

Overlapping Sacred Spaces: Islam, Pluralism and the Hegemony of 'Human Rights'

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Abstract: The focus of this research is the conceptualization of religious minorities in Islamic thought, the relationship of 'human rights' to religious freedom and pluralism, and the features of the Islam – human rights discourse as they relate to religious liberty and minority rights and explores the potential of an alternative to the human rights approach to pluralism and religious freedom based on Islamic universalism identified in the dissertation as 'overlapping sacred spaces'. Such a study is important because of the increasing focus on the relationship between Islam and human rights in the wake of the Arab Spring and the emergence of extremist groups such as ISIS. The research approach adopted in this dissertation includes critically examining the concept of universal human rights and its relation to pluralism and religious freedom in conjunction with probing the Islamic tradition and history for scripturally rooted answers to the contemporary problem of pluralism. This dissertation recommends that further research be conducted into Islam's theology of difference in addition as well as means of providing foundations for the affirmation of the religious other, in addition to necessary research in the field of practical implementation.

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1. Introduction

1.1 Background

The modern states that make up today's Muslim world¹ are composed of individuals from a diverse array of linguistic, ethnic and religious backgrounds. Even in states where Muslims form a large majority, there continues to exist significant numbers of religious and ethnic minorities. This diversity in turn, gives rise to a series of important and potentially divisive questions, which present challenges related to issues of political representation, political and social autonomy and religious liberty. Finding morally defensible and politically viable answers to these questions is one of the greatest challenges of our time.

The framework of international human rights, premised as it is on equality between all human beings "without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion"² is the primary framework in which the efficacy of approaches to diversity have been, and continue to be evaluated. Thus, any system or approach that gives the appearance of violating the principles of equality outlined in various the conventions which form the backbone of the human rights framework is deemed illegitimate, in as much as they are deemed to contradict the predominant understanding of human rights. The classical Islamic formulation regarding non-Muslim minorities, based as it was on categories of exclusion, is problematized as an impediment to the realization of the human rights project in predominantly Muslim societies.

Consequently, for this and other related reasons, Islam is often perceived as a monolithic entity and treated in the literature as a 'challenge' to the human rights project, reflecting what Sabah Mahmood refers to as "Islam's burden of proving its compatibility with liberal ideas..."³ According to Mahmood, rather than asking how Muslims can become better liberals, we may be better served by asking how the world is (or can be) lived differently,

¹ defined as the ORIC

² Universal Declaration of Human Rights, *Article 2*, <http://www.un.org/en/documents/udhr/>.

³ Mahmood, S., "Is Liberalism Islam's Only Answer?", in Abou el Fadl, K., *Islam and the Challenge of Democracy*, ed. Cohen, J. and Chasman, D., (Princeton: Princeton University Press, 2003), p. 74.

confronted as we are with the historically unprecedented homogenizing force of modernity that does not allow space for alternative visions.⁴

The nature of the relationship between Islam and human rights has received a great deal of attention in academia, and has become a common point of discussion in public discourse particularly in light of the uprisings that have shaken the predominantly Muslim Arab middle east since 2011. This discussion is situated within the larger discussion regarding the universality of human rights and covers a broad range of issues related to Islam and the realization of human rights in the Muslim world.⁵ Claims to have re-established the *shariah* as the basis of governance by groups such as ISIS and musings to resuscitate a largely mutated form of the classical provisions of minority law have provoked anxiety amongst non-Muslim citizens of states undergoing Islamization programs. Consequently, the issue of religious liberty and minority rights in Islam has received a significant amount of attention. This is due in no small part to the prevalent view that Islam is an impediment to the realization of human rights in the Muslim world and irreconcilable with modern understandings of equality.

As a result, contemporary approaches to issues of human rights and pluralism in Islam and the issue of religious minorities in Muslim societies have generally adopted models based on a Rawlsian understanding of political liberalism. Despite the usefulness of this approach in highlighting the significant spaces for overlapping consensus between divergent comprehensive doctrines and visions of the 'good', they have generally failed to take into account the normative history of the Islamic tradition with regards to pluralism. Additionally, the nature of the discourse itself effectively negates Islam's theological potential to foster an alternative vision in response to the challenge of pluralism based on the concept of 'overlapping sacred spaces.' (Needs brief definition)

As part of the ongoing exploration of solutions to the challenges of religious pluralism this paper seeks to critically examine the conceptualization of minority rights in Islamic thought with the purpose of exploring Islam's theological potential to foster an alternative

⁴ Ibid.

⁵ Baderin, Mashood A. "Islam and the Realization of Human Rights in the Muslim World: A Reflection on Two Essential Approaches and Two Divergent Perspectives". *Muslim World Journal of Human Rights* 4, no. 1 (2007)

to the homogenizing tendency of modernity based on the concept of overlapping sacred spaces and what Arnold Toynbee referred to as the Islamic tradition of the brotherhood of man.⁶

1.2 Research Focus

A major focus of this research is on developing a critical understanding the human rights discourse, as it is imperative to developing an analytical perspective from which to view the vast body of literature on the subject. Since the literature on Islam and human rights is primarily comparative in nature, the question of how rights are conceived in the first place needs to be answered in order to avoid anachronistic thinking. Chapter two deals with this question by comparing modern understandings of the concept of 'rights' with the Qur'anic discourse.

Chapter three addresses the issue of human rights and religious pluralism in an exploration of several important questions: what is the nature of the purported universalism in human rights, and how does that impact approaches to religious liberty? What are the features of the discourse on human rights in Islam? What is the human rights position on religious liberty and pluralism and is it effective at achieving its stated goals? Additionally, a critical review of the literature must be done in order to gain critical insight as to the features of the discourse.

Chapter examines the conception of the religious other in the Islamic tradition by focusing on how non-Muslims have been treated in *fiqh* and how they are discoursed about in the Qur'an. The historical record of non-Muslims living under Muslim rule will be examined, with particular attention paid to the Ottoman experience. Additionally this chapter will explore the duality between 'universalist' and 'communalist' perspectives in Islamic law, their justifications and their impact on the view of religious minorities.

Chapter five explores contemporary Muslim responses to the issue of pluralism and minority rights by focusing on two major trends, the 'conservative' and the 'liberal' approaches. It will be argued that both of these approaches are problematic in their own

⁶ Arnold Toynbee, *the World and the West* (New York: Oxford University Press, 1953), 30.

way; the former because of its reification of the classical *sharī'ah* provisions, and the latter because of its non-critical acceptance of the normativity of political modernity.

Chapter 6 explores how an authentic Islamic universalism has the potential to present an alternative framework for society in which religious and cultural communities are given the autonomy to develop their own 'sacred spaces', while at the same time allowing for a common existence together. It is the hope of this author that the preceding discussion can contribute to the long-terms and ongoing project of rethinking how we live together.

2. The Divergent Conceptions of 'Right'

2.1 The Distinction Between *Is* and *Ought*

Modernity has offered various outlooks on the rights of man and the broader concept of 'the good', all of which are intimately connected to the intellectual, social and political project of modernity. With regards to the rights of man, they are most often discussed in legal framework concerned with the relationship between citizen and state. The traditional Islamic understanding of rights, concerned as it is primarily with the relationship between man and God, is arguably better understood through the theological lens in which the Islamic legal tradition is ultimately situated. Although in both conceptualizations the rule of law is paramount, the fact that the Islamic theologico-legal tradition materialized prior to the onset of modernity entails that the concept of evokes an entirely different meaning.⁷

In his *The Impossible State: Islam, Politics and Modernity's Moral Predicament*, Wael Hallaq argues that paradigmatic Islamic governance did not differentiate between law and morality - a common distinction made in post-enlightenment ethico-legal philosophy - a phenomenon Hallaq refers to as the 'rise of the legal'.⁸ The roots of this phenomenon can be seen in a logical extension of a line of ethical reasoning deriving from a Kantian ethical rationalism and the subsequent shift in the epistemology of ethics in which man came to occupy the axial center. This fundamental shift away from religious canon as the source of ethics, tied as it was to the concepts of *maturity* and *autonomy*, represents one of the

⁷ See: Wael Hallaq, *The Impossible State: Islam, Politics, and Modernity's Moral Predicament* (New York: Columbia University Press, 2013), 74-98.

⁸ *Ibid.*, 75.

cornerstones of the enlightenment project. The resulting self-understanding came to see man as sovereign above all else. As Hallaq argues, this characteristic of ‘domination’ became the basis on which the study of and resulting understanding of nature was based.⁹

Mechanical philosophers such as Newton and Boyle had effectively removed God from the creative equation, which not only severed the metaphysical connection between the Creator and created but also the connection between matter and spirit. Matter as ‘brute’ and ‘inert’ retained only a utilitarian and anthropomorphic teleology. When translated to the social and human level, this philosophy allowed for a morally void and dispassionate approach to the other. According to Taylor, this *fact/value* split has become the predominant theme in twentieth century understandings and valuations of human freedom and dignity.¹⁰ In this equation Divine imperative is removed from the equation and man’s unaided reason becomes the sole determiner of value.¹¹ Reason, which in the Islamic tradition of ethics is directed by revelation, becomes *autonomous* and suppresses any authority extraneous to it, including scripture.

2.2 Rights in the Western Philosophical-Legal Tradition

In the contemporary Western philosophical-legal tradition one of the most influential conceptual treatment of rights can be found in the works of Wesley Hohfeld. Referred to as ‘Hohfeldian categories’ in contemporary legal theory, the Hohfeldian conception of rights is presented as universal in nature and is consequently not considered to be culture bound. These categories can be divided as follows:¹²

1. Privileges or Bare Liberties
2. Claim rights
3. Power or liberty to alter existing legal arrangements
4. Immunity from legal change

⁹ Ibid.

¹⁰ Charles Taylor, “Justice After Virtue,” in *After MacIntyre: Critical Perspectives on the Work of Alasdair MacIntyre*, ed. John Horton and Susan Mendus (Cambridge: Polity Press, 1994), 18.

¹¹ Hallaq, *The Impossible State*, 80.

¹² Hohfeld, Wesley N., *Fundamental Legal Conceptions as Applied in Judicial Reasoning*. New Haven, CT: Yale University, 1964

The first category of privileges, or bare liberties, is considered as the minimal category of legal rights. As it relates to religious freedom, a privilege or bare liberty implies the right of an individual to worship without incumbency. The state, or governing authority, would not be required to actively protect the existence of a particular religious group other than to ensure that the bare liberty is maintained. In the context of an Islamic polity, Cornell points out that this would imply the right of a Christian, or other religious minority, to worship.¹⁴

In contrast to the category of privileges or bare liberties, claim rights imply an obligation upon the governing authority to facilitate the religiously sanctioned practices of adherents. A contractual agreement allowing Christians to sell pork or wine or construct places of worship would constitute an analogous example to the first category of claim rights, claim rights *in personam*. The second category of claim rights, *claim rights in rem*, implies an obligation on the part of the governing authority to actively assist religious minorities in the fulfillment of their religious obligations.¹⁵

An analogous example to the right to alter an existing legal arrangement would be the right of the governing authority in an Islamic polity to renegotiate the terms of an existing agreement with religious minorities. In the modern nation state where this power is often constitutionally enshrined, conflicts may arise between it and the aforementioned claim rights *in rem*.

In the pre-modern Islamic context, the right to immunity from legal change can be seen in the opinion of Hanbali jurist Ibn Taymiyyah regarding the rights of religious minorities. Ibn Taymiyyah based his opinion on the apocryphal *Covenant of 'Umar*, which mandated the security of their persons, families and property so long as the conditions imposed upon them were observed.¹⁶ These were the general terms that characterized the relationship between the first four caliphs and their non-Muslim subjects.¹⁷ For Ibn Taymiyyah then, it would appear that the right of immunity from legal change was the primary right of religious minorities in the Islamic empire. Furthermore, the covenant

¹⁴ Cornell, Vincent J. "Religious Orthodoxy and Religious Rights in Medieval Islam: A Reality Check on the Road to Religious Toleration," in *Justice and Rights: Christian and Muslim Perspectives*, ed. Michael Ipgrave (Washington D.C.: Georgetown University Press, 2006), 55.

¹⁵ *Ibid.*, 56.

¹⁶ *Ibid.*

¹⁷ See: Tritton, A.S., *The Caliphs and Their Non-Muslim Subjects: A Critical Study of the Covenant of 'Umar* (London: Oxford University Press, 1930), 5-17.

included what Cornell classifies as a claim right *in personam*, viz. the right of the *dhimmī* to free themselves from the Covenant of ‘Umar by enlisting in the army. As Makari points out, this is indicative of the close attention paid to the letter of the law regarding contractual obligations by Hanbali jurists.¹⁸

Modern understandings of human rights fall under the category of claim rights *in rem* in that they are seen as principally rather than contractually driven. However, as will be discussed in a subsequent section, the reality is that the extents of these rights, particularly as they relate to freedom of religion, are largely subject to the discretion of the state.

2.3 The concept of ‘Right’ in Qur’ānic Discourse

It has often been asserted that pre-modern Islam lacked a conception of rights and, *pace* Joseph Schacht, was focused solely on the fulfillment of duties and obligations.¹⁹ As the above discussion briefly outlined, rights, duties and obligations were all part of the pre-modern Islamic legal discourse. In the Qur’an, the concept of right is denoted by the root word *haqq*, which has a semantic range covering wide range of meanings including truth, reality, rightness, appropriateness, worthiness, responsibility and right.²⁰ In theological discourse the term *haqq* can be said to encompass the totality of the divine – human relationship and the simultaneous existence as both slave (*‘abd*) and vicegerent of God on earth (*khalifat fi’l-‘ard*). It is not difficult to see how a theologically rooted understanding of ‘right’ diverges from modern legalistic discourse on the subject.

However, a concept of rights that may be more familiar to the modern mind can be extrapolated from the textual sources. There are a number of verses in the Qur’an which point to mutual obligations and responsibilities between human beings. There are verses that also indicated a more defined and explicit understanding of rights. Q.6:151 states the following: “Do not take a human life, which God has made sacred, other than as a right (*illā bi haqq*); this He has enjoined upon you so that you might think rationally.” The notion that all human beings possess certain rights as part of their ontological nature is central to the

¹⁸ Victor E. Makari, *Ibn Taymiyyah's Ethics: The Social Factor* (Chico CA: Scholars Press, 1983), 127-131.

¹⁹ Joseph Schacht, “Law and Justice,” in *The Cambridge History of Islam, II*, ed. P.M. Holt (Cambridge: Cambridge University Press, 1971), 541.

²⁰ William Chittick, “Worship,” in *The Cambridge Companion to Classical Islamic Theology*, ed. Timothy J. Winter (Cambridge: Cambridge University Press, 2008), 220.

Islamic conception of justice.²¹ In the traditional Islamic perspective servitude is an inherent part of man's ontological makeup, which entails that rights are necessarily correlated to responsibilities. The concept of 'right' as derived from the Qur'an, is best understood as derivative in nature, not because rights are necessarily dependent on the performance of a corresponding duty, but because they ultimately derive from a sense of duty and obligation to fulfill the divine command.²² A misunderstanding of this nuanced position likely lays at the root of why commentators have often described Islam as a system of duties and responsibilities without any conception of stand-alone rights. This emphasis on the correlation between rights and their corollary responsibilities should not however be foreign to those familiar with liberal discourses on rights, for any claim to a right necessarily involves an obligation on another not to violate this right.

3. Human Rights, Pluralism and Religious Freedom

3.1 Universalism in Human Rights

The human rights project is premised on the concept of universality, as has been asserted by the Universal Declaration of Human Rights (UNHDR) and subsequent covenants. This universality is premised on the incorporation of 'the inherent dignity of all inhabitants of the planet, independent of their culture, religion, social status, ethnic origin, gender or traditions.'²³ Accordingly, it does not allow for the recourse to culture as a means of limiting the scope or content of human rights. In other words, when it comes to human rights context is irrelevant and their validity is established by the source of their existence, which is the human being.²⁴

This premised universality contains within it an antinomy as it ostensibly does not disregard the diversity of cultural and religious values, while at the same time upholding the

²¹ Majid Khadduri, *The Islamic Conception of Justice* (Baltimore: John Hopkins University Press, 1984), 8-10.

²² Allahbukhsh Brohi, "Human Rights and Duties in Islam: A Philosophic Approach," in *Islam and Contemporary Society*, ed. Salem Azzam (London: Longman Group Ltd., 1982) 233.

²³ Chilean Representative in United Nations General Assembly, Official Records, Fifty-fifth session, (December 2000).

²⁴ "Human Rights and Cultural Values: A Literature Review". Hurights Osaka, , 2003. Accessed 30 July 2014. [Http://www.hurights.or.jp/database/E/hr_cultural_values.html](http://www.hurights.or.jp/database/E/hr_cultural_values.html).

view that human rights apply to all people regardless of race, colour, sex, language, religion, national origin, socio-economic or cultural background.²⁵ According to Ignatieff in his *Human Rights as Politics and Idolatry*, the UDHR defines “a limited range of values from different religious, political, ethical and philosophic backgrounds” covering not only Western tradition, but also Chinese, Christian, Marxist, Hindu, Latin American and Islamic.²⁶ Bielefeldt argues that the universality of human rights does not entail the imposition of a particular value set emanating from the West, but rather aims at the universal recognition of pluralism and difference.²⁷ Bielefeldt further adds:

To be sure, pluralism and difference apply also to the concept of human rights which itself remains open – and must be open – to different and conflicting interpretations in our pluralistic and multicultural political world. Without the recognition of such difference within the human rights debate, the discourse would amount to cultural imperialism. Nevertheless, it seems clear that the very idea of human rights precludes some political practices, such as oppression of dissidents, discrimination against minorities, slavery and apartheid.²⁸

Bielefeldt’s statement, although commendable, belies that antimony that undergirds the human rights project in its manifestation in the global system.

Talal Assad, in his article “What do Human Rights Do? An Anthropological Enquiry” provides critical insight into the reality of the human rights discourse in the global system. He sets out to answer the question of why far more attention is given to human rights violations in the non-Western world than to violations in Euro-America.²⁹ He concludes that non-Western nations are more frequently censured for human rights violations, not principally because of the nature of their governing authorities, but rather that in the light of the universalism embedded in the human rights discourse, these societies remain ‘unredeemed’.³⁰ Implied in this is that perceived non-adherence to human rights norms,

²⁵ Ibid.

²⁶ Michael Ignatieff, *Human Rights as Politics and Idolatry*, ed. Amy Guttmann (Princeton N.J.: Princeton University Press, 2001).

²⁷ Heiner Bielefeldt, “Muslim Voices in the Human Rights Debate,” *Human Rights Quarterly* 17, no. 4 (November 1995).

²⁸ Ibid.

²⁹ Talal Asad, “What Do Human Rights Do? An Anthropological Enquiry,” *Theory & Event* 4, no. 4 (January 2000): Accessed 25 July 2014. https://muse.jhu.edu/journals/theory_and_event/v004/4.4asad.html.

³⁰ Ibid.

coupled as they are to the predominant economic and political forms of modernity, are equivalent to underdevelopment, which itself assumes the inherency of linear progress of the 'end-of-history' type' discussed by Fukuyama.³¹ In fact, as Asad argues, the whole human rights project is tied to the expression of the project of political modernity, the state.

Asad notes that the UNHDR turns immediately from the "inherent dignity" and the "equal and inalienable rights of all members of the human family" to the state in the sense that the right bearing individual is made the responsibility of the sovereign state.³² Asad echoes Hallaq's argument that the legal and the moral have been detached under the modern state by pointing out that, in the human rights discourse, there is no explicit recognition that what is lawful may be intolerable, only that nothing deemed to contravene human rights can be considered as lawful assuming a direct convergence between the rule of law and justice.³³

The above discussion demonstrates that despite claims to the contrary, *pace* Bielefeldt, the universalism embedded in the human rights discourse is, for all intents and purposes, negating a pluralism. In practice, any practice deemed to have failed to live up to human rights standards is illegitimate and outmoded. It is important to note here that the idea of universal human rights does represent a powerful tool in the effort to preserve human dignity and to hold state abuses to account, however because the discourse inherently negates anything that lies outside of its boundaries it effectively negates a true plurality of perspectives.

The universalism at the core of the human rights discourse has been critiqued at times by Muslim states, scholars and intellectuals on the grounds of cultural relativity. The argument relied upon at the state level and by those scholars and intellectuals who approach human rights from a so-called conservative perspective is that international human rights norms do not in every case to Islamic norms and values as expressed in the *Shari'a*. More recently there has been a convergence of sorts between Muslim intellectuals and

³¹ For a perspective of democracy, free market economics and human rights as being the pinnacle of linear progree see: Francis Fukuyama, *The End of History and the Last Man* (New York: Free Press, 1992).

³² Asad, "What do Human Rights Do?"

³³ Ibid.

postmodern critiques of modernity, including the universalism implicit in the human rights discourse.³⁴

3.2 The Islam – Human Rights Discourse

The literature on Islam and human rights is varied, however much of the analysis expresses a relationship of confrontation. In other words, Islamic values and those expressed in the human rights discourse are seen to in conflict more often than not. Islam as a comprehensive doctrine and sociological phenomenon is primarily treated as a barrier to the realization of human rights in the Muslim world. That this represents the basic nature of the Islam - Human Rights discourse is unremarkable given the above discussion.

The conclusions vary, with some arguing that the so-called ‘challenge’ of Islam to the realization of human rights is surmountable through novel hermeneutical engagement with the texts, to those who argue that the gap between Islam - reified in the form the *Shari’a* - is so wide that reconciliation between the two is all but impossible. The dichotomy of these perspectives is succinctly expressed by Baderin who identifies two divergent perspectives on the relationship between Islam and human rights. The first of these perspectives, which Baderin labels as *harmonistic* “emphasizes and explores possibilities offered by alternative juristic view of Islamic law that both moderate and legitimate.”³⁵ The second perspective, which Baderin identifies as *adversarial* “emanates from the traditional divide and stereotype of confrontation between the occidental and oriental civilizations, between religion and secularism, and more specifically between Islamic orthodoxy and Western liberalism.”³⁶ This latter perspective can also be understood within the ‘clash of civilizations’ framework elucidated by Huntington.³⁷

The *adversarial* perspective is associated most strongly with those who advocate a secular approach to human rights in the Muslim world, which posits that human rights

³⁴ See: Haldun Güllalp “Globalizing postmodernism: Islamist and Western social theory,” *Economy and Society* 26, no. 3 (August, 1997): 419-433.

³⁵ Mashood A. Baderin, "Islam and the Realization of Human Rights in the Muslim World: A Reflection on Two Essential Approaches and Two Divergent Perspectives," *Muslim World Journal of Human Rights* 4, no. 1 (2007): 12.

³⁶ Mashood A. Baderin, "Human Rights and Islamic Law: The Myth of Discord," *European Human Rights Law Review*, no. 2 (2005): 165.

³⁷ See: Samuel Huntington, *The Clash of Civilizations: Remaking World Order* (New York: Simon & Schuster, 1996).

norms would be best served by sidestepping the normative traditions of Islam in favour of a purely secular ethic and adherence to international human rights law as expressed in the Universal Declaration of Human Rights and other international covenants. The *harmonistic* perspective is taken by a numerous scholars employing a variety of methods, from a Rawlsian understandings of political liberalism and public reason, to novel hermeneutical engagements with traditional Islamic texts.

Interestingly, the *adversarial* perspective is not only expressed by critics of Islam such as Daniel Pipes³⁸ but also by what Akbarzadeh and MacQueen call ‘Muslim literalists’, who also view a fundamental incongruence between Islamic norms and categories of political and social modernity to which human rights norms belong.³⁹ The harmonistic perspective on the other hand argues that the Islamic tradition has a significant role to play in advancing human rights in Muslim majority states and amongst Muslim communities around the world.⁴⁰

Despite the divergence of these two perspectives they share an important commonality, *viz.* their monological nature, echoing what Watson describes as the presumption that current interpretations of human rights laws are impeccable with everything else being adjusted to maintain that assumption.⁴¹ Other reflections on the relationship between Islam and human rights from Muslim authors tend to reflect what Baderin terms “the double standards of countries at the helm of international human rights.”⁴² What is perhaps most striking about these discussions is their reflection of the power differential contained within the discourse and reflect what Mahmood describes as “Islam’s burden of proving its compatibility with liberal ideals....”⁴³ Thus, one very important

³⁸ In a 2006 online article Daniel Pipes wrote that there is a “historically abiding Muslim imperative to subjugate non-Muslim peoples” and concluded that “ultimately there is no compromise with Muslim communities.” See: Pipes, Daniel. “Cartoons and Islamic Imperialism”,

³⁹ Sharam Akbarzadeh, and Benjamin MacQueen, “Framing the Debate on Islam and Human Rights”, in *Islam and Human Rights in Practice: Perspectives Across the Ummah*, eds. S. Akbarzadeh, and B. MacQueen. (New York: Routledge, 2008).

⁴⁰ For a detailed discussion on the importance of Islam to the human rights cause, see: Baderin, “Islam and the Realization of Human Rights in the Muslim World: A Reflection on Two Essential Approaches and Two Divergent Perspectives”. 1-25.

⁴¹ J. Shand Watson, *Theory and Reality in the International Protection of Human Rights* (Ardsley, NY: Transnational Publishers, 1999), 15.

⁴² Mashood A. Baderin, “Dialogue Among Civilizations as a Paradigm for Achieving Universalism in International Human Rights: A Case Study with Islamic Law”. *Asia-Pacific Journal on Human Rights and the Law* 2, no. 2 (2001): 14.

⁴³ Sabah Mahmood, “Is Liberalism Islam's Only Answer?” in Abou El Fadl, Khaled. *Islam and the Challenge of Democracy*, eds. Chasman and J Cohen (Princeton, N.J.: Princeton University Press, 2004), 74.

characteristic of the Islam-human rights discourse that emerges is the fact that Islam is viewed either as an impediment to the realization of human rights norms, or a tool to be used to realize human rights norms without really ever questioning the efficacy of the human rights ideals in question.

A second identifiable characteristic of the Islam-Human Rights discourse is the anachronistic tendency to artificially collapse the distance between the norms of the present and those of the past. An example of this can be seen in many of the discussions concerning human rights in Islam and the rights of non-Muslims in Islam, something that both Muslim and non-Muslim commentators are guilty of at times. In many of these discussions, the concept of 'rights', primarily understood in modern and Western philosophical terms, is superimposed as an analytical framework upon the historical legacy of Islam and upon Islam's textual sources. It is not surprising then that the conclusion is often that there exists a discrepancy between the modern conception of rights and Islamic conceptions.

From the above discussion, it can be seen that two congruent factors - power differentiation and anachronistic thinking - generally skew the Islam-human rights discourse away from an honest and critical discussion.

3.3 The Human Rights Approach: Religious Liberty and Pluralism

Freedom of religion is considered one of the foundations a democratic and pluralistic societies. It also represents one of the cornerstones of the human rights discourse proclaimed by American president Roosevelt as one of the basic 'four freedoms'.⁴⁴ The UDHR, promulgated in 1948, enshrined religious liberty as one of the pillars of the human rights project, as is reflected in various international and regional human rights documents. *Article 18* of the UDHR⁴⁵ and the ICCPR⁴⁶ provide the human rights framework for the protection of this right. *Article 18* of the UDHR states that

⁴⁴ The 'four freedoms' were enunciated by FDR in his 1941 State of the Union Address. The other three included freedom of expression, freedom from want, and freedom from fear.

⁴⁵ Universal Declaration of Human Rights, <http://www.un.org/en/documents/udhr/>.

⁴⁶ International Covenant on Civil and Political Rights, <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship or observance.

Article 18 of the ICCPR declares that:

- (1) Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and to manifest his religion or belief in worship, observance, practice and teaching.
- (2) No one shall be subject to coercion, which would impair his freedom to have or to adopt a religion or belief of his choice.
- (3) Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
- (4) The States Parties to the present Covenant undertake to have respect for the liberty of parents, and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

According to Evans these articles represent the classic human rights formula regarding religious freedom in that they set out what would appear to be a very clear set of rights.⁴⁷ In practice however, these liberties are limited. As Evans argues, the trajectory of the legal interpretation of the human rights discourse is likely to hinder rather than promote the realization of religious liberty and pluralism.⁴⁸

The statement that these liberties are “subject to the limitations as prescribed by the law” is key to understanding this trajectory. It is well understood that any pluralistic society must accept certain limitations on the public manifestation of beliefs however, the examples cited by Evans indicate that the limitations prescribed by the law, and their interpretations by regional human rights bodies, are increasingly taking on characteristics of what he describes as a form of secular fundamentalism.⁴⁹

In the human rights formulation public manifestations of belief are protected only to the extent that the manifestation in question constitutes a protected form. What constitutes

⁴⁷ Malcolm Evans, “Human Rights and the Freedom of Religion” in *Justice and Rights: Christian and Muslim Perspectives*, ed. Michael Ipgrave (Washington D.C.: Georgetown University Press, 2006), 109.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*, 115.

'protected forms' is open to interpretation. However, whether human rights encompasses the protection of religious expression in the form of the denial of services⁵⁰ or public sector employees wishing to wear religious garb⁵¹ is questionable when the state, acting in the name of secularism, seeks to prevent them from doing so. In such cases there is a clear discord between human rights law and religious liberty. Cases such as these demonstrate the the individualistic thrust of human rights provisions related to religious liberty imply that the interpretation of these provisions limit religious freedom primarily to *forum internum*, the sphere of inner belief. In this understanding freedom of religion is equivalent to freedom of conscience. Religious traditions, such as Islam, which contain strong communal and public expressions arguably pose more of a challenge to the dominant interpretation of the human rights project, tied as it is to liberal and secular understandings of pluralism.

Article 27 of the ICCPR states the following regarding cultural homogenization and minority rights:

In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

Notwithstanding the ambiguity of the term 'minority', this article arguably represents a legal formulation of the appreciation of diversity and its need to be protected and respected. Furthering the preservation of human diversity necessitates a revisiting of the values enshrined in this article in light of the inherent challenges that prevalent forms of globalization and the modern state pose to a rigorous pluralism.

In his 1975 work *After Babel: Aspects of Language and Translation* Steiner startlingly reveals that of the six thousand languages currently spoken around the world, current trends suggest that fewer than three hundred will be considered as living languages a century from

⁵⁰ *Pichon v. France*, App. 49854/99, decision of October 2, 2001, http://www.echr.coe.int/Documents/Reports_Recueil_2001-X.pdf. The court judged that pharmacies were required to sell contraceptive pills regardless of whether this contradicted the religious beliefs of the individual pharmacist.

⁵¹ *Dahlab v. Switzerland*, App. 42393/98, decision of February 15, 2001, http://www.echr.coe.int/Documents/Reports_Recueil_2001-V.pdf.

now.⁵² This trend combined with the the antinomy that arguably exists between the predominant form the nation state and the values expressed in Article 27 of the ICCPR is indicative of the challenge of maintaining diversity. The above discussion points to the fact the the human rights approach fails to adequately address the issue of pluralism and religious liberty. Cultural and religious distinctiveness the world over is giving way to the logic of globalization and what Evans describes as the increasingly ‘fundamentalist secularism’ of the modern state, which is corrosive of difference in practice, even where it affirms it in principle.

4. The Religious Other in Islam

4.1 Non-Muslims in Islamic Law

Despite the fact that the majority of Muslim majority states, including so-called ‘Islamic states’, have accepted their international human rights obligations, it is clear that at face value classical Islamic legal formulations fail to confer religious equality that is theoretically enshrined in human rights law. This is particularity problematic in states undergoing Islamisation programs.⁵³ The problem has mainly been attributed to two points; firstly, that religious liberty in Islam favours the monotheistic religions (i.e. Christianity, Judaism, etc.) to the exclusion of faiths such as Hinduism and Buddhism; secondly, that Islam’s supersessionist nature makes it inimical to equality. According to Buck, Islam “accommodates non-Muslim minorities with some degree of egalitarianism, if not quasi-equality, but only if they fit within a prescribed religious framework.”⁵⁴ Aside from the fact that this categorization represents an oversimplification of the religious doctrines and experiences of the diverse communities that have lived under historical Muslim rule, vernacular Islamic history⁵⁵ has demonstrated flexibility in the adaptation of

⁵² George Steiner, *After Babel: Aspects of Language and Translation* (New York: Oxford University Press, 1975), 52.

⁵³ See: Anne Elizabeth Mayer, *Islam and Human Rights: Tradition and Politics* (Boulder Colorado: Westview Press, 2007), 165.

⁵⁴ Christopher Buck, *Religious Minority Rights*. Cited in Andrew Rippen, ed *The Islamic World* (London: Routledge, 2000), 644.

⁵⁵ Vernacular religion can be understood as religious discourses that are socially embedded commentaries on scripture. See: Vincent Cornell, “Islam and Human Diversity: Vernacular Religion Confronts the Categories of

the Qur'ānic category of "People of the Book" (*ahl al-kitāb*) to those religions, which fell outside of the apparent textual definition.

The Moghul dynasty, in their extension of the concept of *dhimmī* to Hindus and Buddhists, are demonstrative of this in practice.⁵⁶ The Qur'an, for obvious contextual reasons however deals with the religious other in the form of Christians, Jews and followers of pre-Islamic Arab polytheism. As Abdal Hakim Murad argues, the strongest condemnation in Qur'anic terms was reserved for the Arab polytheist community from which Islam emerged.

But for the Qur'an, it is the people itself, not the neighbors, that comprise the *barbaroi*, the most inveterate gentile category. The *jahiliyya* against which it inveighs is a quintessentially Arab and autochthonous quality; Christians and Jew are not accused of it.⁵⁷

While the Qur'anic discourse on the near other, the Arab polytheist, is unreservedly condemnatory, the discourse regarding Christians and Jews is more varied. This discourse can be understood in a tripartite classification which I refer to as the *good*, the *bad* and the *ugly*. While the discourse is generally tolerant and in fact embracing of Islam's Abrahamic cousins, Christian and Jewish communities are admonished from their departure from what Islam sees as their original nature, and in the case of the Jews for their treachery against the Muslims in Madina. In other words, the Qur'anic discourse revolving around the religious other is largely contextual.

Q. 2:256 states: "Indeed, those who have believed and who were Christians and Jews and Sabeans – those among them who believed in Allah and the Last Day and did righteousness – will have their reward with their Lord, and no fear will there be concerning them, nor will they grieve." This verse can be said to sum up the first categorization mentioned above, and although its abrogation has been disputed, arguably represents the

Race and Culture," in *Humanity: Texts and Contexts, Christian and Muslim Perspectives*, ed. Michael Ipgrave and David Marshall (Washington D.C.: Georgetown University Press, 2011), 39-40.

⁵⁶ See: Recep Şentürk, "Sociology of Rights: "I Am Therefore I Have Rights": Human Rights in Islam between Universalistic and Communalistic Perspectives," *Muslim World Journal of Human Rights* 2, no. 1 (2005): 13.

⁵⁷ Abdal Hakim Murad, *Qur'anic Truth and the Meaning of 'Dhimma'* (Dubai: Kalam Research & Media, 2010), 9.

Qur'ānic ethos which formed the basis for religious tolerance of Jews and Christians throughout much of Islamic history.

Q. 2: 113 captures the ethos of the second categorization stating: “The Jews say: ‘the Christians have naught (to stand) upon; and the Christians say: ‘the Jews have naught (to stand) upon. Yet they profess to study the (same) Book. Like unto their word is those say who know not; but Allah will judge between them in their quarrel on the Day of Judgment.”

Finally, Q.5:82 states: “Strongest among men in enmity to the believers wilt thou find the Jews and the pagans; and nearest among them in love to the believers wilt thou find those who say: ‘We are Christians’; because amongst them are men devoted to learning and men who have renounced the world, and they are not arrogant.” In this verse, the Jews are classified along with the Arab pagans, who, as mentioned in the passage above, are the recipients of the strongest condemnation in the Qur’an, because of their enmity towards the Muslims rather than for strictly theological reasons.⁵⁸ Additionally, according to al-Wahīdī’s *Asbab al-Nuzūl*, these verses served as reminder to the Muslims of the generosity and hospitality shown to them by the Negus during their exile from Mecca.⁵⁹

In Islamic history, right up until the modern period, the relationship between the Muslim rulers and their non-Muslim subjects was not characterized by the modern nation-state citizen-government relationship, but rather by the conqueror-conquered dichotomy. As a consequence of this condition, the rights of non-Muslims under Muslim rule were set by treaties, which defined the right and obligations of the parties towards each other. The concept of ‘*dhimmi*’ represented the institutional framework in which these contractual relationships were manifested. According to the precepts of Islamic legal doctrine, the *dhimmi*s would enter the ‘*‘aqd al-dhimma*, or contract of protection, which represented a politico-legal device outlining the terms under which the *dhimmi* would live in an Islamic polity and the degree of his accommodation within that polity.⁶⁰ Under the terms of these

⁵⁸ Tanwir al-Miqbas min Tafsir Ibn Abbas,

<http://www.altafsir.com/Tafasir.asp?tMadhNo=0&tTafsirNo=73&tSoraNo=5&tAyahNo=82&tDisplay=yes&U serProfile=0&LanguageId=2>.

⁵⁹ Al-Wahidi. *Asbab al-Nuzul*,

<http://www.altafsir.com/Tafasir.asp?tMadhNo=0&tTafsirNo=86&tSoraNo=5&tAyahNo=82&tDisplay=yes&U serProfile=0&LanguageId=2>.

⁶⁰ Anver M. Emon, “Religious Minorities and Islamic Law: Accommodation and the Limits of Tolerance,” in *Islamic Law and International Human Rights Law: Searching for Common Ground?* ed. by Anver M Emon, Mark S Ellis and Benjamin Glahn (Oxford: Oxford University Press, 2012): 323.

contracts, those classified as *dhimmīs*, as mentioned, agreed to live by certain regulations in return for peaceful residences in Muslim lands.⁶¹ The whole *Dhimmī* institution has framed much of the often-polemical debate on whether or not Islam is tolerant of or accommodating of other faiths.⁶² In fact, the interpretation of the concept itself has varied throughout the Islamic juridical discourse, a fact that Vincent Cornell attributes to the ambiguities in the interpretation of Qur’anic verses relating to the freedom of the religious other.⁶³

Abu Yusuf, an eighth century Hanafī jurist viewed was unequivocal in advising the Caliph Harun al-Rashid that the Jewish and Christian subjects of the ‘Abbasid state be treated with respect and leniency.⁶⁴ Mu’tazilite exegete Zamakhshari counseled against the use of state resources in constructing and maintaining churches and synagogues, and also believed in treating *dhimmīs* with contempt with the hope that they would in the end convert to Islam.⁶⁵ The example of Ibn Taymiyyah cited in chapter three is yet another example of the interpretation of *dhimmī* regulations.

4.2 Competing Perspectives in Classical Islamic Discourse: Universalistic vs. Communalistic Perspectives

The classical Islamic discourse on pluralism and the rights of religious minorities undoubtedly reflects a diverse array of viewpoints, which, as has been discussed, from a textual perspective reflect a kind of scriptural ambiguity regarding non-Muslims. The diversity of approaches is however not merely a hermeneutical issue, as there are concrete historical examples of approaches towards religious minorities on the part of pre-modern Muslim polities and the interpretations of the *dhimma* construct by Muslim jurists.

Within this diversity it is possible to identify two distinct perspectives relating to the status of the religious other. Senturk identifies this dichotomy in terms of ‘universalistic’ and ‘communalistic’ categories in which the universalistic perspective posits a universalized

⁶¹ Anver M. Emon, *Religious Pluralism and Islamic Law: Dhimmis and Others in the Empire of Law* (Oxford: Oxford University Press, 2012), 4.

⁶² See: Ibid.

⁶³ Cornell “Religious Orthodoxy and Religious Rights in Medieval Islam”, 57.

⁶⁴ Ibid.

⁶⁵ Bernard Lewis, *The Jews of Islam*, (Princeton: Princeton University Press, 1984), 14-15.

human being who is a bearer of rights through the mere fact of his humanity.⁶⁶ The communalistic perspective on the other hand holds that rights are due either by way of faith (*iman*) or treaty (*aman*).⁶⁷ In the former perspective rights are correlated to an individual's existence as human being regardless of communal affiliation, whereas in the latter, rights are correlated to one's belonging to a particular community or by way of a contractual relationship.

Underlying these perspectives are the theologico-legal concepts of *adamiyyah* and *'ismah*. While the purpose of this section is not to provide an in-depth analysis of the concepts of *adamiyyah* and *'ismah*, it is necessary to explore the relationship between them in order to understand their relationship to the perspectives on pluralism and religious minorities in classical Islamic discourse.

Adamiyyah is an abstracted term that was used by Muslim jurists and theologians to conceptualize humanity, denoting human beings as a whole as children of Adam.⁶⁸ The roots of the concept of *adamiyyah* are to be found in the Qur'an and the theological understanding of the primordial unity of man beheld before enfleshment - the day of '*alastu bi-Rabbikum*' (*Am I not your Lord?*) (Q.7:172). The concept of *'ismah* is most often used in theological discourse as a concept related to the infallibility of the Prophets.⁶⁹ The term *'ismah* can also be understood as referring to a general inviolability, which lends itself well to the present discussion. In fact, in juristic discourse this is precisely how the term has been used. In this context *'ismah* was used to refer to the inviolability of the *shari'ah's* axiomatic principles, commonly referred to as *maqasid al-shari'ah* (objectives of the law) which were most commonly counted as five: the preservation of life, property, religion, intellect and lineage. To these five some scholars added the concept of honour.⁷⁰ Classified in Islamic jurisprudence as *al-darurriyat* (necessities), pre-modern scholars generally agreed on their

⁶⁶ Recep Şentürk, "Sociology of Rights: "I Am Therefore I Have Rights": Human Rights in Islam between Universalistic and Communalistic Perspectives", *Muslim World Journal of Human Rights* 2, no. 1 (2005): 1.

⁶⁷ Şentürk, Recep. "Adamiyyah and 'Ismah: The Contested Relationship between Humanity and Human Rights in Classical Islamic Law". *Islâm Araştırmaları Dergisi* 8 (2002): 42.

⁶⁸ Literally translated *adamiyyah* means 'Adam-hood'.

⁶⁹ See: Madelung, W., *Encyclopedia of Islam*, '*Ismah*, IV, 182. It defines the term as follows: "as a theological term meaning immunity from error and sin is attributed by Sunnis to the Prophet and by Shi'is also to the Imams."

⁷⁰ Şentürk, "Sociology of Rights", 10.

constitutive elements but were divided over the determining factors of an individual being a bearer of *'ismah* in the juridical sense.

What Şentürk identifies as the universalistic perspective was premised on an correlative relationship between *ādamiyyah* and *'ismah*. This seems to have been first articulated by the eponym of the Hanafi school of jurisprudence, Abu Hanifah in his theological reflections. Al-Shafi'i on the other hand, attached *'ismah* to either *iman* (faith) or *aman* (contract).⁷¹ According to the former perspective the above mentioned *darūriyyat* were extended to non-Muslims on the basis of their humanity, or *adamiyyah* (lit. Adamness). Predicated on the above-mentioned inviolability of the *maqasid al-shar'iah*, all people were accorded protection of life, wealth or property, religion, intellect, and family and in some perspectives, honor.⁷² It is also interesting to note that Muslim jurists held the protection of these five axiomatic principles to have been the most basic purpose of all legal systems, thus providing theoretical grounds for legal pluralism.⁷³

Significantly, in a number of historical cases, Muslim rulers permitted non-Muslims subjects to live by and practice their own communal laws so long as they did not violate the axiomatic principles discussed above. The prohibition of the practice of *sati* - in which widows were burned alive along with their husbands' body on the funeral pyre - by the Moghul rulers of India is illustrative of this point. Hindus were permitted to practice their own laws so long as they were deemed not to violate the axiomatic legal principles.⁷⁴ As such, the *sati* was prohibited because it violated the axiomatic principle of the protection of life.

4.3 A Legacy of Pluralism: Non-Muslims Under Muslim Rule

The theoretical discussions above provide a framework through which we can begin to understand the basis of the concrete treatment of non-Muslims under Muslim rule. How were non-Muslim communities managed by Muslim rulers, and, on what basis were these practices founded? More research is required in order to get a precise answer to the latter

⁷¹ Ibid., 11.

⁷² Ibrahim b. Musa al-Shatibi, *al-Muwafaqāt*. Cited in Şentürk, "Adamiyyah and 'Ismah: The Contested Relationship between Humanity and Human Rights in Classical Islamic Law": 45.

⁷³ Şentürk, "Adamiyyah and 'Ismah: The Contested Relationship between Humanity and Human Rights in Classical Islamic Law": 63.

⁷⁴ Sri Ram Sharma, *The Religious Policy of the Mughal Emperors*, cited in Şentürk, "Adamiyyah and 'Ismah: The Contested Relationship between Humanity and Human Rights in Classical Islamic Law": 64.

part of the question. However, through examining how non-Muslims fared under Muslim rule it becomes possible to get a general picture of how the theoretical discussions above were manifested in a lived reality.

Broadly speaking, under the rule of pre-modern Muslim dynasties non-Muslims enjoyed a high degree of communal autonomy.⁷⁵ What resulted was a system of governance that allowed multiple legal systems and confessional communities to co-exist.⁷⁶ The pre-modern Ottoman Empire is perhaps the most demonstrative in this regards. In their introduction to a comprehensive history of the Ottoman empire, Benjamin Braude and Bernard Lewis sum of the essential features of this empire which ruled over a diverse cross-section of humanity for nearly seven centuries:

For nearly half a millennium the Ottomans ruled an empire as diverse as any in history. Remarkably, the polyethnic and multireligious society worked. Muslims, Christian and Jews worshipped and studied side by side, enriching their distinct cultures. The legal traditions and practices of each community, particularly in matters of personal status – that is, death, marriage and inheritance – were respected and enforced throughout the empire. Scores of languages and literatures employing a bewildering variety of scripts flourished. Opportunities for advancement and prosperity were open in varying degrees to all the empire’s subjects. During their heyday, the Ottomans created a society which allowed a great degree of communal autonomy while maintaining a fiscally sound and militarily strong central government. The Ottoman Empire was a classic example of the plural society.⁷⁷

Lending support to Braude and Lewis’ assertion, Martin Gilbert, recounting Jewish history under the Ottoman Empire in contrast with Jewish treatment in Christendom in his book *In Ishmael’s House: A History of Jews in Muslims Lands* argues that under the Ottomans, Jews were not only allowed to engage in commerce, but also to build synagogues, own property and establish their own religious courts.⁷⁸ In the following passage, the Jewish historian Israel Zinberg quotes from a letter from fourteenth century Rabbi Rabbi Isaac

⁷⁵ Recep Senturk, “Minority Rights in Islam: From Dhimmi to Citizen”, in *Islam and Human Rights: Advancing a U.S. - Muslim Dialogue*, eds. S. Hunter and H Malik (Washington D.C.: Center for Strategic and International Studies, 2005): 67.

⁷⁶ *Ibid.*, 69.

⁷⁷ Braude, B., and Lewis, B. eds. *Christians and Jews in the Ottoman Empire: The Functioning of a Plural Society, vol. 1: The Central Lands*. New York: , 1982: 1.

⁷⁸ Gilbert, Martin. *In Ishmael’s House: A History of Jews in Muslim Lands*. New Haven CT: Yale University Press, 2010: 74.

Tzarfati, who was subsequently made Chief Rabbi of the Ottoman Empire⁷⁹, exhorting his co-religionists on the benefits of life under Ottoman rule:

Here I found rest and happiness; Turkey can also become for you the land of peace... Arise my brethren, gird up your loins, collect your forces, and come to us. Here you will be free of your enemies and find rest.⁸⁰

The case of the Orthodox Church provides provides another important example of a non-Muslim community flourishing under Ottoman rule. Under umbrella of the Ottoman sultans, the Orthodox Church was sheltered from the Latin crusade and made significant gains in the administration of its authority over its membership. Adamantia Pollis argues that the power that the Orthodox Church had over its own community under the Ottomans represented one significant reason why the Church opposed the Greek War of Independence.⁸¹

Communitarian autonomy of the type described above was facilitated in the Ottoman empire by the *millet* (*millah* in Arabic) institution. This institutionalized pluralism granted religious communities autonomy in religious and personal status matters under the expectation of recognition of Ottoman political authority. These communities were also required to pay a head tax, of *jizya*, to the Ottoman state.⁸² This institution represents the Ottoman instantiation of the *dhimma* construct discussed in previous sections. Additionally, the fact that the Hanafi school of legal thought - which as discussed above embraced the 'universalistic' perspective - was adopted as the official *madhhab* of the the Ottoman Empire gives credence to the argument that the *millet* institution was an operationalization of the Hanafi perspective in an effort to rule a multi-religious, multi-ethnic, and multi-civilizational state.⁸³ As mentioned previously, further research is required to determine the precise extent to which Ottoman state-crafters adhered to the Hanafi perspective in their seven centuries of governance.

⁷⁹ Ibid., 75.

⁸⁰ Israel Zinberg, *A History of Jewish Literature, Volume Four, the Jewish Center of Culture in the Ottoman Empire* (New York: Hebrew Union College Press, Ktav Publishers, 1974), 5-6.

⁸¹ Adamantia Pollis, "Eastern Orthodoxy and Human Rights" *Human Rights Quarterly* 15, no. 2 (May 1993): 346.

⁸² Reza Shah-Kazemi, *The Spirit of Tolerance in Islam* (London: I.B. Taruis in association with the Institute of Ismaili Studies, 2012), 22.

⁸³ Şentürk, "Sociology of Rights", 15.

As discussed, the case of multi-ethnic and multi-religious India is also instructive as to how Muslim rulers conceived of the place of non-Muslims who fell outside of the usual categorizations of the Jews and Christians who were classified as *ahl al-kitab* (people of the book).⁸⁴ Generally speaking, the Muslim record regarding the religious ‘other’ in their midsts is positive, especially when compared with Christian Europe during the same period as well as during the colonial period. Caution should be taken not to idealise Islamic civilizations’ record in this regard, however the above discussion should give pause to the often polemic discourse regarding Islam and its treatment of non-Muslims. It also points to the anachronistic thinking often underlying these arguments which demonstrates a bias towards what Kazemi refers to as conceptualizing a “trajectory of tolerance” that flows only from West to East.⁸⁵ This of course, is a microcosm of the end-of-history thinking which sees secular liberalism as the pinnacle of philosophical and ideological achievement. Furthermore, having an understanding of this aspect of Islamic civilizational history and the philosophy underlying it is critical to any effort at challenging the predominant discourse. The nature of this discourse, as has been discussed, identifies Islam as an inherent challenge to the realization of human rights in the Muslim world, and hence, as a barrier to civilizational progress.

5. Contemporary Responses to the Challenge of Pluralism and the Rights of Religious Minorities

5.1 Overview

As has been discussed above, the relationship between Islam and human rights has received a great deal of scholarly attention. Also as discussed above, the issue of religious freedom and the right of non-Muslims has garnered a significant amount of attention due to the fact that the classical legal formulations conceived for dealing with pluralism do not accord with the modern understandings of equality as enshrined in international human

⁸⁴ See: Mouez Khalfoui, “Together but Separate: How Muslim scholars conceived of religious plurality in South Asia in the seventeenth Century”, *Bulletin of SOAS* 74, 1 (2011): 87-96.

⁸⁵ Reza Shah-Kazemi, *The Spirit of Tolerance in Islam* (London: I.B. Taruis in association with the Institute of Ismaili Studies, 2012), 1-22.

rights norms. This is particularly the case with the *dhimmi* construct. Given this dilemma, various solutions have been sought by scholars and by Muslim states.

What Bielefeldt classifies as ‘conservative’ approaches⁸⁶ can also be understood as appropriative. In other words, these approaches seek to appropriate the human rights idea in an exclusivist Islamic framework. This approach gives recognition to the primacy of the human rights idea, however, simply put, it does not account for the discrepancy between the two. Furthermore, the methodology employed by those taking this approach is problematic with regards to its Islamic credentials.

Another contemporary approach to the perceived dilemma between Islamic norms and human rights, classified by Bielefeldt as ‘liberal’⁸⁷, seeks to find an “overlapping consensus” between Islamic and human rights norms, or to re-interpret certain elements of Islamic law and doctrine by way of novel hermeneutical engagement with the texts. The dilemma with this approach is that generally falls victim to the hegemony of the human rights discourse, in that any consensus reached cannot be seen as contravening human rights norms in any way, thus precluding any real re-imaging of human rights. Additionally, a number of these approaches suffer from issues of authenticity from a methodological standpoint.

5.2 ‘Conservative’ Approaches: The Imperative of the Legal

With the aim of gaining a critical understanding of the so-called conservative approach, this section will critically analyze Mawdudi’s *Human Rights in Islam*, in content and methodology.

Mawdudi, one of the most prominent Islamists of the twentieth century and founder of *Jama’at-e-Islami* aimed to “reinstate” the *Sharia’s* and establish an Islamic state in Pakistan. His book *Human Rights in Islam* illustrates that a *shari’ah* approach to human rights is the ideal, whereas the Western approach is hypocritical at best. In other words, he falls into what Vincent Cornell calls a typical fundamentalist approach by taking modern concepts, in this case human rights, and projecting them back onto the Islamic scriptural

⁸⁶ See: Bielefeldt, "Muslim Voices in the Human Rights Debate": 602-606.

⁸⁷ Ibid., 606-610.

sources and heritage.⁸⁸ This is anachronistic not only because of the erasure of time, but also because, as discussed in chapter 3, the nature of the human rights discourse is fundamentally modern and from a different thought universe than traditional Islamic thought.

The chapter on the equality of human beings in Mawdudi's text does not in fact mention religious freedom per se, but rather reasserts the principle of non-discrimination based on race, colour or nationality.⁸⁹ For Mawdudi, superiority of one man over another is based only on his piety and God-consciousness, invoking the Qur'anic maxim.⁹⁰ Mawdudi, following the classical *Sharia's* formulations, argues for subjecting non-Muslims to certain limitations in practicing their religion, for he holds that complete freedom for non-Muslims would amount "spreading evil and wickedness" although he never actually defines what that means.⁹¹

In his formulations regarding non-Muslims, Mawdudi adheres to the Qur'anic principle of non-compulsion in matters of religion, arguing that even if non-Muslims fail to convert to Islam, they should not be forced to do so.⁹² Additionally he holds that non-Muslims should be respected in their faith as "people of the book".

In his section on "equality before the law", Mawdudi asserts that Islam "gives its citizens the right to absolute and complete equality before the law."⁹³ However, since in Mawdudi's conception, only Muslims are full citizens of the state, non-Muslims are left as second-class citizens. The framework within which Mawdudi views non-Muslims is based on the *dhimmi* construct, which as mentioned, involves a relationship between conqueror and conquered. In the context of the modern nation state, which Mawdudi advocated for in an 'Islamic' form, that relationship no longer exists and thus the institution itself becomes questionable. This provision speaks to the methodology employed by Mawdudi, for he seems to fail to understand the underlying cause and function of the *dhimmi* provision in classical Islamic law, *viz.* dealing with pluralism from a governance perspective.

⁸⁸ Cornell, "Religious Orthodoxy and Religious Rights in Medieval Islam": 53.

⁸⁹ Abul Ala Mawdudi, *Human Right in Islam*, online:

http://www.teachislam.com/dmdocuments/Maulana_Maududi_Human_Rights_in_Islam.pdf.

⁹⁰ Ibid.

⁹¹ Ibid.

⁹² Ibid.

⁹³ Ibid.

Often equated with 'traditional' Islam, the approach taken by Mawdudi and the Islam has distinctly modern features which differentiate it methodologically from the classical and medieval period. Their basic methodology regarding textual interpretation involves a reduction of its potential meaning to the positive content of classical *fiqh*. This entails what Reinhart calls an ontological equivocation of *fiqh* with God⁹⁴ and what T.J. Winter (also known as Abdal Hakim Murad) calls the fundamentalist veiling of God.⁹⁵

The above assertions require some unpacking in order to avoid misunderstanding. Reinhart's assertion regarding the fundamentalist tendency of making an ontological equivocation between the positive legal tradition in Islam (*fiqh*) and the will of God can be re-phased as follows: The reified 'Shari'a' acts as a determining factor of legitimacy of Qur'anic meaning. Reinhart describes this situation as follows:

For fundamentalists... Shari'a is the secondary religious object that acts as a gravitational attractor pulling Islam and the Qur'an after it... This is not the view of medieval legists, however. That Shari'a was, at least in theory, subject to examination and interrogation. Assertions about it required proof... Yet now, it would seem, the Shari'a is a freestanding body imagined to be immutable, and the whole edifice of scholarship that once undergirded it has become irrelevant, as medical doctors and civil engineers publish fatwas stripped of the structures of justification that once were the essence of the fatwa itself... The Shari'a and *fiqh* have been collapsed into each other, and what were once understood as the efforts of human beings are reified and recognized not as human attempts to act in accordance with God's rule but as rulings ontologically identical with God's rule.⁹⁶

This approach, furthering the point raised above regarding the 'veiling' of God, effectively nullifies the *maqāsid* (objectives) and minimizes the scope and the urgency of *ijtihad*. In terms of the question of religious pluralism and the rights of religious minorities, the fundamentalist methodology can be seen at work in Mawdudi's *Human Rights in Islam*. In his analysis of Mawdudi's work on human rights, Heiner Bielefeldt equivocates Mawdudi's

⁹⁴ A. Kevin Reinhart, "Fundamentalism and the Transparency of the Arabic Qur'an", in *Rethinking Islamic Studies: From Orientalism to Cosmopolitanism*, ed. Carl W. Ernst and Richard C. Martin (Columbia, S.C.: The University of South Carolina Press, 2010), 103.

⁹⁵ Abdal Hakim Murad, *Qur'anic Truth and the Meaning of 'Dhimma'*, 8.

⁹⁶ Reinhart, "Transparency of the Arabic Qur'an", p. 106.

upholding of the *Sharia's* as constituting 'traditional' Islam. While the normative content between fundamentalist thinkers and traditional Islam may be very similar, the discussion above gives an indication as to why this is.

Bielefeldt's analysis is more useful in delineating another problematic of the fundamentalist approach exemplified in this case, by Mawdudi. Bielefeldt identifies the fact that rather than rejecting the idea of human rights altogether, the emphasis is more on re-defining human rights in an exclusively Islamic framework.⁹⁷ In Mawdudi's view, human rights are merely an inherent part of the Islamic tradition. Bielefeldt argues that that Mawdudi's approach merely 'harmonizes' - although it is the opinion of this researcher that the term 'appropriates' is more suiting - without addressing the tensions and conflicts between the traditional *Shar'i* formulations and human rights norms.⁹⁸ As the above discussion on the concept of rights in the Islamic sources, such a muddling of modern human rights codes with Islamic scriptural imperatives is a definition *par excellence* of an anachronism.

5.3 Liberal Approaches: The Search for an 'Overlapping Consensus'

Bielefeldt argues that the idea of human rights offers an opportunity for accomplishing a basic normative consensus across ethnic, cultural and religious boundaries.⁹⁹ For Bielefeldt, this search for an overlapping consensus means that the universalism in human rights should not mean the global imposition of a particular set of values, but rather aims at the "universal recognition of pluralism and difference - different religions, cultures, political convictions, ways of life - insofar as such difference expresses the unfathomable potential of human existence and the dignity of the person."¹⁰⁰ As contended in this paper, despite this commendable normative claim made by Bielefeldt and others, the human rights framework, wedded as it is to the forms of political modernity, actually inhibits pluralism, particularly of the religious variety, but also of the cultural variety as well.

⁹⁷ Bielefeldt. "Muslim Voices in the Human Rights Debate", 603.

⁹⁸ Ibid.

⁹⁹ Bielefeldt, "Muslim Voices in the Human Rights Debate", 594.

¹⁰⁰ Ibid.

According to John Rawls, the notion of an “overlapping consensus” entails a practical normative consensus on political and legal justice in a pluralistic democratic society.¹⁰¹ Whereas comprehensive religious doctrines are unlikely to provide normative consensus in pluralistic societies, thus causing conflict if imposition is attempted, according to Rawls political justice entailed only limited normative demands, referring to the societal institutions not covering more comprehensive claims made by religion. However, this poses a problem, since religions are, by their nature comprehensive doctrines. Thus, the possibility of human rights forming that basis for such a normative consensus in religiously pluralistic societies is unlikely, unless they are reduced to their bare minimum. For example, with regards to religious freedom, the human rights approach dictates non-discrimination on the basis of religion, therefore, if a Christian man wished to marry a Muslim woman, human rights law would support the union. Whether or not such an arrangement is scripturally permitted is beyond the scope of this paper, however it is clear that it contradicts the practical norms accepted by the vast majority of Muslims. An alternative model based on the autonomy of religious and cultural communities to develop their own ‘sacred spaces’, would allow communities to set normative demands for their members.

A number of Muslim academics and intellectuals have presented arguments for an Islamic theory of human rights, seeking to re-interpret elements of the normative tradition of Islam deemed as problematic through novel hermeneutical engagements with Islam’s textual sources, for the purpose of realizing international human rights norms in the Muslim world. As has been discussed in the above sections, the classical Islamic legal treatment of non-Muslims has been deemed to further inequality. There are three figures in particular that personify this approach. Foremost amongst them is Sudanese scholar Abdullah Ahmed An-Na’im who has proposed a two-step method for achieving a universal consensus on human rights. The first step in this method is what An-Na’im refers to as an *internal cultural discourse* with a view changing commonly held perceptions from within.¹⁰² Secondly, An-Na’im calls for a *cross-cultural dialogue* on the basis that cultures are constantly changing and evolving internally, as well as with interaction with other cultures, and thus

¹⁰¹ John Rawls, *Political Liberalism* (New York: Columbia University Press, 2005), 133.

¹⁰² Abdullahi Ahmed An-Na’im, “Introduction.” In *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus*, ed. Abdullahi Ahmed An-Na’im (Philadelphia: University of Pennsylvania Press, 1992), 3.

the possibility exists that it may be possible to “influence the direction of that change and evolution from outside...”¹⁰³ Further An-Na'im argues that:

The proposed approach to the cross-cultural legitimacy of universal human rights recommends that the processes of intercultural relations should be more deliberately and effectively utilized to overcome cultural antagonism to human rights norms that are problematic in a given context.¹⁰⁴

In other words, An-Na'im's approach assumes the impeccability the predominant interpretation of human rights, and seeks to re-interpret certain 'problematic' formulations of Islamic norms in order to realize the human rights norms. According to An-Na'im, “this approach, however, does not seek to repudiate the existing international standards of human rights.”¹⁰⁵ Sociologically speaking, the problem with An-Na'im's approach is that while its stated goal is to achieve cultural legitimacy for human rights norms, it risks alienating those with whom he seeks to legitimize such norms by radically altering their traditional social structure. Furthermore, from the perspective of authenticity, An-Na'im's methodology is highly problematic. His proposed method of 'reverse abrogation'¹⁰⁶ appropriates a concept, which in its conventional understanding, is itself contested in Islamic legal theory.¹⁰⁷

Khaled Abou el Fadl, in a similar vain to An-Na'im, attempts to delineate an Islamic conception of democracy through a re-interpretation of relevant concepts from the Islamic tradition.¹⁰⁸ The arguments he presents are articulate, reflective and scholarly rigorous, however, it appears that underlying his work is a normative assumption that liberal democracy is necessarily the most appropriate model and the best method for achieving the stated goals of human rights, including religious pluralism.

Abdulaziz Sachedina approaches the issue of Islam and human rights from a what can be termed a theological perspective. In his *Islam and the Challenge of Human Rights*, Sachedina calls for a major epistemic shift as a necessary condition for the development of a

¹⁰³ Ibid., 4.

¹⁰⁴ Ibid., pp. 4-5.

¹⁰⁵ Ibid., 5

¹⁰⁶ See: An-Nai'm, A.A., *Towards an Islamic Reformation, Civil Liberties, Human Rights and International Law*, (Syracuse: N.Y.: Syracuse University Press, 1990)

¹⁰⁷ See: Fatoohi, L., *Abrogation in the Qur'an and Islamic Law: A Critical Study of the Concept of "Naskh" and its Impact*, (New York: Routledge, 2013).

¹⁰⁸ See: Abou el Fadl, "Islam and the Challenge of Democracy", pp. 3-49.

human rights discourse in the Muslim world; one which moves the discussion from the juridical level to a 'theological-ontological' one.¹⁰⁹ Sachedina displays an erudite understanding of both the Islamic tradition and secular-humanist philosophy and argues articulately for an Islamic conception of human rights that is reconcilable with human rights norms. However, like Abou el Fadl, underlying his work is an assumption that liberal understandings of freedom, tolerance and equality are the model for safeguarding human rights (and pluralism) *par excellence*.

All of these approaches, in addition to some other problematic elements discussed above, assume to normative and apparently universal value of a legally monistic community that privileges individualism over community autonomy. As mentioned, they are also problematic because they are open to critique of departure from the normative principles of Islamic orthodoxy. Thus, while these approaches have greatly contributed towards understanding the commonalities that exists between different comprehensive doctrines, they ultimately do not provide a model wherein religious freedom and pluralism can be guaranteed.

6. Islamic Universalism and the Concept of 'Overlapping Sacred Spaces'

6.1 Islamic Universalism and the Moral Imperative of *Ijtihād*

The concept of 'overlapping sacred spaces', which this paper proposes as an alternative means of guaranteeing religious freedom and pluralism, is premised upon the development of an Islamic universalism. As has been discussed in the section on the divergent perspectives in classical Islamic law, Islamic universalism is premised upon the a theologically based recognition of the universal human being (*ādmiyyah*), which consequently entitles all human beings to inviolability (*'ismah*). This inviolability revolves around axiomatic principles, which have been interpreted by Muslim jurists and theologians as constituting the basis of all legitimate legal systems. According to theologians and jurists, these axiomatic principles (sometimes counted as five or six) constitute the unchanging core

¹⁰⁹ Abdulaziz Sachedina, *Islam and the Challenge of Human Rights* (Oxford: Oxford University Press, 2009), 23.

of all religions in addition to the legal systems.¹¹⁰ There is consensus amongst Muslim scholars that creed (*'aqidah*) does not change, and also that the particular formulations of the law accept change because societies evolve and undergo change.¹¹¹ Therefore it is the axiomatic principles that guide and restrain legal change.

This principle finds life in the *maqāsid al-sharī'ah* discourse, which involves a privileging of principles over particular form. In fact, this discourse has been applied as a methodology by Muslim scholars and intellectuals for dealing with social and political change, including issues related to human rights.¹¹² Dealing with change necessarily involves the employment of *ijtihād*, which can be considered as the penultimate theological exercise. This is because, traditionally understood, *ijtihād* is determined by an understanding of God's purposes (*maqāsid*). Through a faithful adherence to the principle of *fiqh* as understanding of the Divine purposes, new ways of approaching the issue of religious pluralism can be sketched out.

Historical models also cannot be discounted. The Ottoman model in particular, founded on the *millet* system provides an interesting example for communal autonomy which could serve to preserve religious freedom and pluralism. The Mughal practice of extending protected status to Hindus and Buddhists also provides precedent for re-thinking traditionally enshrined categories of exclusion.

6.2 Theological Roots of Islamic Universalism

As discussed above, the basis of the universalist perspective is a view of a universal human being, and as mentioned, theologically speaking this is based on a primordial view of mankind as 'children of Adam'. Timothy Winter describes Islam's theological orientation as 'Ishmaelite', "since the universalizing implications of Ishmael's exile mean that the whole world, Hebrew and gentile, form part of an *ummah*."¹¹³ There is a striking absence of significant reference to the Arab people in the Qur'an, thus, enterprises such as John

¹¹⁰ Şentürk, "Adamiyyah and 'Ismah: The Contested Relationship between Humanity and Human Rights in Classical Islamic Law": 63.

¹¹¹ Ibid.

¹¹² For a comprehensive overview of this topic, see: David L. Johnston, "Maqāsid al-Sharī'A: Epistemology and Hermeneutics of Muslim Theologies of Human Rights", *Die Welt des Islams* 47, Issue 2 (2007): 149-187

¹¹³ Murad, *Qur'anic Truth and the Meaning of 'Dhimma'*, 9.

Wansrbough, which read the Qur'an as a narrative of election, are far from the mark. In contrast to this view, the Qur'an is not the salvation history of a particular people, but rather a universal history telling the stories mainly of non-Arab protagonists. In other words, the 'heroes' of the Qur'an are mainly non-Arabs.¹¹⁴ The Qur'an does not demand a growth into some kind of realized Arab self-hood, but rather into the monotheism which was originally and mainly practiced by the neighboring other.¹¹⁵

This 'Ishmaelite' universalism can be seen in Islam's supersessionist nature, which is, according to Timothy Winter, "non-categoric".¹¹⁶ In short, what this entails is a recognition that while Islam is legitimized by its supersessionist nature, it is not the only instantiation of truth to have ever been revealed. In fact, Winter argues that "a scriptural doctrine of non-categoric supersession has in practice often underpinned a level of religious co-existence which as been sustained for many centuries, and can today easily support a theology of an authentic esteem for the other."¹¹⁷ A conception of non-categoric supersession can provide the necessary theological foundation for the reassessment of the medieval *shari'a* regulations "which have defined the place of non-Muslim sanctuaries."¹¹⁸

6.3 The 'Medina Document'

Ali Bulac (b. 1951) represents a growing group of Muslim intellectuals in Turkey seeking to apply the Islamic tradition to modern problems by undertaking a systematic analysis of said tradition.¹¹⁹ Ali Bulac and his cohorts argue that because in the Islamic system, the concept of community is more important than the state, democracy – associated with the rule of the majority over the minority – should be replaced with a true pluralism, whereby each community is governed by its own comprehensive belief system.¹²⁰ In such a conception, multiple legal orders could thusly coexist, whereby the role of the state would

¹¹⁴ Ibid., 9.

¹¹⁵ Ibid., 9.

¹¹⁶ Tim Winter, "The Last Trump Card: Islam and the Supersession of other Faiths", *Studies in Interreligious Dialogue* 2, Issue 2 (1999): 133-155.

¹¹⁷ Ibid., 151.

¹¹⁸ Ibid., 153.

¹¹⁹ Michael E. Meeker, "The New Muslim Intellectuals in the Republic of Turkey", in *Islam in Modern Turkey*, ed. R. Tapper (London: I.B. Tauris, 1991), 197-198.

¹²⁰ Haldun Gulalp, "Globalizing postmodernism: Islamist and Western Social Theory" *Economy and Society* 26, no. 3 (August 1997): 425.

transfer from administering a monolithic body of laws to guaranteeing the autonomy of each community.¹²¹ Bulac's basis for analysis is the so-called 'Medina Document', a contract signed by the Prophet Muhammad, Jews and polytheists granting Muslims the right to rule while at the same time protecting the communal rights of the other groups.

The contents of the document itself are progressive, not only for its time, but arguably for our time as well, as through this document, the Prophet Muhammad demonstrated the possibilities of coexistence realized through a pluralist social project based on religious and legal autonomy. In Bulac's words, "the Medina Document proposes a social project not based on "domination" but on "participation" by all social groups.¹²² The legacy of this document represents not only the basis on which subsequent systems of social organization in Islamic history were based, particularly the Ottoman *millet* system, but as demonstrated here, represents a site of critical understanding of the Islamic heritage to contemporary problems.

7. Conclusion

Returning to the original objective of this paper, *viz.* to engage in a critical examination of pluralism and religious minorities in Islamic thought with a view of exploring Islam's theological potential to foster an alternative to the homogenizing tendency of modernity, it has been demonstrated that an Islamic universalism premised on a theologically based conception of humanity, a non-categoric supersessionist understanding of scripture, in conjunction with a critical understanding of Islamic history and law, holds the potential to underpin an alternative conception of societal relations based on the concept of 'overlapping sacred spaces.'

This approach stands in contrast to the bulk of the contemporary Islamic approaches to the question of pluralism and minority rights that stand between an inauthentic fundamentalism and a liberalism that accepts the normativity of the assumptions of political modernity. Both of these approaches share in common a failure to delve deeply into the Islamic tradition in search of authentic solutions to contemporary problems.

¹²¹ Ibid.

¹²² Kurzman, C., ed. *Liberal Islam: A Sourcebook*. Oxford: Oxford University Press, 1998: 174.

A clear limitation of this research is the lack of practical proposals for implementing such a radical project– radical in the sense of its opposition to political modernity. However, a project such as this must begin with critical reflection, not only of one’s own tradition, but also of the predominant discourses and way of life, which permeate our globalized world.

The objectives of the human rights idea are commendable and raise important questions for our time related to the place of religion in the public sphere and the need to protect pluralism in the face of a homogenizing globalization. As regards the contemporary understanding of religious tolerance and equality, Muslims lose nothing in acknowledging that the Western-based tradition and the human rights project has indeed set high standards regarding equality and human dignity. However, Muslims should also not shy away from contributing the global discourse and answer the morally imperative call of exploring how we can live differently.

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