answers the greater the risk of prioritising the word of humankind over the word of God. Resort to *fiqh* texts moves away from the *Qur'an* and focuses on the varied opinions of the *madhahib* that have attached permanence to their expanded, narrowed or contradictory understandings of the *hudud*.¹⁶¹ Once more, this leaves room for an alternate understanding of the *hudud* that does not move so far away from the *Qur'an* in the order of authoritative texts.

¹⁵⁹ Ibid. 91.

¹⁶⁰ Ibid. citing Mohammed al-Zoheily *Al-Muatamad fi al-Fiqh al-Shafei* 3 ed (2011) Vol. 5 at 145.

¹⁶¹ See Chapter Three for greater detail on the extent to which the impact of *fiqh* can be seen to greatly adjust the *hudud* rules by narrowing their meaning, extending their reach and in some cases contradicting them.

4.2.3 Hudud Safeguards

Adding a layer to the application of rules that can now be described as having little scriptural basis is the fact that when they are applied according to the variety of expanded rules, the restrictive safeguards are also negatively affected by select legalistic *fiqh* rules. Various *Qur'anic* provisions and concepts working together to ensure the minimal invocation of the punishments have been negatively impacted by fundamentalist interpretations resulting in the restrictive approach to punitive matters often being overlooked. This impact includes: vastly broadening the narrow construction of the law; disregarding high evidentiary safeguards; sidelining the emphasis on repentance; and, cessation of the doctrine of *shubha* or doubt.

In looking to the criticism that is the broadening of narrow constructions of the law, the expansion and distortion of the *hudud* not only counters the claim of their fixed nature but illuminates the extent to which *hudud* crimes have been both expanded far beyond the scope of their original narrow *Qur'anic* construction, as is the case with *zina*, and allocated harsher punishment, as is the case with the death penalty being imposed for *riddah*.¹⁶² This leads to their application in circumstances that were never envisaged by the Prophet, and the infliction of punishments that were never articulated in the *Qur'an* or by the *Sunnah* of the Prophet. If *hudud* punishments are to be more widely and incorrectly applied, evidentiary safeguards become a critical focus. All *hudud* crimes require the evidence of at least two witnesses, four in the case of *zina*¹⁶³ where witnesses must be male, sane, of legal age and have never engaged in sinful behaviour,¹⁶⁴ and, there is a strong focus on confession evidence. Confessions, if either not forthcoming or retracted at any time up to the moment of punishment will prevent the completion of the punishment unless other evidence is available to alternatively prove the crime.¹⁶⁵ Additionally, circumstantial evidence is not generally permitted.¹⁶⁶ These evidentiary

¹⁶² See Chapter Three for the specific impact of *fiqh* on these crimes.

¹⁶³ M. Cherif Bassiouni, *The Shari'ah and Islamic Criminal Justice in Time of War and Peace* (Cambridge University Press 2014) 135.

¹⁶⁴ Matthew Lippman, 'Islamic Criminal Law and Procedure: Religious Fundamentalism versus Modern Law'. (1989) 12(1) *Boston College International & Comparative Law Review* 52-53.

¹⁶⁵ Cliff Roberson, Dilip K. Das, *An Introduction to Comparative Legal Models of Criminal Justice* (CRC Press 2008) 153.

¹⁶⁶ Ruud Peters, Rudolph Peters and Maarten Barends *Islamic Criminal Law in Nigeria* (Spectrum 2003) 4.

safeguards in states where fundamentalist interpretation dominates have not been altogether adhered to and sometimes discarded.¹⁶⁷

Regarding repentance, most *hudud* prescribe punishment for the afterlife and focus on repentance and reform in this life. The fear of God as an omniscient, omnipotent observer that will pass judgement for an afterlife where punishments would far outweigh those meted out on earth was the stronger focus throughout the *Qur'an* where the earthly focus was grounded in repentance and reform. Recalling Chapter One, of the 6,236 verses of the *Qur'an*, only thirty relate to crime and punishment. Punishments in the afterlife and provision for repentance can be seen in the verses that prescribe the offences. For *zina* this can be seen in verse 25: 68-70 which states:

*'And those who do not invoke another god along with God, nor kill the self that God has prohibited except in the pursuit of justice, nor commit fornication. Whoever does will meet the penalty for vice: doubled will be the torment for him on the Day of Resurrection, and he will eternally abide therein degraded— except for those who repent, believe and do righteous deeds...'*¹⁶⁸

For *qadhf* repentance and forgiveness is set out at 24:4-5, 23-25, *sariqah* at 5:38-39, *hirabah* at 5:33-34 and *riddah* at 9:73 and 88:25-26. Although repentance is not detailed within those verses, *riddah*'s affiliation with *baghi* allows it to access repentance for transgressors at 49:9. The fact that repentance and punishment in the afterlife for *shurb al-khamr* are not distinctly set out in the *Qur'an* bolsters its questionable *hudud* nature whilst *baghi* at 9:9 does not directly reference punishment in the afterlife but is grounded in repentance and reconciliation. Of all of the *hudud*, those that entirely originate in the *Qur'an* make clear provisions in this regard. This consistent feature in the penal philosophy of the *Qur'an* has not been reflected in the *fiqh* texts and whilst the Hanafi

¹⁶⁷ Elizabeth Peiffer, 'The Death Penalty in Traditional Islamic Law as Interpreted in Saudi Arabia and Nigeria' (2005) 11(3) William and Mary Journal of Race, Gender, and Social Justice 537-539. Kamali (n58) 221 citing Muhammad Abu Zahrah, *Al-Jarimah Wa'l-Uqubahfi'l-Fiqhal-Islami:al-Uqubah*, (Dar alFikr al-'Arabi) 210-218. Forte (n67) 27-68.

¹⁶⁸ Holy Qur'an, Surah al-Furqan 25:68-70.

and Maliki schools reject the assertion that repentance can suspend the *hudud*, the Shafi'i and Hanbali schools agree that it is possible, given certain circumstances.¹⁶⁹

Evidence to support punishment being reserved for recidivists also plays a role in the strength of the *Qur'anic* paradigm of repentance. It is reported that a young offender presented to the Caliph Umar for amputation for theft and upon his mother's pleading Umar responded '*Allah is too merciful to reveal the nakedness of his servant for his first failure*'.¹⁷⁰ It has been observed however, that regardless of the extensive *Qur'anic* provisions for repentance and reform, that *fiqh* texts have at worst excluded these and at best reduced them to mechanical formalities that can hardly be said to reflect the original teachings of the *Qur'an*. Accordingly, with fundamentalist interpretation relying on select *fiqh* texts for validity, denying the opportunity to utilise the provisions for repentance and reform could be classed as tantamount to overruling the divine revelations of the *Qur'an*.¹⁷¹

The doctrine of *shubha*, or doubt is another safeguard employed to prevent excessive resort to *hudud* punishments and is recorded in a reportedly correct *hadith*.¹⁷² Whilst the four Sunni *madhahib* agree in principle that a suspect cannot be sentenced in cases of doubt, in practice this is rarely observed and the schools differ from crime to crime in their application of the doctrine.¹⁷³ Considering this, the presumption of innocence is placed in a precarious position with fundamentalist resort to legalistic *fiqhi* rules given the *hudud* crimes are considered the most serious category of crimes in Islamic Law.

The use of *fiqh* techniques such as that of abrogation further demoted the *Qur'an* as a divine authority. Between one and five hundred texts were modified or deleted by reason of a later revelation at various times by various *fiqh* scholars reflecting the worldly interests of the exegete and the social and political milieu.¹⁷⁴ This selective retention of

¹⁶⁹ Unknown Author, Human Rights and Islamic Law – Punishments and Death Penalties, Unidentified Source.

¹⁷⁰ Kamali (n58) 216.

¹⁷¹ Ibid.

¹⁷² Sunnah, al Tirmidhi Hadith No. 1424.

¹⁷³ Gabriel (n90) 98-99, 103.

¹⁷⁴ Armstrong (n21) 390 citing Jamal al-Banna, *Al-Awda ila l'qur'an (Return to the Qur'an)* (Cairo 1984).

Qur'anic verses only served to dilute religious pluralism¹⁷⁵ whereas the *Qur'an* had clearly advocated it:

*'And we have revealed to you the book in truth, confirming that which preceded it of the Scripture and as a criterion over it. So judge between them by what Allah has revealed and do not follow their inclinations away from what has come to you of the truth. To each of you we prescribed a law and a method, ...so race to all that is good. To Allah is your return all together...'*¹⁷⁶

Moreover, the fundamentalist literal reliance on specific *ahadith* contributed to by abrogation as a result of various political agendas works to remove the potency of *Qur'anic* themes. Removing verses because of their disparate or disconnected nature contravenes the thematic characteristic of divine revelation. Regardless of the temporal disconnect or disparity in Prophetic application, all of the *Qur'anic* verses are required for a holistic approach to a moral life and decision making in various circumstances. Each verse was significant and provided more material for personal reflection that would grow more profound over time. The *Qur'an*, according to the modernist approach, intended to build awareness in as broad a scope possible. This view contends it did not intend for only its latest revelation regarding a certain matter to be regarded as a final position that was reached that overruled all that came before it - it did not intend to impart metaphysical certainty.¹⁷⁷

The changed understanding of *hudud*, their distortion in *fiqhi* texts and the removal of *hudud* safeguards combined, result in the fundamentalist focus on literalist wording of the *hudud* contravening the Islamic maxim universal across all schools and sects that the law must be flexible to avoid injustice.¹⁷⁸ The *Qur'anic* verse '*God intends every facility for you*' is invoked to support this maxim.¹⁷⁹ With this sense of justice mandated by the *Qur'an*, criminal regimes must strive to do justice (*adl*) and avoid injustice (*zulm*) and the

¹⁷⁵ Abdulaziz Sachedina, *The Islamic Roots of Democratic Pluralism* (Oxford University Press 2001) 26.

¹⁷⁶ Holy Qur'an, Surah al-Ma'idah 5:48.

¹⁷⁷ Armstrong (n21) 240.

¹⁷⁸ Jamal J. Nasir, *The Islamic Law of Personal Status* (Kluwer Law International 2002) 31.

¹⁷⁹ Holy Quran, Surah al-Bakarah 2:185.

legal rules must be tools for achieving this.¹⁸⁰ If fundamentalist interpretations of the *hudud* are literal and rigid, *adl* cannot be done. Criminality remains as serious a threat to the fabric of modern society as it was to society in seventh century Arabia but new opportunities for crimes and varieties of criminal conduct suggest there are now other issues that are just as much of a threat. In this vein, limiting the most serious crimes to those of the *hudud*, in the manner in which they are applied, does not serve the purpose of justice that they initially set out to achieve¹⁸¹ and their application in an alien context only serves to frustrate the Islamic vision of justice and fair play,¹⁸² contravening the set goals of Islam.

To summarise the impact of fundamentalism on the criminal law the following can be said. For fundamentalists, the route to attainment of the perfect *ummah* lies in the imposition of the exact rules that applied at the time of the Prophet and the early centuries of Islam as these rules revealed by God worked to order the perfect society. However, their reliance on both these rules and on *fiqh* texts to support them has resulted in a changed contextual approach to the interpretation of Islam and Islamic Criminal Law. The *fiqh* texts of the medieval *ulema* thwarted the natural development of *Qur'anic* thought to the extent that it is claimed they: a) created a new understanding of *hudud* that moved away from its conception of 'limits of moral behaviour' to a conception of 'purely punitive sanctions'; b) altered their nature to that which they understood as both 'fixed' and 'infallible'; and, c) largely removed the *hudud* safeguards that effected the delivery of justice. By sidelining the role of the interpreter and relying on literalist *fiqh* texts, fundamentalist interpretations of the criminal law do not reflect the original benevolent spirit of Islam. Moreover, the imposition of these seventh century punishments, whilst once serving the *maqasid* well in the era within which they were imagined, do not do so now. The passage of time has resulted in these punishments being considered draconian, anachronistic, and out of touch with the externalities of twentieth century life within which brutality towards humanity is rejected by modern society.

4.3 Grounds for an Alternative Interpretive Approach

¹⁸⁰ Sardar Ali & Kaur Heer (n31) 178-179.

¹⁸¹ Kamali (n58) 225.

¹⁸² Sardar Ali & Kaur Heer (n31) 229. See also Gabriel (n88) 36.

In Islamic states where fundamentalist interpretations dominate (be that through the historical application of fundamentalist interpretation or newly reintroduced as a component of Islamisation processes embarked upon in retaliation against modernisation and western imposition) the fundamentalist ideology, in resorting to select *fiqh* texts relying on *hadith* that are potentially weak, has sharpened its focus on the *hudud* as a symbolic assertion of Islamic legitimacy. Due to the traditionalist Islamic orthodoxy that has developed in line with allegiance to the juristic scholars of the medieval period, the harsh penalties of the *hudud* are accepted as legitimate and any assertions to the contrary potentially run the risk of inviting accusations of blasphemy or apostasy. However, in their reintroduction, whilst their legitimacy is not contested within the Islamic world by many Muslims, their condition in the *fiqh* texts in terms of their substance, methods of application and evidentiary requirements has been distorted by this phenomenon of uncritical reverence. There has been little resort to the divine revelations of the *Qur'an* and its holistic approach to those prescriptions and proscriptions to be adhered to in order to lead a moral life and proceed peacefully to the promised utopia of the afterlife. This poses the problem that a fundamentalist interpretation that has removed the *hudud* from their seventh century context, misshapen the crimes and punishments, and, essentially and significantly removed their protective safeguards, cannot be effectively imposed on Islamic society of the twenty first century, despite fundamentalist assertions to the contrary that it is required for the ordering of a perfect Islamic society.

Recalling the impact of certain matters and events including the conservative nature of Islamic society historically and its focus on mythos, the death of the Prophet and the subsequent reversion to patriarchy, the establishment of various schools of thought with a certain prominence of traditionalist varieties, the traditionalist paradigm of most Islamic power elites, and the impact of the Western world, it is a largely natural progression that firstly, traditionalism or conservatism is considered Islamic orthodoxy and secondly, that given the impact of the generally conservativist paradigm of *fiqh* where great attention is focussed on extrapolating the *hudud*, that there is an acceptance of the *hudud* in Islamic traditionalist orthodoxy as permanent, immutable, non-negotiable and uncompromising - given that it is divinely created. However, in the post colonial Islamisation processes fundamentalist ideological discourses assuaged the fear of further western control and exploitation, and found favour in the masses for a re-Islamisation of society - largely due to the fact that the defence of Islam had become enmeshed in the popular Muslim

imagination.¹⁸³ It has been asserted that whilst most Muslims welcome Islamisation of state and society, that their understanding of what this entails is not homogenous. When questioned, they seek both Islam, and democracy, equality, freedom of religion and freedom from corruption.¹⁸⁴

What perhaps may not have been anticipated is the symbolism that a reintroduction of the ancient criminal codes would merit.¹⁸⁵ Despite assuaging the fears of the oppressed, the reintroduction of these codes were not motivated by an honest religious spirit or a desire to live by the *Qur'an* or the *Sunnah*, rather, they were introduced to gain legitimacy and authority in the public domain.¹⁸⁶ However, with the passing of centuries, the conditions of society into which fundamentalists attempt to reintroduce these rules has changed far beyond anything that could have been imagined either in the Prophetic Period or in the medieval period when the *hudud* were legalistically expanded beyond their original intended purpose. Their medieval *fiqh* rules combined with the fundamentalist approach of literalism and selectiveness in their interpretation quite simply do not work in such a changed environment, given the extent to which the course of history has altered and the changes that have taken place as a result of urbanisation, communication and modern methods of governance¹⁸⁷ - not least the establishment of dedicated departments of justice providing police forces, methods of investigation and facilities for incarceration of criminals.

Thus, harsh, publicly visible punishments no longer have the purpose to fulfil that they did in seventh century Arabia despite the fundamentalist assertion that they are what is required to truly Islamise society. Their rationale has thoroughly eroded and scholars have commented that whilst they wish to see society re-Islamised, this should not be in the form of amputating the hand of a petty thief whilst embezzlement of huge sums from public treasuries goes unchecked.¹⁸⁸ *Zina* they say, is not meant for a society where economic conditions and social customs make marriage difficult and *sariqah* is not

¹⁸³ Ayoob & Lussier (n25) 6.

¹⁸⁴ Sardar Ali & Kaur Heer (n31) 179. See also Amaney Jamal and Mark Tessler, "The Democracy Barometers: Attitudes in the Arab World", (2008) 19 The Journal of Democracy, 2008 97–110; and Mark Tessler, Amaney Jamal and Michael Robbins, "New Findings on Arabs and Democracy", (2012) 23(4) Journal of Democracy 89–103.

¹⁸⁵ Peters (n29) 1.

¹⁸⁶ Sardar Ali & Kaur Heer (n31) 182.

¹⁸⁷ Kamali (n58) 224.

¹⁸⁸ Yusuf al-Qaradawi, *Shari'ah al-Islam* (Dar al-Sawah, 1983) 35.

intended for an environment where the economic system leads to the enrichment of the few at the cost of crushing poverty of the many.¹⁸⁹ Rather, *sariqah* is intended for a just society that eliminates needs¹⁹⁰ and cannot operate where there is focus on a *hadd* like theft which is mentioned only once in the *Qur'an* and far less emphasis on the payment of *zakat* and the social support system.¹⁹¹ As such, the prevailing environment is unsuitable for the application of the *hudud*. To say that one can achieve justice in an alien environment is unrealistic and rather works to frustrate the Islamic vision of justice and fair play instead.¹⁹² The goals of Islam, that is, the nurturing of the righteous individual, the delivery of justice and the realisation of benefit, cannot be achieved in these circumstances.

How the religious texts have been interpreted by fundamentalists (though they have an avenue for a claim of legitimacy in Islamic legal hermeneutics) is therefore hugely problematic in modern society and is a raging battle within Islam as its norms continue to adjust, as well as a global issue in the realm of human rights when secularly squared up against IHR Law. The fact that a *Qur'anic* verse can be interpreted in two very different ways by two different schools of thought, as can be evidenced in the translations and interpretations of *ayat* 2:217 that either does, or does not, prescribe the death penalty for apostasy,¹⁹³ is illustrative of the difficulties that arise when relying on select *fiqh* texts as literal legalistic rules. Fundamentalists oppose reform and deny there can ever be a neo-*ijtihad*, yet decry blasphemy as a capital offence when there is no scriptural basis for it.¹⁹⁴ Despite this opposition, Islam in modern society cannot operate with a medieval penal system.¹⁹⁵ The ability to instil change however is made all the more complicated when many apocryphal *hadith* remain the legal mainstay of traditionalist Islamic orthodoxy.¹⁹⁶

¹⁸⁹ SAA Maududi, *The Islamic State and Constitution* (Islamic Publications 1983) 54, 55. See also Mohammad S. El-Awwa, *Punishment in Islamic Law: A Comparative Study* (American Trust Publications 1982) 136.

¹⁹⁰ M. Cherif Bassiouni, *The Islamic Criminal Justice System* (Oceana Publications 1982) 5.

¹⁹¹ Al-Qaradawi (n120) 162.

¹⁹² Kamali (n58) 229.

¹⁹³ Declan O'Sullivan, 'The Interpretation of the Qur'anic Text to Promote or Negate the Death Penalty for Apostates and Blasphemers' (2001) 3(2) *Journal of Qur'anic Studies* 63-93.

¹⁹⁴ Forte (n67) 66.

¹⁹⁵ Etim E. Okon, 'Hudud Punishments in Islamic Criminal Law' (2014) 10(14) *European Scientific Law* 227.

¹⁹⁶ Joseph Schacht, *Introduction to Islamic Law* (Clarendon Press 1984) 97-101.

It begs the question of whether a clear text prescribing punishment can be abrogated in the name of *maqasid al-Shari'a* and *maslaha mursala*.¹⁹⁷

In order to find a basis for entertaining this question it is important to call two matters to attention. Firstly, it should be noted that a punishment seen as cruel and severe by one society may in fact be welcomed by another society; and, how the goals of punishment should be balanced will indeed vary from one society to another.¹⁹⁸ By way of analogy it is worth noting that at Common Law, until the introduction of police forces there was a standard practice that nearly all felonies, in theory, carried the death penalty.¹⁹⁹ Indeed it was not until the late eighteenth and early nineteenth century that public physical punishments including whipping and branding began to decline.²⁰⁰ So, whilst the *hudud* in their fundamentalist understanding may be abhorrent to a non-religious public morality, it bodes well to recall that it was only in recent centuries that these public physical punishments declined in usage. Whilst they may now not be welcomed, they are part of relatively recent western history. Another analogy with the Common Law as a legal system is also relevant - *Shari'a* can be viewed as no more a code of law than the Common Law. Rather, like Common Law, it is the collection of particular answers that jurists gave at particular times to particular situations that has taken on the modern conceptualisation of a code of positive law. The *Shari'a* is actually more accurately described as a method of reasoning – *ijtihad*, as is the Common Law, where certain established principles are applied to a range of circumstances to achieve a just outcome in different cases over time and it is not known for its collection of Common Law rules that applied at any one particular time.²⁰¹

Secondly, although quite a controversial proposition, *hudud* law can, on the above critique, be interpreted as contextual and malleable. In claiming this we recall that the *fiqhi* definition of *hudud* does not reflect the use of the term in the *Qur'an* as moral limits that have very little to do with any penal laws. We also recall that there are great differences between the *madhahib* to the extent that none of the schools adhere precisely to the *Qur'anic* provisions and that some of the *fiqhi* texts go so far as to contradict these

¹⁹⁷ Unknown Author (n101).

¹⁹⁸ Ibid.

¹⁹⁹ Andrew Novak, *The Global Decline of the Mandatory Death Penalty: Constitutional Jurisprudence and Legislative Reform in Asia Africa and the Caribbean* (Routledge 2016) 1-7.

²⁰⁰ Ibid. 6.

²⁰¹ Forte (n67) 66.

provisions.²⁰² Therefore, whilst the *hudud* by origin may be divine revelations prescribing limits, some of which may have legal implications, they can also be interpreted as not actually being infallible. These limits were never specifically listed in the *Qur'an* but rather spoke to a broad sense of moral righteousness. Further, the Prophet is known to have provided options for punishment suggesting some *hudud* offences were actually treated as *ta'zir* in the use of the Prophet's discretion and that on occasion these punishments were self imposed with no suggestion of the involvement of authorities. Additionally, the focus on repentance in this life and punishment reserved for the afterlife is a strong *Qur'anic* theme. Moreover, where the application of the *hudud* results in more harm than good, the *hudud* are known to have been suspended. Both the Prophet and the second caliph Umar are known to have suspended the *hudud*. The Prophet suspended *sariqah* during wartime and Umar suspended it during famine, as in both cases, the economic and social conditions were not such as to permit the existence of the true ideal Islamic society, therefore, not such as to permit the application of penalties.²⁰³

On the basis of these conclusions the fixed, unavoidable, non-negotiable and infallible nature of the *hudud* can be, though a controversial proposition, refuted. Both of these conclusions, that is, the textual and malleable nature of the *hudud* and an understanding of the *Shari'a* as *ijtihad*, serve to answer the question of whether clearly prescribed texts can be abrogated in the name of the *maqasid* and *maslaha*. This is the aim of modern Islamic reformists who wish to reinterpret Islam for the twenty first century.

5. Modernist Interpretation of Islamic Law

The Modernist approach to the interpretation of Islamic Law maintains a relationship with the approach of the Prophet at the time the *Qur'an* was revealed – that is – a connection with his spirit of moral reform, adaptability and progress. Considering the condition of tribal Arabia in *Jahiliyyah*²⁰⁴ when women were treated no better than animals, men had up to one hundred wives, justice was delivered via the sword and society existed in an utterly lawless fashion, Modernists recall the extraordinarily liberalising effect of the *Qur'an* with its prominent focus on dignity and the introduction of rights. The *Qur'an*

²⁰² Gabriel (n90) 33.

²⁰³ Abdelwahab Bouhdiba, Mohammad Mar'uf Dawalibi, *The Individual and Society in Islam* (UNESCO 1998) 309.

²⁰⁴ See Chapter Two for a description of the conditions of *Jahiliyyah*.

could be described as being as revolutionary as the Declaration of the Rights of Man with its progressive views on, among other matters, the treatment of women, marriage, education and forgiveness.²⁰⁵ Mohammad was a progressive Prophet who strove to address the skewed moral compass of tribal society. He did this by formulating community duties through the divine revelations that would provide guidance in living according to the moral bases now newly introduced by God into a patriarchal society²⁰⁶ - the '*maqasid al' sharia*'. Islam had a spirit of progression based on then current issues of Mecca and Medina in the seventh century, and whilst its communicative act remains deeply connected to the specific context in which it first occurred,²⁰⁷ many scholars believe it was never intended to freeze history at the time of God's revelations and that God never intended to lock the epistemology of the seventh century into the immutable text of the *Qur'an* and hold Muslims hostage to this epistemological framework for all ages to come.²⁰⁸ What was intended, they believe, was for answers to be found through its guidelines for issues that required resolution, no matter the age or era.²⁰⁹

Modernists claim the disconnected and disparate verses of the *Qur'an* were more inclined towards the repetition of themes where a verse would add a layer upon others that would provide more material for personal reflection and understanding that would grow more profound over time. According to this interpretation, Islam did not attempt to impart

²⁰⁵ The *Qur'an* states that man and woman were born equal unlike in Christianity where at 4:1 it declares: "O mankind! reverence your Guardian-Lord, who created you from a single person, created, of like nature, His mate, and from them twain scattered (like seeds) countless men and women;- reverence Allah, through whom ye demand your mutual (rights), and (reverence) the wombs (That bore you): for Allah ever watches over you". Regarding marriage the Prophet said that girls must first be consulted: Bukhari 7:67:42: "The widow shall not be married until she is consulted, and the virgin shall not be married until her consent is obtained". The original intended purpose of a wali was to protect girls from making ill informed decisions and regarding polygamy the *Qur'an* reduces the number of permitted wives to four but only if they can be taken care of - *Qur'an* 4:3 "And if you fear that you will not deal justly with the orphan girls, then marry those that please you of [other] women, two or three or four. But if you fear that you will not be just, then [marry only] one or those your right hand possesses". The Prophet also said that education was for everyone: Al Tidmidhi Hadith 218. 'The seeking of 'ilm' (knowledge) is obligatory for every Muslim'. On revenge the *Qur'an* advises to overcome a bad deed with a good one where at 41:31 it states "A good action and a bad action are not the same. Repel the bad with something better and, if there is enmity between you and someone else, he will be like a bosom friend" and on inheritance the *Qur'an* claims a woman is entitled to half the share of a man where she had previously been entitled to nothing where at 4:1 it states 'Allah instructs you concerning your children: for the male, what is equal to the share of two females. But if there are [only] daughters, two or more, for them is two thirds of one's estate. And if there is only one, for her is half'.

²⁰⁶ We recall these are the protection of religion, life, intellect, family and property.

²⁰⁷ Abdullah Saeed, *Reading the Qur'an in the Twenty First Century: A Contextualist Approach* (Routledge 2014) 83.

²⁰⁸ Adis Duderija, *The Imperatives of Progressive Islam* (Taylor & Francis 2017) 31.

²⁰⁹ Santosh Saha and Thomas Carr, *Islamic, Hindu and Christian Fundamentalism Compared: Public Policy in Global Perspective* (E. Mellen Press 2003) 301.

metaphysical certainty but to build awareness.²¹⁰ The progressive view even claims the *Qur'an* had the ability to be the single most effective women's rights document in recorded history had it not been for its temporal context and the lack of a successor to continue the growth of Islam in its intended progressive spirit. Those inclined towards a reformist or modernist approach to interpreting Islam believe that the gates of *ijtihad* never closed on the basis of the closure being a human scholarly endeavour as opposed to having any grounding in the *Qur'an* or the *Sunnah*.²¹¹ They believe that the *hudud* can be recontextualised in the twenty first century and that this can synchronise Islamic Criminal Law with IHR Law, potentially eliminating the claim of incompatibility. Indeed an increasing number of modernists/reformists/rationalists have engaged with the neo-*ijtihad* paradigm in an effort to strengthen the connection with IHR from within Islam. Saeed notes the expressions of the major reformists²¹² and summarises their engagement thus: Rahman claims the *Qur'an* must be understood as the divine response, through the Prophet's mind, to the moral-social situation of the Prophet's Arabia;²¹³ An Na'im considers the way forward in terms of IHR to be alternative Islamisation through the reformation of the *Shari'a* rather than abandoning Islam to the fundamentalists;²¹⁴ El Fadl claims muslims incorporated legal and cultural practices from various external states and Roman provinces in the knowledge that many were not consistent with Islam, and, many were not contrary to it – nevertheless they became part of the rules that were applied in Muslim society;²¹⁵ Ali submits the importance of recognising that Islamic legal rules are a product of human (therefore fallible) interpretive processes which renders them susceptible to reform;²¹⁶ Barlas argues the *Qur'an* should not be read in a piecemeal form,²¹⁷ whilst Wadud agrees that it must be read in a contextualist and holistic manner to understand its ethos and spirit.²¹⁸ These modernists have contributed to the neo-*ijtihad* that sources doctrines and concepts within Islam in an attempt to recontextualise Islamic Criminal Law for twenty first century living.

²¹⁰ Armstrong (n21) 240.

²¹¹ Jordan (n39) 59, 68.

²¹² Saeed, (n74) 181-186.

²¹³ Rahman, (n36) 5.

²¹⁴ Abdullahi An Na'im, 'The Rights of Women and International Law in the Muslim Context' (1987/1988) 9 Whittier Law Review 500.

²¹⁵ Khaled Abou El Fadl. *Reasoning with God* (Rowman & Littlefield 2014) xxxiii.

²¹⁶ Kecia Ali, *Marriage and Slavery in Early Islam* (Harvard University Press 2010) 3.

²¹⁷ Asma Barlas, 'Believing Women' in *Islam: Unreading Patriarchal Interpretations of the Qur'an* (University of Texas Press 2002) 15.

²¹⁸ Amina Wadud, *Qur'an and Woman: Rereading the Sacred Text From a Woman's Perspective* (Oxford University Press 1999) 3.

5.1 Recontextualising the *Hudud* for the Twenty First Century

Notwithstanding the self legitimised interpretation of the fundamentalist position, the extent to which this method relies on *fiqh* texts can be construed as the continuous movement of the law away from its original intended objective and purpose. It must then be asked that if this approach leads to claims of incompatibility, then what might the criminal law look like if the alternative, modernist approach was applied that relies on a close relationship with the *Qur'an* and the *maqasid al-shari'a*. Those who believe that the gates of *ijtihad* never closed on the basis of the closure being a human scholarly endeavour as opposed to having any grounding in the *Qur'an* or the *Sunnah*²¹⁹ are attempting to awaken Islam from its debilitating slumber that largely rendered it bankrupt of any response to modernity²²⁰ and use the *maqasid* approach to achieve an understanding of the law that allies with modern society.

There are a number of theories proposed by reformists but before looking to each, the question of how the criminal law might change by invoking these theories should be posed. So, what are the major features of the criminal law as it stands? The first is its purpose in contributing towards the protection of the *maqasid al-sharia*: the criminal law must, using the guidance of *maslaha*, serve to protect religion, life, intellect, progeny and property. The second is the list of crimes the *Shari'a* prescribes in order to protect those values: *sariqah*, *zina*, *qadhaf*, *hirabah*, *baghi*, *riddah* and *shurb al-khamr*. The third feature is the distinct punishments that are prescribed in order to effect a positive change in the individual and/or a general deterrence in society to prevent against criminality: lashes, amputation, stoning, crucifixion and execution. If reformist theories were applied to the criminal law, more specifically the *hudud*, what would happen to the values that require protection? Would any of the *hudud* crimes have to be removed from the list? If it is a case that the punishments are the issue then how would these change, or, what could reformist theories do to eliminate them as an issue?

The general reformist theme is that a Muslim is not conditioned by strict adherence to the principles of the *fiqhi* scholars from whence came the literalist interpretations of the

²¹⁹ Ibid. 68.

²²⁰ Onder Bakircioglu 'The Principle Sources of Islamic Law' in Tallyn Gray (ed.) *Islam and International Criminal Law and Justice* (Torkel Opsahl Academic Epublisher 2018) 41.

fundamentalists, but, that each generation of Muslims must be entitled to resolve their problems through critical deliberation. They wish to reverse the turn to uncritical reverence of the *fiqh* texts and, as noted regarding their view of *Shari'a* as a form of *ijtihad* rather than a set legal code, reengage with *ijtihad* in an effort to once more interpret the revelations to best serve the five values of the *maqasid al-Sharia*. In order to achieve this, the modernist focus is on reducing the reverence of the texts and promoting the role of the interpreter. It has been suggested that:

Texts that are unable to become liberated from their authors or unable to challenge the reader with levels of subtlety or tease with nuances of meaning have a nasty... habit of becoming predictable, dull and closed. Texts that remain open stay alive, relevant and vital'.²²¹

In this sense the emphasis is on the Prophet in his role as interpreter and we recall Chapter One sought to emphasise all of the subjective factors the individual interpreter brings to the texts when engaging in hermeneutical exploration and interpretation.²²² The *Qur'an*, though divinely revealed, was nonetheless revealed through the intermediary of Mohammad who lived the revelations by what he understood them to mean, thus, the *Qur'an* was intimately connected with the Prophet's deeper personality,²²³ his personal history, his state of mind, his problems and his general environment²²⁴ - a range of subjective elements. Chapter Five then drew attention to the fact that God granted humanity the status of his vicegerent on earth by virtue of verses 2:30 to 2:34. In this respect, God directed that the natural and written wisdom, that is, the circumstances of man's environment and the divine texts, inform human wisdom in the execution of God's moral law on earth. This combination of natural, written and human wisdom is referred to as the sacred reality and as God did not specify a particular class of men, these verses indicate God's preference for humanity in general to be tasked with implementing his authority on earth and thus determine the sacred reality where any given number of factors influence the natural and human wisdom.²²⁵ In applying this *Qur'anic* direction, just as the Prophet determined what was appropriate in the seventh century, the *Qur'an*

²²¹ El-Fadl (n69) 97.

²²² See 'Islamic Legal Hermeneutics' in Chapter One.

²²³ Fazlur Rahman, *Major Themes of the Qur'an* (University of Chicago Press 2009) 95.

²²⁴ Armstrong (n21) 397.

²²⁵ Riadh El-Droubie, 'Authority and Freedom in Islam' in *Freedom of Authority in Religions and Religious Education* Brian Gates ed. (Bloomsbury 2016) 44.

directs that humankind may determine what is appropriate where changed circumstances arise.

The contextualisation approach directly applies here and has potential for great benefit where aspects of the criminal law are claimed to conflict with IHR. Scholars can consider the original purpose of the text and consider how it might be applied in today's context. This approach involves not just reading a predetermined meaning into the text, but looking at the text linguistically in conjunction with two additional sets of factors; firstly, the political, social, economic, intellectual and religious factors, and secondly, the values, norms and institutions that existed in that society. Considering all of these factors and the concerns and needs of society at that time, will allow the interpreter to discover how all of these factors together had a bearing on the issue under investigation.²²⁶ The doctrine of rationale and wisdom (*hikma*) is central to this approach and provides that it is the *hikma* that is to be considered when interpreting the text.²²⁷ This approach allows a comparative analysis with the present context of each mentioned factor and the whole process permits a relevant interpretation of the text without sacrificing its ultimate objective and fundamental message, that is, the *hikma* behind the ruling.

If attention then is granted to this contextual approach, and we return to the fact that Mohammad was primarily a moral reformer, the authentic intention of his message can be determined from the particular context of revelation and restated by modernists in a way that speaks directly to the conditions and challenges of modernity.²²⁸ In formulating a method of reengagement with *ijtihad* reformists promote a return to the moral guidance of the Meccan revelations.²²⁹ It has been argued that whilst Islam did evolve to a less tolerant and more authoritarian Islam this was only for a short time during the Medinan phase in the context of protecting a fledgling state and that there is nothing un-Islamic about reverting to the original emphasis on tolerance and freedom.²³⁰ Indeed, using this process avoids the imposition of foreign legal concepts as Islam rightly claims ownership of all of the rights and duties necessary for the protection of society and the individual within. Chapter Five distinctly observed the values of Islam deeply embedded in its

²²⁶ Saeed (n74) 31

²²⁷ Ibid, 31-32.

²²⁸ Rahman (n36) 6-7.

²²⁹ Okon (n127) 227.

²³⁰ Alan Kick, 'The Right to Thought, Conscience and Belief in Islamic Law' Thesis (Greenleaf University – Trinity Law School 2003) 103.

framework that work to afford Muslims the opportunity to live a moral life according to his or her interpretation of how best to observe the *maqasid*.

With the *Qur'anic* licence to interpret the law in mind, this first approach of the modernists - contextualisation - would serve to allow the clear cut texts prescribing punishment that fundamentalists rely upon to be abrogated in the name of the *maqasid*. The non-eternal (as they are man-made) *fiqh* rulings could be understood against the context of their political and social circumstances that provided the rationale for their introduction, whilst timeless principles such as *maslaha* that help determine alignment with the *maqasid* can be utilised to develop new modes of thinking.²³¹

A second and complementary approach returns directly to the manner in which the *maqasid* are formulated. Recalling from Chapter One that rulings in Islamic Law promoting the five objectives, or *maqasid*, are further subdivided into necessities, needs and refinements, the doctrines of necessity (*darura*) and need (*haja*) are both central to legitimising reformist interpretation. *Darura* allows Muslims to depart from an established ruling in exceptional circumstances provided the result does not go against the fundamental objective of the *Shari'a* and applies where protection of one of the *maqasid* is gravely at stake for an individual.²³² *Haja*, a related principle, relates to a lesser degree of hardship for the individual and applies when a legal ruling leads to an individual encountering significant hardship, though it may not, as with *darura*, be a matter of life or death. Significantly, when a *haja* affects a whole society (as the issue of punishment does presently for the compatibility issue between IHR and Islamic Criminal Law), the need becomes a universal need, fundamentally, a necessity.²³³

On all of the above reformist reasoning, many of the *hudud* that were established in the Medinan period can be repealed – *baghi*, *hirabah*, *shurb al-khamr* and *ridda*.²³⁴ *Zina*, *qadhaf* and *sariqah* of Meccan origin can then be exposed to an alternative theory that

²³¹ Bakircioglu (n152) 42, 43.

²³² Saeed (n74) 30.

²³³ European Council for Fatwa and Research's Resolution on 'Permissibility of Conventional Mortgage under Necessity'. Fourth Ordinary Session [27-31 October, 1999] Resolution 2/4. Available at <http://eshaykh.com/halal-haram/permissibility-of-conventional-mortgage-under-necessity> (accessed 14 April 2022).

²³⁴ Holy Qur'an, Surah al-Baqarah 2:256 'There shall be no compulsion in the religion. The right course has become distinct from the wrong. So whoever disbelieves in taghut and believes in Allah has grasped the most trustworthy handhold with no break in it. And Allah is all hearing and all knowing'.

combines the extension of the doctrine of *shubha*, or doubt, and the Prophetic precedent of suspension. With the doctrine of *shubha* providing that any presence of doubt prevents the application of the *hudud*, it is therefore an extension of the same logic that the conditions of modern society cast great doubt over the benefits of the *hudud* in terms of the harm that it can cause, and, that suspension according to these inappropriate conditions for the operation of a just Islamic society is a just expectation.²³⁵ A further reformist theory suggests that even to engage in a simple exercise of measuring the juristic *fiqhi* concept of the *hudud* as mandatory purely punitive measures against the *Qur'anic* concept of reformation and reform would have to result in a departure from fixed provisions of universal application²³⁶ whilst yet another argues that Islam's deterrent character in terms of instilling the fear of God in anticipation of the last day is enough to ensure a Muslim leads a moral life.

In considering these theories, a return to the main features of the criminal law can help determine how it may look after the application of the modernist approach to interpretation. Looking to the first feature, that is, the values that require protection, it can be seen that there is nothing wrong here. Religion, life, progeny, intellect and property are values protected in most societies and so there is no reason to reinterpret this feature of the *hudud* crimes and the values to be protected remain the same – indeed, these values are specifically protected in IHR. Looking to the second feature, that is, the list of crimes that substantiate the *hudud*; *baghi*, *hirabah*, *shurb al-khamr* and *riddah* can be grouped as those crimes that were revealed during the Medinan period in the context of protecting itself as a fledgling state. Aside from the question marks that already surround *shurb* and *riddah* as *hudud* - not least regarding *riddah* that there should be no compulsion in religion - Islam, in the twenty first century, can no longer be considered fledgling and in need of the prohibitions on these behaviours that were once necessary to ensure its survival. Thus, the changed context of the twenty first century leaves only those *hudud* crimes that were revealed during the Meccan phase of Islam: *sariqah*, *zina* and *qadhaf*. In the twenty first century, these crimes of theft, adultery and defamation are crimes that form part of the criminal law in many states and legal systems across the world and so no issue can be found with their remaining a part of Islamic Criminal Law as the criminal laws of the west similarly punish them.

²³⁵ Kamali (n58) 231.

²³⁶ Ibid. 224.

With three crimes remaining, this leaves the shape of the third feature of the *hudud*, the distinct punishments, to be determined. Once more, the changed context of the twenty first century gives rise to how these punishments may be reinterpreted and in this regard we recall the harsh landscape of seventh century Arabia when those punishments were revealed. They were, in their original incarnation, designed to deter engagement with the worst problems of *Jahiliyyah* when there was limited means of communication and a complete absence of a police force and prisons. Whilst there are *hudud* crimes that remain relevant in the twenty first century, the changed context provides incomparable means of communicating clear messages to the public and developed forms of governance, not least established departments of justice incorporating police forces, advanced methods of investigation and facilities for incarceration of criminals. Thus, harsh, publicly visible punishments no longer have the same purpose to fulfil. Using the modernist approaches to interpreting the *hudud*, the twenty first century can provide options for punishments that have the ability to protect the *maqasid* but that are suited to modern society.

The *maqasid* operate to nurture, reform and cultivate the individual as their primary aim and in the changed context of the twenty first century they leave little by way of encouragement towards the harsh punishments of seventh century Arabia as any element of enforcing the spirit of the *Qur'an* in line with contemporary realities.²³⁷ The application of the alternative modernist approach to interpretation of the *hudud* thus removes the harsh punishments revived by fundamentalists, who are a minority grouping in Islam but whose interpretations have substantiated the divergence that has led to claims of incompatibility with IHR. Reengaging with *ijtihad* using the *maqasid* to guide chosen rulings in the twenty first century according to the licence granted to humankind in the verses of the *Qur'an* to do so, changes the shape of the *hudud* whilst retaining the values they protect, and in doing so, removes the asserted incompatibility between the *hudud* of the Islamic Criminal Law and IHRL.

6. Judaic Law in Israel as a Recontextualising Precedent

²³⁷ Unknown Author (n101).

Judaic Law co-existed contemporaneously with Islam and is certainly, also, a creature of its time. To this end, Judaic Law will be introduced as a comparable scheme of traditional religious law. This comparison will give perspective on the norms that were present at the time in terms of societal threats, categories of crimes and punishment types. Once more, context is crucial. The prevailing conditions of society saw most legal systems in these early centuries having brutal systems of punishment – Islam was not alone in this aspect of its criminal laws. Corporal punishment was just as normal in Jewish society as there was an absence of prisons and little capacity to impose fines, whilst it was also considered necessary as a deterrent in the absence of police forces. The modern secular state of Israel has now reformulated its ancient laws and this Jewish approach is hugely relevant, because from a 21st century standpoint, the *principles* behind the laws remain intact, but, through a contextualising process, their application has been conditioned to fit the moral demands of contemporary society. A comparison of the schemes will now be discussed before addressing the method of reformulation as a potential precedent for the *Shari'a*.

6.1 Judaic Law as Comparable with Islamic Law

Judaism, being the first of the three monotheistic religions, shares its primary text with both Christianity and Islam.²³⁸ This text is comprised of the five books revealed to Moses namely Genesis, Exodus, Numbers, Leviticus and Deuteronomy - collectively called the written *Torah*. Known as the ‘instructions’, these five books, together with the ‘prophesies’ and ‘writings’, constitute the whole of the Hebrew Bible - the *Tanakh*. Comparable to the way in which the *Sunnah* clarifies and elaborates the contents of the *Qur'an*, the oral tradition does this for the *Torah* on the reasoning that any knowledge gaps are there due to the assumption that the information to fill those gaps is conveyed through an alternative medium - the oral tradition. These oral traditions were eventually written down when there was a perceived danger of them being lost and forgotten much like the reasoning in Islam for the recording of the Prophet’s traditions. The written compilation of the oral traditions of Judaism known as the *Mishnah*²³⁹ were debated over

²³⁸ In Islam, people of the book, namely Christians and Jews, are known as *dhimmi* and the Prophet made regular references to Mosaic law and tradition in his *Sunnah*. In Christianity the five books of the written *Torah* are known as the Old Testament.

²³⁹ The *Mishnah* was compiled by Rabbi Judah ha-Nasi by the end of the 2nd century BCE.

a number of centuries before the commentaries were edited and compiled into two volumes together referred to as the *Talmud*.²⁴⁰

The *Talmud* therefore is comprised of two parts: the *Mishnah* (oral traditions) and the compilation of commentaries on said traditions referred to as the *Gemara*. Essentially, the *Talmud* interprets God's word as proclaimed in the Bible whilst also extending the scope of biblical teachings in accordance with the social and economic conditions that prevailed during the long period within which the works came into being.²⁴¹ Whilst in Islamic Law the jurisprudential techniques allow the principles of *Shari'a* to be adapted to changing society, in Judaism the *Torah* is continuously interpreted and a number of redactions have appeared throughout the centuries interpreting the original texts in light of changing times and situations. After comparatively analysing the criminal laws of Judaism against those of Islam, the modern secular state of Israel will be distinguished insofar as changing interpretations for times and situations are concerned. Israel has, within the last century, adapted Judaism to life in the twenty first century whilst adequately protecting its core values that were once protected by harsh corporal punishments.

6.2 Judaic Criminal Law

The sources of Judaic Criminal Law are the above divine texts, oral traditions and commentaries. These texts were heavily influenced by practices preceding them, namely the Hammurabi Code of the Babylonians²⁴² which had a small number of focuses regarding crime and punishment, principally '*Talio*' (amputation or mutilation of the body part that committed the offence) and capital punishment.²⁴³ The 'instructions' of the *Torah* follow the punishments of the Hammurabi Code and as the text is of divine authority, the crimes within are violations of God's will, deserving of the execution of the

²⁴⁰ The *Talmud* was compiled between 220 BCE and 470CE.

²⁴¹ Max May, 'Jewish Criminal Law and Legal Procedure' (1940) 31(4) *Journal of Criminal Law and Criminology* 438.

²⁴² The Hammurabi Code was written approximately 1750BCE.

²⁴³ Lewis Lyons, *The History of Punishment* (Amber Books 2003) 21, 22. Capital punishment in the Hammurabi Code was awarded for numerous crimes including stealing, dealing in stolen goods, kidnapping, assisting fugitive slaves or the sale of alcohol.

enumerated punishments. The functions of the criminal law are threefold: expiation,²⁴⁴ retribution,²⁴⁵ and deterrence²⁴⁶ – all three of which we see mirrored in the *Shari'a*.²⁴⁷

The Bible states that God abhors the criminal ways of other nations²⁴⁸ whose practices the Israelites must not follow and from whose abominations they must not learn²⁴⁹ as by violating his laws his name is profaned.²⁵⁰ Not only are both criminals²⁵¹ and crimes²⁵² abhorrent to God, but his own holiness obliges man to be holy like him.²⁵³ By taking impassioned action²⁵⁴ to punish violators, expiation is made to God and his fierce anger²⁵⁵ is turned away from Israel.²⁵⁶ Where retribution is concerned the Bible says “*Whoso sheddeth man's blood, by man shall his blood be shed; for in the image of God made he man*”.²⁵⁷ Further, purging Israel of the blood of the innocent²⁵⁸ by eliminating the killer was necessary to avoid ‘blood guilt’ attaching to the land and people forever,²⁵⁹ accordingly, a murderer must be taken even from God's very altar to be put to death.²⁶⁰ With respect to deterrence the Bible states that punishment is designed “*to put away the evil from the midst of thee*”²⁶¹ and that “*...All people should hear and be afraid*”.²⁶² Whilst the infliction upon the criminal is expiatory the infliction in public is a deterrent – “*...they will do no more presumptuously*”²⁶³ - as it is in the *Shari'a*. Beyond executing punishment in public the Bible further advocated the act of impaling the offender on a stake²⁶⁴ until nightfall to maximise the reach of the deterrent message.

²⁴⁴ Jewish Virtual Library, ‘Punishment’ <<https://www.jewishvirtuallibrary.org/punishment> > accessed 30 September 2016. This was the original and foremost purpose of punishment in Biblical Law.

²⁴⁵ Ibid Jewish Virtual Library, ‘Punishment’ <<https://www.jewishvirtuallibrary.org/punishment> > accessed 30 September 2016. This was the original and foremost purpose of punishment in Biblical Law.

²⁴⁶ Ibid Jewish Virtual Library, ‘Punishment’ <<https://www.jewishvirtuallibrary.org/punishment> > accessed 30 September 2016. This was the original and foremost purpose of punishment in Biblical Law.

²⁴⁷ To compare, see Section 3.5 above regarding punishment as a mercy, Section 5.1 regarding punishment in public to maximise deterrence and Section 3. regarding retribution and *qisas* crimes.

²⁴⁸ *Torah*, Leviticus 20:23.

²⁴⁹ *Torah*, Deuteronomy 20:18

²⁵⁰ *Torah*, Leviticus 22:31-32

²⁵¹ *Torah*, Deuteronomy 18:12, 22:5, 25:16, 27:15

²⁵² *Torah*, Leviticus 18: 27-29

²⁵³ Ibid 19:2 *Torah*, Leviticus

²⁵⁴ *Torah*, Numbers 25:13

²⁵⁵ *Torah*, Deuteronomy 13:18

²⁵⁶ *Torah*, Numbers 25:4

²⁵⁷ *Torah*, Genesis 9:6

²⁵⁸ *Torah*, Deuteronomy 19:13

²⁵⁹ Ibid 21:9, 19:10 *Torah*, Deuteronomy

²⁶⁰ *Torah*, Exodus 21:4

²⁶¹ *Torah*, Deuteronomy 17:7, 12, 19:19, 21:21; 22:24; and 24:7

²⁶² Ibid 17:13, 19:20 and 20:21 *Torah*, Deuteronomy

²⁶³ Ibid 19:20. *Torah*, Deuteronomy

²⁶⁴ Ibid 21:22 *Torah*, Deuteronomy

6.2.1 Punishment in Biblical and Talmudic Jewish Law

Whilst capital punishment was divine and God revealed in his books that no criminal would be guiltless and escape divine wrath,²⁶⁵ the *Talmudic* jurists proclaimed there was an alternative in judicial punishment²⁶⁶ - of the corporal type and invariably flogging – guided by Deuteronomy 25:2 stating the punishment must be ‘*according to the measure of his wickedness*’. Maimonides²⁶⁷ articulated that the measure of punishment be determined according to four criteria: the gravity of the offence; the frequency of the offence; the temptation prompting the offence; and the secrecy of the offence.²⁶⁸ Punishment types in Jewish law, as in the *Shari’a*, are also capable of being categorised into physical, fiscal, freedom restrictions and alternative. Physical punishments can be sub-categorised into capital and corporal punishment including burning, beheading, stoning, strangulation and flogging. Fiscal punishments include both repayment and compensation whilst freedom restrictions include imprisonment and refuge in a city of asylum and alternative punishments involve the infliction of a punishment known in Judaism as the ‘ban’.

With regard to capital punishment, stoning²⁶⁹ was the most common method used, mainly for crimes that affected the well-being of the whole community including sexual crimes.²⁷⁰ It was executed by throwing the criminal from a platform two stories high or twice his height, after which, should he remain alive, a large rock is placed over him until he is crushed to death. Stoning appears in the texts of Numbers at 14:10²⁷¹ and Exodus at 17:4.²⁷² Beheading²⁷³ was a *Talmudic* addition to Jewish Law²⁷⁴ influenced by the

²⁶⁵ *Torah*, Exodus 20:7, Deuteronomy 5:11

²⁶⁶ Babylonian *Talmud*, Shev’uot 21a ‘Lashes are precious for they atone for sins....according to the measure of wickedness’.

²⁶⁷ Maimonides widely known by his acronym ‘Rambam’ was a 13th century polymath considered one of the four most influential Jewish philosophers in history. Maimonides, influenced by Al-Farabi, Avicenna and Averroes developed many works acclaimed in both the Jewish and Islamic worlds but is most renowned for his writing of the *Mishneh Torah*, a fourteen volume code of Jewish religious law that is a complete statement of the Oral Tradition or *Mishnah*.

²⁶⁸ Moses Maimonides, *Guide for the Perplexed* M Friedlander trans. (Courier Corporation) 1956 Part III, Chapter 41, p344.

²⁶⁹ Institute of Jewish Law, *The Jewish Law Annual* (Harwood Academic Publishers 1991) 114. Death by stoning was an interpretation of the casting from Mount Sinai by Divine Hand – the tradition that God cast the scapegoat from a rock.

²⁷⁰ Lyons (n175) 35.

²⁷¹ *Torah*, Numbers 14:10 states “But all the congregation bade stone them with stones. And the glory of the Lord appeared in the tabernacle of the congregation before all the children of Israel”.

²⁷² The *Torah*, Exodus 17:4 states “And Moses cried unto the Lord, saying, “What shall I do unto this people? They are almost ready to stone me!”.

Roman practice and reserved for wilful murderers and communities of apostates.²⁷⁵ Strangulation²⁷⁶ as mentioned in Genesis 40:22²⁷⁷ was a complex affair by which a rope was placed around the neck and pulled at either side by executioners until the criminal was strangled to death whereas burning²⁷⁸ mentioned in Genesis 38:24²⁷⁹ was not at the stake but a method whereby the criminal burned from the inside out as a consequence of having molten lead poured down the throat.²⁸⁰ Death by burning was prescribed for nine categories of incest and one of adultery – that of having sex with the married daughter of a priest.²⁸¹ All capital offence trials necessitated a twenty three judge court with a requirement of majority by at least two to convict.²⁸²

With regard to these practices of the classical Jewish era what must be noted are the efforts of the *Talmudic* jurists to keep their application to a minimum relying on Leviticus 19:17 - “*Love thy neighbour as thyself*” as applying to all including the condemned criminal with the aim of advocating the most humane death possible, and, strict evidentiary requirements. Whilst Biblical law provided for the necessity of at least two witnesses,²⁸³ *Talmudic* law further mandated that both witnesses must testify as to their advance warning to the criminal that he was about to break the law.²⁸⁴ Only if he disregarded this warning, stated his awareness of the illegality of the imminent act and

²⁷³ Institute of Jewish Law, (n126) 114. Institute of Jewish Law, *The Jewish Law Annual* (Harwood Academic Publishers 1991) Death by the sword was an interpretation of the Sword of Heaven as noted in Leviticus 26:25 “I shall bring upon you a sword of vengeance to avenge the covenant”.

²⁷⁴ Based upon biblical references to the Sword of God the *Talmudic* jurists assigned beheading the capital punishment for murderers (Sanhedrin 52b) and those in the ‘subverted towns’ (Sanhedrin 9:1).

²⁷⁵ Irene Merker Rosenberg and Yale L. Rosenberg, ‘Of God’s Mercy and the Four Biblical Methods of Capital Punishment: Stoning, Burning, Beheading and Strangulation’ (2005) 41 Boston Criminal Law Bulletin 353.

²⁷⁶ Marcus Jastrow, S. Mendelson, ‘Capital Punishment’

<<https://www.jewishencyclopedia.com/articles/4005-capital-punishment>> accessed 1 June 2021.

²⁷⁷ *Torah*, Genesis 40:22 states “...but he hanged the chief baker just as Joseph had interpreted to them...”

²⁷⁸ Institute of Jewish Law, (n126) 114. Death by burning was an interpretation of the burning of the souls of Aharon’s sons and the Korahites by fire from heaven which besides burning the soul, consumed the person also.

²⁷⁹ *Torah*, Genesis at 38:24 states “*About three months later Judah was told, “Your daughter-in-law Tamar is guilty of prostitution, and as a result she is now pregnant.” Judah said, “Bring her out and have her burned to death!”*”

²⁸⁰ May (n173) 441.

²⁸¹ Menachem Elon, *Jewish Law: Cases and Materials* (M. Bender 1999) 8.

²⁸² Lyons, (n162) 22.

²⁸³ *Torah*, Deuteronomy 17:16 “At the mouth of two witnesses, or three witnesses, shall he that is worthy of death be put to death; but at the mouth of one witness he shall not be put to death”. Deuteronomy 19:15 “One witness is not enough to convict anyone accused of any crime or offense they may have committed. A matter must be established by the testimony of two or three witnesses”.

²⁸⁴ Babylonian *Talmud*, Sanhedrin 8b <http://www.halakhah.com/sanhedrin/sanhedrin_8.html#PARTb> accessed 2 October 2016.

proceeded to carry same out would he be liable for capital punishment. In addition, the witnesses were cautioned by the court given that a life was at stake, they were not allowed to rely upon hearsay and their evidence was required to be consistent on salient points.²⁸⁵ Maimonides, in commenting upon the rules of evidence and relying on Exodus 23:7,²⁸⁶ notes the inability to convict unless the actual crime is witnessed and asserted that it is more desirable that a thousand guilty persons go free than a single innocent put to death²⁸⁷ – much the same as Mohammad’s reasoning with limiting the application of *hudud* punishments in the *Shari’a*.

As a result of such strict evidentiary requirements for capital crimes it was difficult to sentence the accused to death but strong deterrents were required in order to strike fear and awe into the hearts of other wicked men.²⁸⁸ Essentially, what we learn from this analysis of capital punishment is that Biblical capital sanctions were as difficult to impose as *Qur’anic* prohibitions were in the *Shari’a*; the *Talmudic* jurists advocated humane treatment of condemned criminals. In both religious sets of laws it would appear the difficulties associated with imposing harsh punishment in actuality, may suggest that such punishments were only ever designed to be meted out infrequently and further that their existence and mere threat of imposition may have been all the revelations ultimately aimed to achieve. What is noteworthy is that this same God, in the *Shari’a* deems murder to be a *qisas* matter, a civil matter between men, and not an infringement of the rights of God (*haqq Allah*). Here, the *Qur’an* and *Torah* differ.

Corporal Punishment in Judaic Law is invariably in the form of flogging and is prescribed for all crimes attracting *karet* (divine punishment) and all violations by overt act of negative biblical injunctions.²⁸⁹ As a rule, flogging was applied for any crime that did not

²⁸⁵ Babylonian *Talmud*, Sanhedrin 4

<<http://www.jewishvirtuallibrary.org/jsource/Talmud/sanhedrin4.html>> accessed 2 October 2016.

²⁸⁶ *Torah*, Exodus 23:7 “And the innocent and righteous you shall not slay”.

²⁸⁷ Moses Maimonides, *Sefer ha-Mitzvot* (Book of Commandments), Negative Commandment No.290 relying on *Torah*, Exodus 23:7 ‘*And the innocent and righteous you shall not slay*’.

<<http://www.jewishcontent.org/general/daily-rambam/317.htm>> accessed 2 October 2016.

²⁸⁸ Rabbi Avraham A. Levitan, ‘*Torah* and the Extra-Legal System’ Neirof Foundation – The Centre for Jewish Thought <<http://www.neirof.com/values-ethics/torah-and-an-extralegal-system>> accessed 2 October 2016.

²⁸⁹ Jewish Virtual Library, ‘Flogging’ <<https://www.jewishvirtuallibrary.org/flogging>> accessed 3 October 2018.

have a specific punishment previously delineated²⁹⁰ but was also known to be carried out extra-judicially where capital punishment could not be exacted for various reasons, similar to the operation of the *ta'zir* category of punishments in the *Shari'a*. In Biblical law flogging applied to over two hundred offences and was limited to a maximum of forty stripes²⁹¹ but *Talmudic* law reduced that to thirty-nine, ensuring the maximum was never exceeded even upon an error in counting.²⁹² This number of lashes is reflected in Islamic jurisprudence. Unlike the *Shari'a*, the *Torah* did not advocate any form of mutilation in corporal punishment²⁹³ despite the influence of the Hammurabbi Code which did include mutilation. Once the punishment had been executed the offender was immediately reintegrated into regular life on the basis of the profound respect for human dignity that is found throughout the *Torah*²⁹⁴ – whilst the rationale in Islamic Law for returning the criminal to society is to avoid a decrease in societal production, costs to the state and financial concerns within the family. Jewish law provided for corporal punishment, as it did for capital punishment, the heavy evidentiary burdens of warning and testimony.²⁹⁵

6.2.2 Comparative Crimes and Punishments in Islamic and Judaic Law

Categorising and delineating the punishments in Biblical and *Talmudic* Jewish Criminal Law facilitates a clearer comparison between the controversial *hudud* punishments of the *Shari'a* with the punishments of the *Tanakh*. Taking each of the *hudud* crimes in turn and comparing the provisions for the crime and the corresponding punishment with those set out in the *Torah* will permit a detailed description of the similar or differing attitudes towards those behaviours in both religions.

²⁹⁰ *Torah*, Deuteronomy 25:2 states “then it shall be that if the guilty man deserves to be beaten, the judge shall make him lie down and be beaten in his presence with a [certain] number of stripes in proportion to his offense”.

²⁹¹ *Ibid* 25:3.

²⁹² *Mishna Torah*. Vol 11, *Nezikin* (Book of Damages) Chapter 5, *Makkot*. 22a.

²⁹³ *May* (n173) 441.

²⁹⁴ *Ibid* 441. See also Melissa Weintraub ‘Does the *Torah* Permit Torture’ (2007) 5(1) *Review of Faith and International Affairs* 3 – 8.

²⁹⁵ *Tanakh*. Book 7, *Nevi'im*. Book of Judges, Law of Courts, No 4. “A person is not punished by lashes until his transgression was observed by witnesses and they administered a warning to him. The witnesses are questioned and cross examined in the same manner as they are in cases involving capital punishment”.

Looking firstly to *sariqah*, it can be seen that in the *Mishna*, upon the basis of clear evidence of two witnesses, a thief must repay twice the value of the stolen property²⁹⁶ on the rationale that he must repay what he unlawfully stole and then lose what he had intended to deprive his victim of. If the accused has no resources he is sold, but if this route is taken he is liable for the principal amount only and not higher multiples of same.²⁹⁷ Whilst the punishment in the *Shari'a* is amputation and we know Jewish punishments do not entail mutilation, and further, that according to Halacha 1 of Laws of Theft Chapter 1 lashes are not imposed, we can identify the clear difference between the two punishments insofar as the *Torah* favours a violence free punishment of restitution and compensation.

Regarding '*hirabah*' secondly, in the *Torah* this is based upon Leviticus 19:13 which simply states "*Do not rob*" and is punished in much the same way, but, if a violation can be corrected by the fulfilment of a positive commandment then no lashes are imposed. The robber in the *Torah* is liable to repay the principal amount plus, upon personal admission of his guilt, an extra one fifth.²⁹⁸ Further, the Judaic focus on human dignity is evident in the suggested treatment of the robber should he come to repent and return what he had taken.²⁹⁹ Whilst the *Shari'a* permits forgiveness of the *hirabah* criminal, its punishments are considerably stronger – execution, crucifixion, mutilation or exile. Moving to the third *hadd* crime of '*shurb al-khamr*', whilst gradually forbidden within the Islamic texts,³⁰⁰ it is not forbidden in Judaism and alcohol consumption is mentioned in the *Torah* at Genesis 9: 20 – 27 when Noah is found inebriated by his son and in Psalms 104:14 wherein it is stated '*alcohol gladdens human hearts*'. Despite this, and the fact that alcohol consumption is an integral part of Sabbath rituals, the texts do advise against excessive consumption at Leviticus 10:9 which reads "*A priest must not enter the temple intoxicated*". A comparison with the *Shari'a* concludes that whilst there is corporal punishment of between forty to eighty lashes prescribed for drinking alcohol, no such equivalent punishment exists in Judaism.

²⁹⁶ This is a rule of thumb. Theft or robbery of certain animals or items must be paid to a higher multiple value. See Book of Damages, Law of Theft Chapter 1 Halachas – 4 – 6.

²⁹⁷ Book of Damages, Law of Theft, Chapter 3 Halachas 11, 12.

²⁹⁸ Book of Damages, Law of Robbery, Chapter 1 Halachas 13.

²⁹⁹ Ibid.

³⁰⁰ See Chapter Three on *hudud*.

Progressing to the fourth *hadd* crime of ‘*zina*’, in Judaism this is a capital offence based upon the religious sanctity of the marriage bond and any abuse of it being deemed an affront to God. Its prohibition among other sources is stated in Exodus 20:13.³⁰¹ Genesis terms adultery the ‘great sin’ and is punishable for both the man and woman by stoning.³⁰² Intentional and unintentional adultery are distinguished in Numbers 5:13 suggesting the woman is only guilty of adultery if she was not forced into it.³⁰³ Deuteronomy 22:23–27 deems an engaged woman guilty if she does not cry for help when in a place that she may be heard³⁰⁴ but no such distinction is made for the married woman. In *Talmuddic* law the Book of Proverbs warns extensively against the seductions of adulterous women.³⁰⁵ Fornication in the *Torah* separates the *kedeshah* (harlot) from the seduced with the former deemed criminal and receiving lashes and the latter deemed a victim and ushered into marriage with the seducer if her father will allow it.³⁰⁶ Judaism, in comparison to the *Shari’a* not only applies a similar punishment for adultery and fornication on the basis of violating the will of God but goes beyond what the *Shari’a* proscribes in listing an extensive range of incestuous and sexual offences which are liable for the death penalty by stoning or burning to death.³⁰⁷ An adulterer may also be put to death by strangulation.³⁰⁸ Whilst *zina* is punishable by stoning and lashes in the *Qur’an* and *Sunnah*, we see the *Torah* has a harsher focus on corrective measures for adultery and fornication utilising all of its capital measures.

³⁰¹ *Torah*, Exodus 20:13: “But the seventh day is the Sabbath of the Lord thy God: in it thou shalt not do any work, thou, nor thy son, nor thy daughter, thy manservant, nor thy maidservant, nor thy cattle, nor thy stranger that is within thy gates: For in six days the Lord made heaven and earth, the sea, and all that in them is, and rested the seventh day: wherefore the Lord blessed the Sabbath day, and hallowed it. Honour thy father and thy mother: that thy days may be long upon the land which the Lord thy God giveth thee. Thou shalt not kill. Thou shalt not commit adultery. Thou shalt not steal. Thou shalt not bear false witness against thy neighbour”.

³⁰² *Torah*, Deuteronomy 22:24: “Then ye shall bring them both out unto the gate of that city, and ye shall stone them with stones that they die; the damsel, because she cried not, being in the city; and the man, because he hath humbled his neighbour's wife: so thou shalt put away evil from among you”.

³⁰³ *Torah*, Numbers 5:13 “...and a man lie with her carnally, and it be hid from the eyes of her husband, and be kept close, and she be defiled, and there be no witness against her, neither she be taken with the manner”.

³⁰⁴ *Torah*, Deuteronomy 22:23–27 “If there is a betrothed virgin, and a man meets her in the city and lies with her, then you shall bring them both out to the gate of that city, and you shall stone them to death with stones, the young woman because she did not cry for help though she was in the city, and the man because he violated his neighbour's wife. So you shall purge the evil from your midst”.

³⁰⁵ Jewish Virtual Library ‘Adultery’ <<https://www.jewishvirtuallibrary.org/adultery-2>> accessed 2 October 2016.

³⁰⁶ *Torah*, Exodus 22:16 “And if a man entice a maid that is not betrothed, and lie with her, he shall surely endow her to be his wife.”

³⁰⁷ *Mishna*, Book of Judges, Law of Courts, Chapter 15 Halachas 10 and 11.

³⁰⁸ *Mishna*, Book of Judges, Law of Courts, Chapter 15 Halacha 13.

Moving to the fifth *hadd* crime, ‘*qadhf*, this has no direct equivalent, but there exists a provision for slanderous comments against one’s new wife arising in situations where the husband questions the virginity of his wife without reasonable cause.³⁰⁹ Rabbinical enactments were very strict, often including public apologies and fasting as part of the repentance process whilst compensation was also paid to the accused’s father in law, and he would lose his divorce rights and receive lashes into the bargain.³¹⁰ In the *Torah*, whilst compensation payable to the father in law is suggestive of the punishment being primarily justified on damage to family reputation we can similarly identify the same justification for the punishment of eighty lashes in the *Shari’a* for *qadhf* based on the ‘protection of lineage and reputation’ objectives.³¹¹

Progressing to the last two *hudud*, *baghi* and *riddah*, it can be seen that whilst *baghi* has no direct counterpart in Judaic Law, it can be, on a certain level, compared to communal apostasy. ‘*Baghi*’ – an act of armed rebellion or an act of unjust and violent disobedience towards the Muslim ruler is a measure that protects the Islamic state and therefore its *ummah*. Apostasy in the *Tanakh* refers specifically to ‘rebels against God and the law’, together with ‘deserters of the faith’³¹² - whilst the *Shari’a* differentiates. The use of the word ‘rebel’ suggests revolt against the people as much as against God and as it was declared that those who apostatised would also never be well disposed of the affairs of the king, this suggests punishment for apostasy in Judaic Law served not only as a protection of the religion but also as a protection against threats to the state³¹³ as *baghi* did in Islam. In the *Torah*, apostasy was punishable by death via the sword.³¹⁴ Apostasy or *riddah* in the *Shari’a* - as Islam is considered a religion, a nationality and a state – is tantamount to waging war against Allah, the Prophet Mohammad and the *ummah*. The *Shari’a* therefore equates the dangers of apostasy with that of *baghi*, justifying the punishment of both by death - the difference being, in the *Shari’a*, *baghi* and *riddah*, though punishable by death do not have a method delineated – hence the debate between *madhahib*

³⁰⁹ Noman Khanani, ‘Punishment in the Hebrew Bible and the Qur’an: A Comparative Analysis’ <https://www.academia.edu/8095141/Punishment_in_the_Hebrew_Bible_and_the_Quran_A_Comparative_Analysis?auto=download> accessed 5 October 2016.

³¹⁰ *Torah*, Deuteronomy 22:13 – 21.

³¹¹ For further discussion on the Objectives of the *Shari’a* see Chapter One.

³¹² Khanani, (n241) 12.

³¹³ Ibid 12-13.

³¹⁴ *Torah*, Deuteronomy 13:15.

regarding their inclusion as *hudud* crimes – whilst the *Torah* clearly prescribes beheading by sword for both apostasy and communal apostasy.

6.2.3 Identified Similarities and Differences

Largely, Judaic and Islamic Law seek to protect the same principles within their religious legal systems. Of the *hudud* crimes in Islam there are equivalents for all, if not always by name but by nature, in Judaism. For both theft and robbery Judaism favours a violence free punishment endorsing restitution through repayment and compensation whilst the *Shari'a* prescribes amputation, execution, crucifixion and exile. Both systems, though slightly differing in nature with regard to the defamed person, agree *qadhaf* should be punished with lashes. Whilst the *Shari'a* prescribes a higher number of lashes, the *Torah*, prescribing a lower number adds compensation and the loss of rights. *Shurb-al-khamr* comes with but a caveat on excess in the *Torah* whilst the *Shari'a* gradually prohibits consumption in its entirety and punishes the guilty with lashes. *Riddah*, juristically debated as *hudud*, prescribes no punishment in this life in the *Qur'an* but in the afterlife. Relying on *ahadith* to substantiate its categorisation as *hudud*, death is prescribed but no particular method is delineated as is the case also with *baghi*. In *Talmudic* Law *riddah* and communal *riddah* are punishable by beheading via the sword.

What is identifiable now regarding similarities and differences in punishments between the two religio-legal systems, in very summarised terms, is that property crimes – *sariqah* and *hirabah* – are more harshly punished in Islam than in Judaism. *Qadhaf* is similarly punished in both though carrying slightly more responsibility in Judaism, whilst *shurb-al-khamr* is punished only in the *Shari'a*. Neither *riddah* nor *baghi* have capital punishments set out in the original religious texts of either religion but in their supportive texts – the *Talmud* and the *Sunnah* - with the former more specific in setting out its capital measure of beheading. Sexual crimes, although carrying both corporal and capital punishment in Islam are exceeded in type and punishment in Judaism. With sexual crimes limited to *riddah* in both its forms of adultery and fornication in Islam, this could be described as minor in comparison to the exhaustive list of sexual crimes set out in Judaism, all attracting corporal or capital punishment via strangulation, burning from the inside out and stoning.

When comparing punishments between the *Torah* and the *Shari'a* we should recall the *hadith* which states

*“Allah's Apostle never killed anyone except in one of the following three situations: (1) A person who killed somebody unjustly, (2) a married person who committed illegal sexual intercourse and (3) a man who fought against Allah and His Apostle and deserted Islam and became an apostate”.*³¹⁵

Accordingly, in Islam, the right to impose capital punishment can only be invoked on three occasions under strict evidentiary rules. In Judaism, there are no less than thirty-six capital punishments.

Comparing the penal schemes has been an exercise in gaining perspective on the provisions of the criminal *Shari'a*. Judaic Criminal Law is comparable as it is also a creature of its time, and, a system from which certain punishments were imported into the Islamic scheme. From the comparison it can be seen that Islam did not impose any punishments that were not a temporal norm for legal systems, and both sought to protect against similar threats to society. Of course, the Islamic world, unlike Judaism, largely has not embraced secularism, and consequentially its ancient criminal laws remain intact, and dependent upon interpretation, valid. Judaism however has, for the majority, embraced secularism and to this end Chapter Seven will explore the endeavours of the state of Israel to reformulate Judaism and combine its traditional religious outlook with the conditions of a modern world, establishing a precedent for Islam.

6.3 Judaic Law In Israel – A Reformulation Precedent

The state of Israel can lead as an example of how a traditional religion and the modern world can combine to a relatively successful extent, although, it is acknowledged that there remains tensions between certain streams of interpretation and the speed at which they are prepared to adapt to this modern world. However, having set out the extent to which Judaism entails all of the severities of draconian punishment that Islam entails, if not to an even greater extent, it is useful to explore how Judaism, coming from this

³¹⁵ Sunnah, Sahih Al-Bukhari, Hadith No. 6889.

background, has attempted to marry the protection of its values with modern society whilst considering the relationship with International Human Rights. In order to set out the extent of Israel's success with its endeavours, its history and first entanglement with modernity will be noted before addressing the formula for interpretation of the Messianic hope in the twentieth century and the methods by which the state of Israel practically approached the fusion of religion and secularism in a traditionally patriarchal society.

Before the modern state of Israel was established Jewish people had been without a 'homeland' for almost two thousand years. For a millennium it had been under the control of the Saracens, the Crusaders, the Mamelukes, the Turks and the British³¹⁶ - all of whom left their mark. Whilst it was colonised as early as 1870, Zionism, or the campaign to resurrect a state wholly governed by Judaic values, did not emerge until the turn of the twentieth century.³¹⁷ By 1917 international support had developed and in 1947 an independent Jewish nation was established by UN resolution.³¹⁸ Its Declaration of Independence was proclaimed on May 14th, 1948.

The newly declared Jewish state however was secular and so this needed to be aligned with the Messianic hope. In Israel, Judaism had encountered liberalism not as the dominant ideology of a non-Jewish society to which the Jews were endeavouring to accommodate themselves, but as the outlook of the majority of the state's Jews³¹⁹ - many Jews were returning to their 'homeland' from various states across the world bringing with them their experiences of life elsewhere. Because of this familiarity with the secular norms of liberalism and pluralism the Zionists realised there was no hope of creating a theocracy. The Messianic hope was reformulated to articulate a new hope for a time when Judaism would recover from its association with the secular state and the population could be persuaded of the desirability of a state where the *Torah* was fully sovereign. In the meantime, the best that could be hoped for was a blend of theocracy and democracy.³²⁰ Some Zionists joined the call for secularism but this was not with the

³¹⁶ Haim Cohn, 'Criminal Law Reform in Israel' 1962 (11) 1 American University Law Review 1.

³¹⁷ Ibid.

³¹⁸ UN Resolution No. 181

<<https://unispal.un.org/DPA/DPR/unispal.nsf/0/7F0AF2BD897689B785256C330061D253>> accessed 16 July, 2021.

³¹⁹ Allan Arkush, 'Theocracy, Liberalism and Modern Judaism' (2009) 71(4) The Review of Politics 650.

³²⁰ Ibid.

aim of acknowledging individual rights or liberalism, it was to ensure that religion could be protected from being used as a political tool.³²¹

The parliament, or Knesset, identified that religious values were homogenised throughout the new state and that the religious parties had strong support. The practical application of this combination of secularism in a Jewish state saw the secular leaders and the religious political parties collaborating and negotiating in an attempt to infuse the operation of the state of Israel with Jewish values. They agreed to various Jewish practices including, for example, the provision of kosher food only in public facilities, the prohibition of public transport on the Sabbath, and, importantly, the validity of the religious courts.³²² Jewish Law is applied by these Rabbinical courts within their jurisdiction in matters of personal status and also by the civil courts when called upon to deal with such matters concerning Jews. In civil and criminal law it is not the law of the land but it does serve to help give a Jewish shape to new legal rules both in the jurisprudence of the courts and in the Knesset.³²³

This is all permissible due to the orthodox view of the relationship between the *Torah* and the State, otherwise described as divine revelation and national consciousness that are thought to be inextricably linked. Despite this, a comprehensive corpus of complicated laws for the government of a Jewish state does not exist.³²⁴ This is reasoned by the temporary nature of any particular governance type being incapable of outliving the permanence of the *Torah*. The *Torah* therefore will not bind itself to only one form of state rule, but whatever form is in operation must be in consonance with the spirit of it.³²⁵ Infusing the modern secular state with Jewish rituals and practices, thereby retaining the values as the religious national consensus, complies with this requirement of the *Torah*. At the same time, the impact of secular values saw policy changes that better utilised prisons³²⁶ and allowed the remaining draconian punishments to be abolished in line with

³²¹ Yeshayahu Leibowitz, *Judaism, Human Values and the Jewish State* (Harvard University Press 1993) 176.

³²² Arkush (n251) 655.

³²³ Brian Duignan, 'Israeli Law' in Encyclopedia Britannica <<https://www.britannica.com/topic/Israeli-law>> accessed 21 July, 2021.

³²⁴ Mosheh Zevi Neria, 'The State of Israel and the Halakhah' (1959) 1(2) *Tradition: A Journal of Orthodox Jewish Thought* 200, 201.

³²⁵ Ibid.

³²⁶ Joseph W. Eaton, *Prisons in Israel: A Study of Policy Innovation* (University of Pittsburgh Press 1964) 47.

the conditions of modern life. Only a short number of years after the state of Israel was established the Punishment of Whipping (Abolition) Law 1950³²⁷ brought an end to the practice in Israel³²⁸ and similarly capital punishment was abolished by the Penal Law Revision – Abolition of Death Penalty for Murder Law 1954.³²⁹

Despite these changes, there were, and there continues to be, areas of conflict between religious and secular values. These conflicts are ironed out in the courts, which, over time, have developed a common language between religious and secular values. This is the language of human dignity. Gender equality is a prime example of one of these flash points where the religious perspective leans towards patriarchy. Using this example, we note firstly that the Declaration of Independence, containing a reference to the principle of equality, was never endowed with constitutional force; likewise with the Women's Equal Rights Law of 1951.³³⁰ The courts however utilise all these laws as interpretive tools, and, combined with the introduction of the 1992 Basic Law: Human Dignity and Liberty,³³¹ the Supreme Court has generally held that equality for women is incorporated into the right to human dignity.³³² This has led to the courts securing the principle of equality as a fundamental principle of the Israeli legal system. In this sense, in the public sphere, or, in all areas of law not directly concerned with religious values, a strong concept of gender equality has developed. In the private sphere however, religious values are strong enough for the Rabbinical courts to impose patriarchal norms on family life.³³³ Whilst the religious tradition is maintained, the public sphere allows women full immersion in economic and social life, and so marries the religious values with a modern secular state.

As with Islam, there are in Judaism divisions between believers in their approach to interpretation of Jewish Law. These are categorised into Ultra-Orthodox, Orthodox and Reformist Judaism. Ultra-Orthodox Jews are the most conservative and they seek to

³²⁷ Israeli Punishment of Whipping (Abolition) Law 5710—1950, 4 LSI 140.

³²⁸ Gabriel Bach, 'Development of Criminal Law in Israel During the Twenty Five Years of its Existence' (1974) 9(4) Israel Law Review 570.

³²⁹ Israeli Penal Law Revision – Abolition of Death Penalty for Murder Law -5714-1954, 8 LSI 63.

³³⁰ Women's Equal Rights Law of Israel 5711—1951. No. 69.

³³¹ Basic Law of Israel: Human Dignity and Liberty 5752—1992.

³³² Frances Raday, 'Equality, Religion and Gender in Israel' The Shalvi/Hyman Encyclopedia of Jewish Women <<https://jwa.org/encyclopedia/article/equality-religion-and-gender-in-israel>> accessed 15 July, 2021.

³³³ Ibid.

protect themselves against modernity by barricading themselves away from it and remaining as culturally isolated as possible from the outside world. They take advantage of the freedoms available to them in order to live in their own *Torah* observant enclaves and reject imposing modernity to the greatest extent possible.³³⁴ The majority orthodox view holds, as per the rationalisation above as to why the *Torah* does not align itself with any particular form of government, that whosoever rules, must rule with the knowledge of the *Torah*, and, Leviticus 18:5 that states ‘*Keep my decrees and laws for whoever obeys them will live by them*’ is relied upon to both ensure a government does not exceed its authority and to suspend laws in favour of the preservation of human life.³³⁵ Any ruling government, in the Orthodox view, must rule according to the principles and goals of the *Torah*.

Reform Jews then, are those who have had to, often out of necessity in their circumstances of living in pluralist societies, reformulate Judaism in order to marry it to such prevailing modern conditions. They developed a belief that the words of the Pentateuch, or five books of the *Torah*, were not ‘literally’ true but indicative of values that should be revered and protected in order to live a good Jewish life whilst also being able to integrate into the liberal, pluralist societies in which they lived.³³⁶ Reform Jews believe in the legitimacy of change and accept that human conceptions of the divine are, in fact, human, so that both belief and practice may evolve in the face of scientific, social, ethical and other human developments.³³⁷

Unlike Islam, for Judaism, reformism has been developing for over two hundred years and their theory has stabilised to the extent that it is an accepted stream of Judaism.³³⁸ The first official reform movement in Israel was set up in 1958 and offered an alternative to orthodox Judaism. The movement progressed to the establishment of the Israel Movement for Progressive Judaism (IMPJ) in 1971, a branch of the World Union for Progressive Judaism (WUPJ), whose headquarters moved to Jerusalem in 1973.³³⁹ Whilst

³³⁴ Arkush (n251) 657.

³³⁵ Neriah (n256) 200, 201.

³³⁶ Arkush (n251) 646.

³³⁷ Dana Evan Kaplan, ‘Reform Judaism’ in *The Blackwell Companion to Judaism* (Wiley Blackwell 2008) 291.

³³⁸ Eugene B. Borowitz, Naomi Patz, *Explaining Reform Judaism* (Behrman House 1985) 1.

³³⁹ World Union for Progressive Judaism, ‘History’ <<https://wupj.org/about-us/history/>> accessed 20 July, 2019.

Reform Judaism has not attracted greatly significant numbers in Israel for various reasons including there being hostility by Orthodox Jews towards other streams of Judaism and the perceived lack of need in a Jewish majority state for alternatives to Orthodoxy,³⁴⁰ in 2016 the Supreme Court of Israel nevertheless ruled against discrimination towards Reform Jews and stated, in a case that took ten years to resolve, that public baths, or *mikveh*, must accept all converts including both Reform and Conservative. The court said that the State of Israel is free to supervise these facilities provided it does so in an egalitarian manner.³⁴¹ In the Jewish state of Israel, one form of Judaism is to be considered as valid as the next. The battle for representation of Judaic truth is mediated by the courts who have held against discrimination of interpretational streams within it and who have promoted the validity of all approaches to interpretation.

The state of Israel has succeeded in marrying the language of International Human Rights with religion, and, within the courts, these two separate perspectives communicate in the common language of human dignity. The religious national consciousness is further respected by firstly leaving all personal status matters to the jurisdiction of the Rabbinical courts and secondly by infusing state practices with Jewish values and traditions. Where the criminal law is concerned, Judaism, starting out in much the same manner as Islam, that is, with rules for societal obedience that were necessary in the prevailing conditions, has also had to face the challenge of imposing modernity. The state of Israel has, through policy change, continued to successfully protect Jewish values whilst allowing state laws to eschew the brutality that modernity dictates it should. Criminal Law utilises the facilities of policing and prisons that now exist, and are acceptable in a twenty first century world, in order to deal with criminal behaviour.

In once more addressing a central theme of this thesis, the Jewish state of Israel has accepted that the world has changed, and through the use of human dignity as a mediating tool, has implemented the essence of International Human Rights in the daily functioning of Jewish life in Israel. If Islam was to follow the example of Judaism in Israel and avoid the fundamentalist literalist approach to interpretation that has developed since the time of emergence from colonialism, it could potentially achieve the same result. A

³⁴⁰ Avinoam Rosenak, *Reform Judaism: Thought, Culture and Sociology* (Van Leer Jerusalem Institute 2014) 420-439.

³⁴¹ Julie Maltz, 'Israel's High Court Forbids Discrimination Against Conservative and Reform Converts in Public Mikvehs' *Haaretz Israel News* 11 February, 2016.

contemporary Islam could operate that succeeds in protecting its fundamental values but in a manner allied with the demands of modern society and where there is no friction with the fundamental values of International Human Rights. The fact that neither the Qur'an nor the Prophet provided a prescriptive model of governance means there is flexibility inherent in Islamic tradition to devise approaches to governance that are sensitive to historical and societal change.³⁴² Progressive Muslims and proponents of human rights in Muslim states must be sensitive to the legacy of secularism for Muslims and harmonisation must be between human rights and *Islamic* principles and values.³⁴³ However, in order to harmonise Islamic Criminal Law and human rights the willpower, inspired vision and commitment of Muslims is required - otherwise, the doctrinal potentialities of the modernist interpretation may remain unrealised.³⁴⁴

7. Conclusion

As noted in Chapter Six, this thesis set out to investigate the assertion that Islamic Criminal Law and IHR are genuinely and inherently incompatible and the discoveries made in previous chapters allowed the identification of the points of incompatibility, those being (a) the God motivation for law (considered in Chapter Six) and (b) the rigidity of the *hudud* and the draconian nature of punishments considered in this chapter.

Where this second incompatibility, that is, where the rigidity of the *hudud* and the draconian nature of punishments is concerned, it has been established that there are a number of approaches to interpretation, and that the *Shari'a* does not need to be interpreted in a hardline or fundamentalist way. Hence, the problem surrounding this issue reflects a de-contextualised literalism in interpreting *Shari'a* rules by radical or fundamentalist Muslims. Options for interpretation exist that would allow the spirit that originally underpinned Islamic Criminal Law to be retained but for those elements of the law that no longer serve the *maqasid* to be respectfully confined to their historic context. The example of how *Talmudic* criminal law has been approached in contemporary Israel is indicative of this reality. The difficulty is that, just as the machinery of the UNHRC chose to interpret the ICCPR in the staunchly secular manner that it did, the

³⁴² Saeed (n74) 118.

³⁴³ Ibid, 147.

³⁴⁴ Khaled Abou El Fadl, *Islam and the Challenge of Democracy* (Princeton University Press 2004) 5.

fundamentalist interpretation of Islam chose to assert itself sensationally as the ultimate truth of Islam, thereby clouding the non-Muslim view of Islamic Law.

The sensationalism of fundamentalist interpretation takes from the orthodox views of the silent majority. Non-Muslims incline towards a stereotype that perceives the criminal law in terms of the interpretation of it by Salafi *jihadis* such as ISIS or Boko Haram. Whilst the fundamentalist approach to interpretation is in the minority, it is politicised and so has the support of the elite, whilst ordinary Muslims must endure its imposition, duped into supporting these processes in their early stages as they were enveloped in a campaign to end colonialism. Notwithstanding, the manner in which the modern state of Israel has succeeded in reformulating its laws in order to align with the characteristics of a modern society, that is, a pluralist, liberal and secular society, has shown there is potential for a reformulation of Islam. It is not impossible to reformulate Islamic Criminal Law in such a way that the criminal laws continue to protect its central societal values but use the judicial and penal facilities available to it, and acceptable in the twenty first century, rather than only those that were available at the inception of Islam. Once again, the clash between Islamic Criminal Law and International Human Rights, on this issue of harsh punishments, is not inherent, rather, it is a matter of interpretation.

CONCLUSION

Islamic Law is a legal system built by Mohammad's successors in order to preserve his moral teachings. The doctrine of *tawhid* illuminates the impossibility of ever separating law and faith and the paramount concern of Islamic Law is the protection of all religious precepts, thus the protection of the criminal laws, as no human is entitled to interfere with God's will. Islam is a valid legal system, and the truth of its laws is deciphered using Islamic legal hermeneutics that opens its laws up to various interpretations. In this respect, as long as there is unity within any interpretive community there can be no superiority of one community's truth over another. Accordingly, no one system of law can assert primacy, nor attempt to impose values or interpretations of values on another, that within that other, hold no credibility.

The Prophetic Period set out the basis for the establishment of the *hudud* punishments of the criminal law, evidencing their appropriateness and effectiveness given the conditions of society at the time of their inception. Where interpretation is concerned, all periods throughout Islamic history have exemplified the adaptation of its principles and provisions to the contemporaneous needs of the *ummah*, and the conditions of its existence. However, the opposite is also true. The politicisation of Islam and the concern for expansion and control saw a series of returns to the basic Islamic formula of relying upon faith and strength, and closing ranks to protect the *ummah* whenever it deemed itself to be vulnerable, not least upon the imposition of all things western during the period of colonisation and imperialism. Thus, at the end of the period of colonialism three strains of interpretation had become an Islamic reality; traditionalism was prominent, rationalism though never having been eliminated, was sidelined, and literalist fundamentalism as an element of once more closing ranks against intrusion to best protect the *ummah* had begun to attract considerable global attention.

The penal scheme of Islam is complemented by a body of criminal justice that has all the hallmarks of modern criminal justice provisions. Despite the view of *hudud* punishments as the divine word of God that is entirely unchangeable by man, there is great disagreement on the criminal rules suggesting their meaning and application are open to interpretation, thus exposed to the three listed interpretational approaches.

International Human Rights and Islamic Criminal Law jar at two flashpoints of conflict – the matter of the presence of God, and, in the absence of consensus on interpretation, the harsh nature of the physical punishments. The presence of God is problematic for International Human Rights as it has relegated God to the private sphere of life and is an entirely secular moral edifice, whilst for Islam, the doctrine of *tawhid* dictates that all things without exception come from God. Regarding the issue of punishments, International Human Rights developed in a forward looking, progressive and modern society where harsh physical punishments were not required in order to protect the values of society. This is because more humane methods of deterrence and punishment had developed, those being, policing and incarceration. In this sense, severe corporal punishment, understood as unchangeable as it is God’s clear direction, jars with the moral rules of a secular scheme that has long employed alternatives. The opposing natures of seventh and twenty first century punishments are a point of friction between International Human Rights Law and Islamic Criminal Law.

Both the United Nations and the Organisation of Islamic Cooperation seek to protect humanity based on the values of human dignity, equality and autonomy that underscore their respective human rights declarations despite their differing historical impetuses and moral origins. Regarding the UN, accusations of western bias in the UDHR ring true and any intercultural consensus said to have been reached at the time of its creation is argued to be a falsity - the UN claim that the UDHR is wholly universal is accordingly rendered a fallacy. The criticism that no alternative views have been allowed to factor in the development of human rights norms since, affirms the stance of restriction of interpretation of human rights values to a secular framing only, and this must impact the character of the criticisms levelled against the OIC. Due to the perception that IHR is non-inclusive of a tradition based on religious values, the values in the Cairo Declaration are framed in an Islamic context, thus, the CDHRI is representative of just over a quarter of the world’s population whose morality, by virtue of the doctrine of *tawhid*, is grounded in the divine word of God. The strong secularity of the UDHR undermines its ability to enforce its moral values on those who claim they are not represented by the moral source of those values, based on the earlier conclusion that one interpretive community cannot claim superiority of moral truth over another.

The values of human dignity, autonomy and equality examined in both the Islamic and IHR contexts are equally identified within those contexts as the most fundamental and essential values required for a moral and just society in both the Islamic and International human rights schemes. The distinguishing features do not affect the benefit accrued to individuals. Both systems acknowledge the relationship between rights, the individual and the community and identify with the concept of limiting rights in the interest of public morality. Both accordingly have a similar view of justice. If neither scheme can claim primacy of universal truth, IHR cannot claim the right to a 'superior' truth, therefore it cannot force an interpretation of God's law - that includes the controversial aspects of the criminal law - according to its interpretational standards. For Islam, the criminal laws have been affirmed as morally sound within the interpretive community and are accordingly valid. God's intention is their application for the betterment of society and complete submission to God does not question his intentions for humanity. IHR cannot claim that the aspect of physical punishment is wrong. However, both schemes are steadfast in their assertion of global legitimacy of their universal moral truth that ultimately comprises their public moralities.

On the problematic area of the presence of God as a motivation for the law, the manner in which the UNHRC interpreted public morality pointed to a fundamentalist secularism at work within the machinery of the UN. On the problematic area of the harsh *hudud* punishments, these only arise in the context of the stream of Islamic interpretation that is fundamentalist in nature and uses scriptural literalism as a technique employed to best guide the *ummah* in the twenty first century.

Where the presence of God as a motivation for the law is concerned interpretation has its impact in the following way. There is insistence in the UNHRC upon its secular ideology as dominant and correct and this can be identified by the impact of both General Comments 22 and 34 of the UNHRC. Thus, any perception of the rightness or wrongness of actions that comprise flash points of conflict is going to affect the manner in which aspects of Islamic Criminal Law are perceived globally. In delegitimising God as a single basis for a conception of public morality, the UN unilaterally delegitimised the entire body of Islamic Law, including its criminal laws. It did so despite the established terms of validity that earlier deemed Islamic Law to be a completely valid legal system and with no textual basis in treaty law whatsoever. In doing this, the UNHRC inadvertently

admitted that IHRL is not, in fact, truly international. Ultimately, it evidenced a culture of fundamentalism within International Human Rights.

Where the harsh punishments of the *Shari'a hudud* are concerned interpretation has its impact in the following way: rationalists, or modernists, are in the interpretational minority; orthodox traditionalism is prominent, though a silent majority as it cannot deny the existence of the texts fundamentalists rely on for legitimacy; and, fundamentalists are also in the interpretational minority but their interpretational approach of scriptural literalism insists on the imposition of seventh century draconian punishments in the twenty first century as a solution to the problem of how best to protect and better the *ummah* in the modern world. The sensationalism of fundamentalist interpretation takes from the orthodox view and non-Muslims incline towards a stereotype that perceives the criminal law in terms of the interpretation of it by Salafi *jihadis*. If these punishments are meted out on the understanding that they are dictated by God and are entirely unchangeable, and the fulfilment of God's will is the prime purpose of the criminal scheme of the *Shari'a*, then they are going to influence IHR to ensure the exclusion of God in any permitted restrictions on rights.

The hypothesis at the outset of this thesis suggested there is nothing inherently problematic between Islamic Criminal Law and International Human Rights Law. Contrary to a suggestion of incompatibility, there is genuine international consensus on the values necessary for optimum human flourishing. Islamic Criminal Law aligns with Islamic Human Rights values, whilst these in turn align with International Human Rights values. Islamic Criminal Law is thus UDHR compliant and in answer to the first part of the thesis question, is not inherently incompatible with the text of the instruments of International Human Rights. The second part of the hypothesis proposed interpretation of values to be an issue. It accordingly submitted that to the extent it is perceived International Human Rights and Islamic Criminal Law *are* at odds, this is because International Human Rights will not include God, and, Islamic Criminal Law must be in line with the *Shari'a*. It has now been shown that the secular fundamentalism on the part of the UN does indeed exclude God as a motivation for law, and, that Islamic Criminal Laws must indeed be in the line with the *Shari'a*. Notwithstanding, it is possible for these laws to be in line with the *Shari'a* even if they are interpreted in a different way.

As has been established by the *madhahib*, the criminal rules are open to interpretation despite their divine origins. In this respect, the modernist approach to interpretation that returns to the early Meccan guidance of the *Qur'an* and the *maqasid* approach to determining how to best protect the *ummah*, can reformulate Islamic Criminal Law for the twenty first century and in doing so, remove the incompatibility that arises in the problematic area of the harsh criminal punishments. Islamic Criminal Law was fundamentally no different in terms of the threats it protected against, and the manner in which it protected against them, to alternative legal systems that existed contemporaneously with it in seventh century Arabia, namely, Judaic Law. Despite this, the modern state of Israel has succeeded in reformulating its traditional Judaic religious laws in order to align with the characteristics of a modern society, that is, a pluralist, liberal and secular society. This has shown that there is potential for a similar reformulation of Islamic Criminal Law in line with the externalities of its twenty first century environment to succeed.

In short, the fundamentalist interpretation of Islamic Criminal Law and the resort of the UNHRC to a fundamentalist interpretation of public morality are responsible for the perception that Islamic Criminal Law does not align with International Human Rights. As such, the clash is between interpretations, not between International Human Rights Law and Islam.

Finally, proving the truth of the thesis proposition that Islamic Criminal Law and International Human Rights Law are not *inherently* incompatible contributes to the scholarship in this area in a number of ways. Firstly, the general western public may benefit from knowledge regarding the religion of Islam, as the Islamic and Western worlds have once again been colliding in the last number of decades. As Muslims make up almost a quarter of the world's population it can only be beneficial to disseminate knowledge of the religion, the tradition and the culture of Islam so that as a whole it can be better understood as we become an increasingly multicultural society. This thesis aims to contribute to the dissemination of knowledge of the Islamic tradition.

Secondly, Islamic Criminal Law has been a western socio-political issue for the general public (long before but particularly refocused) since the terrorist attacks by *jihadi* fundamentalists in the last number of decades. Without an education on streams of

Islamic interpretation the western public to a large extent has been inclined towards tarring all stripes of Muslims with the one brush – that is – downgrading them to the rank of terrorists. This thesis highlights the manner in which fundamentalist interpretation gains its legitimacy and how this makes it difficult for many Muslims to deny same.

Thirdly, the issue of western interference in the Middle East being responsible, particularly throughout the era of colonialism, for the carving up of the Islamic world and the imposition of oppressive secular regimes that led to the suffering of ordinary people has had an impact to the extent that yet another western secular imposition, this time in the form of an insistence upon a single interpretation of human rights that delegitimises God, makes it difficult for many muslims to find a comfortable place for a western understanding of human rights in the Islamic world. Accordingly, this thesis attempts to illustrate the presence of the very values required for the operation of human rights in the Islamic tradition in order to point to the fact that a western imposition of a decided formulation of human rights that excludes God is not necessary for human rights to flourish in the Islamic world - these values are, and have always been, inherent within the religion.

Fourthly, in order to support the progression of human rights adherence in the Muslim world, difficulties on the IHR side must be fairly called into question. The thesis controversially suggests that the UNHRC has itself resorted to fundamentalism in its interpretation of certain concepts, and, that the militant insistence upon these interpretations shows similar stubbornness in the approaches to interpretation in both schemes of law, that is, the Islamist fundamentalists in their approach to the rules of criminal punishments that have been sourced from man made fiqh texts marred with disunity, and the machinery of the UN in the guise of the UN Human Rights Committee in their approach to public morality that has absolutely no treaty basis whatsoever. Just as there is a textual basis for restricting rights on the basis of a religious public morality so that Islam may protect God, there equally is a textual basis for the criminal laws of Islam (specifically the punishments that cause most tension with International Human Rights) to be reformulated according to the externalities of the twenty first century. Ultimately, if this modernist reformulation can gather momentum within Islam, the perceived gap between Islam and International Human Rights can be reduced significantly. This thesis seeks to contribute towards that momentum.

By way of qualification, the thesis does *not* attempt to insist upon a particular interpretation of Islam, as this would go against the established hermeneutical validity of various approaches to interpreting the texts. In time to come, the modernist interpretation may not be suitable for resolving future issues, however, considering the *current* human rights issues addressed, the thesis seeks to contribute to the scholarship that draws attention to viable interpretational alternatives that may help to resolve the issues between the major perspectives on human rights today in order to work towards their harmonisation.

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