

SOME REMARKS ON WESTERN AND ISLAMIC PERCEPTIONS OF THE LAW: WITH A REFERENCE TO THE RIGHT TO FREEDOM OF SPEECH

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Khulasah

Dalam makalah ini penulis mengetengahkan beberapa perbezaan yang mendasar di antara budaya perundangan Islam dan Barat, antaranya dalam isu berkaitan kebebasan bersuara. Di samping itu, pandangan Barat terhadap undang-undang umumnya bersifat kontrak. Namun begitu, perdebatan tentang hak asasi manusia di Barat membawa kepada suatu dakwaan metafizikal yang hebat apabila mereka menganggap bahawa hak-hak ini adalah suatu yang tabi'i dan bukan semata-mata suatu yang bersifat kontrak. Pandangan Islam tentang isu ini, sebaliknya, berdasarkan kepada suatu keyakinan terhadap konsep penciptaan Ilahi: Dia, yang satu-satunya berupaya mencipta, adalah juga satu-satunya yang mampu menentukan apa yang benar dan yang salah dalam penciptaan ini. Para fuqaha dalam menentukan hukum mereka berpandukan nas-nas Syar'i dengan menggunakan *uṣūl al-fiqh*. Apa yang jelas, perbezaan dasar di antara tradisi perundangan Islam dan Barat ini tidak menolak kemungkinan kedua-duanya mengemukakan suatu norma yang sama atau merealisasikan nilai-nilai yang sama.

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Abstract

In this article, the author outlines some of the fundamental differences between the Islamic and the Western legal cultures (the issue of freedom of speech being an example thereof). On the one hand, the Western view of the law is mostly contractual (even despite the fact that the Western human rights discourse makes a strong metaphysical claim by implying that these rights are (quasi) natural and not merely contractual). On the other hand, the Islamic viewpoint rests on the belief of divine creation: the only One Who can create, can also stipulate what is right or wrong in creation. All in all, the fundamental differences between the Islamic and the Western legal traditions do not prevent them from often producing similar norms or seeking the realization of similar values.

Keywords: Law; Islamic Jurisprudence; Freedom of speech; Human rights; *khilāfah*; *'amānah*; *ḥurriyyah*

Introduction

I shall briefly deal with some of the ideas or convictions that, in my view, belong to the core of the Islamic conception of the law and bear on the issue of the right to freedom of expression (even to the point of blasphemy).

The Islamic standpoint will be contrasted with the current Western perception. This article is not an accomplished treatment of the subject matter but rather an informal presentation of some pointers that can be used to start a discussion on this issue. It is none other than a simple attempt to discover some of the rationale behind these traditions as they stand today. Needless to say, I do not pretend to speak for all Muslims or for all Westerners; different individuals and schools of thought will lay different accents or, why not, also disagree with me.

I shall start off this reflection with the question of how the law tends to be envisaged among Muslims and Westerners nowadays.

The Law and our Laws

The law has always been important to people and it still is. However, as lexeme, the English word "law" is a polysemous term. I would like to distinguish here between "law" understood as *droit* (French), *derecho* (Spanish) or *recht* (Dutch), on the one hand, and "the law" as in *loi* (French), *ley* (Spanish) or *wet* (Dutch), on the other. While the former refers to something general rather difficult to define, the latter is made of singular identifiable instances, for instance, as found in the code of civil law. If we look at its Arabic counterparts, the issue becomes even more complex. *Shari'a* refers to God's normative dispensation, *fiqh* to jurisprudential norms, and *tashri'*/*qānūn* to binding legislation.

Anthropologically speaking, laws are "recipients of mores or customs, as well as of ethics and convictions". As such, they are an "empty concept, without a content of their own," based on values "borrowed from elsewhere".² They do not come out of nothing. They all refer back to an ideational framework, a set of presuppositions and historical circumstances.

Nowadays, the interplay between law as *droit* and law as *loi* becomes crystallized in the concept of "the rule of law." The law becomes both a stable heuristic instrument (i.e. an imaginary construction) and an unstable, ever-changing reality. Moreover, it becomes an overarching framework, as seen in the concept of the state. For it is the law that qualifies the state (as a state of law) and not vice-versa. A society organized in terms of legality as well as of the moral legitimacy that the law confers constitutes a *society of citizens*.³

² Ali Mezghani (2001), "Contribution au débat sur l'identification du droit," in Chawki Gaddes (ed.), *Mélanges en l'honneur de Mohamed Charfi*, Tunis: Centre de Publication Universitaire, p. 66 (whole article: pp. 55-89). See also André-Jean Arnaud (1998), *Entre modernité et mondialisation, cinq leçons d'histoire de la philosophie du droit et de l'État*, Paris, LGJD.

³ Ali Mezghani, *op. cit.*, 55.

All laws share a common *binding* character, be it subjective or objective, or both; otherwise they are not 'laws'. Insofar as they are enforceable, they are objective and transgressors will in most cases be punished by virtue of the same law. If laws are only subjectively or morally binding, such as the Ten Commandments or the UN Universal Declaration of Human Rights, they will not be directly enforceable. For them to become enforceable, they will have to be brought into the body of enforceable positive law by the relevant legal means (which also applies to Islamic law).

Having said that, the question suggests itself as to what makes a law become 'Islamic'.

What makes a Law or a Law System "Islamic"

A law system can be said to be "Islamic" if and when it is wholly or partially based on the Islamic view of law.

The essential characteristic of "Islamic" law is that all legislation must be based on or derived from a divine *ḥukm* (decree, ruling). God is the only true legislator because He, as Creator, is the only one that can determine the nature, goal and fashion of all things. A legal system aspiring to be Islamic will therefore be dependent on the elucidation of God's *ḥukm* (Q. 6:57). Since God remains the most elusive Being, His dispensation must be deduced. The Islamic tradition does that by means of its four traditional sources of juridical discourse:

- (1) the Revelation to the Prophet Muḥammad (*al-Qur'ān*)
- (2) the binding precedent of the Prophet (the *sunna*)
- (3) the consensus of Muslim (legal) scholars (*al-ijmā'*)⁴

⁴ Ibn Rushd already remarked in the Middle Ages that the existence of true consensus (content-wise) is in itself something hard to be established. This concept must therefore be handled with much care.

(4) analogical reasoning (*qiyās*)

Even though the different Muslim communities may understand or qualify these sources and their interrelationship in slightly different ways, they all share the basic core presuppositions.⁵ I usually reduce these four elements to two basic elements:

- **the prophetic element:** what God inspired His Last Prophet as rendered in the (*muṣḥaf*) *al-Qur'ān* and in the Prophetic practice (or *sunna*)
- **the rational or deductive element:** what Muslim thinkers have concluded throughout the ages when asked what the Islamic law or practice was in a given case (bearing in mind that only the Prophet had been entrusted with the mission of conveying God's Message and of leading his people by means of his example)

The "Islamic" dimension of the Muslim discourse on the law becomes clearer when some of its concepts are specified further, for instance, the concept of "(human) rights".

⁵ Cf. Hisham M. Ramadan (2006), *Understanding Islamic Law. From Classical to Contemporary*, Lanham: Altamira Press. Mohammad Hashim Kamali (1997), *Freedom of Expression in Islam*, Cambridge, UK: Islamic Text Society. Idem (2002), *The Dignity of Man. An Islamic Perspective*. 2nd edition, Cambridge, UK: Islamic Text Society. Idem (2002), *Freedom, Equality and Justice in Islam*, Cambridge, UK: Islamic Text Society. Idem (2005), *Principles of Islamic Jurisprudence*. 3rd edition, Cambridge, UK: Islamic Text Society. Idem (2008), *The Right to Life, Security, Privacy and Ownership in Islam*, Cambridge, UK: Islamic Text Society. Lucie Pruvost (2001), "Loi divine (shari'a) et autonomie de la pensée juridique," in *Chawki Gaddes (ed.), Mélanges en l'honneur de Mohamed Charfi*, Tunis: Centre de Publication Universitaire (whole article: pp. 143-179).

The Concept of "(Human) Right" and Islamic Juridical Discourse

The idea of "rights," in particular the perception that most Westerners have of them, constitutes one of the elements that separate the Western (humanist) discourse on law from its Islamic counterpart.

In the Western juridical tradition, "rights" can be both *claims* to something and *liberties* to do (and not to do)⁶ something. In the context of *human* rights, rights are also understood as a "faculty inherent in the individual," that is, as inscribed at the core of human rationality. Seen in this light, the concept of "rights" does not depend on governments: it is a *natural* reality.⁷ From this definition, it is clear that the very idea of subjective rights presupposes other concepts, such as *subject* and *individual* meant in their modern sense. It would therefore be anachronistic to expect to find such a treatment in the Qur'ān, a document revealed in the language and cultural concepts understandable to Ḥijāzī Arabs of 14 centuries ago (cf. Q. 12:2, 16:103, 26:192-195, 39:27-28 and 41:2-3).⁸ Nonetheless, they are not repugnant to the Quranic mindset.

⁶ Here I consider "not doing" as a way of "doing". The idea that when we opt *not to do something* we are *not doing anything* at all, is a *fallacy*. Conscious assertions of the will constitute acts; they are enactments of an option. That process makes reference to the intellect, which is the one that enables the subject to consciously visualize different courses of action as being plausible. That is why freedom ceases to exist when the subject has no option at all, either because there are no objective alternatives or because he/she cannot subjectively see them. However, the issue of freedom is a very complex theme and cannot be dealt with here.

⁷ André-Jean Arnaud, *op. cit.*, 55. See also Sadok Belaid (1998), "Religions révélées et concept de droit: éléments d'une étude historique comparée," in Chawki Gaddes (ed.), *Mélanges en l'honneur de Mohamed Charfi*, Tunis: Centre de Publication Universitaire, p. 97 (whole article: pp. 91-142).

⁸ If we are to take the Qur'ān seriously for what it says about itself, then we cannot fail to give its due hermeneutical importance to the stress that it places on the fact that it was revealed in the sort of Arabic that was clear to its historical audience. The first "you" addressed by

The general current Western perception—albeit often vague—is that laws are based on some implicit *social contract* coupled with *democratic representation*. In other words, societies and communities are based on agreements negotiated throughout history that “We the people” make and which we must abide by. This process takes place through the channels of democratic representation, be it direct or indirect. Democratically elected representatives are, in a sense, the people’s authorized delegates to negotiate, shape, and translate these agreements into legally binding norms.

However, when it comes to the “UN Universal Declaration of Human Rights,” the Western popular perception unconsciously jumps from the *contractual paradigm* sketched above to a *metaphysical* one and, finally, to a *natural* one.⁹ Although laws are usually perceived in the West as changing and changeable realities (subject to consecutive renegotiations of the social contract),¹⁰ this particular UN declaration is deemed to be something self-evident, universal, and somehow sacred.

What started as a *contractual* feat¹¹ became an outing of a *metaphysical declaration* meant to elucidate the

the Qur’ān is not us, but Muḥammad and his community in their concrete geo-social situation. We are also its addressees, but in our case we can only tap into the divine Message mediated by the Qur’ān by piercing through the veil of the cultural language into which God Himself chose to cast His Message when He communicated it to His last Prophet.

⁹ This is yet another example of “la dérive mythologique de la rationalité juridique;” Baudouin Dupret (2000), *Au nom de quel droit*, Paris Cedeux: L.G.D.J., pp. 122ff.

¹⁰ Positive laws are subject to the moods of the societies that contractually establish, abrogate and replace them, as well as to the interpretation of their judicial officials.

¹¹ Historically speaking, the Declaration represented the agreement reached by its signatories (nation states) and was directed to nation states, not individuals. It was some sort of a contract or commitment to strive to implement the ideals enunciated in it—a sort of roadmap towards the ideal world. Legally speaking, it was not about *doing* something as it was about *striving* to pursue a number of values. It

nature of the good world society, as well as of the natural, metaphysical rights of its human members. All governments are expected to accept this wording of the fundamental rights of human beings as the revelation of our basic moral DNA, so to speak.¹² By so doing, a double leap took place: from the merely social contractual level to the metaphysical, and from there to the natural.

The ongoing discussion about Islam and Human Rights has helped to reveal that the UN declaration has an implied dogmatic character, calling for corresponding faithful compliance. The UN Universal Declaration of Human Rights is based on a particular metaphysical perception. For, if it was a true case of contractual agreement without a forceful metaphysical basis, it could always be altered, even undone. Yet, such an idea seems to be somewhat repugnant to Western sensibility. Therein lies the bias of the so-called non-confessional humanism: the pretention of being an unbiased philosophy, of having no presuppositions that 'must' be accepted 'in good faith'. In other words, the UN Declaration calls for an act of faith (as much as does any wording of the *sharī'a*).

The metaphysical component that is tacitly present in the Western perception of the law occupies centre stage in the Islamic discourse. Moreover, this bias is not perceived as a drawback but as a guarantee against the wilful refusal of individuals and governments to recognize the God-given rights of individuals; for nobody is above God's law.¹³

The Islamic worldview is grounded on the faith conviction that only God is divine and possesses the power to

therefore lacked of itself (and still does) a truly enforceable character, measurable by undisputable, universal judges.

¹² Oddly enough, although most westerners accept that metaphysical views (e.g. Religions) are a question of free choice, non-Westerners are often expected to blindly accept the Declaration and the western interpretation thereof.

¹³ C. G. Weeramantry (2001), *Islamic Jurisprudence. An international perspective*, Kuala Lumpur: The Other Press, p. 116.

call the whole creation into being and keep it in existence. That is why He also decrees its destiny, meaning, and function. Hence, we humans are born, live, and die not in *our* world, but in *God's* creation: we are *not of us*, but *of God*. Even though this might sound slavish to some, it is usually perceived as a gift: our very existence is God's first gift to us.

It is within this overall creational framework that the Islamic discourse on the nature and purpose of the law and laws is conducted, and not primarily within that of contractual social agreements. Only God has rights that are subjective and unconditional since they do not depend on anybody else or on anything exterior to Him. This is the original background over against which Muslims speak of the *ḥuqūq Allāh* (God's rights).

For the Islamic discourse, the "human lawgiver is, despite his exalted position within the monotheistic scheme of things, only the mediator of the divine law to mankind (*sic*)".¹⁴ The concepts of generic *khilāfah* (caliphate) and personal leadership as *nubuwwa* (prophecy) and *khilāfah/imāmah* (successor/ presider) represent this idea.

Generic Human *Khilāfah*

According to the Qur'ān, human beings were created as *khulafā'* (successors or "caliphs"). Even though it is not clear whether humans were meant to replace or represent somebody else, there is no doubt that any claim that we may stake is essentially *by delegation*. This *khilāfah* is only ours *by attribution*, that is, because God wills it that way.¹⁵ Consequently, all duties and derived rights, seen from the

¹⁴ Bernard G. Weiss (1988), *The Spirit of Islamic Law*, Athens and London: The University of Georgia Press, p. 1.

¹⁵ This idea is so fundamental to the Islamic thinking that Muslim philosophers have argued that even our acts are by attribution: without God's sustaining us existentially, we would not even be able to lift a finger. The fact that this does not feel this way would not mean that it is not like that.

Islamic perspective, depend on God's *ḥukm* (ruling, decree).¹⁶ For instance, the Qur'ānic statement in Q. 2:256 ("there is no compulsion in religion") combined with Q. 10:99 ("Had your Lord willed, everyone on earth would have believed. Do you then force people to become believers?") establishes both the *right* of individuals to choose their own religion and the *duty* of the community to respect that choice. This is recognized in the Universal *Islamic* Declaration of Human Rights, issued by the Islamic Council of Europe provides: "Every person has the right to freedom of conscience and worship in accordance with his religious beliefs." (Art XIII.)

The difference between the Islamic and Western views is that according to the Islamic legal discourse, neither rights nor duties are "entities": they are *interrelationships* or *correlations* established by God's rule—because God wills A, there follows B.¹⁷ These interrelations are either expectations (on the part of the one attributed the right) or obligations (on the part of the one upon whom rests a duty).

The qur'ānic idea of general *khilāfah* is complemented with that of *hudā* ("guidance"). This shows that Muslims are not deists but theists: they believe not only that God is there (deism), but also that *the* Deity is actively involved in the affairs of continuous creation (theism).

Out of the universal human *khilāfah* flows another important concept: *amānah*, to which I shall turn now.

When *amānah* refers to the relationship between God and humans, it can be translated as "trusteeship". Our duties towards God have to do with having *received* our life; therefore, all in it is "on trust". It is God, of course, Who determines the boundaries of that trust, prophets being the emissaries entrusted with the mission of

¹⁶ Cf. Muhammad Tahir Haji Mohammad (2003), *Right and Duties in Shari'ah and Common Law*, Selangor: Ilmiah Publications.

¹⁷ Cf. Imran Ahsan Khan Nyazee (2003), *Islamic Jurisprudence*, Selangor: The Other Press.

eliciting some of those boundaries. For instance, Moḥammad told Muslims in his last public address that a person's life and property are as inviolable to them as the sacredness of that holy day in which he was speaking.¹⁸ This text reveals that life and property are not rights that *individuals can or may* lay a subjective claim to but off-limit realities that the *community* (and therefore its members) *must* respect. Or as Ibn 'Arabī put it: "In our situation we only need an explanation of the Realm of this world, which is *the place of responsibility, trial, and works*".¹⁹ In other words, they are primarily universal duties, and only then personal rights. Since they are not *natural* rights, but *attributive* ones, God can also determine in which cases individuals may cross these borders. For instance, life may be taken in the case of armed self-defence or the death penalty; property may be transferred through endowment, sale or inheritance; and one may gain access to somebody else's body (chastity) through the marital contract.

When *amānah* is used about the relationship between humans, it can be rendered as "loyalty, faithfulness". Within the bounds set up by God, we are free to enter into mutual relationships of "loyalty and faithfulness". This is the so-called *ḥuqūq al-ʿibād* (the rights of God's servants). Once we have agreed to something, our word establishes the manner of our transaction and becomes the criterion for judging whether we have done what we had committed ourselves to doing. It is at this level that the idea of contractual binding relationships enters the Islamic legal discourse. It is also at this point that the Islamic legal discourse and its Western counterpart intersect.

¹⁸ . إن دماءكم وأموالكم حرام عليكم كحرمة يومكم هذا . Şafī al-Raḥmān al-Mubārakfūrī (2004), *Al-Raḥīq al-Makhtūm*, Riyāḍ, KSA: Dār al-Salām, p. 551.

¹⁹ Ibn 'Arabī (1981), *Journey to the Lord of Power*, translation of Rabia Terri Harris, London and The Hague, p. 26.

Hence, I would say at this point that, on the one hand, despite the similarities between the Islamic and the Western worldviews and legal methodologies, there are fundamental differences between them. And, on the other hand, I would like to underline that their differences do not necessarily imply that these two traditions must a priori be conceived of as mutually exclusive and completely irreconcilable (specially in the area of human rights).

The idea of inspiration, which institutionalizes the principle of heteronomy in the Islamic juridical thinking and separates it from its Western counterpart, may not be underestimated. For the Islamic profession of faith confesses both the absolute otherness of God ("I testify that nothing is divine but for The God") and the fact that the Absolute has used human channels, namely prophets, to educate His human creatures ("I testify that Muḥammad is God's Messenger"). Inspiration as a source of law must also not be taken out of context.

The qur'ānic revelation left no room for doubt that Muḥammad would be the Last of Allāh's Prophets. Q. 33:40 reads,

"Muhammad is not the father of any male among you, but he is the messenger of God and the seal of the prophets; and God is aware of all things."

No official, open revelation from on high should therefore be expected after him. For Muslims, prophecy as such died with Muḥammad: with his last breath God sealed the prophetic ministry for good. All that the Muslim community was left with was a Sacred Text (*muṣḥaf al-Qur'ān*) and the memories of what Muḥammad had ever said or done.

Having said that, some of the early Muslim leaders claimed that God's guidance had taken place in two stadia: first through prophets and then through caliphs/imams. This was not only a Shiite idea; there are two caliphal letters

that spell it out in no uncertain terms: one from al-Walid II (125 a.H.) and the other from Yazid III (126 A.H.), both Umayyad caliphs.

In the first, we read:

"1. To continue, God (blessed are His names, mighty is His praise, and exalted is His glorification), chose // [*sic*] Islam as His own religion and made it the religion of the chosen ones of His creation. Then he selected messengers from among angels and men, and He sent them with it and enjoined it upon them. [...] Ultimately the grace of God [as manifested] in His prophethood reached Muḥammad, at a time when knowledge had become obliterated and people had become blind, having acquired different desires and gone their separate ways, the way marks of the truth having become effaced".²⁰

"[...] 3. Then God deputed His caliphs over the path of His prophethood (*'alā minhāj nubuwwatihi*) — [that is] when He took back His Prophet and sealed His revelation with him — for the implementation of His decree (*ḥukm*), the establishment of His normative practice (*sunna*) and restrictive statutes (*ḥudūd*), and for the observance of His ordinances (*fārā'id*) and His rights (*ḥuqūq*), supporting Islam, consolidating that by which it is rendered firm, strengthening the strands of His rope [Q. 3:98.108], keeping [people] away from His forbidden things, providing for equity (*'adh*) among His servants and putting His lands to right, [doing all of these things] through them. [...]

²⁰ Patricia Crone & Martin Hinds (2003), *God's Caliph. Religious authority in the first centuries of Islam*, Cambridge: Cambridge University Press, p. 120.

4. [...] So the caliphs of God followed one another, in charge of that which God had caused them to inherit from His prophets and over which He had deputed them. Nobody can dispute their right without God casting him down, and nobody can separate from their polity (*jamā'a*) without God destroying him, nor can anyone hold their government in contempt or query the decree of God (*qaḍā' Allāh*) concerning them [sc. the caliphs] without God placing him in their power and giving them mastery over him, thus making an example and a warning to others."²¹

The party of 'Alī, the fourth caliph and the first imam according to Shiite Muslims, adds to the above that the imams were all inspired (although in a different way than the prophets) and infallible. Nonetheless, both Sunni and Shiite Muslims would overtime have to agree that both the caliphate and the imamate are a thing of the past. Nowadays, Sunni Muslims do not have a world caliph, nor do Shiites have a functioning (visible) imam. All this means that Muslims do not have anything else other than a noble tradition that needs to be reinterpreted continually wherever and whenever they happen to live. That is why Muslims such as Iqbal have underlined that prophecy was but a preparation for our current epoch, the age of reason (of science, be it Islamic or otherwise).²²

As said before, examples are a versatile way to elicit the peculiarity of Islamic juridical thinking. I shall now turn to the topic of freedom of speech in the context of the Muḥammad cartoons affair and seen from an Islamic perspective.

²¹ Ibid.

²² Cf. Muhammad Iqbal (2000), *The Reconstruction of Religious Thought in Islam*, New Delhi: Kitab Bhavan.

Freedom of Expression from an Islamic Perspective

The words of the Danish Director of Public Prosecutions, concerning the Muḥammad cartoons affair, raise some of the important questions related to the right to freedom of speech.

“During a meeting with Prime Minister Anders Fogh Rasmussen of Denmark’s Liberal Party, an imam urged the government to use its influence over Danish media so that they can draw a more positive picture of Islam...The public space is being intimidated. Artists, authors, illustrators, translators and people in the theatre are therefore steering a wide berth around the most important meeting of cultures in our time – the meeting between Islam and the secular society of the West, which is rooted in Christianity... Some Muslims reject modern, secular society. They demand a special position, insisting on special consideration of their own religious feelings. It is incompatible with secular democracy and freedom of expression, where one has to be ready to put up with scorn, mockery and ridicule”.²³

However, before I suggest one possible Islamic reaction to the last statement in the above passage, it must be noted that the expression “right to freedom of expression” implies three notions: not only that of *right*,

²³ Director of Public Prosecutions, Decision on Possible Criminal Proceedings in the case of *Jyllands-Posten's* Article “The Face of Muhammed.” March 15, 2006. [Http://www.rigsadvokaten.dk/ref.aspx?Id=890](http://www.rigsadvokaten.dk/ref.aspx?Id=890). Last visited September 25 2007. L.S. EKO, (2008), “To Punish or Not to Punish Blasphemy, That is Not Out of the Question: The Mohammed Cartoons Controversy and Free Speech in Denmark and France,” in *Paper presented at the annual meeting of the International Communication Association, TBA, Montreal, Quebec, Canada Online. 2009-05-23*, p. 1. Online version: http://www.allacademic.com/meta/p232248_index.html

but also that of *freedom* (or liberty) and that of *expression*—the first two being the main ones to be dealt with in this paper.

Freedom

In Islamic parlance, freedom is spoken of in terms of *ibāḥah* and *ḥurriyya*.

Ibāḥah refers to "the unrestricted and voluntary choice of a person to do or not do something without any blame".²⁴ It could therefore be translated as *liberty*. This reveals that the idea of "freedom" in juridical parlance is interconnected with the idea of *permissibility*.

Ḥurriyya is best understood over against the backdrop of slavery (*‘abūdiyya*) and could be defined as "the independent management of one's own affairs and fear of none but Allah".²⁵ Although one may get the impression that with the idea of "natural (subjective) rights" slips into the Islamic discourse, this is not quite the case. Even *ḥurriyya* depends on God's *ḥukm* since it "is invested in individuals through permission of the Lawgiver for [the] purpose of attracting good and preventing harm for his own interests."²⁶ *Freedom/liberty is not a blank cheque; it is framed by the divine order* within which it can reach its goal.²⁷

Muslim jurists are not agreed, however, whether the basic freedom to shape one's life is a gift coterminous with us (i.e. we are free from birth) or an effect of the law (we become free). Both views seem to be supported by different qur'ānic verses.²⁸

The content of the human rights is connected with human dignity, which, for the Islamic discourse, is both a

²⁴ Haji Mohammad, *op. cit.*, 166.

²⁵ *Ibid.*, 187.

²⁶ *Ibid.*, 188.

²⁷ This basic conviction does not do away with the fact that God's Will remains something that must be ascertained through careful interpretation of the revealed sources time and time again.

²⁸ Haji Mohammad, *op. cit.*, 190f.

gift and a task not just for the individual, but also for the whole community. This means that the community has the duty to empower all humans to lead lives that are in consonance with their God-given ethical vocation.

When the ideas behind the notions of *ibāḥah* and *ḥurriyya* are combined, it becomes clear that for the Islamic worldview,

FREEDOM-LIBERTY = a God-given RIGHT and DUTY entailing social LIBERTIES and OBLIGATIONS

It should be clear after these preliminary considerations why, according to the Islamic discourse, the "right to freedom of expression" can never be a one-sided (right-only) or an absolute (no matter what) notion. This is clearly enunciated in the Universal *Islamic* Declaration of Human Rights, art. 12, especially in §§ a and e.

a) Every person has the right to express his thoughts and beliefs so long as he remains within the limits prescribed by the Law. No one, however, is entitled to disseminate falsehood or to circulate reports which may outrage public decency, or to indulge in slander, innuendo or to cast defamatory aspersions on other persons.

b) Pursuit of knowledge and search after truth is not only a right but a duty of every Muslim.

c) It is the right and duty of every Muslim to protest and strive (within the limits set out by the Law) against oppression even if it involves challenging the highest authority in the state.

d) There shall be no bar on the dissemination of information provided it does not endanger the security of the society or the state and is confined within the limits imposed by the Law.

e) No one shall hold in contempt or ridicule the religious beliefs of others or incite public

hostility against them; respect for the religious feelings of others is obligatory on all Muslims."

Expression

Expressing oneself belongs to the process whereby we become socialized as humans. It is also a form of homecoming to ourselves by trying to bring out what seems to be inside of us. Through the mediation of the 'it' (signs and symbols), the 'I' and the 'You' form the 'We' and thus establish the foundations of their own identities. In short: expressing ourselves is necessary for becoming ourselves. Having said that, we may also ask: Must we then express all that crosses our mind?

In response to the utterance that in the ambit of "secular democracy and freedom of expression [...] one has to be ready to put up with scorn, mockery and ridicule," I dare say that this statement is untenable *from an Islamic perspective*. There is a distinction between, on the one hand, stating facts or theories that some people may consider offensive within the realm of the sciences and of the framework of research and, on the other hand, expressions that are not part of a concerted effort to seek the truth (i.e. insults). To define secular society as the society that tolerates —nay, celebrates— the fact that somebody may publicly "scorn, mock and ridicule" somebody else is, in my eyes, a regrettable affirmation.

Thinking from the body of central Islamic convictions, it may be added that here, too, applies the Islamic rule that Muslims must "promote what is good (acceptable) and thwart what is evil (reprehensible)" (cf. Q. 16:91; 7:157). Accordingly, individuals and groups have the right to express *what is right* (or what, at least, has not been proven to be wrong) or *what can expectedly lead to wholesome and constructive behaviour*. However, they do not have an absolute right to the contrary. Moreover, they ought at the same time to restrain or, as some would argue, to be

restrained from what is wrong or can predictably encourage or cause wrong behaviour. In principle, individuals ought to even prevent by the hand, the tongue or the mind that something wrongful be said or done to the detriment of oneself or others. Nevertheless, this does not mean that individuals can *motu proprio* punish the transgressors of the "acceptable" (*al-ma'rūf*). People deemed to be transgressing the bounds of acceptable behaviour may not be assaulted indiscriminately. Life, the body, property and reputation have been made sacred (or taboo) by God's *ḥukm*. They are holy ground that must be trodden carefully. Humans may therefore deal with transgressors *only in keeping with God's aḥkām*. Life, the body, property and reputation are correlatives comprising rights *and* duties, on the part of the transgressors, as well as of those who think that they are adhering to the (divine) law.

The idea that the right to freedom of expression is not absolute has also been contemplated by non-Muslim Western thinkers. It has been argued that this right exists in the balance between liberty and equality. Whenever the free expression of personal beliefs can lead to hate crimes (i.e. as "hate speech"), then such utterances should be curtailed.²⁹ In Western countries, the "hate" element in a crime is punished in three different ways: (1) by increasing the sentence of bigoted criminals, (2) by adding an extra element to existing crimes (the bigoted "animus"), or (3) by outlawing designated expressions (*idem*, 3-4). In fact, one could even justify some limitations to the right to freedom of speech on the grounds of art. 2 §2 of the Universal Declaration of Human Rights:

"(2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations

²⁹ Tim Bakken (2000), "Liberty and equality through freedom of expression: the human rights questions behind 'hate crime' laws," in *The International Journal of Human Rights*, vol. 4, no. 2, p. 10 (whole article: pp. 1—12).

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."

Both the Islamic and the non-Islamic argument in favour of setting limitations to freedom of expression are intended to *defend* the individuals or groups that might be influenced negatively by it, either because they can become victims of bigotry³⁰ or because they might become bigots themselves³¹. The problem here is that all depends on what is considered to be "dangerous expressions" and who defines them (e.g. to dictators, any criticism of their regime will be seen as "dangerous expressions" deserving to be censored). As a result, different societies will circumscribe the right to freedom of expression differently. For instance, in the USA obscenity is banned, but pornography is not; whereas in Saudi Arabia both are outlawed and punishable.

One could also raise the question of proportionality between crimes. Why do some societies show a tendency to overstate the harmfulness of some expressions (e.g. films, books, utterances, etc.), while at the same time they downplay or even condone other types of pernicious behaviours (e.g. bribery, nepotism, oppression of women enshrined in the law, etc.) or negligence in the fulfilment of one's duty (such as taxi drivers that rip off their clients or nurses that steal medicines from the job)?

³⁰ For instance, a film in which most Arabs are represented as terrorists could lead to the illegal victimization of the Arab members of the community, regardless of their moral qualities, as in cases of racism or what Dutch law calls "eigen richting" (taking the law in one's own hands).

³¹ This is similar to preventing that children come in contact with weapons, alcohol, or drugs in virtue of which they could bring harm to themselves or to others.

The above indicates that it is not always easy or possible—not even desirable—to gauge freedom of expression with a uniform measure across the globe. As all other human phenomena, this one, too, is contextual. This does not mean that unnecessary censorship may be easily justified in the name of safety, respect, or equality. Even though orthopraxis should be defended so that the moral fibre and sense of decency of a society may be preserved, there exists a clear danger that the orthodoxy presupposed by a given orthopraxis may become confused with mandatory uniformity or mere repression. Such a scenario would result in an arbitrary situation of not only *cuius regio, eius religio*, but also *cuius region, eius religio* and *eius lex* and even *eius mores*. Besides, it must be taken into account that—as the opponents of limitations to the right to freedom of expression argue—it has not been proven yet that censorship leads to more just societies where equity has the upper hand. On the contrary, when the free flow of ideas is not criminalized, societies become more critical, and this enhances the democratic mentality that counters the abuse of power and privileges.³²

Final Remarks

Recapitulating, it may be said that the Islamic legal mindset has many positive elements. Its view of *rights and duties as correlatives* is one of them. Its realistic awareness that rights and duties are not *natural* things but *attributions* is another one.

The dangers only creep in through the methodological cracks when people forget that the gap between God's *ahkām* and the human social reality is bridged by humans (e.g. officials and scholars). What we call "God's law" has not been revealed to us directly but through the mediation of language and of social agents. It is always human beings

³² Cf. Tim Bakken (2000), *op. cit.*, 10. See also EKO, *op. cit.*, 17.

who elucidate and apply God's law in the here and now of the cases which they are consulted about or entrusted with. Prophets, caliphs, and imams (in the case of the Shiite community) occupied a very special place in God's disposition, but they are no longer here. We can no longer go up to them and ask for their advice. Therefore, not only God's word must be deciphered from texts, but also that of the prophets, including Muḥammad (and that of the imams, too).

Hence, it is not about God that non-Muslims should worry when they think of Islamic law, but about those who mean to speak in His Name.

As for us, Muslims, we ought to demythologize the legal machinery, the grand imams and their schools. Their testimony need not be done away with; for they have proven to be useful and their systems are well thought out. Nonetheless, too many assumptions are made and, regrettably enough, far too many of them are attributed to God while they have been the product of human minds. This demythologization process is necessary not to please the West but to remain faithful to the core the Islamic message: the *tawḥīd* (the defence of the oneness and uniqueness of God). Only Allāh is god. Our *fiqh* manuals are not.

Speaking from within the Islamic tradition, I defend the idea that freedom of speech is both a right and a duty that coexists with other binary correlations of rights and duties, such as that of promoting what is good and curtailing what will sow unnecessary and unhealthy discord. We human beings have been endowed with *reason* and should therefore lead *reasonable* lives, not whimsical ones, striving to evolve not only technologically, but also spiritually. The traditional Islamic separation of the private and the shared spheres applies to this issue, too. Not everything needs to be shouted out from the roof-tops or painted on the city walls (i.e. not all needs to

be 'expressed'), especially not what will expectedly have consequences that are detrimental to the peaceful, respectful and decent³³ functioning of society.

If Europeans can prohibit people to urinate in public, which is a much more basic and pressing bodily urge, and punish transgressors with heavy fines in order to safeguard cleanliness and preserve health, why does the idea of banning public expressions that can pollute the social climate and sicken the community sound so unpalatable to so many of them?

Also from within the Islamic tradition, I would say that often more harm is done by applying measures that are too severe than by allowing for some social flexibility.

³³ I am aware that the word "decent" can raise many questions; for it is a culturally-charged notion. I do not equate decency with self-effacement (as in the case of a *burqa*) or self-hatred (as in puritanical anti-body spiritualism). To me, it entails the respect for oneself and for others, the recognition of the different ambits and spheres within which we continually move, and the basic and sound etiquettes employed in said ambits.

S. A. S. Apostolo, "Some Remarks", *Alkar* (2010), 11: 191-214