

THE WESTERN UNIVERSALISM V. CULTURAL RELATIVISM DEBATE ON HUMAN RIGHTS AND ISLAM: AN 'AQĪDAH-BASED APPROACH

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Abstract

The human rights discourse of (Western) universalism versus cultural relativism in international law becomes interesting when Islam is put into the equation. Scholars incline to either side of the debate while trying to have something in between to bridge the differences. This article uses a literature doctrinal method and does not use the 'third-person view' used by most scholars. Rather, this article uses an '*aqīdah*' approach to analyze the challenge faced by Muslim international law scholars. It is argued that inclining to either universalism or relativism is against the Islamic '*aqīdah*' (creed). Rather, the position which is correct according to the Islamic '*aqīdah*' is to take a third path, namely Islamic universalism as a way forward.

Keywords: '*Aqīdah*'; Islam; international human rights law; relativism; universalism.

Khulasah

Wacana hak asasi manusia universalisme (Barat) lawan relativisme budaya dalam undang-undang antarabangsa menjadi menarik apabila Islam diposisikan ke dalam wacana tersebut. Para sarjana cenderung kepada salah satu daripada kedua-dua sisi perdebatan sambil cuba menghubungkan pertentangan

tersebut. Makalah ini menggunakan kaedah doktrinal kepustakaan, dan tidak menggunakan 'pandangan orang ketiga' sepertimana yang digunakan oleh kebanyakan sarjana. Sebaliknya, makalah ini menggunakan pendekatan akidah untuk menganalisa cabaran yang dihadapi seorang sarjana Muslim dalam bidang undang-undang antarabangsa. Dihujahkan bahawa cenderung sama ada kepada universalisme atau relativisme adalah kedua-duanya bertentangan dengan akidah (kepercayaan) Islam. Sebaliknya, posisi yang tepat menurut akidah Islam adalah jalan ketiga, iaitu universalisme Islam sebagai jalan ke hadapan.

Kata kunci: Akidah; Islam; undang-undang hak asasi manusia antarabangsa; relativisme; universalisme.

Introduction

The relationship between Islam and human rights has always been the subject of hot debates, with endless scholarly works dedicated to this very issue. Some scholars tend to be more apologetic in their defense of Islam, some heavily criticize Islam, but they seem to generally agree that there are agreements and disagreements within the two regimes.¹ At the heart of the debate of Islam and human rights (or religion and human rights in general) is the debate of universalism versus relativism. This, too, has been subject to major scholarly debates. Some argue for universalism, some do for relativism, while a third group

¹ See generally, among others: Abdullahi Ahmed An-Na'im, "Why Should Muslims Abandon Jihad? Human Rights and the Future of International Law," *Third World Quarterly* vol. 27, no. 5 (2006), 785–797; Mashood A. Baderin, *Hukum Internasional Hak Asasi Manusia dan Hukum Islam* (Jakarta: Komisi Nasional Hak Asasi Manusia, 2010); Anver M. Emon, Mark S. Ellis and Benjamin Glahn, eds., *Islamic Law and International Human Rights Law* (Oxford: Oxford University Press, 2012); Ann Elizabeth Mayer, "Universal versus Islamic Human Rights: A Clash of Cultures or Clash with a Construct," *Mich. J. Int'l L.* vol. 15 (1993), 307.

says that there should be a bit of both.² The universalists would demand Islamic law to adapt while the relativists would argue otherwise.

This article approaches the issue from the perspective of the Islamic *'aqidah*. It is essential to the belief of a Muslim that he or she may not use laws other than the Qur'ān and the Sunnah, as per the Qur'ān in al-Nisā' verse 59. This is a matter which would have implications towards the *'aqidah* of a Muslim. On the other hand, a scholar of international law would understand that his or her field of study would traditionally have its own sources of law reflected in the Statute of the International Court of Justice, Article 38(1).

Muslim scholars of international law who have to express their opinion about human rights questions may occasionally find themselves caught between two approaches which are based on very different theoretical considerations. In other words, they may be faced with a dilemma. A scholar of law not only elaborates and elucidates the nature, state, and application of the law, but he or she also identifies the lack and weakness in the current system and then later contributes to the development of the law itself.³

² See generally, among others: Al-Khanif, Herlambang P. Wiratraman and Manunggal Kusuma Wardaya, eds., *Hak Asasi Manusia: Dialektika Universalisme vs Relativisme di Indonesia* (Yogyakarta: LKiS, 2017); Jack Donnelly, "The Relative Universality of Human Rights," *Human Rights Quarterly* vol. 29, no. 2 (2007): 281–306; Alison Dundes Renteln, *International Human Rights: Universalism versus Relativism* (New Orleans: Quid Pro Books, 2013); Boaventura de Sousa Santos, "Toward a Multicultural Conception of Human Rights," *Zeitschrift Für Rechtssoziologie* 18, no. 1 (1997): 1–15.

³ Malcolm N Shaw, *International Law*, 6th ed. (New York: Cambridge University Press, 2008), 113; L. J. von Apeldoorn, *Pengantar Ilmu Hukum (Inleiding Tot de Studie van Het Nederlandse Recht)* (Jakarta: Pradnya Paramita, 2008), 164–168.

What, then, should the response of a Muslim international law scholar be while contributing to the scholarship of international human rights law in order to be consistent with the Islamic *'aqīdah*? This article explores first the universalist and then the relativist arguments in the Islam and human rights debate and finds that neither argument is consistent with the Islamic faith. Finally, this article provides a third option which is more appropriate according to the Islamic *'aqīdah*.

An *'Aqīdah* Approach to an International Law Discourse?

This article may be discussing both international law and Islamic law, particularly those relating to human rights. However, this article does not primarily revolve around a jurisprudential discussion. Rather, this article mainly uses an *'aqīdah* approach in order to perceive the international human rights law discourse.

The term *'aqīdah*, in the *shar'ī* sense, refers to all scientific matters arising from Allah and His messenger which are compulsory for all Muslims to believe in.⁴ The concept of belief (*imān*) and disbelief (*kufr*) are central topics in *'aqīdah*, which includes the foundations of, and the nullifiers of, faith.⁵ Particularly, in reference to nullifiers of faith (*nawāqid al-īmān*, sometimes referred also as 'nullifiers of Islam' or *nawāqid al-Islām*), the Islamic science of *'aqīdah* sees *riddah* (apostasy) not only when a person no longer identifies as a Muslim but rather

⁴ Umar Sulaymān al-Ashqar, *Aqīdah fī Allāh* (Jordan: Dār al-Nafā'is, 1423), 12.

⁵ See *inter alia* Sa'īd bin 'Alī bin Wahf al-Qaḥṭānī, *Sharḥ 'Aqīdah Wasīṭiyah* (Surakarta: al-Tibyan, n.d.); Ibn Abī Al-'Izz, *Sharḥ al-'Aqīdah al-Ṭaḥawīyyah* (Riyadh: Imadat al-Baḥth al-'Ilmi and the Institute of Islamic and Arabic Sciences in America, 2000); Sa'd al-Dīn al-Taftāzānī, *A Commentary on the Creed of Islam (Sa'd Al-Din Al-Taftazani on the Creed of Najm al-Din al-Nasafi)* (New York: Columbia University Press, 1950); Zayn al-Dīn al-Malībārī, *Irshād al-'Ibād ilā Sabīl al-Rashād* (Jakarta: Dār al-Kutub al-Islāmiyyah, 2010).

also when certain objective criteria are met, *inter alia* committing major *shirk*, slandering Islam, and believing that human-made laws are better than the law revealed by Allah.⁶

It is important to mention that, albeit the differences and discourse between the three *madhhabs* of the *Ahl al-Sunnah wa al-Jamā'ah* (*Ash'ariyyah*, *Māturīdiyyah* and *Athariyyah*)⁷ in certain issues, the matters discussed in this article are those which there is no disagreement found. Therefore, this article does not confine itself to either of the three aforementioned *madhhabs*. Rather, references are made to works across the different *madhhabs* under the *Ahl al-Sunnah wa al-Jamā'ah*.

It is also important to point out that, while apostasy is truly a matter of *'aqīdah*, books of *fiqh* discuss it too as there are numerous legal consequences of *riddah*.⁸ Another discussion of *riddah* is regarding the requirements to make *takfīr* (declare an individual as a *murtad* i.e. an apostate) which must be conducted extremely carefully and on a

⁶ Muḥammad bin 'Abd al-Wahhab, *Nawaqidh al-Islam - Pembatal Islam (Matan dan Terjemah)* (Surabaya: Pustaka Syabab, 2015); Ibn Abī al-'Izz, *Sharḥ al-'Aqīdah al-Ṭahawīyyah*, 261-282; Ibn Ḥajar al-Haytamī, *al-'Ilām bi Qawāṭi' al-Islām* (Syria: Dār al-Taḥqāwā, n.d.); Sa'd bin 'Alī al-Shahrānī, *Firqah al-Ahbash*, vol. 1 (Makkah: Dār 'Alam al-Fawa'id, n.d.), 660–661; Muḥammad al-Nawawī al-Jāwī, *Tafsīr Marah Labid*, vol. 1 (Beirut: Dār al-Kutub al-'Ilmiyyah, n.d.), 253; 'Alī al-Qārī, *Sharḥ Fiqh Al-Akbar*, vol. 1 (Beirut: Dār al-Kutub al-'Ilmiyyah, n.d.), 253; 'Iyāḍ bin Mūsā, *al-Shifā' bi Ta'rīf Ḥuqūq al-Muṣṭafā* (Beirut: Dār al-Kitāb al-'Arabī, 1404), 932.

⁷ Muḥammad ibn 'Alī ibn Sallūm, *Mukhtaṣar Lawāmi' al-Anwār al-Bahīyyah wa Sawāṭi' al-Asrār al-Athariyyah* (Beirut: Dār al-Kutub 'Ilmiyyah, 1983), 58.

⁸ See *inter alia*: Choirul Anwar, *Terjemah Ilmu Fiqih: Sullamut Taufiq* (Surabaya: Penerbit Amelia, n.d.), 80–93; Yahya ibn Sharaf al-Nawawī, *Rawḍah al-Ṭālibīn*, vol. 10 (Riyadh: Dār 'Alām al-Kutub, 2003), 64–85; Abū Ishāq Burhān al-Dīn al-Ḥanbalī, *al-Mubdī' fī Sharḥ al-Muqni'*, vol. 5 (Beirut: al-Maktab al-Islāmī, 1421), 170. See also in various parts: Imam Syafī'i, *Ringkasan Kitab al-Umm*, vol. 2 (Jakarta: Pustaka Azzam, 2004).

case-per-case (individual) basis.⁹ Having that said, this article is not written to make *takfir* towards any individuals. Rather, it only analyses the 'aqidah implications of certain human rights positions.

This is also the reason why and how issues of 'aqidah can be manifested in matters of law, as is explained in the following paragraphs. One of the areas of 'aqidah is related to law, which is the belief in Allah as the Lawmaker. In fact, the Arabic word for 'religion', *al-Dīn*, shares the same root word and semantic relation with 'judicious power'.¹⁰ This indicates how the belief in Allah as the Lawmaker is central to the Islamic 'aqidah. The Qur'ān in al-Mā'idah verse 49 reads as follows:

وَأَن أَحْكُم بَيْنَهُم بِمَا أَنزَلَ اللَّهُ وَلَا تَتَّبِعْ أَهْوَاءَهُمْ
وَاحْذَرُهُمْ أَن يَفْتِنُوكَ عَنْ بَعْضِ مَا أَنزَلَ اللَّهُ إِلَيْكَ
فَإِن تَوَلَّوْا فَاَعْلَمُ أَنَّمَا يُرِيدُ اللَّهُ أَن يُصِيبَهُمْ بِبَعْضِ
ذُنُوبِهِمْ وَإِنَّ كَثِيرًا مِّنَ النَّاسِ لَفَاسِقُونَ

“And judge, [O Muhammad], between them by what Allah has revealed and do not follow their inclinations and beware of them, lest they tempt you away from some of what Allah has revealed

⁹ See *inter alia* Yahya ibn Sharaf Al-Nawawī, *Ṣaḥīḥ Muslim Sharḥ Al-Nawawī*, vol. 1 (Damascus: Dar al-Khayr, 1416), 150; Aḥmad ibn `Abd al-Ḥalīm Ibn Taymiyyah, *Majmu' al-Fatāwa*, vol. 12 (KSA: Wizārah al-Shu'ūn al-Islāmiyyah wa al-Awqāf wa al-Da'wah wa al-Irshād, 1425H), 180; Muḥammad bin `Abd al-Wahhāb, *al-Durar Al-Saniyah* (al-Iskandariyyah: Dār al-Imān, 2001), 66; Ibn Abī al-'Izz, *Sharḥ al-'Aqidah al-Tahawiyah*, 267-74.

¹⁰ Aḥmad Mukhtār, *Mu'jam al-Lughah al-'Arabīyyah Mu'Aṣirah* (Cairo: 'Alam al-Kutub, 2008), 796; Syed Muhammad Naquib al-Attas, *Prolegomena to the Metaphysics of Islam: An Exposition of the Fundamental Elements of the Worldview of Islam* (Kuala Lumpur: ISTAC, 1995), 41-42.

to you. And if they turn away - then know that Allah only intends to afflict them with some of their [own] sins. And indeed, many among the people are defiantly disobedient.”

While the Islamic theology holds Allah as the One True Lawmaker, Prophet Muḥammad PBUH also has an important position in this regard. While Prophet Muḥammad PBUH is indeed a human being, but the Islamic *‘aqidah* holds him at a very high position including in law. The Qur’ān mentions in al-Nahl verse 44 that he explains the Qur’ān, al-Ahzāb verse 21 explains that he is the best of examples, and al-Najm verses 1-4 explain that he does not make mistakes. Other verses specifically prohibit disobeying Prophet Muḥammad PBUH, such as al-Nur verse 63.

In addition, numerous verses in the Qur’ān, including al-Nisā’ verse 59, Muḥammad verse 33 and al-Taghabun verse 12, command the Muslims to obey not just Allah but also Prophet Muḥammad PBUH. These are evidence that the Islamic *‘aqidah* requires the belief that the teaching of Prophet Muḥammad PBUH is considered also as laws of Allah. The Qur’ān also reads in Surah al-Mā’idah verse 44:

وَمَنْ لَّمْ يَحْكَمْ بِمَا أَنزَلَ اللَّهُ فَأُولَٰئِكَ هُمُ
الْكَافِرُونَ

“And whoever does not judge by what Allah has revealed - then it is those who are the disbelievers.”

Among the meanings of this verse is that an individual who rejects or disbelieves in the laws of Allah and prefers human-made laws is considered as a *kāfir* (disbeliever, or non-Muslim).¹¹ If such a belief is held by a Muslim, he/she

¹¹ ‘Abd al-Wahhab, *Nawaqidhul Islam - Pembatal Islam (Matan Dan Terjemah)*, 4; Ibn Abī ‘Alī al-Ḥanafī, *Sharḥ al-‘Aqidah al-*

would be considered to have committed *riddah*.¹² It is a popular belief that such a position is only held by extremists, but the previous note shows that this is a consensus held by scholars across different creeds and schools of jurisprudence.

Granted, it is true that there is a diversity among the Muslim jurists across the ages resulting in differences of opinion in a vast amount of *fiqh* rulings.¹³ However, it is a consensus among the jurists that *fiqh* rulings made through interpretation are only done towards matters not specifically regulated by the Qur'ān and the Sunnah.¹⁴ Jurists from all *madhhabs* put both the Qur'ān and the Sunnah as primary sources of law.¹⁵ Therefore, as an 'aqīdah-centered article, an Islamic jurisprudence analysis

Tahawīyyah, vol. 2 (Beirut: Mu'assasah al-Risalah, 1997), 446; Ibn Kathīr, *Shahih Tafsir Ibnu Katsir*, vol. 3 (Jakarta: Pustaka Ibnu Katsir, 2016), 149. See also: Haji Abdulmalik Abdulkarim Amrullah, *Tafsir al-Azhar*, vol. 3 (Singapore: Pustaka Nasional PTE Ltd, n.d.), 1758–60. See also from many other scholars from various creeds and *madhhabs*: Abū Ṣuḥayb 'Abd al-'Azīz ibn Ṣuḥayb al-Mālikī, *Aqwāl al-Ā'imma wa al-Du'āt fī Bayān Riddah Man Baddala Sharī'ah min al-Ḥukkām al-Ṭughāt* (Ilmway (Online), 2000), http://www.ilmway.com/site/maqdis/MS_9234.

¹² al-Hanafī, *Sharḥ Al-'Aqīdah Al-Tahawīyyah*, 2:446. Ibn Kathīr, *Shahih Tafsir Ibnu Katsir*, 2016, 3:149. See also: Amrullah, *Tafsir Al-Azhar*, 3:1758–60. See also from many other scholars from various creeds and *madhhabs*: Al-Mālikī, *Aqwāl al-Ā'imma*.

¹³ Ibn Rushd is one of the jurists who have compiled the differences of opinion between jurists and the causes of these differences. See Ibn Rushd, *The Distinguished Jurist's Primer*, trans. Imran Ahsan Nyazee Khan, vol. 1 (Reading: Garnet Publishing, 2000).

¹⁴ Muḥammad bin Idrīs al-Shāfi'ī, *Shafi'is Risalah: Treatise on the Foundations of Islamic Jurisprudence (Translated with an Introduction, Notes, and Apendices by Majid Khadduri)*, 2nd ed. (Cambridge: The Islamic Texts Society, 1987), 288; Imran Ahsan Khan Nyazee, *Islamic Jurisprudence* (Selangor: The Other Press, 2003), 214 and 263.

¹⁵ See: Abu Ameenah Bilal Philips, *The Evolution of Fiqh (Islamic Law and the Madh-Habs)* (Riyadh: Tawheed Publication, 1990).

is not the main approach used herein. Rather, it is only discussed when it is relevant.

This article instead mainly considers the development of international human rights and the response of the Muslims from an *'aqīdah* perspective, meaning to consider what may preserve or what may annul faith. Not only the belief in Allah as the Lawmaker, but there are various other aspects of *'aqīdah* which may be relevant. In this context, it is possible that some responses by Muslims towards international human rights may affect their *'aqīdah*. Much in the highlight is the Muslim international law scholar, as indicated in the previous section, who is at the centre of the debate between Western Universalism and Cultural Relativity.

The (Western) Universalist Approach to Human Rights and Islam

The general idea of Western universalism in human rights is that there are certain human rights which are inalienable and applicable towards all human beings by the mere virtue of being humans.¹⁶ Previously considered part of domestic affairs, the Universal Declaration of Human Rights (1948) marked the start of the human rights law regime as part of international law.¹⁷

The (Western) Universalism Claim

The language of the universalist claim is repeated in most, if not all, of the first lines of the preambles of the multitude of international human rights law instruments that poured in the decades to come after that. These include the International Covenant on Civil and Political Rights (1966), the International Covenant on Economic, Social and Cultural Rights (1966), and the Convention on the

¹⁶ Jack Donnelly, *Universal Human Rights in Theory and Practice* (New York: Cornell University Press, 2003), 10.

¹⁷ Shaw, *International Law*, 270.

Elimination of All Forms of Discrimination against Women (1989).

A Western universalist¹⁸ approach towards the general debate on human rights and religion in international law would say that religion must adjust towards international human rights law standards whenever there are discrepancies.¹⁹ This is also the approach of some Muslim international law scholars towards the debate on Islam and human rights, albeit to different extents and in different ways, some scholars say no exception can be argued by Islam²⁰ and others say that Islam and international human rights must both accept some changes to adjust to each other.²¹

This is different from some who understand universality as 'similar standards are held in both Islam and

¹⁸ The term 'Western' is usually used to identify the European colonialist civilization and its extension in the modern-day. Syed Muhammad Naquib al-Attas, *Risalah Untuk Kaum Muslimin* (Kuala Lumpur: ISTAC, 2001), 18; Wan Mohd Nor Wan Daud, *Islamization of Contemporary Knowledge and the Role of the University in the Context of De-Westernization and Decolonialization* (Johor Baru: UTM Press, 2013), 6–7; Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (New York: Cambridge University Press, 2004).

¹⁹ See for example Helen Quane, "Legal Pluralism and International Human Rights Law: Inherently Incompatible, Mutually Reinforcing or Something in Between?," *Oxford Journal of Legal Studies* vol. 33, no. 4 (2013), 675.

²⁰ See generally, Ebrahim Afsah, "Islamic Exceptionalism: How Valid Is the Concept of 'Islamic Human Rights,'" *Kennedy School Review* 1, no. 1 (2000), 5–15; Ebrahim Afsah, "Contested Universalities of International Law. Islam's Struggle with Modernity," *Journal of the History of International Law* 10 (2008), 259–307.

²¹ See generally: Baderin, *Hukum Internasional*. Some of Baderin's points would observe different opinions between Islamic jurists and prefer which is closer to international human rights. See also: Ali Ahmari-Moghaddam, *Towards International Islamic Human Rights: A Comparative Study of Islamic Law, Shari'ah, with Universal Human Rights as Defined in the International Bill of Human Rights* (Canada: University of Toronto, 2012), 139.

international human rights' and therefore the norms simply coincide with each other rather than one following the other.²² In the second type above, however, sometimes we may also find traces of Western universalism. This is in case of difference of opinions between Islamic jurists, universalist scholars will incline towards an opinion when it inclines towards international human rights law for that reason alone.²³

The above claim would seem to rely on two assumptions, the claim of universality, and that Islamic law can be changed. A discussion concerning the first matter is done in the next section under the topic of Cultural Relativism. This section explores the claim that Islamic law can be changed.

'Islamic Reformist' Basis towards Universalism

The main assumption brought by the Western universalists to reform Islamic law, as this sub-section shows, is the permissibility of the use of hermeneutics.²⁴ The idea of hermeneutics is to understand that a text is produced by a

²² Meaning that this 'universality' is due to Islamic law contributing to the many different norms of coincidental values. See for example in the context of some areas of international humanitarian law: Zayd bin 'Abd al-Karīm al-Zayd, *Muqaddimah fī al-Qānūn al-Duwalī al-Insānī fī al-Islām* (Kuwait: The International Committee of the Red Cross, Kuwait Delegation, 2004).

²³ For example, Abdullaahi An-Na'im who uses the concept derived from his teacher Maḥmūd Muḥammad Ṭaha, saying that the Madani verses of the Qur'ān should be abrogated by the Makki verses due to the former being more conforming to the modern standards of human rights. See Abdullaahi Ahmed An-Na'im, *Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law* (New York: Syracuse University Press, 1996), 57–60.

²⁴ A second and no less important assumption held by this school of thought is that the Western view of human rights is 'the universally accepted standard of today'. This particular point is the main complaint of the cultural relativists who then build up their entire stance as an opposition based on this. This is explained further in Section C.

man, and therefore subject to all the limitations of a man's mind i.e. limited by his socio-historical background, and anything divine or spiritual is beyond what this method can observe or consider.²⁵ It holds a basis that no text can be separated from, and therefore substantially 'stays' in, its historical context.²⁶

Such a view would mean that if a text claimed to be divine is contemplated with hermeneutics, then such claim, by this method, cannot even be considered. Consequently, its contents are limited by the human faculty. This would then serve as a basis for the second assumption, namely the separation between 'Islam' and 'Islamic law'. This is why Ebrahim Afsah argues that Islamic law disregards the impact of modernity, agreeing with Fouad Zakaria that Islamic law, "...freezes a certain moment of history and holds fast to it till the very end, thus doing away with dynamism, mobility and historical development."²⁷

They would then simplistically argue how Islamic law is merely the human understandings of Islam, therefore it may be easily reinterpreted to adjust to time and place.²⁸ This, then, is the path to easily adjust Islam towards modern standards because 'this is the standard of today'. An alternative method of hermeneutics is used by Maḥmūd Muḥammad Ṭaha, which was then developed by Abdullahi An-Na'im. Ṭaha proposes that the Makkī verses of the Qur'ān should abrogate the Madanī ones as the former is

²⁵ Adian Husaini and Abdurrahman al-Baghdadi, *Hermeneutika & Tafsir Al-Qur'an* (Jakarta: Gema Insani Press, 2007), 33.

²⁶ Fahmi Salim, *Kritik Terhadap Studi al-Qur'an Kaum Liberal* (Jakarta: Perspektif, 2010), 116.

²⁷ Afsah, "Islamic Exceptionalism," 7; Fouad Zakaria, "Human Rights in the Arab World: The Islamic Context," in *Philosophical Foundations of Human Rights*, ed. UNESCO (Paris: UNESCO, 1986), 237.

²⁸ Abdullahi Ahmed An-Na'im, "Islamic Law, International Relations, and Human Rights: Challenge and Response," *Cornell International Law Journal* vol. 20, no. 2 (1987), 320-321; Afsah, "Contested Universalities of International Law," 278-287.

more universal than the latter which is mere contextual towards the 'historical Madīnah'.²⁹

A Critical Observation

The use of hermeneutics in religious laws may have started in Christianity due to its character as a 'divinely inspired religion', i.e. the authors of the testaments as human beings were (merely) inspired by God.³⁰ Thus, if the text is written by and subject to the limitations of a man towards his socio-political and historical environment, the use of hermeneutics makes sense.³¹

On the contrary, the Qur'ān is the literal and verbatim of Allah's Words to Prophet Muḥammad PBUH,³² and not written or made by the latter who definitely was not merely 'inspired'. Therefore, as the Qur'ān is not a human product according to the Islamic belief, it cannot be assumed to share the human limitations of its socio-historical background. Rather, it transcends the boundaries of time, space, and cultures, because it is the Words of Allah. This means that, from an Islamic standpoint, hermeneutics cannot be used.³³

Some parts of Islamic law are directly from divine sources and therefore, naturally, cannot be changed. Does this mean that Afsah's and Zakaria's claim is correct after

²⁹ Mahmoud Mohamed Taha, "The Second Message of Islam," in *Liberal Islam: A Sourcebook*, ed. Charles Kurzman (New York: Oxford University Press, 1996), 270–283.

³⁰ Pope Benedict XVI, cited in Husaini and al-Baghdadi, *Hermeneutika & Tafsir al-Qur'an*, 10–11.

³¹ *Ibid.*, 12. Thus, no surprise that the Christians believe in the Old Testament but do not practice it. See: Joseph Tkach, "Are Old Testament Laws Still Binding on Christians?," *Grace Communion International*, accessed November 29, 2017, <https://www.gci.org/law/otlaws>.

³² Ahmad von Denffer, *Ulum al-Quran: An Introduction to the Sciences of the Quran* (Leicestershire: The Islamic Foundation, 2014), 6–7.

³³ For detailed critic towards hermeneutics in Islam, see Salim, *Kritik Terhadap Studi al-Qur'an Kaum Liberal*; Husaini and al-Baghdadi, *Hermeneutika & Tafsir Al-Qur'an*.

all? The answer is, not entirely. While it may be true that some parts of Islamic law indeed are 'frozen', it must be important to note that these parts (i.e. the divine parts) do not follow the limitations of the human mind as explained earlier. Therefore, to assume that 'it lags behind human development' is epistemologically flawed. This is because much of the jurists' rulings around these matters do not necessarily reflect the socio-historical surroundings of the jurists.

An example of this is the case of *hudūd* (i.e. penal sanctions provided explicitly in the text of the Qur'ān and the Sunnah)³⁴ which are usually at the center of the critics of the universalists. The jurists rule that the penal sanctions of *hudūd* are to be applied, not because they believe they correspond to the particular socio-historical context of the time but because the Qur'ān and the *Sunnah* are to be by default taken literally unless there is a basis to suggest otherwise.³⁵ Claiming that the *hudūd* is 'out of date' is to assume that it was a time-place specific ruling, while they are explicit rulings taken from the Qur'ān which is, as per the Islamic theology explained earlier, not limited by that.

Further, it may be true that most of the rulings in Islamic laws are derived by interpretation or legal reasoning (i.e. *ijtihād*) when there are no direct rules in the Qur'ān or the Sunnah,³⁶ and some of that *ijtihād* may be based on *maṣlaḥat* or customs; therefore such *ijtihād* would adjust to

³⁴ 'Abd al-Qādir 'Awdah, *al-Tashri' al-Jinā'i al-Islāmī Muqāranan bi al-Qānūn al-Waḍ'i* (Cairo: Maktabah Dar al-Turath, 2003), 127.

³⁵ Taj al-Dīn Ibn al-Subkī, *Matan Jam' al-Jawāmi'* (Beirut: Dār al-Kutub 'Ilmiyyah, 2003), 54. See also: Sayf al-Dīn al-Āmidī, *al-Ihkām fī Uṣūl al-Ahkām*, vol. 3 (Bayrūt: Dār al-Fikr, 1996), 38.

³⁶ 'Abd al-Karīm Zaydān, *Synopsis on the Elucidation of Legal Maxims in Islamic Law*, trans. Md. Habibur Rahman and Azman Ismail (Kuala Lumpur: IBFIM, 2015), 29; Yusri Mohamad, *Contemporary Ijtihad: An Analysis of Individual and Collective Approaches* (Kuala Lumpur: Islamic and Strategic Studies Institute, 2016), 67.

time and place.³⁷ This part of Islamic law may partially correspond to Afsah's and Zakaria's claim that Islamic law only captures the particular socio-historical reality at the time of the jurists. However, this part of Islamic law will naturally change to correspond with the change of *maṣlahat* or customs. Therefore, Islamic law, contrary to Afsah's and Zakaria's claim, can adjust to modernity as long as it does not contravene the Qur'ān or the Sunnah.

The truth is that most of what the Western universalists want is practically a reform of not only *ijtihād* but really to also reform the Qur'ān and the Sunnah. This is such as the cases of the demand of feminists towards Western-style gender equality, legalization of homosexuality, all of which demand reform of, not just *ijtihād*, but the Qur'ān and the Sunnah altogether in preference of human-made standards. As explained in the second section, this kind of belief contradicts the Islamic '*aqīdah*'.

The reform method by Ṭaha was claimed by Abdullahi An-Na'im to be Islamic. However, the *fatwa* ruling that Ṭaha is considered a *murtad* (apostate) due to his thoughts by both the al-Azhar Islamic Research Academy and the Muslim World League should be a 'red flag'.³⁸ Ṭaha based his argument on an assumption that the Islamic jurists ruled that the more universal Makkī verses were abrogated by the more particular Madanī verses, while he argued it should be the other way round (i.e. the Madanī verses should instead be abrogated by the Makkī verses).³⁹ Note that a vast majority of verses containing rules and regulations are

³⁷ Abū Hāmid Muḥammad al-Ghazālī, *al-Muṣtaṣfa Min 'Ilm al-Uṣūl*, vol. 1 (Cairo: Al-Amiriya Press, 1324), 286; Amir Syarifuddin, *Ushul Fiqih*, vol. 2 (Jakarta: PT Logos Wacana Ilmu, 1999), 363–364.

³⁸ See Sāmī al-Ḍīb, "Tawaruṭ al-Azhar fī Shanaq Muḥammad Ṭaha," *Ahewar.Org*, February 8, 2015, <http://www.m.ahewar.org/s.asp?aid=454296&r=0>.

³⁹ See Ṭaha, "The Second Message of Islam."

Madani verses,⁴⁰ therefore, consequently, so many bases for laws and *ijtihad* are dismissed by this method.

The problem is that Ṭaha was refuting a 'strawman', no Islamic jurists have abrogated all the Makkī verses. Rather, the use of abrogation is very restricted, and some scholars even say that abrogation can only be used as a last resort in *ijtihad* when resolving *ta'arud* is not possible without it.⁴¹ In fact, the consensus of the jurists maintains that only nine verses were abrogated.⁴² Further, Ṭaha's claim makes very little sense considering the idea of abrogation is a newer verse overriding an older one and not the other way round as Ṭaha proposed.⁴³

When Taha's method is applied by An-Na'im, it further displays the mistake of such understanding. For example, An-Na'im claims that the Makkī verses provide gender equality while the Madanī verses discriminate women by giving different rights and obligations between men and women. Then, he concludes that this is a contradiction.⁴⁴

However, this is not a contradiction as per the Islamic theological position regarding the Qur'ān and the Sunnah on how one part relates to the others, as per Surah al-Nisā' verse 82. As al-Shāfi'ī and other jurists note, there is no true contradiction in the Qur'ān and the Sunnah, except only

⁴⁰ Manna' Khalīl al-Qaṭṭān, *Mabāhiith fi 'Ulūm al-Qur'ān* (Riyadh: Mansurat al-'Asr al-Hadīth, n.d.), 63–64.

⁴¹ Al-Utsaimin, *Ushul Fiqih*, 84–87.

⁴² There are more alleged abrogations, and scholars disagree on them. Nonetheless, even counting those, there is an insignificant amount of them compared to the entire Qur'ān. See: 'Abd Allāh bin Muḥammad al-Amīn al-Shinqīṭī, *al-Āyāt al-Mansūkhah fi al-Qur'ān al-Karīm* (Cairo: Maktabah Ibn Taymiyyah, n.d.), 155 and generally.

⁴³ Al-Utsaimin, *Ushul Fiqih*, 86. See also: Asmu'i, "Studi Kritis Atas Konsep Nāsikh-Mansūkh Abdullahi Ahmed An-Na'im," *Kalimah: Jurnal Studi Agama Dan Pemikiran Islam* vol. 11, no. 1 (2013), 151–174.

⁴⁴ Such as inheritance etc. See An-Na'im, *Toward an Islamic Reformation*, 176–77.

appearing so.⁴⁵ Therefore, the jurists approach apparent contradictions by a presupposition that there cannot be true contradictions, and therefore resolve these seemingly contradicting verses or Sunnah by a number of alternative methods, namely: reconciliation (reconciling the meanings), preference (e.g. preferring explicit meanings over manifest meanings, etc), and abrogation (if there is solid evidence of its occurrence).⁴⁶

In the case of equality between the sexes, Islam's concept of 'equal' does not always mean 'the same'. In Islam, proportionate (instead of same) rights between the sexes is the true meaning of equality.⁴⁷ This is an application of reconciliation. The only alleged contradiction An-Na'im has found is between the Islamic and the liberal feminist concepts of equality. The latter is epistemologically different and contradictive towards Islam and inaccurately claimed to be a 'universally recognized' concept.⁴⁸

Therefore, in the end, this view of Western universalism finds its place in a dangerous position according to the Islamic belief. It is not that Islamic law scholarship does not accept any innovation whatsoever.

⁴⁵ Al-Shafi'i, *Shafi'i's Risalah*, 37; Sapiudin Shidiq, *Ushul Fiqh* (Jakarta: Kencana, 2017), 248.

⁴⁶ Ahmad Atabik, "Kontradiksi Antar Dalil Dan Cara Penyelesaiannya Perspektif Ushuliyyin," *Yudisia* vol. 6, no. 2 (2015), 262–267.

⁴⁷ Saipudin, "Kritik Atas Pemikiran Abdullahi Ahmed An-Na'im Tentang Distorsi Syariat Terhadap HAM," *Ahkam* vol. 16, no. 1 (2016): 37–39.

⁴⁸ Fajri Matahati Muhammadin, "Universalitas Hak Asasi Manusia Dalam Hukum Internasional: Sebuah Pendekatan Post-Kolonial," in *Hak Asasi Manusia: Dialektika Universalisme vs Relativisme Di Indonesia*, ed. Al-Khanif, Herlambang P. Wiratraman, and Manunggal Kusuma Wardaya (Yogyakarta: LKiS, 2017), 12–13. For a further critical discussion on the concept of gender in western feminism, see Dinar Dewi Kania, ed., *Delusi Kesetaraan Gender: Tinjauan Kritis Konsep Gender* (Jakarta: Yayasan AILA Indonesia, 2018).

However, *ijtihād* must not break the fundamental rules. A person implementing non-Islamic laws due to the belief that such a law is better than the Qur'ān and the Sunnah is considered as a *murtad* for committing such an act of *kufṛ* (disbelief)..⁴⁹ The same goes for a person who defies an *ijma'* (consensus) of the jurists,⁵⁰ which is what all these universalist scholars are proposing.

Cultural Relativist Approach to Human Rights and Islam

The idea of cultural relativism in human rights is that there shall be no claim of 'inherent' truths of human nature, rather the truths are dependent on the norms and expectations of particular cultures.⁵¹ Therefore, human rights, too, depends on its cultural context. The term 'culture' is broad to include indigenous traditions, customary practices, and political and religious ideologies. Hence, a relativist would argue that notions of human rights necessarily differ throughout the world because the cultures in which they take root differ. It follows that the Western concept of human rights should not be imposed on nations that have different standards of human rights. Therefore, this section explores the arguments used in favor of relativism and sees whether it is acceptable in the Islamic '*aqīdah*.

⁴⁹ 'Abd al-Wahhab, *Nawaqīdhul Islam*, 4; al-Ḥanafī, *Sharḥ al-'Aqīdah al-Ṭahawīyyah*, 2:446. See also this compilation of fatwas on the same matter from 200 scholars, classical and contemporary, and from various madhhabs: al-Mālikī, *Aqwāl al-Ā'immaḥ*. These rulings are derived from various verses in the Qur'ān such as al-Maidah, verses 44 and 50.

⁵⁰ 'Uthmān bin 'Alī Ḥasan, *Manhaj al-Istidlal 'alā al-I'tiqād 'Inda Ahl al-Sunnah wa al-Jamā'ah* (al-Riyāḍ: Maktabah al-Rushd, 1415), 149–150; Yaḥya ibn Sharaf al-Nawawī, *Rawḍah al-Ṭālibīn*, vol. 1 (Riyadh: Dār 'Alām al-Kutub, 2003), 667. Among the *ijma'* of the Muslims, that the Qur'ān and Sunnah shall be definite sources of law. See the above note.

⁵¹ Ajnesh Prasad, "Cultural Relativism in Human Rights Discourse," *Peace Review* vol. 19, no. 4 (2007), 590.

The Cultural Relativism Claim

In the context of international law, there does seem to be some evidence in favor of this particular view. For example, cultures and religions with regard to how the rights of women as practiced domestically differ from one State to another. There are currently 189 States Parties to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), with 58 Parties currently having reservations to the CEDAW.⁵²

Twenty-four Muslim majority states have reservations primarily on the ground that certain provisions of the CEDAW, especially Article 16 thereof, are contrary to Islamic teachings. In addition, Niger has declared *inter alia* that Articles 2(d) and (f), 5 and 16(c), (e) and (g) cannot be applied immediately as they are contrary to existing customs and practices. There are a few States where Muslims are the minority that have reservations on, among other things, Article 16. For example, India has a reservation on Article 16(2) on the ground that it is not practical in India with its variety of customs, religions, and levels of literacy. Singapore has a reservation on Articles 2(a)-(f), 16(1)(a), (c) and (h) and 16(2) on the ground of religious or personal laws. Micronesia, a non-Muslim State, has reserved the right not to apply Articles 2(f), 5 and 16 to marital customs. This is not to mention that some states such as Sudan and the United States of America are not even parties to the CEDAW.

This is why the arguments of scholars like An-Na'im and Afsah sound peculiar when they portray Islamic law as

⁵² "Declarations, Reservations, Objections and Notifications of Withdrawal of Reservations Relating to the Convention on the Elimination of All Forms of Discrimination against Women," 2006, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N06/309/97/PDF/N0630997.pdf?OpenElement>.

so diverse and lacking a unified stance on various matters,⁵³ as if there is true universality in the so-called 'universal' international human rights norm. The truth is that even if Islamic law is really that diverse in practice, then this adds more evidence to the relativistic nature of international human rights. There is less merit, then, to claim the so-called 'universal' international human rights as a standard for everyone.

This is not to mention a more philosophical difference among the states which would affect the differences. The secular design of the international human rights regime, noting that such design was made as it was believed to be more 'universal',⁵⁴ is also clearly a source of trouble. The reality is that there are both secular and non-secular states and societies, which would lead to different ways of understanding the rights prescribed in international conventions.⁵⁵ This is also behind the differences of perspectives of human rights in the CEDAW and other international human rights instruments.⁵⁶

It is undeniable that there are differences in the acceptance and recognition of human rights, and this would have legal consequences. Note that international law is based on consent, because binding norms would require

⁵³ Ebrahim Afsah, "Contested Universalities of International Law. Islam's Struggle with Modernity," *J. Hist. Int'l L.* vol. 10 (2008), 304. Although the extent of differences between the differing schools and how much they matter is a subject to another debate because differences of opinion occur only on the *furu'* (branch) matters and not the *usul* (foundation) matters. See: 'Umar Sulaymān al-Ashqar, *Nazarat fī Uṣūl al-Fiqh* (Jordan: Dār an-Nafā'is, 1999), 385–390; Abuddin Nata, *Studi Islam Komprehensif* (Jakarta: Kencana, 2011), 534.

⁵⁴ Michael Freeman, "The Problem of Secularism in Human Rights Theory," *Human Rights Quarterly* vol. 26, no. 2 (2004), 391.

⁵⁵ See: *Ibid.*, generally.

⁵⁶ Similar diversities through reservations and declarations can be found in other international human rights treaties such as the ICCPR and others.

either acceptance of treaties or *opinio juris* (which is a form of consent towards a custom, as opposed to persistent objection) in case of customary international laws.⁵⁷ Therefore, as a matter of law, such differences of practices and acceptance towards treaties means a great deal in judging whether a particular rule should be acknowledged as binding or not. In such case of a reservation or different state practices,⁵⁸ states are not bound by the laws that they reserve or differ in practice with. A state cannot be judged by a law that is not applicable to it.

Therefore, the cultural relativists' arguments may seem to have a strong basis against the universalists. However, it does not end here. Not only have the cultural relativists argued that the Western universalists do not have a strong basis, but they have also contended that the latter is immoral. The argument stems from the fact that cultural relativism was born as resistance towards Western hegemony.⁵⁹ Scholars of international law have used the postcolonial theory to look back in history and have found that there was a hegemony of international law imposed by the West through colonialism, under the assumption that other non-European cultures were 'backward' and 'uncivilized'.

Based on such an assumption, the Western colonial powers believed they were mandated to undergo a 'civilizing mission' to hegemonically impose their worldview and laws on their colonies through all means necessary.⁶⁰ This logic which included intellectual hegemony was preserved throughout the 19th century and

⁵⁷ Anghie, *Imperialism, Sovereignty*, 44.

⁵⁸ Or even the lack of acceptance, such as how Malaysia and Saudi Arabia are not parties to the ICCPR. Likewise, Sudan and the United States of America are not parties to CEDAW.

⁵⁹ Prasad, "Cultural Relativism in Human Rights Discourse."

⁶⁰ Anghie, *Imperialism, Sovereignty*, 31, and 250–51.

continued after the decolonization period in the form of neo-colonialism which is preserved until today.⁶¹

Muslim Scholars and Thinkers, and Cultural Relativism

Naturally, numerous Muslim thinkers and scholars of international law have used cultural relativism as a basis either for arguing extreme relativism by rejecting universalism in its entirety or arguing limited relativism or generally agreeing to some extent the idea that rights would depend on its cultural context. As Muslims, in general, have mostly been the victims of colonization,⁶² relativism and post-colonial discourse may seem to be more tempting as some form of 'intellectual retaliation'.

Rachminawati, for example, does not exactly promote an Islamic concept of human rights but rather an ASEAN one.⁶³ She argues that, while human rights may be universal, the 'ASEAN values' should be treated as a different regime of human rights in terms of implementation due to its cultural particularity.⁶⁴ Muhammadin, while arguing vehemently against universalism, emphasizes the reality of pluralism and the immorality of universalism as an intellectual hegemony.⁶⁵ Abul Aziz Said also stresses the same line of thought in dismissing the general international human rights regime as 'Western-biased'.⁶⁶

⁶¹ *Ibid.*, chap. 2; Daud, *Islamization of Contemporary Knowledge*, 6–7; Muhammadin, "Universalitas Hak Asasi Manusia."

⁶² Afsah, "Contested Universalities of International Law," 274.

⁶³ Note that three members of ASEAN (Malaysia, Indonesia, and Brunei) are Muslim-majority and implement some level of Sharia law.

⁶⁴ Rachminawati, "ASEAN Human Rights Declaration: A New Form of Universalism," *Indonesian J. Int'l L.* vol. 11 (2013), 396–413.

⁶⁵ Muhammadin, "Universalitas Hak Asasi Manusia."

⁶⁶ Abul Aziz Said, "Human Rights in Islamic Perspectives," in *Human Rights: Cultural and Ideological Perspectives*, ed. Admantia Pollis and Peter Schwab (New York: Praeger, 1979), 86.

Even some with a more secular tendency such as Bassam Tibi has argued that the Islamic intellectual tradition is very different from the European one and that there is simply insufficient 'cultural consensus'.⁶⁷ Another big figure accused of secularism but also argues in favor of relativism when speaking of human rights would be Mahathir Mohamad, the current Prime Minister of Malaysia.⁶⁸ In fact, to some extent, even Abdullahi An-Na'im agrees that the logic of relativism can be acceptable in international human rights as long as it does not breach certain issues he argues to be universal.⁶⁹

A Critical Observation

However, while it may seem that relativism is a very lucrative stance to hold on in arguing against Western universalism, from an Islamic standpoint there are deeper implications to consider. It is understood that cultural relativism in human rights is an argument rooting from researches of the anthropologists such as Melville Jean Herskovits who says that "[e]valuations are relative to the cultural background out of which they arise."⁷⁰ This is in line with relativism as a philosophy of truth, which means that truth is relative to the subject, and, consequently, there can be many (albeit opposing) truths at the same time.⁷¹

⁶⁷ Bassam Tibi, *Islam and the Cultural Accommodation of Social Change* (Boulder: Westview Press, 1991), 61.

⁶⁸ Mohd Azizuddin Mohd Sani, "Mahathir Mohamad as a Cultural Relativist: Mahathirism on Human Rights," in *17th Biennial Conference of the Asian Studies Association of Australia*, Melbourne, 2008, 1-3.

⁶⁹ Abdullahi A An-Na'im, "Religious Minorities under Islamic Law and the Limits of Cultural Relativism," *Hum. Rts. Q.* vol. 9 (1987), 1-18.

⁷⁰ Melville Jean Herskovits, *Man and His Works: The Science of Cultural Anthropology* (New York: Alfred A. Knopf, 1949), 63.

⁷¹ Syamsuddin Arif, "Ilmu, Kebenaran dan Keraguan: Refleksi Filosofis-Historis," in *Orasi Ilmiah Dalam Rangka Memperingati Ulang Tahun Ke-13 INSISTS* (Jakarta: Institute for the Study of Islamic Thought and Civilizations, 2016), 5.

In the context of international human rights, the logic of relativism goes to say that the different practices, interpretations, and implementations, can be all equally correct. As explained in the previous section, the different statuses of treaty acceptance, reservation, and practice, may lead to the fact that different states are bound by different laws so that they simply cannot legally judge each other. All these differences are lawful within the legal obligation of the different states, so one state cannot impose a legal obligation towards another state under different legal obligations. Such an imposition of truth becomes the antithesis of relativism.

However, the problem in this is the idea that there are different truths upon the same subject and this is what is usually overlooked by Muslim international law scholars. It must be remembered that this 'different truths' is not about different necessities in the sense that a rabbit and a wolf cannot be fed the same food, or a coastal area cannot be developed in the same way as a mountainous one. This is also not about tolerance, meaning to let other civilizations and states apply whatever they want without intervention while still disagreeing. Rather, this is an acceptance of multiple truths at the same time.

Human rights speaks of what rights are inherent to humans, while cultural relativism assumes that there are no values inherent to 'humans' (only what is shaped by culture).⁷² This means that the concept of 'humans' in one culture is correct towards the humans adhering to that culture, while a different concept of 'humans' in another culture to the adherents of that other culture is equally correct despite some items being possibly contradictory.

An example with profound implications would be the concept of 'humanity' itself. Secularism, on one hand,

⁷² Prasad, "Cultural Relativism in Human Rights Discourse."

perceives reality to include only materialistic realities and assumes that the world is devoid of metaphysical realities.⁷³

Under this philosophy, humans are nothing but mere complex biological creatures. Islam, on the other hand, teaches that reality is more than just material but also metaphysical. The human is a complex creature which includes the body as well as the soul which, in the Islamic notion of the soul, longs to worship Allah.⁷⁴ This would certainly affect how to derive human rights, among other things, how 'freedom of religion' is understood. The two philosophies above cover not only the nature of humans but also that of reality itself. How illogical is it to think that both of those are equally correct and dependent on the perceiver? This is the least of the problems that relativism causes.

The most important problem of relativism in the eyes of a Muslim is that it then contradicts one of the basic concepts of faith. In the second and third section, it has been explained how believing that there are laws or guidance better than Islam is an act of *kufṛ* (disbelief) which can make the perpetrator considered as a *murtad*. In this section, we find ourselves in a similar situation. At a glance, relativism seems to deny a 'higher truth'. However, the reality is that relativism does hold one rule above all, 'that there is no higher truth above all'. This also belittles Islamic teachings as being below the rule set by relativism and is therefore equally tantamount to *irtidād* in the same way as to how the previous Section is concluded.

Furthermore, apart from the absurdity of accepting the truth of two diametrically opposing truths, the act of agreeing that another truth exists besides what Islam

⁷³ Harvey Cox, *The Secular City: Secularization and Urbanization in Theological Perspective* (New Jersey: Princeton University Press, 2013), 2; Syed Muhammad Naquib al-Attas, *Islam and Secularism* (Kuala Lumpur: ISTAC, 1993), 35–37.

⁷⁴ Al-Attas, *Prolegomena to the Metaphysics of Islam*, chap. 4.

provides is also wrong. The Qur'ān in Ali Imrān verse 19 reads:

إِنَّ الدِّينَ عِنْدَ اللَّهِ الْإِسْلَامُ

“Indeed, the religion in the sight of Allah is Islam”

As explained previously in the second section, the word *al-dīn* which is used in the above verse encompasses also ‘judicious power’ or ‘law/statute’. Therefore, if the Qur'ān and the Sunnah have provided a system or rule, it will be against the Islamic *'aqīdah* for a Muslim to agree that there is a system or rule beside Islam that is equally as true as Islam. As per al-Anbiyā' verse 107 and Saba' verse 28, Islamic teachings are for everyone and all peoples. To say that Islamic teachings are correct for some people but incorrect for others would, therefore, be also belittling Islamic teachings by believing that other laws can be above or equal to Islam. As explained earlier, a person who believes in such an act of *kufr* is considered as a *murtad*.

Furthermore, the consequence of this is to commit *al-istiḥlāl*, which means to believe that it is right for some people to commit what is prohibited in Islam. *Al-istiḥlāl* is also an act of *kufr al-akbar* (major disbelief)⁷⁵ Which may cause its perpetrator to become a *murtad*. An example to this would be the case of homosexuality which is prohibited in Islam but is considered as part of human rights under numerous United Nations resolutions.⁷⁶ Under relativism, one would argue that ‘homosexuality is a right’ is equally correct with ‘homosexuality is not a right’, depending on

⁷⁵ Aḥmad ibn `Abd al-Ḥalīm Ibn Taymiyyah, *Al-Ṣārim Al-Maslūl 'Ala Shātim Al-Rasūl* (Saudi Arabia: Al-Haras Al-Waṭāni Al-Su'ūdi, n.d.), 521–22.

⁷⁶ “United Nations Resolutions - Sexual Orientation and Gender Identity,” *OHCHR*, accessed August 7, 2018, <https://www.ohchr.org/en/issues/discrimination/pages/lgbtunresolutions.aspx>.

the varying cultures. Such a view would amount to *al-istiḥlāl*.

The Third and Correct Way

It has been explained in the third section that inclining towards (Western) universalism is a stance not acceptable in Islam. Therefore, if a Muslim international law scholar advocates this position, it will contradict the Islamic *'aqīdah*. The fourth section shows that advocating cultural relativism, albeit being a very strong academic discourse against Western universalism, is not acceptable in Islam either. Both ends of the debate are based on lines of thinking which may lead to *kufr* (disbelief). However, Western universalism and cultural relativism are not the only choices. Rather, there is a third choice as explained in the following sections.

Islamic Universalism

It is impossible to have a concept of human rights without truly first understanding humans. One cannot be a Muslim without believing that Allah is the All-knowing of all in existence, as the Qur'ān says in al-Ṭalaq verse 12:

اللَّهُ الَّذِي خَلَقَ سَبْعَ سَمَاوَاتٍ وَمِنَ الْأَرْضِ مِثْلَهُنَّ
يَتَنَزَّلُ الْأَمْرُ بَيْنَهُنَّ لِتَعْلَمُوا أَنَّ اللَّهَ عَلَىٰ كُلِّ شَيْءٍ
قَدِيرٌ وَأَنَّ اللَّهَ قَدْ أَحَاطَ بِكُلِّ شَيْءٍ عِلْمًا

“It is Allah who has created seven heavens and of the earth, the like of them. [His] command descends among them so you may know that Allah is over all things competent and that Allah has encompassed all things in knowledge.”

In the Islamic *'aqīdah*, one also cannot be a Muslim without believing that Allah, as the Creator of humankind, knows best about humankind. As the Qur'ān says in al-Baqarah verse 216:

كُتِبَ عَلَيْكُمُ الْقِتَالُ وَهُوَ كُرْهُ لَكُمْ وَعَسَى أَنْ
تَكْرَهُوا شَيْئًا وَهُوَ خَيْرٌ لَكُمْ وَعَسَى أَنْ تُحِبُّوا شَيْئًا
وَهُوَ شَرٌّ لَكُمْ وَاللَّهُ يَعْلَمُ وَأَنْتُمْ لَا تَعْلَمُونَ

“But perhaps you hate a thing and it is good for you; and perhaps you love a thing and it is bad for you. And Allah Knows, while you know not.”⁷⁷

It is not possible for a Muslim to believe that the laws that Allah has revealed are only good for the Muslims and not for others. Rather, as mentioned in the Qur’ān in al-Anbiyā’ verse 107:

وَمَا أَرْسَلْنَاكَ إِلَّا رَحْمَةً لِّلْعَالَمِينَ

“And We have not sent you, [O Muhammad], except as a mercy to the worlds.”

This means that the position of the Islamic ‘*aqidah* is to believe that Islam is universal and its teachings are beneficial to all. This is in line with the main objective of Islamic law to provide *maṣlaḥat* or public interest.⁷⁸ This concept of *maṣlaḥat* is derived into five essentials of human beings which are: (a) preservation of religion, to fulfill the human need to worship Allah, (b) preservation of life, including health and wellbeing, (c) preservation of intellect and reason, (d) preservation of progeny and lineage, and (e) preservation of wealth,⁷⁹ and is currently the basis for most development of *maṣlaḥat*-based Islamic law. This

⁷⁷ See also: al-Mulk, verse 14.

⁷⁸ Nurizal Ismail, *Maqashid Syariah Dalam Ekonomi Islam* (Yogyakarta: Smart WR, 2014), 5–6.

⁷⁹ Abū Hāmid Muḥammad al-Ghazālī, *Shifā’ al-Ghalīl fī Bayān al-Shabah wa al-Mukhīl wa Masālik al-Ta’līl* (Baghdad: Mathba’ah al-Irsyād, 1971), 159–161; Ibrāhīm al-Shāṭibī, *al-Muwāfaqāt*, vol. 2 (al-Khubar: Dār Ibn ‘Affān, 1997), 17.

elaboration towards the concept of *maṣlahat*, in the Islamic concept, corresponds with the needs of all human beings.

Further, Islam teaches that the true basic nature of a human is that human is both body and soul.⁸⁰ This is why a secular approach towards the sciences (including human rights, as is the nature of international human rights)⁸¹ simply does not work; and rights accommodating not just material but also metaphysical realities would truly be proper for humankind, which is what Islam teaches.⁸² This is why the correct '*aqīdah* is to believe that Islamic teachings are applicable for everyone who falls under the category of 'humans'.⁸³ It is the Islamic belief that the Islamic teachings hold true universality (unlike the Western 'pseudo-universalism'), and applies to all (unlike cultural relativism).

Therefore, the path for a Muslim scholar of international law which is consistent with the Islamic '*aqīdah* is to advocate the Islamic concept of human rights as a universally applicable norm. In other words, this means to advocate Islamic universalism.

⁸⁰ Al-Attas, *Prolegomena to the Metaphysics of Islam*, 143.

⁸¹ Freeman, "The Problem of Secularism in Human Rights Theory."

⁸² Al-Attas, *Prolegomena to the Metaphysics of Islam*, 91–111; Nurizal Ismail, Fajri Matahati Muhammadin and Hanindito Danusatya, "The Urgency to Incorporate Maqasid Shari'ah as an Elucidation of 'Benefit' as a Purpose of Law in Indonesia's Legal Education," in *1st International Conference on Law, Technology, and Society (ICOLESS) 2018* (Malang: Universitas Islam Negeri Maulana Malik Ibrahim, 2019).

⁸³ Further references on the fundamental and paradigmatic differences between the Islamic and international (secular) concept of human rights, see: Umar Ahmad Kasule, *Contemporary Muslims and Human Rights Discourse: A Critical Assessment* (Selangor Darul Ehsan: IIUM Press, 2009), 33–141; Sigit Riyanto and Fajri Matahati Muhammadin, "The Urgency to Incorporate the Islamic Concept of Rights into the International Human Rights Law Course in Indonesian Law Schools," *Al-Ihkam: Jurnal Hukum Dan Pranata Sosial* vol. 14, no. 1 (2019), 176–198.

Some 'Homework' For Future Research

Sometimes misconceptions would occur due to misunderstandings, such as the debate on the rights of women mentioned in the third Section. Another example is the major incident of the execution of warriors of Banu Qurayzah which is sometimes portrayed as cruel, while this was actually based on Jewish Law (Deuteronomy 20:13-14).⁸⁴ In addition, Muslims were to apply Jewish Laws to the Jewish community according to the Madinah Treaty which the Muslims kept to the very end despite the Banu Qurayzah betraying this same treaty.⁸⁵

However, it is part of the obligation of *da'wah* or propagation in spreading the words of truth, not only to spread what Muslims believe as truth but also to clarify misconceptions. This also includes showing and proving to humanity that the way of Islam is good for all. This is as the Qur'ān commands, that the Muslims must "Invite to the way of your Lord with wisdom and good instruction, and argue with them in a way that is best."⁸⁶

Further, the concept of 'Islamic human rights' may still need to be developed further so that it can incorporate today's *maṣlahat*. The *ummah* already has the Cairo Declaration of Human Rights in Islam which can be an initial reference point for this. However, further research and critics would need to be done to improve what may be lacking. Critics to the Cairo Declaration could include an analysis of whether it truly is based upon correct sources of the *Shari'ah*.

⁸⁴ See Abdullah Yusuf Ali, *The Holy Qur'an: Translation and Commentary* (Birmingham: IPCI: Islamic, 1999), nn. 3701–3704.

⁸⁵ Then, as the narration explains, Prophet Muhammad PBUH noted that Allah approves the verdict. Ismail Ibn Kathir, *The Life of the Prophet by Ibn Kathir*, vol. 3 (Reading: Garnet Publishing, 2005), 147–148, 152, 155.

⁸⁶ Al-Nahl verse 125. See also: Ali Imran verses 104 and 110, al-Qasas verse 87, and many more.

An example of a weakness of the Cairo Declaration in the preamble which mentions that the Islamic Ummah is made by Allah to be "... the best community and which gave humanity a universal and well-balanced civilization". The Arabic word used for 'civilization' in the original text of the Cairo Declaration is حضارة (*haḍārah*), which is criticized because the term is more 'worldly' and less 'spiritual-religious',⁸⁷ unlike the other Arabic word for 'civilization' i.e. تمدن (*tamadun*) which is a derivation of the word الدين.⁸⁸

Another conceptual weakness of the Cairo Declaration is that it seems to succumb to the West's 'rights-based' concept, listing only a set of human rights in the manner of other international human rights conventions. The truth is that Islam puts a balance between rights and obligations (some scholars term this as 'duty-based'), unlike international human rights which are very heavily only 'rights-based'.⁸⁹ Islam provides obligations from which rights would arise. For example, education in the *sharī'ah* is not a right but an obligation.⁹⁰ Therefore, the Islamic

⁸⁷ Therefore this term should be appropriate only to refer to non-Islamic civilizations. See Hamid Fahmy Zarkasyi, "Tamaddun Sebagai Konsep Peradaban Islam," *Tsaqafah* vol. 11, no. 1 (2015): 1–28.

⁸⁸ The term shows how the true civilization of Islam is based on *al-Dīn*. Al-Attas, *Prolegomena to the Metaphysics of Islam*, 43–44.

⁸⁹ Shamrahayu Abdul Aziz, "Islamic Concept of Human Rights," in *Human Rights Law: International, Malaysian and Islamic Perspectives*, ed. Abdul Ghafur Hamid @ Khin Maung Sein (Selangor: Thomson Reuters Malaysia Sdn Bhd, 2012), 329; "Fatwa Majelis Ulama Indonesia No. 6/MUNAS VI/MUI/2000 Tentang Hak Asasi Manusia" (Jakarta, 2000), <https://mui.or.id/wp-content/uploads/2017/02/26.-Hak-hak-Asasi-Manusia-HAM.pdf>.

⁹⁰ Muḥammad ibn Yazīd Ibn Mājāh, *Sunan Ibn Mājāh*, vol. 4 (Riyadh: Darussalam, 2007), para. 224; Muḥammad Nāṣir al-Dīn al-Albānī, *Ṣaḥīḥ wa Ḍa'īf Sunan Ibn Mājāh*, vol. 1 (Riyadh: Maktabah al-Ma'arif, 1417), 92.

government which has a duty to implement the *sharī'ah* and ensure *maṣlahat*⁹¹ must make education available.

An example of a weakness of the Cairo Declaration in its detailed provisions is Article 3b which indicates a general prohibition "...to cut down trees, to destroy crops or livestock..." during the time of war. This prohibition is taken from a part of a narration attributed to the first Caliph Abū Bakr al-Ṣiddīq.⁹² However, there are three major problems. First, this narration is not authentic as there is a missing chain between the narrators.⁹³ Non-authentic narrations cannot be used as a basis for law.⁹⁴ Second, even if it is authentic, Abū Bakr's opinion is not a source of Islamic law.⁹⁵ Third, this weak narration seems to contradict a stronger narration which may indicate the permissibility to cut trees.⁹⁶

While Islam is perfect, the works of Muslim scholars have so far, unfortunately, been wanting. There are matters

⁹¹ Musthafa al-Khin and Musthafa al-Bugha, *Konsep Kepemimpinan dan Jihad Dalam Islam: Menurut Madzhab Syafi'i* (Jakarta: Darul Haq, 2014), 110–11; al-Mawardī, *Al-Aḥkām al-Sultāniyyah* (Beirut: Dār al-Kutub al-'Ilmiyyah, 1996), 3.

⁹² Mālik bin Anās, *Muwatṭā' al-Mālik* (Granada: Madinah Press, 1992), chap. 21 para.10.

⁹³ See Ahmad al-'Uthmānī al-Tahānawī, *I'lā al-Sunan*, vol. 12 (Karachi: Irādah al-Qur'ān wa al-'Ulūm al-Islāmiyah, 1418), 25. See an alternative chain which also has missing links: al-Baihaqī, *Ma'rifaḥ al-Sunan wa al-Athar*, vol. 13 (Karachi: Jami'ah Dirasat Islamiyah, 1412), paras. 18077–18079.

⁹⁴ Anshari Taslim, *Thariqus Shalihin* (Bekasi: Toga Pustaka, 2015), 7–8.

⁹⁵ As per al-Nisa' verse 59, the only true sources of Islamic law are the Qur'ān and the Sunnah. See Nyazee, *Islamic Jurisprudence*, 141–260; Al-Shafi'i, *Shafi'is Risalah*, 88–122.

⁹⁶ Muḥammad bin Ismā'īl al-Bukhārī, *Ṣaḥīḥ al-Bukhārī*, vol. 5 (Lahore: Kazi Publications, 1979), para. 365. See also the Qur'ān, al-Hashr verse 5. For a further discussion on the ruling towards environmental destruction, see Fajri Matahati Muhammadin and Thara Kunarti Wahab, "Fiqh al-Jihād in Modern Warfare: Analyzing Prospects and Challenges with Reference to International Humanitarian Law," *IJUM Law Journal* vol. 26, no. 2 (2018), 241–74.

which are already clearly regulated in the Qur'ān and the Sunnah, and there are others where only general guidance is provided so that the Muslims should make *ijtihād*. The same goes for the Islamic concept of human rights, where the scholars have much 'homework' to develop and articulate a true Islamic concept of human rights.

There are already a number of propositions from which to work with in order to construct this new 'Islamic concept of human rights'. These propositions, if they were to escape the trap of either Western universalism or cultural relativism, would require fundamental and even epistemological reconstruction. Some works provide good platforms to start from, such as the work of Umar Ahmad Kasule.⁹⁷

Conclusion

In the Islamic '*aqīdah*, a Muslim cannot acknowledge that there is another standard higher than Islamic law. Neither can a Muslim acknowledge that there can be different truths with Islam being just one of those truths. In the human rights context, agreeing to either Western universalism or cultural relativism is incorrect and may even lead to *kufr*. The the path which is consistent with the Islamic '*aqīdah* is to promote Islamic universalism. One must advocate that the only true and universal standard of human rights is what Islam provides. There is nothing higher than the Islamic human rights, neither is there any other standard equally correct.

⁹⁷ See Umar Ahmad Kasule, *Pursuit of Human Dignity and Justice : Islamic Alternative Values to Human Rights* (Kuala Lumpur: A.S. Noordeen, 2008). To further separate and distinguish the proposed Islamic discourse on rights from the Western secular development, see Kasule, *Contemporary Muslims and Human Rights Discourse: A Critical Assessment*; Riyanto and Muhammadin, "The Urgency to Incorporate the Islamic Concept of Rights"; Zara Khan, *Refractions Through the Secular: Islam, Human Rights, and Universality* (New York: The City University of New York, 2016).

For the time being, some arguments proposed by cultural relativists can be used as rhetoric just to negate Western universalism (e.g. pointing out the reality of reservations or non-acceptance of international human rights treaties to prove that Western universality does not exist). However, the main foundation of cultural relativism (i.e. that truth is subjective) is as un-Islamic as Western universalism.

Sometimes, when the Qur'ān and the Sunnah only provide a general principle but not a detailed implementation instruction, a Muslim international law scholar may make references to other sources (e.g. customary practices, treaties, *etc*). If these details do not contradict and even help the implementation of Islamic law, then there is no problem.⁹⁸ This is not a multiple truth as per cultural relativism, neither does this suggest a hierarchy (with Islam being below) as per Western universality.

Sometimes there are matters where 'Islamic law coincides with international human rights law', then this is something to be grateful for.⁹⁹ This is the same truth, so it is not cultural relativism. However, one should be careful to be grateful in this scenario not because 'Islam coincides with international human rights' as this implies that

⁹⁸ E.g. Islamic law provides an obligation to 'treat war captives well', and *tafsīr* books give some examples such as the kind treatment of the Muslim armies towards the captives after the Battle of Badr. However, there is no detailed rule explaining 'well treatment' means but only some examples (see *inter alia*: Ismā'īl ibn Kathīr, *Shahih Tafsir Ibnu Katsir*, ed. Safiurrahman Al-Mubarakfuri, vol. 9 (Jakarta: Pustaka Ibnu Katsir, 2016), 404.) International humanitarian law or IHL, on the other hand, provides a comprehensive implementation of this by providing minimum standards of quarters and logistics, sanitary requirements, etc (See The Third Geneva Convention Relative to the Treatment of Prisoners of War 1949). Perhaps Islamic jurists can refer to IHL as an '*urf*' to elaborate the modern standards of 'well treatment' for captives, insofar as it does not contradict the *Sharī'ah*.

⁹⁹ For example, there seems to be no issue or debate with regards to the Islamic teachings of charity and the responsibility to care for the poor.

international human rights are the (higher) standard, as what Western universalism demands. One should be grateful because 'international human rights coincides with Islam', the latter being the (higher) standard.

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