

Dilemmas about the interaction of international human rights and the sharia in the 21st century

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Abstract. *The non-governmental organizations of the European Union regularly publish strictly condemning human rights reports on Islamic countries, including the self-proclaimed secular Turkey. The summary often articulates shortcomings, which are based on the provisions of religious law. However, the rejection of the provisions of religious law caused even greater resentment among the population affected by religious traditions. What can be the solution? Total rejection of religious law? Its reformation? How can these two areas of law be harmonized for the sake of economic and social development? I am looking for answers to these questions in my study presenting the solution proposals of the main representatives of the literature.*

Keywords: sharia, human rights, legal development, universality, nationalism

Introduction

The Sharia (path) is substantially different from the other legal systems in the world. Although it contains provisions, the branches of law are not legally separated. It mainly regulates family law and civil law relations and contains only a few criminal and procedural rules. Using a specific scale of moral values, the sharia divides human activities and behavior into commanded, useful, indifferent, disapproved, and forbidden actions. To these the sharia assigns sins and punishments, merits, and rewards. It extends to all areas of life, regulates the individual's relationship with himself and God, and interprets customs. The task of the sharia is to provide appropriate tools and methods to guide and judge the conduct of Muslims.¹

It requires a clear understanding of domestic and international factors and processes, including religion and the role of religious institutions, which influence the actual conduct of states in this regard. There is no reliable international mechanism for enforcing human rights standards against the will of national governments, so the crucial question is how to encourage governments to ratify human rights treaties and motivate them to comply with the obligation to protect these rights within their respective territories.² International human rights norms are not legally binding, and respected in practice, without strong legitimation within national politics. Popular perceptions of human rights as consistent with the religious beliefs of the population are essential for these rights' legitimation in each country. Even in so-called

secular states a clear understanding and appreciation of the political and sociological importance of religion is essential to influence the human rights policies and practices of the state.³

Islam plays a positive role in the lives of Muslims today though the sharia that was developed more than a thousand years ago must face some practical difficulties today. Yet, significant reform of any problematic aspect of sharia cannot be executed if the sharia is regarded as divine and not "man-made" rules and interpretation. The thousands-year-old rules (speculations, loans, contractual obligations) no longer reflect the economic and financial challenges of the 21st century, so it would be almost impossible to live according to the literal interpretation of Sharia.⁴

The great dilemma of our days is that, although as a religion, Islam deserves unconditional respect, there is no chance for European integration as a culture and a system of norms. Do we really need to accept and living with this point of view, or there may be another approach to harmonize the relationship between human rights and the law of religions. Is there an irreconcilable contradiction between the divinely derived sharia and the man-made international human rights treaties? What feature does their relationship really have and by what approach can they serve together our well-being? In my study I am looking for answers to these questions. By lining up the pros and cons side by side, the arguments of the main opinion leaders in the international literature on the subject help us reach the point of view that offers

¹ Szűcs, Lászlóné Siska Katalin: Az emberi jogok az arab világban, Debrecen, Magyarország: Debreceni Egyetemi Kiadó (2012), 164 p.

² Siska Katalin: Thoughts on the Special Relationship between Nationalism and Islam in Particular the Late Ottoman Empire and the Early Turkish Republican Era, JOURNAL ON EUROPEAN HISTORY OF LAW 8: 1 pp. 121-129, 9 p. (2017)

³ Prof. Kondorosí Ferenc: Az európai kultúrkör és az iszlám A KÖVETENDŐ(?) ÚT. 2020.11.13. <https://rendeszet.uni-nke.hu/document/rendeszet-uni-nke-hu/Az%20iszlám%20és%20az%20európai%20kultúrkör%202020.11.13.pdf> 2

⁴ Szűcs, Lászlóné Siska Katalin: Gondolatok a török szekularizmus gyökereiről. JURA 22:2 pp. 333-340., 8 p. 2016.

approximate and livable solutions.⁵

Universality and relativity

The implementation of international human rights norms in any society requires the knowledge of religion as the main influencing factor on human behavior regardless the formal relationship between the state and religion. Traditions and religious norms even without faith built in the everyday life of the society therefore we cannot ignore its relevance during legislation.⁶

Abdullahi Ahmed An-Na'im Islam scholar examined the connection between the universality of human rights and the relativity of the religion. The dichotomy is misleading, because while the universality of human rights cannot be realized among believers unless they accept it as consistent with their religious beliefs, the integrity of religious faith and its relevance to the lives of its adherents is dependent on the effective protection of human rights. Accordingly, it is more useful to see this relationship in terms of synergy and mutual influence. Mediating between universality and relativity by emphasizing common features of human experience over differences in abstract theological terms is a more effective way to understand the interaction.⁷

It makes necessary to distinguish between the two senses of human rights. The notion refers to freedom and social justice in general, to the conception of freedom and social justice that was articulated in the Universal Declaration of Human Rights (UDHR) of 1948, and more specifically defined in subsequent treaties. The key feature of human rights as defined in the UDHR is that these rights are due to all human beings by virtue of their humanity, without distinction on such grounds as race, sex (gender), religion, language, or national origin.

Whether the secular Western origins of human rights, as defined by the UDHR, necessarily mean that these rights are not (or cannot be) truly universal. The moral or philosophical foundation and political justification of the conception of human rights as defined by the UDHR can be found in different religious and cultural traditions.⁸

Like other believers, Muslims have always sought to experience their faith in terms of individual and collective conformity with its normative system, the sharia, which is supposed to regulate their daily lives as Muslims. . While Muslims tend to ascribe divine authority to sharia by jurists of the eighth and ninth centuries, the precise content of the sharia system has always been the product of human understanding in specific historical context.

"Although the law [sharia] is of divine provenance, the actual construction of the law is a human activity, and its results represent the law of God as humanly understood. Since the law does not descend from heaven ready-made, it is the human understanding of the law, the human fiqh (literally, understanding) that must be normative for society.⁹

In practice, however, Muslim individuals and their governments routinely charge and pay interest on loans and conclude and enforce contracts of insurance because it is impossible to have viable economic systems today without these practices that are totally forbidden activities according to the sharia. This discrepancy between theory and practice can be bridged through an appreciation of the fact that all specific definition of concepts and notions such as ribba and gharar are necessarily the product of human understanding in specific historical context, not direct divine decree.¹⁰

Muslims claim that historical formulations of sharia have always secured human rights in theory, though such a situation may not have materialized in practice. By securing a relatively advanced degree of protection for the rights of women and non-Muslims, historical formulations of sharia did provide for better protection of human rights than other normative systems in the past. For example, from the very beginning, sharia was understood to require an independent legal personality for women, and the protection of certain minimum rights for them in inheritance and family relations, beyond what was possible under other major normative systems until the nineteenth century.¹¹

Similarly, sharia guarantees specific rights for the so-called People of the Book (mainly Christians and Jews) more than what had been provided for under other major normative systems in the past.¹² However, since the rights of women and non-Muslims under sharia are not equal to those of men and Muslims, respectively, the level of protection of rights under sharia is not sufficient when judged by the standards set by the UDHR, which require equal rights for all human beings, without distinction on such grounds as sex, religion, or belief. The reinterpretation of Islamic sources that demonstrates agreement with human rights norms should be considered on its own terms, rather than dismissed as un-Islamic because it is inconsistent with previously established human understandings of sharia. For Muslims, a reinterpretation should be accepted or rejected in terms of its own foundation in Islamic

⁵ Abdullahi Ahmed An-Na'im: Islam and Human Rights, Collected Essays in Law Series, edited by Mashood A. Baderin, Ashgate Publishing Ltd, 2010.

⁶ United Nations Human Rights Office of the High Commissioner. Universality and Diversity.

<https://www.ohchr.org/en/special-procedures/sr-cultural-rights/universality-and-diversity>

⁷ Abdullahi Ahmed An-Na'im: Decolonizing Human Rights. Cambridge University Press, 2021. 75.

⁸ Jari Pirjola: Culture, Western Origin and the Universality of Human Rights. Nordic Journal of Human Rights. 11, April, 2005. Vol 23. Iss 1. <https://www.idunn.no/doi/10.18261/ISSN1891-814X-2005-01-01>

⁹ Siska, Katalin: Folytonosság és változás. Iszlám és szekularizmus a késő Ottomán birodalomban és a fiatal Törökországban, JURA 23: 1 pp. 131-139., 9 p. (2017).

¹⁰ Siska, Katalin: Az Atatürkizmus "Hat nyila". IUSTUM AEQUUM SALUTARE 13 : 2 pp. 201-213. , 13 p. (2017) 11 Siska, Katalin: A női jogok alakulásának áttekintése a Török Köztársaság megalakulásától napjainkig JOG ÁLLAM POLITIKA: JOG- ÉS POLITIKATUDOMÁNYI FOLYÓIRAT 2 pp. 39-54., 16 p. (2017)

¹² Siska, Katalin: Vallási tolerancia az Oszmán Birodalomban, In: Szabó, Béla; Újvári, Emese (szerk.) Ritus cum lacrimis: Könyv Babják Ildikó emlékére. Debrecen, Magyarország: Debreceni Egyetem Marton Géza Állam és Jogtudományi Doktori Iskola, Lícium Art. (2017) pp. 161-176., 16 p.

sources, instead of being rejected simply because it is new or unorthodox.¹³

Generally, the intense and hostile Muslim reaction to the reformation clearly indicates that the issue has become proxy for broader cultural and political concerns. Religious people were threatened that if they allow the changes finally all their freedom of religion will be lost, including the right to hold Friday prayers in our mosques. Despite their clearly secular Western origins, human rights must also be legitimated in the context of different religious traditions because of the importance of those perspectives for most people around the world.¹⁴

To find consistency between human rights and modern understandings of sharia we need to emphasize an anthropological approach to Islam which can make it possible to establish the religious legitimacy of such an interpretation. We need dynamic and organic approach in interpretation of sacred texts and practical experiences of human beings. This approach is not only justified in the Q'uran but required as numerous verses invites individuals, or the community, to reflect and reason independently. The verse 12 of chapter 2 and verse 43 of chapter 3 proclaim that human reflection and understanding is the whole purpose of revealing the Qur'an. The rich diversity of opinion among Muslim jurists over almost every significant legal principle or issue of public policy clearly indicates a dynamic legal development.¹⁵

The proposed approach to the relationship between religion and human rights strongly emphasizes commonalities as well as differences in the experience of societies. These commonalities are easier to appreciate considering a clear understanding of the dynamics of local struggles over power and resources, than by exclusively focusing on abstract theological precepts. This approach will enable human rights scholars and advocates to address the role of Islam (or any other religion) as a source of motivation and mobilization for political and social agendas, without appearing to challenge its legitimacy as the faith of a significant segment of the population of any country.¹⁶

Professor An-Na'im's perceptive, "liberal" perspective on Human Rights and Islam. Professor An-Na'im sees neither "immediate compatibility" nor "permanent contradiction" between Human Rights and Religion, nor between human rights and a particular religion e.g. Islam; rather he sees "synergy" and "mutual influence," but also some tension and some need for reconciliation. Professor An-Na'im

does not focus on theoretical, theological differences between Religion and Human Rights, but on their features in human experience. He stresses that universal human rights are to be implemented locally, recognizing that, in our times, human rights are designed for individual and communal life within a state, every nation state. (Indeed, if all states respected human rights at home, there would be little need for an international human rights movement or an international human rights law.)¹⁷

It is important to distinguish tensions between religion and human rights, from tension between human rights and religions or a particular religion. Religious ideology has not always been comfortable with the human rights ideology. Religion has sometimes suspected and resisted human rights as non-theistic, derived from a non-theistic source of authority (even if from "natural law"), an anthropocentric ideology rooted in the dignity of individual, mortal, human beings.¹⁸

The Turkish Model

With the example of Turkey, according to Katalin Siska expert on Turkey referred to several times in this study, the issue of ensuring religious freedom and the evaluation of the criterion from both sides - sheds light on a seemingly incompatible ontological situation between the EU and Turkey, which forms a fundamental barrier to the accession process. In the case of the secular nation-state Turkey, the concept of the "other" has European roots, it was formulated on a European model, the country's official policy is secular, which has been strongly influenced by the hundreds of years of Islamic tradition since the 1980s and the human rights norms, such as the issue of religious freedom was conceived within the framework of Islam. According to the European Union, which has fundamentally Christian roots, in a constitutional democracy, it must be accepted at the level of basic institutions and decision-making procedures that different political, moral, and religious views coexist in a society. Islam thinks in terms of the community, Christianity in terms of individuals.¹⁹

In Turkey, secularism, which can be interpreted broadly, provides the political framework for freedom of religion and conscience, so this human right cannot be interpreted in this community without its presentation. In the case of Turkey, official secularism is not the same as

¹³ Asaf A. A. Fyze: The Reinterpretation of Islam. University of Malaya Law Review, Vol. 1, No. 1 (July 1959), pp. 39-57. <https://www.jstor.org/stable/i24874695>

¹⁴ Mustafa Akyol: The Islamic World Doesn't Need a Reformation. 31 October, 2017. [theatlantic.com. https://www.theatlantic.com/international/archive/2017/10/muslim-reformation/544343/](https://www.theatlantic.com/international/archive/2017/10/muslim-reformation/544343/)

¹⁵ Jens Kreinath: Toward the Anthropology of Islam: An Introductory Essay. September 2011. In book: Anthropology of Islam Reader (pp.1-42), Publisher: Routledge – Taylor & Francis Group, Editors: Jens Kreinath. https://www.researchgate.net/publication/235221675_Toward_the_Anthropology_of_Islam_An_Introductory_Essay#:~:text=The%20anthropology%20of%20Islam%20aims,work%20within%20the%20social%20world.

¹⁶ Baas de Gay Fortman: Religion and Human Rights: A Dialectical Relationship. Dec 5 2011. <https://www.e-ir.info/2011/12/05/religion-and-human-rights-a-dialectical-relationship/>

¹⁷ Abdullahi Ahmed An-Na'im: Islam and Human Rights, Collected Essays in Law Series, edited by Mashood A. Baderin, Ashgate Publishing Ltd, 2010.

¹⁸ European Parliament: Religion and Human Rights. EPRS European Parliamentary Research Service. December 2018. <https://www.europarl.europa.eu/at-your-service/files/be-heard/religious-and-non-confessional-dialogue/events/en-20181204-eprs-briefing-religion-and-human-rights.pdf>

¹⁹ Katalin Siska: Cujus regio ejus religio? A vallásszabadság esete Törökországgal. Európai Jog, EJ, 2017/2., 31-37

including religious freedom, no effective development without equality, including religious and gender equality. Effective development would also be promoted by fraternity between religion and human rights.²³

According to Katalin Siska focusing on the official secular policy in Turkey we can find that Islamic legal

language on the issue, which is interestingly opposed to official public policy and harmonizes better with EU criteria than Turkish policy. The question arises, to what extent do the heated debates on the issue of religious freedom reflect the true opinion of the Islamic community and to what extent are they the ideological weapons of the Turkish parties?²⁴

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²⁴ Siska Katalin: Folytonosság és változás. Iszlám és szekularizmus a késő Ottomán birodalomban és a fiatal Török Köztársaságban (JURA, 2017/1., 131-139.