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# MASTER THESIS

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***'Free Will in an Arab Human Rights Context: An Incompatibility of Arab Human Rights Sources with International Human Rights Regarding Religious Freedom and Gender Equality?'***

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For my kids

**Tizian, Marian, Felicia and Cajetan**

## Abbreviations

ACHPR	African Charter on Human and Peoples' Rights
ACHR	Arab Charter on Human Rights
ACIHL	Arab Center for International Humanitarian Law and Human Rights Education
AmCHR	American Convention on Human Rights
AI	Amnesty International
AIHR	Arab Institute of Human Rights
AJIL	American Journal of International Law
ANHRI	Arabic Network for Human Rights Information
AOHR	Arab Organization for Human Rights
appl	application
Art	Article(s)
AU	African Union
CDHRI	Cairo Declaration on Human Rights in Islam
CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women
CIS	Commonwealth of Independent States
CoE	Council of Europe
CRC	Convention on the Rights of the Child
EC	Egyptian Constitution
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ed.	edition or editor(s)
e.g.	exempli gratia
EPC	Egyptian Penal Code
esp	especially
et al	et altera
etc	et cetera
fn	footnote
GA	General Assembly

GCC	Gulf Cooperation Council
HHRJ	Harvard Human Rights Journal
HRC	Human Rights Committee or Human Rights Council
HRL	Human Rights Law
HRLR	Human Rights Law Review
HRQ	Human Rights Quarterly
HRW	Human Rights Watch
ibid	ibidem
IC	Iraqi Constitution
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Commission of Jurists
ICL	International Criminal Law
IGO	Intergovernmental Organization
IHRL	International Human Rights Law
IHL	International Humanitarian Law
ILC	International Law Commission
INGO	International Non-Governmental Organization
IPC	Iraqi Penal Code
JPJ	Justice Policy Journal
LAS	League of Arab States
lit	littera (or, plural, litterae)
MENA	Middle East and North Africa
MP	Member of Parliament
MPEPIL	Max Planck Encyclopedia of Public International Law
MWJHR	Muslim World Journal of Human Rights
NGO	Non-Governmental Organization
No (or: no)	number(s)
OAS	Organization of American States
OAU	Organisation of African Unity

OHCHR	Office of the High Commissioner for Human Rights
OIC	Organization of Islamic Cooperation
OPEC	Organization of the Petroleum Exporting Countries
PSC	Personal Status Code
rev	revised
resp	respectively
Res	Resolution
sec	section
SG	Secretary-General
StACtHR	Statute of the Arab Court of Human Rights
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNDP	United Nations Development Programme
UNTC	United Nations Treaty Collection
UNTS	United Nations Treaty Series
VCLT	Vienna Convention on the Law of Treaties
Vol	Volume
WEF	World Economic Forum
WHR	World Happiness Report

## Foreword

In 2004 and 2005 I was living in Dubai, United Arab Emirates. A very typical expat life with all its privileges and comforts that I took for granted back then. During those years I very frequently travelled the whole Middle East (especially to states like Saudi Arabia, Iran, the five smaller GCC countries, Lebanon, or Jordan) and often spent several weeks in a row in places like Tehran, Riyadh, Beirut, Muscat or Kuwait City. Mainly between 2012 and 2020 I returned to the region on a regular basis and made countless trips to the Muslim world including Muslim-controlled nations in South Asia (e.g. Pakistan, Indonesia, Malaysia, Brunei, the Maldives and Bangladesh) and Western as well as North Africa (for example Senegal, Nigeria, Burkina Faso, Tunisia, Algeria, Morocco or Egypt). Already during my expat years in the Emirates, based on numerous personal observations, questions were circling through my head such as: How did the working conditions of those thousands of construction workers in their blue full-body work suits in Dubai, Abu Dhabi or Doha, who were constantly transported from one site to the other, really look like? What about their human rights?<sup>1</sup> Why did Arab women always walk about five meters behind their husbands (or other male relatives)? How did their lives look like? Were they free to choose their own path? And given the dominance of Islam as state religion and a mosque every few hundred meters, how free were local Arabs really in choosing a different religion or living an atheist or agnostic life? Many of these maybe naïve questions bothered me, and some of them I carry around with me until today. This master thesis is the result of a certain combination of curiosity and my ambition and motivation to learn and better understand what is going on in a few dozen countries spread across at least two continents, covering a population of more than 2 Billion people<sup>2</sup>. In particular the question about the existence of a real free will in Arab societies in the context of religion and gender is a main driver for my research on the following pages. I write this as I believe credibility matters: The findings in this master thesis are not only based on the analysis and assessment of relevant human rights norms and legal provisions in states affecting a given human rights situation, but on many personal experiences, observations and discussions with scholars and intellectuals having been kind enough to share

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<sup>1</sup> It seems worth mentioning here that not only construction workers from Pakistan, Bangladesh, India, Sri Lanka or the Philippines often find themselves in very challenging (human rights) conditions in Gulf nations, also foreign expats from the U.S. or Europe can fairly quickly end up in very critical situations. An impressive and fascinating, yet terrifying account in this regard can be found in a meanwhile famous article on Dubai and what can happen behind the shiny facades of its glittering skyscrapers: *Hari J.*, The Dark Side of Dubai, 7 April 2009, see the whole report at the newspapers' website under [www.independent.co.uk/voices/commentators/johann-hari/the-dark-side-of-dubai-1664368.html](http://www.independent.co.uk/voices/commentators/johann-hari/the-dark-side-of-dubai-1664368.html) (last retrieved on 6 July 2022).

<sup>2</sup> See under <https://worldpopulationreview.com/country-rankings/muslim-population-by-country> (last visited on 7 July 2022).



their views with me. Though I read *Huntington's 'Clash of Civilization'*<sup>3</sup> with great interest many years ago, a text at least equally worth reading by two brilliant minds shall be specifically mentioned here, in particular the key message to their readers: '*Cultures don't fight each other, they converge.*'<sup>4</sup> Despite taking up a partly very critical stance on the following pages of this thesis, the work here was primarily composed in the very spirit of this absolutely pivotal message and the findings hereunder shall be understood accordingly.

Eichgraben, July 2022

Dr. iur. Gabriel Wilhelm Bartalyos Thurner

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<sup>3</sup> *Huntington S.P.*, *The Clash of Civilization and the Remaking of World Order*, London 2002 (re-issue ed.)

<sup>4</sup> See *Trojanow I./Hoskote R.*, *Kampfabsage, Kulturen bekämpfen sich nicht, sie fließen zusammen*, Frankfurt am Main 2016.

## I. The Problem

Over the past few decades both international and regional human rights systems have experienced a remarkable evolution. From the *Universal Declaration of Human Rights*<sup>5</sup> (UDHR, ratified in 1948) to the two key human rights covenants, *i.e.* the *International Covenant on Civil and Political Rights*<sup>6</sup> (ICCPR, including its two *Optional Protocols*) and the *International Covenant on Economic, Social and Cultural Rights*<sup>7</sup> (ICESCR, including its *Optional Protocol*), both signed in 1966 and effective since 1976, each with more than 170 parties, solid legal human rights frameworks have been established on a global level. In the context of this thesis of particular relevance are also the *Convention on the Elimination of all Forms of Discrimination Against Women*<sup>8</sup> (CEDAW, effective since 1981, including the *Optional Protocol to CEDAW* adopted in 1999, with its entry into force in December 2000) as well as the *Convention on the Rights of the Child*<sup>9</sup> from 1990 (CRC, including in the meantime three *Optional Protocols to CRC*, with an entry into force in 2002 and 2014 respectively). In terms of religious freedom also a key document is the (non-binding) *UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*.<sup>10</sup>

Further notable human rights instruments on the international level – though only indirectly relevant or important with respect to the topic of this master thesis – are *e.g.* the *United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*<sup>11</sup> (UNCAT, in full effect since 1987, including its *Optional Protocol* or simply OPCAT, having entered into force in June 2006) and the *International Convention on the Elimination of All Forms of Racial Discrimination*<sup>12</sup> from 1969 (ICERD). Finally to be mentioned in this enumeration of key human rights sources is the *International Convention for*

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<sup>5</sup> See *United Nations* (ed.), *The Universal Declaration of Human Rights, Proclaimed by the United Nations General Assembly, Paris, December 1948*, Foreword by Amal Clooney, Oxford 2021.

<sup>6</sup> See *Taylor P.M.*, *A Commentary on the International Covenant on Civil and Political Rights*, The UN Human Rights Committee's Monitoring of ICCPR Rights, Cambridge 2020.

<sup>7</sup> See *Saul B./Kinley D./Mowbray J.* (ed.), *The International Covenant on Economic, Social and Cultural Rights, Commentary, Cases and Materials*, Oxford 2014.

<sup>8</sup> See *Freeman M.A./Chinkin C./Rudolf B.* (ed.), *The UN Convention on the Elimination of all Forms of Discrimination Against Women, A Commentary*, Oxford 2012.

<sup>9</sup> See *Tobin J.* (ed.), *The UN Convention on the Rights of the Child, A Commentary*, Oxford 2019.

<sup>10</sup> See GA Res 36/55 of 25 November 1981, download *inter alia* at <https://www.ohchr.org/en/instruments-mechanisms/instruments/declaration-elimination-all-forms-intolerance-and-discrimination#:~:text=Article%204,1.,political%2C%20social%20and%20cultural%20life> (last visited on 7 July 2022).

<sup>11</sup> See *Nowak M./Birk M./Monina G.* (ed.), *The United Nations Convention Against Torture and its Optional Protocol, A Commentary*, 2<sup>nd</sup> ed., Oxford 2020.

<sup>12</sup> See *Thornberry P.*, *The International Convention on the Elimination of All Forms of Racial Discrimination, A Commentary*, Oxford 2016.

*the Protection of All Persons from Enforced Disappearance* (ICPPED, signed 2007, in effect since 2010).<sup>13</sup>

With respect to *regional* efforts, the results are mostly equally impressive. Be it the European human rights regime with the *European Convention on Human Rights*<sup>14</sup> (ECHR, signed 1950, in effect since 1953), the *American Convention on Human Rights*<sup>15</sup> (AmCHR, signed in 1969, effective since 1978) with the *Inter-American Court of Human Rights* and its innovative jurisdiction, or the *African Charter on Human and Peoples' Rights*<sup>16</sup> (ACHPR, also known as *Banjul Charter*, in effect since 1986), there has been substantial development in terms of human rights on several continents.

And yet there's still a lot of work ahead. While Asia for instance is struggling to define a *comparable* regional human rights instrument – the *ASEAN Human Rights Declaration* from 2012 only being briefly mentioned hereunder and having been widely criticized by various civil society organizations and the UN<sup>17</sup> –, the Middle East and North Africa, *i.e.* the Council of the *Arab League*, has adopted an *Arab Charter on Human Rights*<sup>18</sup> in 2004. However, it didn't take long until the provisions of that charter (likewise) met with considerable criticism. Prominent voices like the former UN Commissioner for Human Rights, Ms. *Louise Arbour*, stated that the Arab Charter was incompatible with the United Nations' understanding of universal human rights.<sup>19</sup>

And indeed, when analyzing the Arab Charter (in the following simply also referred to as 'the Charter') or reading country-reports of well-established regional and international human rights organizations<sup>20</sup>, it quickly becomes clear that the human rights situation on the ground in many

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<sup>13</sup> A comprehensive list of all UN human rights instruments can be found on [www.ohchr.org/en/instruments-listings](http://www.ohchr.org/en/instruments-listings) (last checked on 8 July 2022).

<sup>14</sup> See *Schabas W.A.* (ed.), *The European Convention on Human Rights, A Commentary*, Oxford 2015.

<sup>15</sup> See *Hennebel L./Tigroudja H.* (ed.), *The American Convention on Human Rights, A Commentary*, Oxford 2022.

<sup>16</sup> See *Murray R.* (ed.), *The African Charter on Human and Peoples' Rights, A Commentary*, Oxford 2019.

<sup>17</sup> See certain concerns regarding the wording of the declaration raised by former UN High Commissioner for Human Rights *Navi Pillay* *e.g.* under <https://news.un.org/en/story/2012/11/426012#UPgVKGckSOI> (last retrieved on 20 June 2022).

<sup>18</sup> See *e.g.* in *Bisset A.*, *Blackstone's International Human Rights Documents*, 12<sup>th</sup> ed., Oxford 2020, pp 473-483.

<sup>19</sup> See her official statement from 30 January 2008 at <https://news.un.org/en/story/2008/01/247292-arab-rights-charter-deviates-international-standards-says-un-official> (last visited on 18 June 2022).

<sup>20</sup> Periodic country-reports and human rights assessments of NGOs such as, but not limited to, *Human Rights Watch* or *Amnesty International* on the global level as well as regional ones such as the *Arab Organization for Human Rights*, the *Egyptian Organization for Human Rights* or the tireless *Arabic Network for Human Rights Information* undoubtedly form indispensable, unfiltered sources of the human rights conditions in North Africa and the Arabian peninsula, in particular considering the fact that official (*i.e.* state-based) human rights sources are either inexistent, incomplete or simply false. In addition, as for example in the case of the said ANHRI beginning of 2022, many of these regional NGOs are facing repeated, substantial intimidation, threats and other forms of state terror.

Muslim-controlled countries is challenging to say the least, and in some of them forthrightly unacceptable. The reasons for the partly dire human rights conditions in the Arab world are complex and multi-faceted. This thesis focuses on *one* major factor why human rights are constantly under pressure: The lack of separation between state and religion, exemplified by two aspects, which in one way or the other matter to every human being, and which are characterized by profound expressions of an individual's personal will: The free will to choose a particular religion (or not to believe at all) as most prominently foreseen in the ICCPR, *i.e.* in Art 18 ICCPR<sup>21</sup>, and, secondly, the free will of a woman to choose her specific way of life, in accordance with her own private wishes, desires, interests, rights, sexual orientations, or professional career options as defined in particular in Articles 2-16 CEDAW<sup>22</sup>, which explicitly bind state parties to take all appropriate legislative and other measures to ensure women can indeed enjoy the same rights as men, free from any restrictions, limitations or any form of discrimination as per Art 1 CEDAW.

The basic assumption hereunder is: With respect to a private person's right to freely choose a religion or – if born as a female into an average family in North Africa, the Middle East or South Asia – live a life free of any restrictions reaching deeply into some of the most personal areas, the notion of 'free will' is far too often rendered void and futile, and the aforementioned wishes, desires and interests are substantially affected or even impaired. In other words, the problem is that for individuals – foreigners and even more so for locals – the possibility to exercise their free will as identified and substantiated in the ICCPR<sup>23</sup> or the Charter<sup>24</sup>, free will hereunder understood as sort of overarching element of human rights in general (resembling *e.g.* the concept of human dignity)<sup>25</sup>, often does not exist, in particular taking into consideration certain national criminal law systems in the Arab world.

The objective of this thesis is to assess some of the main issues for this problematic state of affairs by applying a multilayered analysis. In order to adequately address substantial human rights concerns regarding the freedom of religion and gender equality, three different levels or layers shall be examined closely:

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<sup>21</sup> See the comprehensive commentary on Art 18 in *Taylor P.M.*, supra note 6, pp 499 et seq, esp pp 514 et seq.

<sup>22</sup> See in *Freeman M.A./Chinkin C./Rudolf B.*, supra note 8, pp 71 et seq.

<sup>23</sup> See for instance Art 18 para 1, Art 19 para 1 and 2 or Art 22 para 1 ICCPR, which all represent a very clear and concise expression or manifestation of an individual's personal right and freedom of self-determination. More details in chapter III.

<sup>24</sup> See Art 24, 25, 30 and 32 ACHR.

<sup>25</sup> Art 3 para 3 ACHR even specifically mentions 'human dignity' and provides that 'men and women are equal in respect of human dignity, rights and obligations in the framework of the positive discrimination established in favour of women by the Islamic Shariah, other divine laws and by applicable laws and legal instruments.'

1. The first layer concerns the legal situation on the international level: Which international human rights instruments do exist for individuals in the Arab world to address any violations of their right to religious freedom and gender equality, in particular which complaint mechanisms can concerned individuals resort to?
2. The examination and assessment of the second layer focuses on human rights instruments established on the regional level, *i.e.* Arab human rights frameworks.
3. Finally, national/local laws of selected<sup>26</sup> Muslim-controlled countries affecting or impacting the basic rights of religious freedom and gender equality need to be examined. In this third layer especially national criminal laws (*inter alia* the so-called *hudud* ordinances or punishments<sup>27</sup>) often do play a very critical role. In addition, certain legal and cultural traditions and customs need to form part of any reasonable assessment to gain a fuller, more comprehensive understanding of the issues. Even though local statutory laws of a state may grant individuals certain fundamental rights, this does not necessarily mean that these laws are always in accordance with national *criminal* laws, let alone how these criminal laws are applied under specific circumstances in a particular region or territory of a Muslim-controlled country.

As will be shown in this thesis, a multi-layered approach and assessment subsequently (and almost inevitably) leads to multi-layered compatibility concerns and inconsistencies: While regional human rights frameworks are in conflict with international human rights standards, national (criminal) provisions are partly incompatible with regional human rights instruments, depending in which member state of the Arab League one carries out an assessment or an evaluation. A third set of inconsistencies – and maybe the most crucial ones as they are to be considered genuine Islamic ones and any serious debates among Islamic scholars may potentially form the basis for any reconciliatory mechanisms in view of international human rights law and its adequate implementation – appear to occur within Islamic legal sources as such, in particular between primary and secondary sources of Islamic law.<sup>28</sup> These conflicts or inconsistencies are insofar crucial or decisive as they mark the border where conservative and more liberal Islamic scholars interpret and apply certain norms and rules in quite different ways. In fact, it shall be mentioned already at this stage that there are intense debates in Arab academic

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<sup>26</sup> A study and evaluation of the legal situation concerning religious freedom and gender equality in *all* Muslim-controlled nations would clearly go beyond the quantitative scope of this master thesis, hence the author decided to focus on a limited, yet representative number of specific states of the Arab League.

<sup>27</sup> More details to terminology and nature of these forms of punishment please see in chapters II and V.

<sup>28</sup> See *e.g.* Gabriel M.A., *Liberating Islam, How to Reconcile Islamic Criminal Law with Human Rights*, St. Petersburg (Florida, U.S.) 2019, pp 6 et seq.

circles as regards the validity of *Sharia* and Islamic laws to the point that some scholars argue that certain Islamic laws and rulings having been developed by Islamic jurists (Islamic jurisprudence or *fiqh*) are partly even in contradiction to the main primary sources of Islam, the *Qur'an* and the (correct) *Sunnah*.<sup>29</sup>

In view of the topic chosen hereunder a very clear delineation regarding the scope (geographical scope, material law, etc) of this study as well as precise definitions of key terms in an Arab legal context are essential and will be given in chapter II. It will be shown that what is often referred to as 'Arab world' is in fact a quite incoherent and very diverse region.<sup>30</sup> In other words, one needs to understand that the terms 'Arab world' or 'Muslim world' are actually imprecise and should only be used with a certain caution. The fact that (Western) media sometimes draws a fairly one-dimensional picture of a historically, culturally and politically complex, richly-layered region shall be noted at this point and definitely does not help all those who are interested in and aim at a mutually better understanding between Western and Muslim-dominated societies.<sup>31</sup>

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<sup>29</sup> See *Gabriel M.A.*, supra note 28, p 14. An explanation of key terms and necessary distinctions please see in chapter II.

<sup>30</sup> A very interesting read in this context is *Davidson C.M.*, *After The Sheiks, The Coming Collapse of the Gulf Monarchies*, London 2015, esp pp 49 et seq and pp 111-154.

<sup>31</sup> On how we perceive the Arab world and Islam almost indispensable and highly recommended here is the following work of the honorable *Said E.W.*, *Covering Islam, How the Media and the Experts Determine How We See the Rest of the World*, London 1997, in particular pp 3-35 and pp 135-174. Also of interest is the excellent work of *Tibi B.*, *Islamism and Islam*, New Haven & London 2012, with respect to this thesis in particular of interest are pp 1-30 as well as pp 158-176.

## II. Basics – Definitions, Terminology and Sources

### 1. Islamic Law and *Sharia*

The clarification of certain terms in Islamic law<sup>32</sup> and Islamic jurisprudence is essential if one wants to fully understand the complex relationship between religion and law as well as the legal and social correlations and implications between both. Apostasy for instance, which is considered a crime in several Muslim-controlled nations, can be better perceived if the reader is aware and knows the Islamic source(s) of apostasy, how norms in general are made and interpreted in Islam, and how these norms – shaped by legal and cultural traditions – are actually applied. While legislation and jurisdiction in European countries for example are carried out in comparably clear and transparent processes (*i.e.* binding norms are drafted, negotiated and adopted in parliamentary procedures, the executive and jurisdictional branches adhere to the rule of law, sanctions against individuals are based on a specific code, *e.g.* a criminal code), the situation in many Islamic countries can be quite different. The following few sections will try to give a short overview on some of the key terms in Islamic law as the knowledge of those will facilitate a more appropriate approach and understanding with respect to what is considered a socially abnormal or inadequate behavior in the Arab world. In any event the author concurs in the view of *Baderin* when he writes that Islamic law ‘*is probably the most misunderstood legal system today, especially in the West.*’<sup>33</sup>

Though unfortunately often used interchangeably, there is a certain difference between *Sharia* (also *Shariah* or *Shari’ah*) and *Islamic law*. *Sharia* represents a body of religious law that forms part of the Islamic tradition.<sup>34</sup> Its roots can be found in the religious precepts of Islam and are based on the sacred scriptures of Islam, particularly the *Quran* and the *Hadith*.<sup>35</sup> The term is ambiguous though.<sup>36</sup> ‘*Sharia*’ literally means ‘*the way or path channeled by God*’<sup>37</sup> or, also, ‘*the way to the watering hole or place.*’<sup>38</sup> It is important to emphasize that *Sharia*, used as technical term, often appears and is used in both wider, but also in narrow contexts, these different understandings sometimes causing confusion.<sup>39</sup> In a broader view, *Sharia* not only

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<sup>32</sup> See *El Fadl K.A./Ahmad A.A./Hassan F.S.* (ed.), *Routledge Handbook of Islamic Law*, London & New York 2019, pp 127 et seq.

<sup>33</sup> *Baderin M.A.*, *Islamic Law, A Very Short Introduction*, Oxford 2021, in his preface at p xv.

<sup>34</sup> *Bassiouni M.C.*, *The Sharia and Islamic Criminal Justice in Times of War and Peace*, Cambridge 2014, pp 18-87, esp pp 39 et seq.

<sup>35</sup> *Ibid.*

<sup>36</sup> See *Rohe M.*, *Das Islamische Recht, Geschichte und Gegenwart*, 3<sup>rd</sup> ed., Munich 2011, p 9.

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*, with further references.

<sup>39</sup> *Ibid.*

comprises the entirety of all religious and legal norms, but also the various mechanisms of norm finding and interpretation rules of Islam, as well as provisions regarding prayers, almsgiving, fasting, the prohibition of specific food (pork) and drinks (alcoholic beverages), or the pilgrimage to Mecca (*hajj*) as well as contract law, family law or inheritance law. In this regard a translation of `Sharia' with `Islamic Law' would be a substantial contraction or truncation.<sup>40</sup> And such simple translation would render the term Sharia with regards to content virtually wrong when linking the word to the common *legal* meaning, *i.e.* understanding Sharia as a set of norms with a legally binding character.<sup>41</sup> *El Shamsy* gives an adequate description when he states that Sharia `is concerned as much with ethical standards as with legal rules, indicating not only what an individual is entitled or bound to do in law but also what one ought, in conscience, to do or refrain from doing. Accordingly, certain acts are classified as praiseworthy (*mandub*), which means that their performance brings divine favour and their omission divine disfavour, and others as blameworthy (*makruh*), which has the opposite implications. However, in neither case is there any legal sanction of punishment or reward, nullity or validity.<sup>42</sup> He concludes that `the Shari'ah is thus not merely a system of law but also a comprehensive code of behaviour that embraces both private and public activities.'<sup>43</sup> Islamic law or Islamic law norms on the other hand `should be limited to what is *sahih* as distinguished from what is *batil* (respectively, valid and invalid), whereas the norms of sharia are referred to as addressing that which is *halal* and *haram*, namely, the legitimate and the forbidden.'<sup>44</sup> Hence, *Bassiouni* continues to explain, `Islamic law must always find its legitimacy in the sharia, and it is therefore considered a branch of the sharia (...).'<sup>45</sup>

One of the main challenges with Sharia is the question of *application*. The manner of application in modern times has been the subject of considerable controversy between conservative Muslim fundamentalists and liberal modernists or, as *Amanat* and *Griffel* correctly point out: `Muslim fundamentalists in particular claim that Sharia and its sources, the *Quran* and the *hadith*, constitute a divine law that regulates all aspects of Muslim life, as well as Muslim societies and Muslim states, in the most perfect and everlasting way. Muslim

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<sup>40</sup> Ibid.

<sup>41</sup> Ibid, but also pp 10-18 in which *Rohe* explains in a concise manner the various features and elements and why Sharia and Islamic law cannot, and shall not, be mixed too frivolously. See also *El Demery A.M.*, *The Arab Charter on Human Rights: A Voice for Sharia in the Modern World*, Chicago 2015, p 39.

<sup>42</sup> *El Shamsy A.*, Shari'ah (Islamic Law), contribution to the *Encyclopedia Britannica*, see on the website <https://www.britannica.com/topic/Sharia> (last visited on 14 July 2022). At times, also *N.J. Coulson* appears as author of the Shariah entry in the online encyclopedia.

<sup>43</sup> Ibid.

<sup>44</sup> *Bassiouni M.C.*, supra note 34, p 42, with further references.

<sup>45</sup> Ibid.



modernists, a far less audible voice these days, on the other hand, criticize the old approaches to Sharia by traditional Muslim jurists as obsolete and instead advocate innovative approaches to Sharia (...).<sup>46</sup> And Gabriel mentions that 'the failure to distinguish between Shariah and Islamic law is one of the main factors that strengthens the argument of orthodox Muslims that *hurdud* ordinances<sup>47</sup> are divine, infallible, immutable and non-negotiable.'<sup>48</sup> In other words, the precise and correct application of a specific Sharia provision or norm may, in certain cases, lead to quite contested results.

With respect to sources of Shariah, the literature differentiates between primary and secondary sources.<sup>49</sup> The primary sources of the Shariah are the *Quran*, the holy book of Islam, and the *sunnah* (or also *sunna*), which represent the traditions and practices of the Islamic prophet Mohammed, forming an important model or concept for the lives of Muslims.<sup>50</sup> According to classical theories of Islam, the sunnah are documented by the aforementioned *hadith* (pl. *ahadith*), which is the verbally transmitted record of the teachings, deeds and sayings, silent permissions or disapprovals of the prophet Mohammed, which a majority of Muslims believe in.<sup>51</sup>

The main secondary or subsidiary sources of the Sharia are the principal of analogical deduction (*qiyas*) and the consensus among Islamic scholars (*ijma*). Some orthodox scholars (namely those of the *Hanbali* school) consider the principles of *qiyas* and *ijma* even as part of the primary sources along with the Quran and the Sunnah, calling these four *the al-usul al-arbaa* (the four primary sources).<sup>52</sup>

Other important secondary sources of Islamic law and Islamic belief are the *al-masalih al-mursalah* (the consideration of public interest), the *istihsan* (the juristic preference) and the *sadd al-zara' i* (the so-called 'blocking of means', to be understood in the sense of protecting

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<sup>46</sup> See Amanat A./Griffel F. (ed.), *Sharia, Islamic Law in the Contemporary Context*, Stanford 2007, preface at p vii, with further references and interesting contributions of other experts on Islamic law.

<sup>47</sup> The term *hurdud* (*ordinances*) will be explained in more detail in this chapter II, sections 1 and 5.

<sup>48</sup> Gabriel M.A., supra note 28, p 15.

<sup>49</sup> See Souaiaia A., *On the Sources of Islamic Law and Practices*, *Journal of Law and Religion*, Vol 20, No 1 (2004-2005), pp 123 et seq.; Gabriel M.A., supra note 28, p 17; Edge I., *Islamic Law and Legal Theory*, New York 1996, pp 1 et seq.

<sup>50</sup> On the *sunnah* see e.g. Duderija A. (ed.), *The Sunna and its Status in Islamic Law, The Search for a Sound Hadith*, Palgrave Series in Islamic Theology, Law, and History, Basingstoke 2015, 1 et seq, with further references.

<sup>51</sup> *Hadith* is not only a very complex subject, with different types, components, schools of thought or traditions (e.g. Shia vs Sunni textual traditions) to be taken into consideration, it also forms the basis for partly intense intra-Muslim debate and criticism, in particular with respect to questions of authenticity of the ahadith. As a starting point see for example Ibn al-Shahrazuri/Dickinson E., *An Introduction to the Science of the Hadith: Kitab Mar'rifat Anwa' 'Ilm Al-Hadith*, Reading 2006.

<sup>52</sup> Gabriel M.A., supra note 28, p 21, with further references.

Muslim society from harm and to achieve what is beneficial for it by closing any door that can lead to harmful results for the (Muslim) people.<sup>53</sup>

While the Quran and the Sunnah are considered holy and infallible given their divine origins, Islamic jurisprudence or *fiqh* plays a different, *complementary* role and – as having been established and further developed and enhanced over centuries by humans (*i.e.* specialized lawyers or *muftis*) – is being conceded *fallible*. *Fiqh* becomes relevant for Islamic scholars and jurists when an interpretation of certain rules or regulations of the Shariah needs to be executed and ascertained when a particular problem or question arises which is not specifically referred to or is considered ambiguous in the Quran or the Sunnah. In other words, *fiqh* serves as an instrument to create a new legislation by qualified Islamic scholars (*mujtahid*) practicing an independent reasoning (*ijtihad*).<sup>54</sup> These methodologies of deriving Sharia rulings from various scriptural sources have been developed in different (mostly *Sunni*) schools, the most prominent being the schools of *Hanafi*, *Hanbali*, *Maliki*, *Shafi'i* (or *Shafei*) and *Ja'fari*, the last one being the only one in this list belonging to *Shia* Islam. *Fiqh* as traditional form of jurisprudence can be split in two main sections: religious rituals (*ibadah* or – in the plural form – *ibadat*) of Muslims, and secondly the area of social relations and commercial transactions (*mu'amalat*). The development of Islamic jurisprudence commenced after the death of prophet Mohammed, when the extension of the Islamic state took on a completely new dimension and Islam spread across the whole Arabian peninsula and even beyond.<sup>55</sup> The first Muslim scholars had to introduce the Sharia rules and provisions in new Muslim territories and communities, which required them to interpret and apply the rules of the Quran and the Sunnah and, while adhering to and keeping the very purpose and spirit of Sharia, at the same time also addressing and considering the challenges and circumstances of the various new Muslims groups.<sup>56</sup>

This first brief summary shall give an indication on how complex and wide the fields of Islamic law and Islamic jurisprudence actually are: A number of different sources with different levels of authority are accompanied by a broad variety of rules and procedures of interpretation, understanding and application of norms developed over centuries by a legion of *mujtahid*, *fuqaha* (another name for legal experts in Islam matters) and *muftis* – both legally binding ones as well as those provisions that might not be binding or enforceable *stricto sensu*, but where the

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<sup>53</sup> *Gabriel M.A.*, supra note 28, p 24.

<sup>54</sup> See this and many other terms mentioned hereunder in *Esposito J.L.* (ed.), *The Oxford Dictionary of Islam*, Oxford 2003, *e.g.* *fiqh* at p 87, *ijtihad* at p 134, etc.

<sup>55</sup> *Gabriel M.A.*, supra note 28, p 28.

<sup>56</sup> *Ibid*, esp the description of the several stages of the evolution of Islamic jurisprudence and its respective features on pp 28 et seq.

level of social ostracism reaches a point where the result of *social* punishment is tantamount to a regular verdict. It is against this background that freedom of religion and gender themes need to be assessed. In the following section 2 of chapter II a delineation of the geographical scope is attempted, not only for reasons of scientific accuracy, but also in order to limit the scope of this thesis reasonably as all 50+ Muslim-majority states have their very own set of Sharia rules.

## 2. Geographic Scope of Analysis

The title of this thesis mentions the phrases ‘*Arab Human Rights Context*’ and ‘*Arab Human Rights Sources*’, and on the preceding pages on various occasions terms like ‘the *Arab World*’ (or ‘*Muslim world*’), ‘*Muslim-controlled*’, ‘*Muslim-dominated*’ or ‘*Muslim-majority*’ states or nations were used. As there are no generally accepted, let alone legal definitions for any of these terms/phrases, it appears appropriate and necessary – in accordance with academic conventions – to precisely define the respective topic of research. *Seib* points out that ‘*no universally accepted definition of “the Arab world” exists, but it is generally assumed to include the twenty-two nations belonging to the Arab League that have a combined population of about 280 Million*’<sup>57</sup>, with the Arabic language serving as *lingua franca* in those member states. The author follows this approach. The *Arab League* (formally known as the *League of Arab States*) is the main political regional organization in the Arab world and, together with the OPEC and the GCC, one of the most powerful and influential organizations there. As the Arab League (in the following simply also ‘*the League*’) also has drafted and adopted the *Arab Charter on Human Rights* in 2004, it seems adequate to focus the research of this thesis on its current 22 member states<sup>58</sup> which are (in alphabetical order): Algeria, Bahrain, the Comoros, Djibouti, Egypt, Iraq, Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, Oman, Palestine, Qatar, Saudi Arabia, Somalia, Sudan, Syria (suspended since 2011), Tunisia, The United Arab Emirates and Yemen.<sup>59</sup> In other words, the analysis of (national) human rights situations will

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<sup>57</sup> See *Seib P.*, *Hegemonic No More: Western Media, the Rise of Al-Jazeera, and the Influence of Diverse Voices*, *International Studies Review* (2005), Vol 7, No 4, pp 601-615, p 604.

<sup>58</sup> Official status as per July 2022.

<sup>59</sup> It is interesting that a large regional player like the *Islamic Republic of Iran* is not a member of the League. Though Iran, as the official name already indicates, without doubt is a Muslim-controlled nation with Islam (*Shia* Islam to be precise) dominating all aspects of life, people mostly speak Farsi (Persian). In this respect very similar is the situation concerning (the *Islamic Republic of*) *Pakistan* (with Urdu and English as official languages) with the world’s second largest Muslim population, and the *Islamic Emirate of Afghanistan* (with Pashto and Dari as major languages). Finally, also countries in the (wider) region like Uzbekistan (with Uzbek and Karakalpak as official languages and more than 90% Muslims), Turkmenistan, Kazakhstan, Kyrgyzstan or Tajikistan can be named here, not to forget Azerbaijan and – another regional powerhouse – Turkey. While Islam clearly represents the prevalent belief (with Turkey considering itself as secular state in its constitution with no official state religion) in all these countries, at least one thing is different: No Arabic as (one of the) official language(s). Hence, it is obvious that Arabic is a key criterion of membership within the League, and even though the human rights challenges in these states are partly comparable with those in the member states of the League, they do *not* form

be done with regard to these twenty-two states, and a closer look will be taken on a few selected nations out of that circle.<sup>60</sup>

### 3. Relevant International Human Rights Standards

#### a) *International Covenant on Civil and Political Rights*

In terms of freedom of religion and gender equality the most important sources of international human rights law on a global level are the treaties of the UN, with regard to the two rights just mentioned in particular the ICCPR as well as CEDAW. The ICCPR and CEDAW are of utmost relevance and both represent cornerstones and elementary achievements in international law as they contain legally binding, enforceable norms and grant individuals being subjects of human rights violations effective complaint mechanisms. As regards religious freedom the pivotal norm is Art 18 ICCPR, which explicitly states: *‘Everyone shall have the right of freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.’*<sup>61</sup> The 2<sup>nd</sup> subparagraph of Art 18 ICCPR clearly provides: *‘No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.’*<sup>62</sup> Subparagraph no. 3 continues with the only admissible limitations as known from other human rights: *‘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.’*<sup>63</sup> Art 18 is to be interpreted in a broad sense, *‘encompassing freedom of thought on all matters, personal conviction and the commitment to religion or belief; it protects the expression of theistic, non-theistic or atheistic beliefs, as well as the right not to profess any religion or belief.’*<sup>64</sup> Important is also a certain

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part of this master thesis. The exception here is Chad: Arabic is the official language, but it is no member of the League yet, however it applied for membership with the LAS in March 2014. See e.g. under the webpage <https://www.middleeastmonitor.com/news/africa/10509-south-sudan-and-chad-apply-to-join-the-arab-league> (last retrieved on 18 July 2022), which, *inter alia*, explicitly mentions that using the Arabic language as a state’s official language is a prerequisite to joining the League.

<sup>60</sup> Additional literature on the Arab world and Islam recommended in this context: *Tibi B.*, Islam in Global Politics, Conflict and Cross-Civilizational Bridging, London & New York 2012; *Worrall J.*, International Institutions of the Middle East, The GCC, The Arab League, and Arab Maghreb Union, London & New York 2017; *Macdonald R.W.*, The League of Arab States: A Study in Dynamics of Regional Organization, Princeton 1965, pp 33 et seq.

<sup>61</sup> See in *Taylor P.M.*, supra note 6, p 499.

<sup>62</sup> Ibid.

<sup>63</sup> Ibid. As a side note, and quite remarkably, in the section of *Taylor’s* commentary immediately following Art 18, several comparable provisions in other international/regional human rights instruments are mentioned – *i.e.* Art 9 ECHR, Art 12 AmCHR, Art 8 ACHPR – but not a single word about the ACHR.

<sup>64</sup> See in *Taylor P.M.*, supra note 6, p 500.

connection of Art 18 with Art 19 ICCPR ('Freedom of Expression') as can be seen in General Comment No. 22 to the ICCPR, which states that Art 18 *'does not permit any limitations whatsoever on the freedom of thought and conscience or on the freedom to have or adopt a religion or belief of one's choice. These freedoms are protected unconditionally, as is the right of everyone to hold opinions without interference in article 19.1 (...).'*<sup>65</sup> The author shares the view of *Taylor* that freedom of thought, conscience and religion, just as the freedom of expression of opinion, is *'symptomatic of a healthy democratic society.'*<sup>66</sup>

#### **b) Convention on the Elimination of all Forms of Discrimination Against Women**

What the ICCPR represents, *inter alia*, for the human right to freedom of religion, virtually a whole convention – CEDAW – means to women and their long and tedious battle for gender equality, also and especially in Muslim-controlled nations.<sup>67</sup> Already Art 1 CEDAW sets the frame and foundation by providing a wide definition of the term *'discrimination'*, which is at the very heart of the concept of gender equality: *'For the purposes of the present Convention, the term 'discrimination against women' shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.'*<sup>68</sup> What follows then is mandating states to ratify the Convention and to declare intent to incorporate (*'enshrine'* as the Convention stipulates) gender equality into the respective domestic legislations, repeal all discriminatory provisions in their laws, and enact new provisions to guard against discrimination against women (Art 2 CEDAW). Of equally general nature is Art 3, which emphasizes that the *'State Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.'*<sup>69</sup> Articles 5 through

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<sup>65</sup> See General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion), 48<sup>th</sup> Session of the HRC on 30 July 1993, CCPR/C/21/Rev.1/Add.4 (General Comment No. 22), at section 3 of the comment.

<sup>66</sup> *Taylor P.M.*, supra note 6, p 501.

<sup>67</sup> This of course shall not mean that gender equality is only specifically underdeveloped in the Arab world. In fact, with the exception of a few Scandinavian countries, CEDAW provisions are unfortunately required in almost all parts of the world yet, with no foreseeable end of discriminations and violations of women's most basic rights in the nearer future. In the context of this thesis though, and in view of some dreadful human rights violations against women of the worst kind (stoning for adultery, etc), gender equality poses a very special challenge in some LAS nations.

<sup>68</sup> See in *Bisset A.*, supra note 18, pp 62 and 63.

<sup>69</sup> *Ibid.*

17 CEDAW then substantiate and concretize the goals and visions drawn in Articles 1-3 of the Convention. The OHCHR describes CEDAW as an '*international bill of rights for women*' and an agenda for action by countries to guarantee the enjoyment of the rights in CEDAW.<sup>70</sup> As regards the ratification and accession status of CEDAW in the Arab world all LAS member states except for Somalia and Sudan have either ratified or acceded to CEDAW.<sup>71</sup> As will be shown in chapter V the realities on the ground are quite massively in contrast to what international human rights norms in CEDAW (and other international instruments) actually require, and many member states of the League are considerably behind in their efforts to put women on an equal footing with men. This is in particular a major issue as gender-related discrimination is *pervasive*: It affects girls and women constantly in their daily lives in all kinds of civil, social, cultural, political and of course economic situations. And while it seems comprehensible and indispensable that international, regional and local laws (*i.e.* binding, enforceable norms) will play a crucial role in reaching equality among women and men in the Arab world, it also will require more *social* programs like, for instance, '*Men and Women for Gender Equality*', an initiative launched in 2015 by *UN Women* (Arab States section), aimed at a) mobilizing men and boys to challenge gender stereotypes, b) changing attitudes and behaviors to combat gender inequalities, and c) enticing a change in social norms to fight discrimination against women.<sup>72</sup>

### c) *Convention on the Rights of the Child*

The CRC, which is another essential international human rights instrument in the protection of a specifically vulnerable group, is mentioned hereunder because many forms of gender-related discrimination not only affect women, but young women below the age of 18 (as per Art 1 CRC the threshold in terms of age) and girls. As regards religious freedom, the matter needs to be assessed, *inter alia*, in consideration of Art 18 para 4 ICCPR, which forms the legal basis for state parties to respect the liberty of parents (and, where applicable, legal guardians) '*to ensure the religious and moral education of their children in conformity with their own convictions.*'<sup>73</sup> Whether that always happens in the '*best interests of the child*' as per Art 3 para 1 CRC is a different question, but it is beyond any doubt today that the provisions of the CRC are an

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<sup>70</sup> See under <https://web.archive.org/web/20090825232556/http://www2.ohchr.org/english/law/cedaw.htm> (last visit of the webpage done on 18 July 2022), in the 3<sup>rd</sup> section of the introduction to CEDAW.

<sup>71</sup> The Non-LAS member Iran is among the very few countries globally that belongs to the non-signatory states. Though initially ratified in 2003, the ratification got vetoed in the end by the Iranian *Guardian Council*.

<sup>72</sup> See this valuable program by *UN Women* under <https://arabstates.unwomen.org/sites/default/files/2022-04/Gender%20Equality%20in%20Tunisia%20programme%20brief%20new.pdf> (last checked on 15 July 2022).

<sup>73</sup> Art 18 para 4 ICCPR, see also *Taylor P.M.*, supra note 6, esp pp 530-534, with further references and case law.

invaluable instrument of global protection of children against discrimination of any kind, irrespective of a child's (or its parents) religion (Art 2 para 2 CRC). Children have the right to freedom of expression (Art 13 CRC) and the freedom of thought, conscience and religion (Art 14 CRC).<sup>74</sup>

Of specific relevance hereunder is Art 29 CRC, in particular its lit b) and d). While lit b) stipulate member states that the education of children shall be directed to *'the development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations'*<sup>75</sup>, lit d) obliges state parties to the CRC to enable an education including *'the preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin.'*<sup>76</sup> Art 30 CRC, eventually, defines: *'In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language.'*<sup>77</sup>

All these last references to CRC provisions bear a peculiar significance in the Arab world, a region characterized by a multitude of peoples, beliefs, languages and dialects, as well as different cultural and social traditions and customs, let alone the still unresolved intra-Muslim conflict between *Sunni* and *Shia* Muslims or the seemingly interminable territorial (and religious as well as cultural) disputes in the Middle East (*i.e.* Gaza strip, etc) between Jewish and Arab communities, which caused, and still cause, repeated, numerous human rights violations on both sides, very often also affecting (and all too often killing) children and teenagers.

It seems worth mentioning that almost all LAS member states have submitted reservations<sup>78</sup> to the CRC, either making a general reference to the primacy of Sharia and national law, or by claiming that certain provisions of the CRC are incompatible with Islamic law. Iraq for example accepts the Convention but states – in view of Art 14 CRC – that the acceptance is *'subject to a reservation in respect to article 14, paragraph 1, concerning the child's freedom of religion, as allowing a child to change his or her religion runs counter to the provisions of the Islamic*

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<sup>74</sup> See the comments of *Doné S.L.* and *Tobin J.* to Art 14 CRC in *Tobin J.*, supra note 9, pp 475 et seq.

<sup>75</sup> See *Bisset A.*, supra note 18, p 102.

<sup>76</sup> *Ibid.*

<sup>77</sup> *Ibid.*

<sup>78</sup> The problem with reservations to the CRC, but also to CEDAW and other UN Conventions, will be dealt with in detail in chapter VI 3.

*Shariah*.<sup>79</sup> <sup>80</sup> The author is convinced that forms of discrimination and human rights violations concerning gender and religion shall (also) be checked against the legal provisions of the CRC, also as – in the words of *Tobin* - ‘*the principle of non-discrimination as we know it from international and regional human rights law has been largely unable to effectively counter child discrimination. This is due partly to these instruments’ general misapplication and reservations, but also to their inadequacy to protect children against all kinds of child-specific discrimination.*<sup>81</sup> Insofar, taking into consideration the aforementioned articles of the CRC hereunder seems reasonable.

**d) *UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief***

Though of non-binding nature, the *UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* from 25 November 1981<sup>82</sup> (in the following simply ‘*the Declaration*’) likewise forms part of this listing of relevant international human rights frameworks as it elaborates on the human right of religious freedom.

One can share with *Lerner* the importance of this resolution<sup>83</sup>, however, apparently ‘*little political will exists to bring this Declaration to fruition as binding legal instrument.*’<sup>84</sup> This doesn’t necessarily mean that the Declaration has no legal relevance at all.<sup>85</sup> Voices in the literature rightly do claim that the Declaration was ‘*enunciated in normative terms, elevating the rights and freedoms in question to normative status*’<sup>86</sup>, and, by doing so, giving the Declaration a certain legal effect.

Though currently playing a limited role only in the protection of religious freedom, it got explicitly mentioned again in the 2019 Res of the HRC, by which the mandate of the *Special Rapporteur of Freedom of Religion and Belief* (currently held by Mr. *Ahmed Shaheed*) was

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<sup>79</sup> See at the UNTC, Depository to the CRC, download under [https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-11&chapter=4&clang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&clang=en) (last retrieved on 20 July 2022).

<sup>80</sup> See also *Salem N.*, *Sharia Reservations to Human Rights Treaties*, Oxford Public International Law, Max Planck Encyclopedias of International Law, Oxford 2020.

<sup>81</sup> *Tobin J.*, supra note 9, p 47, with further references.

<sup>82</sup> GA Res 36/55, adopted on 25 November 1981, see under <https://www.ohchr.org/sites/default/files/religion.pdf> (last visited on 19 July 2022).

<sup>83</sup> See *Lerner N.*, *Religious Human Rights Under the United Nations*, in: *van der Vyver J.D./Witte J.* (ed.), *Religious Human Rights in Global Perspective*, The Hague 1996, p 114.

<sup>84</sup> See *Ghanea N.*, *The 1981 UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief: Some Observations*, in: *Ghanea N.* (ed.), *The Challenge of Religious Discrimination at the Dawn of the New Millennium*, Dordrecht 2004, pp 9-31, on p 10.

<sup>85</sup> See *Sullivan J.D.*, *Advancing the Freedom of Religion or Belief Through the UN Declaration on the Elimination of Religious Intolerance and Discrimination*, *AJIL* (1988), Vol 82, No 3, pp 487-520, on p 488, with further references.

<sup>86</sup> *Ibid.*



extended until 2022.<sup>87</sup> With the said Special Rapporteur, the provisions of the ICCPR (including its *Human Rights Committee*) and the Declaration, as well as the successful implementation of the so-called *Rabat Plan of Action* in the context of Art 19 ICCPR (Freedom of Expression) to address and identify national, racial and *religious* hatred (*i.e.* religious hate speech and similar), the UN is pro-actively seeking to improve the situation concerning religious freedom on various levels.<sup>88</sup>

#### 4. Applicable Regional Arab Human Rights Frameworks

##### a) *Cairo Declaration on Human Rights in Islam*

The non-binding *Cairo Declaration on Human Rights in Islam* (CDHRI) is a declaration of the parties to the OIC<sup>89</sup>, which was first adopted in Cairo in 1990. Thirty years later, on 28 November 2020, a second, revised version of the CDHRI was adopted in Niamey, which is the basis for this short review here. The declaration of the OCI, claiming on its website to represent the '*collective voice of the Muslim world*'<sup>90</sup>, is mainly seen and interpreted as a sort of response of the Muslim world to the UDHR. Though partly using language being familiar from other (international) human rights instruments, the CDHRI is full of religious terms, phrases and rhetoric directly or indirectly referring to Islam and the Sharia. As Muslims repeatedly criticized the provisions of the UDHR to be (too) secular and Western-oriented, failing to take into account the religious and cultural values and traditions of non-Western nations, the CDHRI follows a very different path. While Art 1 lit a) CDHRI ('*Human Dignity*') clearly emphasizes that '*all human beings form one family. They are equal in dignity, rights and obligations, without any discrimination on the grounds of race, color, language, sex, religion, sect, political opinion, national or social origin, fortune, age, disability or other status*'<sup>91</sup>, this bold claim is put into question (if not rendered void and meaningless) when reading the declaration as a whole. Apart from the fact that the declaration starts with '*In the name of Allah, the Most Gracious, the Most Merciful*'<sup>92</sup>, Art 25 lit a) CDHRI ('*General Provisions*') makes an explicit

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<sup>87</sup> See *Human Rights Council*, Res A/HRC/Res/40/10, adopted on 21 March 2019 at its 40<sup>th</sup> session, see inter alia at <https://www.ohchr.org/en/special-procedures/sr-religion-or-belief> (last retrieved on 19 July 2022).

<sup>88</sup> See more details to the *Rabat Plan of Action* under <https://www.ohchr.org/en/freedom-of-expression> (last visited on 22 July 2022). Also see the excellent work by *Bielefeldt H./Ghanea N./Wiener M.*, *Freedom of Religion or Belief, An International Law Commentary*, Oxford 2016; *Boyle K./Sheen J.* (ed.), *Freedom of Religion and Belief, A World Report*, London & New York 1997.

<sup>89</sup> The *Organization of Islamic Cooperation*, founded in 1969, is an inter-governmental organization and consists of 57 Muslim-dominated member states. It represents a population of more than 1.8 Billion people. For further information see the website <https://www.oic-oci.org/home/?lan=en> (last visit on 20 July 2022).

<sup>90</sup> See the website just mentioned in the preceding footnote.

<sup>91</sup> See the full text of the revised second version of the CDHRI on the website of the OIC under [https://www.oic-oci.org/upload/pages/conventions/en/CDHRI\\_2021\\_ENG.pdf](https://www.oic-oci.org/upload/pages/conventions/en/CDHRI_2021_ENG.pdf) (last check of the site on 21 July 2022).

<sup>92</sup> *Ibid.*

reference to Islam by stipulating: *'Everyone has the right to exercise and enjoy the rights and freedoms set out in the present declaration, without prejudice to the principles of Islam and national legislation.'*<sup>93</sup> The whole text mentions 'Islam' 10 times (the preamble alone, like any preamble, setting the foundation and describing the spirit of the declaration, makes 8 references to 'Islam' or 'Islamic'), and by distinctly referring to 'national legislation', which in most Muslim-controlled nations means nothing else but Sharia and Islamic laws (forming the *state religion* as per the respective national constitutions), it becomes evident that the notion of religious freedom and the promise of religious equality as per Art 1 CDHRI in this context not only lacks credibility, but in effect is inconsequential and purportless. Though Art 20 lit a) and b) CDHRI represents the nucleus in terms of religious freedom in the CDHRI – interestingly in several sentences using the exact same legal wording apparently having been literally copy-pasted from Art 18 para 1, 2 and 3 ICCPR –, the words and the legal text as a whole do not meet the (alleged) aspirations of the OIC drafters. To the contrary, an analysis of the CDHRI leads to the conclusion that at least those sections concerning religion and religious freedom are, as shown, *per se* contradictory and inconsistent: It is inadmissible to proclaim the equality of religions and cultures on the one hand, only to modify and relativize the provision a few sections before and after by determining the supremacy of one specific religion – Islam.<sup>94</sup>

With respect to the rights of women and gender equality the pivotal provision is Art 6 CDHRI. (*Rights of Women*). In its lit a) it stipulates: *'Women and men have equal human dignity, rights and responsibilities as prescribed by applicable laws. Every woman has her own legal status and financial independence, and the right to retain her maiden name and lineage.'*<sup>95</sup> Lit b), not as a subjective right, but as (weaker) state obligation, commits states to take all necessary legislative and administrative measures to eliminate 'difficulties' that impede the empowerment of women, in particular regarding access to quality education, healthcare, employment including equal remuneration for equal work, or their possibility to fully enjoy their human rights and fundamental freedoms. Though the intentions are again noble and can be seen as an

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<sup>93</sup> Ibid. The content of this article is not surprising and in a certain way represents some kind of progress compared to the *first* version of the declaration, which defined that all rights and freedoms were subject to the Islamic Sharia (Art 24 of the 1<sup>st</sup> version CDHRI) and that there would be no crime or punishment except as provided for in the Sharia (Art 19 of the 1<sup>st</sup> version).

<sup>94</sup> In this respect please see a fairly illustrative account by the historian *Littman* and the circumstances of discussing and debating human rights law with representatives of Muslim states: *Littman D.G.*, Human Rights and Human Wrongs, Sharia Can't be an Exception to International Human Rights Norms, article from 19 January 2003, see under <https://www.nationalreview.com/2003/01/human-rights-and-human-wrongs-david-g-littman/> (last retrieved on 20 July 2022). Also of value for this section is *Brems E.*, Islamic Declarations of Human Rights, *International Studies in Human Rights* (2001), Vol 66, Human Rights: Universality and Diversity, pp 241-284, with further references.

<sup>95</sup> See *supra* note 91 for access to the full version of the CDHRI.

effort to support women and girls, the realities in the Arab world, as will be shown in chapter V, are partly very different and substantially below any reasonable standards. The main flaw, however, is that both versions – the one from 1990 as well as the revised version of 2020 – are non-binding declarations only without any monitoring or reporting mechanism as to whether, and to which extent, member states of the OIC factually implement the provisions and hence take credible steps to improve the human rights situations in the respective countries.<sup>96</sup> Whether Muslim nations seized the chance to draft and implement a real and effective regional human rights instrument for the Arab world will be briefly assessed in the following chapter concerning the *Arab Charter on Human Rights*.

### **b) *The Arab Charter on Human Rights***

The *Arab Charter on Human Rights* is currently the only and most prominent regional human rights instrument in the Arab world. Similar to the CDHRI, it took two attempts in the end to get the Charter in effect. The Council of the LAS adopted the Charter on 22 May 2004, after reaching a sufficient number of ratifications (*i.e.* 7 ratifications) it entered into force on 15 March 2008.<sup>97</sup> The currently valid version of 2004 is built on an earlier text, initially adopted in 1994, but which failed to secure sufficient support to enter into effect.<sup>98</sup> As of today, 16 countries have signed the Charter and 14 have ratified it. These are: Jordan, Algeria, Bahrain, Libya, Syria, Palestine, the United Arab Emirates, Yemen, Qatar, Saudi Arabia, Lebanon, Sudan, Kuwait, and Iraq.<sup>99</sup>

It is rather surprising that several Arab nations which ratified various international conventions and protocols refrained from ratifying the Charter, including 5 Arab countries that have already ratified the 1<sup>st</sup> Optional Protocol of the ICCPR.<sup>100</sup> Among them are Tunisia (which the author considers to be a comparably open and advanced Arab country), Djibouti and Somalia. This is insofar remarkable as, as *El Demery* correctly points out, ‘*one has to conclude that, even though the Arab Charter is supposed to reflect the cultures and traditions of the Arab region, it was*

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<sup>96</sup> An interesting, illuminative document in this context is a joint written statement by several NGOs to the *Human Rights Council* dealing with the ‘*wide divergence*’ between the UDHR and the 1990 version of the CDHRI. See doc A/HRC/9/NGO/2 from 18 August 2008, see for example under the following website: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G08/151/47/PDF/G0815147.pdf?OpenElement> (last visited on 20 July 2022). Many of the issues raised thereunder still have relevance and apply to the 2020 rev version of the CDHRI. The document is also of relevance as it shows the involvement or – better – *non*-involvement of the ICJ (despite several attempts) and NGOs to improve the legal quality of the provisions of the CDHRI.

<sup>97</sup> See the full text of the *Arab Charter e.g.* under the site <http://hrlibrary.umn.edu/instreet/loas2005.html?msource=UNWDEC19001&tr=y&aid=3337655> (last visited on 24 July 2022).

<sup>98</sup> *De Schutter O.*, *International Human Rights Law, Cases, Materials, Commentary*, 3<sup>rd</sup> ed., Cambridge 2019, p 33.

<sup>99</sup> *El Demery A.M.*, *supra* note 41, p 138.

<sup>100</sup> *Ibid.*

*not ratified by many Arab countries.*<sup>101</sup> In other words, more than one third of the LAS member states have ignored or simply refused to ratify the Charter.

The Charter, in accordance with Art 45 ACHR, has established an *Arab Human Rights Committee*, however, its mandate as per Art 48 ACHR is comparably weak, especially in comparison to the HRC of the ICCPR for example. The *Arab Human Rights Committee* (consisting of seven members, elected in secret ballot for a 4-year term) shall examine reports of state parties, which shall be submitted periodically, shall discuss them, provide comments thereon, and shall make recommendations in accordance with the aims of the Charter.<sup>102</sup> After 4 years of receiving the sufficient number of ratifications upon adoption by the LAS, it took an additional 4 years upon entry into force of the Charter until the *Arab Human Rights Committee* started with the examination of the first country reports in 2012. Already at this early stage it needs to be stated that compared to other international and regional human rights instruments probably the biggest flaw of the Charter is its obvious lack of an individual complaint and accountability mechanism – for the author *the key criterion par excellence* when it comes to an effective, credible protection of human rights. Leaving the improvement of human rights conditions in the Arab world mainly to country-reports and related recommendations as well as (potential)<sup>103</sup> inter-state litigation concerning violations of the Charter as foreseen in the *Statute of the Arab Court of Human Rights* (see esp. Articles 16-27 of the Statute), cannot be the reasonable answer to the enormous number of human rights violations occurring in the region on a daily basis.

With respect to the actual content of the Charter and the question of religious freedom and gender equality, the Charter contains several provisions regarding religion and religious freedom as well as gender equality. In terms of religious freedom the Charter, however, starts with two very problematic phrases and clauses respectively. The preamble explicitly states that the Charter is *based on the faith of the Arab nation in the dignity of the human person whom God has exalted ever since the beginning of creation (...)*<sup>104</sup> The subsequent paragraph of the preamble again, *expressis verbis*, mentions *the noble Islamic religion*<sup>105</sup>, at least also

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<sup>101</sup> Ibid. This is also insofar interesting as regional charters often receive ratifications in a much swifter way than international instruments. *El Demery* mentions that for example all AU state parties have ratified the African Charter as well as all state parties to the European Council did as regards the ECHR.

<sup>102</sup> See *Rishmawi M.*, *The Arab Charter on Human Rights and the League of Arab States, An Update*, HRLR (2010), Vol 10, issue 1, pp 169-178.

<sup>103</sup> *Potential* as the Statute is not in legal effect yet as it is still missing the sufficient number of ratifications. See also *Almutawa A.*, *The Arab Court of Human Rights and the Enforcement of the Arab Charter on Human Rights*, HRLR (2021), Vol 21, No 3, pp 506-532, with further references.

<sup>104</sup> See the very first line of the Charter's preamble, see the original text at supra note 97.

<sup>105</sup> Ibid.

mentioning in the same line *'the other divinely revealed religions.'*<sup>106</sup> Apart from the fact that the author is convinced that a) no international or regional human rights instrument shall specifically mention or even elevate one specific religion (here again Islam), and that b) drafters of such human rights documents should avoid and abstain from incorporating a reference to a specific religion or religion at all (except, of course, for defining and substantiating the human right of religious freedom as was done *e.g.* with Art 9 ECHR, Art 8 ACHPR (*'Banjul Charter'*), or Art 18 ICCPR), it appears, for the very reasons and concerns already highlighted with the CDHRI, inadmissible to do so and renders a human rights instrument inconsistent, in itself contradictory, and – overall – implausible. The matter gets even more critical a few section further in the preamble of the Charter where *'racism and Zionism'* are equated, *both*, according to the Charter, constituting a human rights violation.<sup>107</sup> What is undoubtedly correct regarding racism, is plainly unacceptable for Zionism and has been widely criticized and rejected in the literature.<sup>108</sup> Art 2 para 3 ACHR repeats this equalization, going even further by determining that *'all such practices* (note: racism, Zionism, foreign occupation and domination) *must be condemned and efforts must be deployed for their elimination.'*<sup>109</sup> All articles of the ACHR dealing with religion and religious freedom – *i.e.* Art 4 para 1, Art 25, Art 30 (representing the core norm to secure the human right of religious freedom and, just like the CDHRI, using legal wording which very much resembles the ICCPR text of Art 18), Art 34 para 1 – should be read in the context of the above remarks and observations. What remains is apparently a rather *'unfortunate'* attempt in balancing religious freedom and Islam (the Shariah). In the eyes of the author, and against the background of a) the principle of universality of human rights and b) the principle of equality of *all* religions, this is to be considered an insufficient and therefore failed attempt in the Charter.

In terms of gender equality between women and men the main provision is Art 3 para 3 ACHR, which states: *'Men and women are equal in respect of human dignity, rights and obligations within the framework of the positive discrimination established in favour of women by the Islamic Shariah, other divine laws and by applicable laws and legal instruments. Accordingly, each State party pledges to take all the requisite measures to guarantee equal opportunities and effective equality between men and women in the enjoyment of all the rights set out in this*

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<sup>106</sup> Ibid.

<sup>107</sup> Ibid.

<sup>108</sup> See *e.g.* De Schutter O., op cit, p 33; Arbour L., statement from 30 January 2008, supra note 19; Hammami F., The Arab Charter on Human Rights, The Task Still Unfinished, European Inter-University Centre for Human Rights and Democratisation, Galway 2013, p 32.

<sup>109</sup> See the text of the ACHR, supra note 97.

*Charter*.<sup>110</sup> Art 43 ACHR, a very decisive norm in the Charter, determines: ‘*Nothing in this Charter may be construed or interpreted as impairing the rights and freedoms protected by the domestic laws of the States parties or those set forth in the international and regional human rights instruments which the States parties have adopted or ratified, including the rights of women, the rights of the child and the rights of persons belonging to minorities.*’<sup>111</sup> While both provisions contain expectable legal wording in terms of gender equality, both norms also (again) comprise problematic references to national/domestic laws and legal instruments of Arab states. One can agree with *Mattar* that the ‘*interpretation of the rights stipulated in the Charter should not be impaired by domestic laws that may restrict such rights.*’<sup>112</sup> Instead, he explains, ‘*the Charter, as a regional convention, should be read in accordance with the principles of international treaty interpretation.*’<sup>113</sup> His correct conclusion: ‘*(...) the Article 43 mandate requires a review of domestic legislation to ensure compatibility with the Charter as well as the incorporation of international law in domestic courts.*’<sup>114</sup> That women’s rights under the Charter get hampered and compromised by applying Sharia rules and other norms under (national) Islamic law is not merely a risk, but – as will be shown – a tragic fact often occurring in the Arab world. Hence, these references to national laws substantially reduce the legislative quality of this instrument.

### c) ***Statute of the Arab Court of Human Rights***

Though not containing *substantive* law but mostly *procedural* norms, the *Statute of the Arab Court of Human Rights* (in the following simply ‘*the Statute*’), with the Court (to be) based in Manama City, is nevertheless mentioned hereunder. It clearly is *not* a regional human rights framework, but may at some point become a human rights document of a certain importance in the future. As the Statute<sup>115</sup> – eight years after having been approved by the LAS<sup>116</sup> – still lacks the sufficient number of ratifications, it is completely unclear at the moment as to when (or whether at all) it will enter into force in the member states of the LAS. Currently, only Saudi Arabia has ratified the Statute in 2016, with one additional candidate showing interest (Bahrain). The Statute has been subject to considerable critique from the very beginning: One of the most profound criticism came from the ICJ. Its meanwhile famous assessment of the

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<sup>110</sup> See supra note 97.

<sup>111</sup> Ibid.

<sup>112</sup> See *Mattar M.Y.*, Article 43 of the Arab Charter on Human Rights, Reconciling National, Regional, and International Standards, HHRJ (2013), Vol 26, pp 91-147, with further references, p 91.

<sup>113</sup> Ibid.

<sup>114</sup> Ibid.

<sup>115</sup> See at [https://aci.hl.org/texts.htm?article\\_id=44&lang=ar-SA](https://aci.hl.org/texts.htm?article_id=44&lang=ar-SA) (last visited on 22 July 2022).

<sup>116</sup> The Statute received its approval by the LAS on 7 September 2014, Res 7790, *Ministerial Council*.

Statute<sup>117</sup> enlists numerous mistakes and failures. One is the lack of any transparency in the drafting process, which was executed without any consultation of external sources, international human rights experts, NGOs or other parties from the civil society sector. *‘Over the past three years, the entire process of the “reform” of the LAS human rights system, including the establishment of an Arab Court, has been conducted behind closed doors and through opaque procedures, thus contravening basic principles of inclusive participation and transparency. The identity of the members of the expert committee that drafted the statute and its mandate and methods of work were never publicized.(...) The LAS Secretariat and most of the LAS member states have refused to engage with civil society organizations, to consider any recommendations formulated by them with a view to amending the draft Statute, or to even answer their requests for meetings.’*<sup>118</sup> The conclusion of the lawyers of the ICJ: *‘As a result of this opaque process, the Statute of the Arab Court, (...), falls well short of regional and international human rights standards.’*<sup>119</sup> *‘The deficiencies are manifest, particularly those provisions relating to the Arab Court’s jurisdiction; the guarantees of the independence of the Arab Court including the independence of its judges; the admissibility of cases; and access to the court for victims of human rights violations.’*<sup>120</sup> The international experts in Geneva rightly criticize that *‘by denying individual victims the right to have direct recourse to the Court, the Statute defeats the very purpose and raison d’être of a regional human rights court.’*<sup>121</sup> Other voices in the literature share these grave concerns.<sup>122</sup>

It is obvious that the Statute will need corrections and amendments. To which extent the involvement of international, independent human rights experts and NGO representatives will be allowed remains to be seen. In the meantime even the LAS itself has conceded some ‘suboptimal’ issues in the creation and drafting of the Statute, its content as well as the seat of

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<sup>117</sup> *International Commission of Jurists*, *The Arab Court of Human Rights, A Flawed Statute for an Ineffective Court*, Geneva 2015, pp 5 et seq.

<sup>118</sup> *Ibid.*

<sup>119</sup> *Ibid.*

<sup>120</sup> *Ibid.*

<sup>121</sup> ICJ, *supra* note 117, p 6.

<sup>122</sup> See e.g. *Magliveras K./Naldi G.*, *The Arab Court of Human Rights: A Study in Impotence*, *Revue Québécoise de Droit International* (2016), Vol 29 (2), pp 147-172, with further references, esp pp 157, 158-166 and 170-172; *Daly T.G.*, *Repression in Bahrain: The End of Any Hope for an Effective Arab Court of Human Rights?*, published as blog under the website <http://www.icconnectblog.com/2016/07/repression-in-bahrain-the-end-of-any-hope-for-an-effective-arab-court-of-human-rights/> (last retrieved on 21 July 2022); *Richardson L.*, *The Regionalization of Human Rights: A Critical Analysis of the Arab Court of Human Rights*, Princeton 2018. A different view comes from Almutawa, who shares certain concerns, but believes it is better to have a court than no court at all, and that a gradual development of the Statute would be the better choice, see *Almutawa A.*, *supra* note 103; similar *El Demery A.M.*, *supra* note 41, pp 393-443 and 453-454, with further references.

the Statute.<sup>123</sup> Also the *National Institution for Human Rights* in Bahrain in the *Bahrain Declaration* from 2014, issued by the *International Conference of Arab Court for Human Rights*, recommended to 'actively seek to develop the ACHR Statute in the light of successful experiences of regional human rights courts as well as other international courts, including the judiciary system.'<sup>124</sup> This was eight years ago. At the moment one can only hope that the LAS will further open up to walk the talk. Otherwise the ICJ's warnings will become reality: 'The Statute of the Arab Court of Human Rights, as adopted, will not be able to meaningfully address these deficiencies or protect rights.'<sup>125</sup> However, there can be no doubt that the Arab world needs a strong, independent, effective human rights court operating on the basis of a state-of-the-art statute in accordance with international law to which victims of human rights violations can turn to and fight for their rights and freedoms.

## 5. The Role of Arab National Criminal Law Systems

An analysis of the human rights situation in a given state in terms of legislation would remain incomplete when focusing on international and regional human rights frameworks and instruments only. Both the CDHRI as well as the Charter, the latter to be considered as *the* regional human rights instrument in the Arab world, refer to national/domestic legislations and/or to principles of Islam. The CDHRI does so in its preamble and in various articles, most clearly and explicitly in Art 25 (in both subparagraphs), and the Charter continues this practice in its Art 43. 'National' or 'domestic' legislation are of course relatively broad references and in the end can mean *all* applicable binding norms regarding a specific matter within the borders of a member state of the LAS. A reference to 'the principles of Islam' goes even beyond that. With respect to human rights the two main legal areas of relevance are national *constitutional* laws and national *criminal* laws. Both bear certain ambiguities. While constitutional laws (not only in the member states of the LAS, but globally) contain provisions that warrant fundamental rights and freedoms for their citizens such as liberty, human dignity, voting rights, or human rights in general, constitutions of almost all LAS member states<sup>126</sup> at the same time also very explicitly stipulate that Islam is the official state religion and Sharia the basis for the nation's

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<sup>123</sup> *League of Arab States*, Human Rights Standards and Mechanisms, Towards Further Civil Society Engagement: A Manual for Practitioners, publ. by the *Open Society Foundations* (Arab Regional Office) and the *Cairo Institute for Human Rights Studies*, Cairo 2015, pp 53 et seq.

<sup>124</sup> See the file under <https://www.nihr.org.bh/EN/MediaHandler/GenericHandler/pdf/HR/ArabCourt/Bahrain%20Declaration.pdf> (last check on 22 July 2022).

<sup>125</sup> ICJ, *supra* note 117, p 5.

<sup>126</sup> This applies *e.g.* for the constitutions of Algeria, Bahrain, the Comoros, Djibouti, Egypt, Iraq, Jordan, Kuwait, Morocco, Oman, Palestine, Saudi Arabia, Somalia, Tunisia, the UAE, etc.



legislation<sup>127</sup> – the latter area being a sphere, which ideally should remain free from any specific religious aspect or element or, if at all, should encompass – in line with human rights principles – the cachet of religious neutrality. From a human rights perspective even more ambiguous and critical are the respective national criminal law systems. On the one hand, very similar to other national criminal law systems all over the world, the Arab national criminal laws guarantee general principles of criminal law – the principles of legality (non-retroactivity, *nullum crimen sine lege, nulla poena sine lege*), the presumption of innocence, equality before the law, individual criminal responsibility, and so forth –, on the other hand all these national criminal laws, having the Sharia and Islamic law as their common foundation and source, comprise crimes and forms of punishments which in many parts of the world are considered cruel, inhumane, medieval, or outright horrifying and therefore unacceptable. In other words, as will be shown also in chapter VI, the *application* of norms and – since based on Sharia – of certain rules of interpretation of these norms and customs poses a major challenge for human rights lawyers in the region as well as internationally. It seems worth mentioning in this context though that the emergence of IHRL after 1945 had its impact on national criminal laws in the Middle East and North Africa. Several relevant IHRL instruments, which entered into force since then, comprised provisions that protected the rights of accused individuals and enhanced victim rights. Many states in the Arab world acceded and ratified those international treaties and turned IHRL into binding law within the respective national legal spheres. *'The new international regime for the protection of human rights has therefore influenced and transformed criminal justice systems in almost all Muslim states, including those that profess to apply the shari'a only.'*<sup>128</sup>

In regard to crimes and punishments in national criminal law systems in the Arab world the situation can be described as follows: Unlike for example European countries where every single state has its own codified set of legally binding criminal norms (usually a penal or criminal code), Arab states in the meantime also do have secular criminal codes, however these criminal codes mostly do rely on the various sources of Sharia and Islamic law: The said primary sources of Sharia, *i.e.* the Quran and the Sunnah, and, complementary, Islamic jurisprudence through *fiqh* and – to be distinguished therefrom – *usul al-fiqh*, *i.e.* the principles of religious science and accepted methodologies by which to interpret the law and to attempt to

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<sup>127</sup> Sharia and Islamic law forming the basis for all national legislation is the case in *e.g.* Iraq, Kuwait, Libya, Oman and Qatar.

<sup>128</sup> See *Bassiouni M.C.*, supra note 34, pp 123, 124, with further references.

`understand the divine will.'<sup>129</sup> This variety of sources is one major difference to criminal law concepts which can be observed globally outside the Arab world, and `frequently multiple sources of law must be combined to complete the definition of a given crime, arrive at its elements or establish its evidentiary requirements.'<sup>130</sup> Bassiouni concedes: `The Sunni and Shi'a jurisprudential schools all give different interpretations as to the exact elements required for crimes in each of these three categories (note: i.e. the three categories of crimes which the Sharia knows, see in the following). This makes the study of these crimes complex and sometimes quite difficult.'<sup>131</sup> Any social behaviour in the Arab world, which is considered inadequate or deviating, falls into one of three categories of crimes the Sharia foresees: *hudud*, *quisas* and *tazir*.<sup>132</sup> These categories of crimes are decisive in terms of substantial criminal law, criminal procedure, rules regarding evidence, as well as certain aspects relating to criminal justice administration, such as, but not limited to, the role of judges, their qualifications, the selection process and the mode of their appointment. *Hudud* (meaning limits) crimes are those crimes which the Quran mentions explicitly. Due to their source, these crimes are considered `crimes against God, as well as against God's established legal and social orders, and both the penal action and the penalty are deemed mandatory, even when the content of the action or penalty is discretionary.'<sup>133</sup> Given the seriousness of hudud crimes, there is consensus that specific evidentiary elements need to be fulfilled, and there must be a clear prove for the commission of a *hadd* crime (`hadd', singular of hudud) that leaves no doubt that the crime actually happened. As regards the precise number of hudud crimes Muslim scholars disagree as to whether there are 5, 6 or even 7 hudud crimes. The five universally accepted ones today are: *hirabah* (highway robbery), *zina* (adultery, fornication), *sariqa* (stealing, theft), *shrub al-khamr* (consumption of alcohol), and, eventually, *qadhif* (defamation of a person's chastity). For two crimes not explicitly mentioned in the Quran, i.e. *ridda* (renunciation of one's belief in Islam) and *baghi* (armed rebellion or uprising), Muslim scholars do not find agreement as to whether they represent hudud crimes. For each of these 7 crimes very specific rules of evidence apply, and also the forms of punishment differ.

One of the reasons why hudud crimes cause considerable debate and criticism outside the Arab world is the application of partly very harsh forms of punishment: While the punishment for

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<sup>129</sup> Esposito J.L., supra note 54, p 87.

<sup>130</sup> Bassiouni M.C., supra note 34, p 132.

<sup>131</sup> Ibid.

<sup>132</sup> In Islam, another category called *diyya* is likewise often mentioned, meaning compensation or blood money, however it does not appear to be a category of crime in a strict sense, but more a specific form of *punishment* (i.e. compensation). The *diyya* is encouraged by the Quran in place of retribution.

<sup>133</sup> Bassiouni M.C., supra note 34, p 133.

*hirabah* is considered mandatory, the range of how to carry out sentences is broad: death by beheading, crucifixion, cutting off a hand or a foot, imprisonment, and exile. The punishment for *sariqa* is cutting off the hand of the perpetrator. *Qadhaf* and *shrub al-khamr* both get punished through lashing. The punishment for *zina* depends on whether the adulterer was married or not. A married adulterer is to be stoned to death while an unmarried one gets away with lashing. One of the many concerns regarding the punishment of stoning linked to *zina* is that it was (and still is) repeatedly executed in Arab countries where stoning, a form of punishment *not* foreseen in the Quran but unfortunately introduced through *fiqh* as *hadd* punishment on the basis of a *hadith*, is *not* legally prescribed (e.g. in Iraq) but nonetheless executed in form of extra-judicial stonings (as a sort of vigilante or self-administered justice) by infuriated mobs. Remarkable side note: The punishment for *zina* is also insofar interesting in the context of this thesis and the question of equality of women and men as mostly *women* get stoned in the Arab world, men less often.<sup>134</sup> Regardless of the sex, the author *in any event* hopes that the punishment of stoning will hopefully soon one day disappear completely – the sooner, the better.

With respect to the ‘crime’ of *ridda* there is, according to *Bassiouni*, ‘*ample support that ridda, or the change of religious faith, is not a hadd crime in itself. The evidence instead shows that the actual crime is renouncing Islam coupled with active combat or warfare against Islam.*’<sup>135</sup> The conclusion: ‘*This makes ridda the equivalent to high treason and not apostasy, which nearly every legal system in the world criminalizes, and many punish with the death penalty.*’<sup>136</sup>

In terms of the other two categories of crimes, *quisas* and *tazir*, they shall be only briefly mentioned here as they are of limited significance for the topic hereunder: Crimes falling under *quisas* (literally meaning equivalence) focus on the retaliation aspect. *Quisas* crimes are murder, voluntary and involuntary killing, intentional physical injury or maiming as well as unintentional physical injury. *Tazir* on the other hand means ‘to correct’ or ‘to chastise’. *Tazir* crimes are characterized by partly far-reaching (absolute) discretionary powers of the respective rulers or judges and hence are in grave conflict with the principles of legality and criminal responsibility.<sup>137</sup>

National criminal laws in the member states of the LAS can, and do, have a significant impact on the human rights of individuals, also and especially with respect to the freedom of religion

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<sup>134</sup> See the article of *Batha E.* from 29 September 2013, Thomson Reuters Foundation, London, to be read under <https://news.trust.org/item/20130927165059-w9g0j> (last visited on 22 July 2022). See also *Alasti S.*, Comparative Study of Stoning Punishment in the Religions of Islam and Judaism, JPJ (2007), Vol 4, No 1, pp 4-38.

<sup>135</sup> *Bassiouni M.C.*, supra note 34, 136, with further references.

<sup>136</sup> *Ibid.*

<sup>137</sup> In this respect very critical with good reasons *Bassiouni M.C.*, supra note 34, at pp 143 et seq.

and the equality of genders. Since written and unwritten laws of Sharia and Islamic law do vary from country to country and from religious school to religious school (between Sunni and Shia schools but also amongst scholars within one of these two branches of Islam), certain criminal laws – in particular when interpreted by conservative Muslim scholars or jurists – may lead to criminal sentences that run counter to regional and international human rights laws and standards.<sup>138</sup> This gets specifically problematic where LAS member states on the one hand have ratified IHR treaties and thus have incorporated globally accepted human rights norms into their national bodies of law, and on the other hand, in parallel, apply provisions and rules of interpretation which cannot be brought in line with or reconciled reasonably with those international human rights instruments. This poses a major challenge, and this won't get resolved quickly on the respective national levels as the issue goes beyond changing, adapting and modernizing criminal laws. It means changing mindsets, traditions, and mentalities.

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<sup>138</sup> See more details to this specific point in chapter VI.

### III. Free Will as Basis for Individual Self-Determination

After having taken a closer look at the international and regional human rights norms in the context of religious freedom and gender equality, it seems worthwhile now to briefly analyze a key element related to these two essential human rights as this element lies at their very heart: The unrestricted exercise of *free will* as a sort of *conditio sine qua non* of the two said rights.

The concept or notion of 'free will'<sup>139</sup> is very old and can be traced back to ancient Greek philosophy and the thoughts and writings of *Aristotle* and *Epictetus*. Beyond academic debates and literature regarding free will and determinism (and indeterminism), (in)compatibilism, moral responsibility, libertarian perspectives, or *e.g.* experimental philosophy, this section does not deal with free will in a historic, psychological or philosophical context.

This chapter rather aims at asking whether, and how, a free will can unfold and blossom without limitation or restriction in a particular social and cultural environment that has been shaped and biased over decades and centuries by religious norms and related cultural traditions and rites (*i.e.* Muslim-majority countries), which are reflected in a whole region's laws and social norms (*i.e.* Sharia and Islamic law), and which have been interpreted and developed over very long periods of time by (religious) teachers, scholars and jurists (*i.e.* since the 8<sup>th</sup> and 9<sup>th</sup> century CE in Sunni and Shia schools of thought (*madhhab*) by their respective *ulama*).<sup>140</sup>

In other words, while the definition of 'free will' as mentioned in the introduction<sup>141</sup> is to be understood in a broad sense in this thesis, the question hereunder is not whether free will as material quintessence and element for many key human rights such as '*freedom of expression*', '*freedom of religion and belief*', '*right to liberty of movement*' or '*freedom of association*' exists in the Arab world and is applicable in the member states of the LAS (through national, regional and international norms), but whether, and to which extent, living or expressing a free will is actually *de facto* possible and, in case violated, subsequently *defendable* and *enforceable* in the region, especially when articulating one's free will in the form of an opinion, attitude or view not only in a private setting (family, friends, etc), but in the public sphere, for example on a public square or in front of a group of people during a larger discussion or public debate.

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<sup>139</sup> A good overview can be found in *Kane R.* (ed.), *The Oxford Handbook of Free Will*, 2<sup>nd</sup> ed., Oxford 2011.

<sup>140</sup> The term *ulama* refers to scholars and interpreters of religious knowledge in Islam, including Islamic doctrine and law. See also under *Esposito J.L.*, *supra* note 54, p 325.

<sup>141</sup> Please see chapter I.

If free will means *'the ability to decide what to do independently of any outside influence'*<sup>142</sup> – regardless in which matter (choice of secondary and tertiary education, personal relationships, sexual orientation, religion, attitude towards life and personal philosophy, job, important economic decisions, etc) – how can that free will really evolve in the Arab world in a specific social or sociological setting being characterized and yet tending towards patriarchal structures, male dominance, and predominantly conservative societal ideas? How can for example a young female adult in/from a conservative Muslim family unfold her free will by choosing, for instance, to live an atheist life and talk about it openly within her family, sharing critical views about religion with friends, at her workplace, or elsewhere in public? And could she, when getting in (legal) trouble as a consequence of her actions or statements, enforce her will and religious freedom in a reasonable and effective manner? What's at stake here is not only her legal and judicial options under the ICCPR if the respective LAS member state has ratified the ICCPR. As mentioned, the ACHR does not grant any individual complaint mechanism. The problem is beyond the legal domain and reaches deeply into the social sphere and cultural contexts. If an individual is granted certain legal rights by which she or he can express her or his free will but the actual execution of that free decision is seriously stunted by various forms of social ostracism, which are rooted in long-lasting religious, cultural and moral traditions and perceptions, does this society indeed allow that individual to implement his or her free will? Can a decision be really free under such circumstances, independent *'of any outside influence'*? To be clear: Every decision of a human being is subject to an external cause and may lead to unpleasant reactions – everywhere in the world. It is argued, however, that expressing a free will in the Arab world in the context of religion, belief or the freedom of expression (related to a specific, sensitive religious topic) for example, by realizing the corresponding human rights *'freedom of religion'* and *'freedom of expression'*, may result in negative legal and social, *i.e. extra-legal*, consequences, which elsewhere in the world would not be as drastic, minatory or daunting.

The alleged *'crime'* of apostasy is a good example in this respect. *An-Na'im* shows in analyzing a former apostasy case from Sudan that conservative Muslims (may) justify the law of apostasy, *inter alia*, on the grounds that apostasy represents a form of high treason and shall therefore be punished accordingly. Conservative voices maintain *'that Islam is not only a religion, but also a social and political order. An apostate repudiates the very basis of this society, and ceases to*

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<sup>142</sup> See *e.g.* the definition in the *Cambridge Dictionary* under <https://dictionary.cambridge.org/dictionary/english/free-will> (last retrieved on 23 July 2022). The author uses this fairly simple and straightforward definition of free will for the purposes of his argument/concern in this chapter.

*hold allegiance to it. (...) According to this argument, an apostate is killed in order to protect the Islamic polity, an extreme preventive measure.*<sup>143</sup> This report is insofar interesting as it illustrates well that conservative Muslims, or those having a very traditional understanding of Sharia, may interpret the expression of a free will – for instance the will to express a specific, personally important opinion about Islam or Sharia like that Sudanese Muslim reformer did – as an attack not only against ‘their’ religion, but also as an attack against their whole social order or the state as such, and this shall justify an execution. Though *An-Na’im*’s account is a relatively appalling one, extreme social and legal responses to specific forms of behavior based on Sharia law are no exception.<sup>144</sup> A kind of behavior which is nothing else than an individual’s expression of his or her personal opinion about Islam or a specific aspect of that religion, his or her way of living or loving (the key- or headword homosexuality comes to mind<sup>145</sup>) – simply a common expression of that person’s free will.<sup>146</sup>

This chapter ends similarly like the preceding one: An adaptation of Arab (criminal) laws based on Sharia and its interpretations won’t suffice. Improving the situation of human rights and raising tolerance for ‘the different’, ‘the deviate’, among conservative-minded Muslims in Arab countries will obviously require a more comprehensive approach by national governments of LAS member states. This is also insofar of decisive importance as it is never the law alone that forms and shapes the behaviour of social groups, but legal and social cultures and traditions, in which laws are embedded. As this chapter has tried to outline, these legal and social cultures in the Arab world lead to a situation in which the free will of individuals is under a constant and extraordinary pressure – in regard to gender equality and religious freedom, but also with respect to many other basic human rights.

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<sup>143</sup> See *An-Na’im A.*, *The Islamic Law of Apostasy and its Modern Applicability: A Case from The Sudan*, in: *Islam and Human Rights, Selected Essays of Abdullahi An-Na’im*, *Collected Essays in Law*, ed. by *Baderin M.A.*, London & New York 2010, pp 219-246, pp 235 et seq.

<sup>144</sup> See in particular chapter V.

<sup>145</sup> It shall be emphasized at this point that homosexuality and its highly problematic perception in society is not an Arab phenomenon only and also doesn’t form part of this thesis. A discrimination of homosexuals can also be observed in several other parts of the world, e.g. in Russia, in various CIS countries as well as in parts of Asia.

<sup>146</sup> Interesting and worth reading in this context is e.g. *Searle J.R.*, *Freedom and Neurobiology, Reflections on Free Will, Language, and Political Power*, New York 2004, esp pp 37 et seq.; free will as an illusion in the book of witty *Harris S.*, *Free Will*, New York 2012, see pp 1 et seq.; *Maoz U./Sinnott-Armstrong Walter* (ed.), *Free Will, Philosophers and Neuroscientists in Conversation*, Oxford 2022, pp 41 et seq, pp 65 et seq and pp 119 et seq.

## IV. Status Quo in Arab Legal Sources – Analyzing Selected Laws

### 1. Freedom of Religion

While international and – with certain deductions – regional Arab HRL, as has been shown in chapter II above, provide legal frameworks on how a just society should ideally look like, national Arab laws, again ideally, should follow those frameworks and aim at bringing Arab societies closer to those international human rights standards. It is thus important and necessary to assess whether, and to which extent, national legislators actually manage to reach those standards, and to see where they fail. The purpose of the following pages therefore is to carry out such assessment and to identify weaknesses in national laws regarding religious freedom and gender equality.

The right to freedom of religion as well as religious pluralism actually have a very long tradition in Islam and the Muslim world. Since the days of the *Constitution of Medina*<sup>147</sup> in the 7<sup>th</sup> century CE declared by the (later) Prophet Mohammed (actually *Muhammad ibn Abdullah*) and already containing various rights for Non-Muslims including, explicitly, ‘*autonomy and religious freedom*’<sup>148</sup>, to the times of the first Islamic *Caliphate* (the *Rashidun Caliphate*, later followed by the *Umayyad Caliphate* and the *Abbasid Caliphate*), religious freedom was largely granted.<sup>149</sup>

An important term in this historic regard is *dhimmi*, literally meaning ‘protected person’. It referred to an obligation under the Sharia for Islamic states to protect a Non-Muslim individual’s life, property as well as religious freedom, in exchange for showing loyalty to the state and for paying a specific tax, the so-called *jizya*.<sup>150151</sup> The overwhelming majority of moderate Muslims rejected (and reject) the *dhimmi* system as representing an outdated and inappropriate model in the age of modern nation-states and democracies.<sup>152</sup>

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<sup>147</sup> See *Lecker M.*, *The Constitution of Medina: Muhammad’s First Legal Document*, Studies in Late Antiquity and Early Islam, Kent 2005.

<sup>148</sup> The translated article of the Medina Charter actually says: ‘*Non-Muslim members have the same political and cultural rights as Muslims. They have autonomy and freedom of religion.*’ See in *Barakat A.*, *Muhammad and the Jews*, a Re-Examination, New Delhi 1979, pp 46 et seq.

<sup>149</sup> See e.g. *Haarmann U./Gronke M.*, *Geschichte der Arabischen Welt*, Munich 2004, 5th ed.; *Armstrong K.*, *Islam: A Short History*, London 2011.

<sup>150</sup> See *Glenn H.P.*, *Legal Traditions of the World, Sustainable Diversity in Law*, 5<sup>th</sup> ed., Oxford 2014, pp 180-235, esp pp 219 et seq, with further references.

<sup>151</sup> Historically, the status of a *dhimmi* was first granted to Jews, Christians and Sabians (also Sabaeans) being considered as ‘*People of the Book(s)*’, an important factor in Islamic theology at that time. Later, this concept was also applied to Zoroastrians, Hindus, Sikhs and Buddhists. Today, the term is mostly considered obsolete. See also *Esposito J.L.*, supra note 54, p 68.

<sup>152</sup> See *Abou El Fadl K.*, *The Great Theft, Wrestling Islam from the Extremists*, New York 2005, at p 214, see also pp 180 et seq and pp 250 et seq., the latter esp regarding the role of women.



Today, looking at constitutional and criminal laws being in force in LAS member states<sup>153</sup>, esp focusing on a) the freedom of religion and b) any related 'crimes' (in particular apostasy and blasphemy), the situation is fairly complex, partly due to the already mentioned situation regarding sources, forms of interpretation in the context of *fiqh*, and application practices. Given the number of LAS member states (22), the following observations concerning selected laws will mostly focus on three member states of the LAS<sup>154</sup>, i.e. 1) *Saudi Arabia* (for being in terms of military and political power one of the biggest and most influential nations within the LAS, and, with Mecca and Medina as the two holiest cities of Islam within its borders, also being considered the home and, historically correct, the birthplace of Islam); 2) *Egypt* (as a representative from a large North African, Muslim-controlled nation); and 3) *Iraq* (for its population being mostly Shia Muslims, which is an exception within the LAS).<sup>155 156</sup>

The subsequent evaluation takes a brief look at applicable national constitutional provisions and criminal norms. In terms of crimes or other socially abnormal forms of misconduct – the author will mainly zero in on: a) *kufir* (a sort of umbrella term meaning disbelief in a broader sense, in essence refusing the faith in God/Allah, the denial of the prophecy of Mohammed, and of the Quran as God's revelation) and, related thereto, *jahiliyyah* (ignorance) and *shirk* (idolatry); b) *ridda(h)* or *irtidad* (apostasy); and c) *ilhad*, *mulhid* or *zandaqah* (heresy) as well as *sabb* (insult), *shath* (abuse or vilification), *takdhib* or *tajdif* (denial), *iftira* (concoction), *la'n* or *la'ana* (cursing), and *ta'n* (accuse, defame), the latter seven all representing subcategories of blasphemy.<sup>157</sup> The boundaries between some of these terms, for example between heresy and blasphemy, are not always strict or clear, and some terms also do overlap at times (e.g. *apostasy* and (forms of) *blasphemy*). They are mentioned to illustrate the variety of denominations in Islam. While some forms of 'irregular' behaviour may result in very harsh legal consequences in one LAS country, a judge in another state of the Arab League might be more willing to show clemency, depending on the applicable penal code, the branch of Islam in that country, or which school of Islamic thought prevails there.

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<sup>153</sup> The following section will deal with national laws only as the relevant international and regional human rights provisions regarding religious freedom and gender equality have been analyzed already. See chapter II 3. and 4.

<sup>154</sup> An analysis of the constitutions and criminal laws of *all* 22 nations would undoubtedly break the mold of this thesis. Hence, this chapter as well as chapter IV 2. focus on selected relevant bills/laws only.

<sup>155</sup> The only other LAS member state having a considerable Shia Muslim population (about 65-70%) is Bahrain.

<sup>156</sup> The laws of these three countries will also form the basis for an assessment of the respective provisions in terms of gender equality. See in the following chapter IV 2.

<sup>157</sup> See the terms and further information on these *inter alia* in *Esposito J.L.*, supra note 54; *Netton I.R.*, *A Popular Dictionary of Islam*, London & New York 1997, rev ed; *Nanji A.*, *The Penguin Dictionary of Islam, The Definitive Guide to Understanding the Muslim World*, London 2008.

## Saudi Arabia

Relevant constitutional provisions: With respect to freedom of religion or any related rights of minorities in this regard, the current Saudi constitution (the *Basic Law* being in force since 1992, with a few amendments/revisions) does not help. While the text of the constitution makes countless references to Islam, the Sharia and Islamic law (like in the CDHRI), other religions, freedom of religion as such, or any indication towards religious pluralism are not mentioned with a single word in its 83 articles.<sup>158</sup> Apparently, this subject is of limited relevance to the Saudi government. In combination with the fact that Saudi Arabia is one of the few nations worldwide that has *not* ratified the ICCPR, the notion of religious freedom in a constitutional context will obviously not materialize any time soon. In sum, the Saudi constitution is in conflict with several principles of IHRL (not only in regard to religious pluralism) and requires extensive reform.

Applicable criminal law: Saudi Arabia does not have a criminal or penal code. Criminal law and its application are based on the aforesaid sources of the Sharia which leads to numerous problems and challenges. More or less all of the crimes or forms of misconduct stated above have no clearly defined legal point of reference and hence cannot be attributed to specifically codified norms with *adequate, coherent and modern* provisions regarding *elements of crimes, evidentiary rules, and an individual criminal responsibility*. Since decades and centuries, criminal law in Saudi Arabia gets interpreted and applied in various ways, and the forms of executions of sentences can be based ranging from traditional tribal rules a judge may be willing to follow through his discretionary powers to a completely different application in another part of the country. This is also possible because judges are *not* bound to follow previous court rulings, *and there is, according to Human Rights Watch, little evidence that judges seek consistency in convicting or sentencing for similar crimes.*<sup>159</sup> This creates numerous legal uncertainties for and questions among the population. There is repeated critique that the criminal justice system in Saudi Arabia is based on a harsh, traditional and literal interpretation and application of Sharia law, with many clerics permitting inadequate forms of punishments, while other Islamic scholars consider those a breach of Sharia law standards.

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<sup>158</sup> See the text of the Basic Law of Saudi Arabia e.g. on the website [https://www.constituteproject.org/constitution/Saudi\\_Arabia\\_2013.pdf?lang=en](https://www.constituteproject.org/constitution/Saudi_Arabia_2013.pdf?lang=en) (last retrieved on 25 July 2022) of the *Constitute* project.

<sup>159</sup> See *Human Rights Watch*, Saudi Arabia: Forthcoming Penal Code Should Protect Rights, Key Recommendations for Meaningful Reform, 29 April 2022, under <https://www.hrw.org/news/2022/04/29/saudi-arabia-forthcoming-penal-code-should-protect-rights> (last visited on 25 July 2022).

This challenging situation might change though. In February 2021, Saudi authorities informed of a criminal justice reform being worked on, which would include the establishment of a first Saudi criminal code in 2022, however for discretionary crimes only (*i.e.* crimes whose punishments are not detailed in the Sharia). The hope among local and international lawyers is that this new penal code will – to the largest extent possible – observe and adhere to international human rights standards. One of the main objectives of that new code must be that it contains clear provisions and definitions as to which behavior exactly represents a punishable ‘crime’. The new *‘penal code should not codify existing arbitrary charges as wide-ranging, catchall offenses that criminalize the rights to freedom of expression, association, and assembly, among other rights.’*<sup>160</sup> Whether and when exactly this new criminal code will be drafted and proposed by the *Shura Council*<sup>161</sup> to the King and his cabinet remains to be seen. Hopes are clouded though. *‘To be fair, independent and effective, Saudi Arabia’s justice system is in dire need of a transformational change, but the repressive climate in which new laws are drafted don’t inspire confidence.’*<sup>162</sup> The main concern: *‘The fear is that Saudi Arabia will codify abusive practices that have developed in the decades-long absence of a written penal code.’*<sup>163</sup>

## **Egypt**

Relevant constitutional provisions: Religious freedom or the freedom of belief in Egypt, at least in theory and on the constitutional level, is quite different from its neighbors on the other side of the Red Sea. Not only does the Egyptian constitution of 2014 represent a more complex (254 articles), advanced and modern version or model compared to the Basic Law of Saudi Arabia, it also contains very explicit provisions regarding the freedom of belief and – closely related – the freedom of expression.<sup>164</sup>

Art 64 EC (*‘Freedom of belief’*) states: *‘Freedom of belief is absolute. The freedom of practicing religious rituals and establishing places of worship for the followers of the revealed religions is a right organized by law.’* And Art 65 EC (*‘Freedom of thought’*), subsequently, stipulates: *‘Freedom of thought and opinion is guaranteed. All individuals have the right to express their*

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<sup>160</sup> Ibid.

<sup>161</sup> The *Shura Council* or, also, the *Consultative Assembly of Saudi Arabia*, is an advisory body of 150 members to the government and proposes laws and other regulations to the King of Saudi Arabia. Thus, it has a legislative function.

<sup>162</sup> See *Page M.*, deputy director Middle East of *Human Rights Watch*, *supra* note 159.

<sup>163</sup> Ibid.

<sup>164</sup> See the full text of the Egyptian constitution under [https://www.constituteproject.org/constitution/Egypt\\_2014.pdf](https://www.constituteproject.org/constitution/Egypt_2014.pdf) (last retrieved on 25 July 2022).

*opinion through speech, writing, imagery, or any other means of expression and publication.*' As will be shown though in the next chapter V, the realities on the ground for example for Coptic Christians or esp the Shia communities are very different from the described constitutional claim and are characterized by repeated discrimination, attacks<sup>165</sup> as well as interventions of the government. Another issue is the government's exclusive benign view at the three Abrahamic (Islam, Judaism, Christianity) religions (as evidenced by a ruling of Egypt's *Supreme Administrative Court* in 2006), while effectively ignoring and delegitimizing all others (such as the *Baha'i* faith, *Ahmadiyya Islam*, *Hindus*, etc), which obviously conflicts with standards of IHRL and the principle of equality of religions (religious neutrality).

Egypt has ratified the ICCPR, ICESCR, CEDAW, ICERD and the CRC, some of those with far-reaching reservations.<sup>166</sup> According to Art 151 para 1 EC, international treaties '*shall acquire the force of law upon promulgation in accordance with the provisions of the Constitution.*'<sup>167</sup> While the EC can be considered one of the more sophisticated versions of a constitution in the Middle East, its broad reference to Sharia in Art 2 2<sup>nd</sup> sentence EC ('*The principles of Islamic Sharia are the principle source of legislation.*'<sup>168</sup>) poses a precarious limitation and a questionable reference to a largely dysfunctional and incoherent legal system.

Applicable criminal law: Egypt does have a criminal code.<sup>169</sup> The Egyptian *Penal Code* (EPC) from 1937 is the main source of criminal law in Egypt, accompanied by a *Code of Criminal Procedure* and various decrees and regulations.<sup>170</sup> Relatively 'comprehensible' norms in the EPC dealing with '*misdemeanors connected with religions*' (Part 11 of Book No.2) are Art 160 EPC (covering the perturbing of sacred rituals and ceremonies, but also the ravaging, breaking or destroying of the sanctity of religious buildings, as well as the violation of the sanctity of graves, cemeteries) and Art 161 EPC (printing/publishing books which are considered holy and are amended in a way which pervert the meaning of these holy books). Already more critical is Art 176 EPC: '*Whoever incites, by any of the foregoing methods* (note: overthrowing the rules in Egypt, trying to change prevailing doctrines and the constitution, assisting financially to commit such crimes, etc), *to hate or deride a sect of people, if such incitement is liable to*

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<sup>165</sup> One such attack occurred in January 2003, known as the *Kosheh Attacks* or *Massacres*, in which 21 Coptic Christians were massacred in the village *el-Kosheh* in Upper Egypt, about 450 km south of Cairo.

<sup>166</sup> See in detail in chapter VI 3.

<sup>167</sup> See supra note 164, p 30.

<sup>168</sup> See supra note 164, p 6.

<sup>169</sup> See e.g. *Reza S.*, Egypt, in: *Heller K.J./Dubber M.D.* (ed.), *The Handbook of Comparative Criminal Law*, Stanford 2011, pp 179-208, with further references and case law.

<sup>170</sup> See *Reza S.*, supra note 169, p 203.

*perturb public peace, shall be punished with detention.*<sup>171</sup> Such provisions are not unusual in LAS member states. They contain vague definitions and are often hardly compatible with e.g. the freedom of expression. For critical minds in Egypt publicly making sarcastic, ironic or other provocative remarks, Art 176 can quickly turn into a trap. The same is (even more) true when analyzing Art 98 lit f) EPC, considered one of Egypt's main blasphemy laws: *'Detention for a period of not less than six months and not exceeding five years, or paying a fine of not less than five hundred pounds and not exceeding one thousand pounds shall be the penalty inflicted on whoever exploits and uses the religion in advocating and propagating by talk or in writing, or by any other method, extremist thoughts with the aim of instigating sedition and division or disdain and contempting any of the heavenly religions or the sects belonging thereto, or prejudicing national unity or social peace.'*<sup>172</sup> What *'extremist thoughts'* are, remains unclear, and it serves as an ideal basis for authorities and judges in repressive or authoritarian regimes in the Arab world and elsewhere to denounce and accuse critical voices by publicly applying the *'extremism argument'*, often combined with the false and unproven allegation of spreading extremist thoughts financed by an external force or enemy.

With regard to definition likewise highly problematic is Art 178 EPC, which threatens with imprisonment of up to 2 years for individuals making, distributing and displaying material (manuscripts, drawings, ads, pictures, photos, symbolic signs, et al) *'if they are against public morals (...)*<sup>173</sup>, without providing any definition what the term *'public morals'* actually means. It is in the worst case the (politically influenced) judge, who decides and interprets this point, with Sharia and Islamic jurisprudence being the interpretative bedrock of the judiciary.

Such circumstances often get aggravated by the fact that the practice of *hisba* is admitted. In Islamic jurisprudence, the principle of *hisba* allows a Muslim to raise a claim (even though vague or unsubstantiated) against a fellow Muslim if he/she believes that *'the defendant is acting in a way that is contrary to the tenets of Islam.'*<sup>174</sup> The concept is vague, virtually anything can be interpreted as offending Islam and may serve as basis for grave legal consequences in court.<sup>175</sup>

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<sup>171</sup> See the full text of the Egyptian Penal Code under [https://sherloc.unodc.org/cld/uploads/res/document/criminal\\_code\\_of\\_egypt\\_english\\_html/Egypt\\_Criminal\\_Code\\_English.pdf](https://sherloc.unodc.org/cld/uploads/res/document/criminal_code_of_egypt_english_html/Egypt_Criminal_Code_English.pdf) (last checked on 26 July 2022).

<sup>172</sup> See EPC, supra note 171, p 44.

<sup>173</sup> See EPC, supra note 171, p 76.

<sup>174</sup> See *Freedom House*, The Impact of Blasphemy Laws on Human Rights, Policing Belief, A Freedom House Special Report, Egypt, Washington 2010, pp 26 et seq., with further references and citing various cases of *hisbah* in Egypt. *Hisbah*, or variants thereof, are also regularly observed in Pakistan, Afghanistan, Iran, etc.

<sup>175</sup> *Ibid.*

Though Egypt has no statutory regulation concerning apostasy, *i.e.* the abandonment of Islam, contemporary Egyptian jurisprudence does prohibit apostasy.<sup>176</sup> Though, as *Berger* observes, ‘*the act of apostasy hardly needs to be scrutinized by the courts since it is almost never related to religious conviction, but to legal issues like marriage or inheritance*’<sup>177</sup>, or, as current blasphemy or apostasy cases in Egypt and elsewhere in the Arab world show, to cases in which individuals express criticism about Islam, Sharia, the ruling family or the government, or any other critique voiced in writing or via social media.<sup>178</sup>

In the literature scholars criticize that the Egyptian (criminal) judiciary has failed to develop a harmonious relationship between Islamic law and the principle of freedom of religion yet.<sup>179</sup> A majority of cases with Egyptian courts repeatedly reveal tensions between the principle of religious freedom as incorporated in IHRL on the one hand and Egyptian judges’ interpretations of Islamic law as a substantial constitutive element of public safety and public order in Egypt.<sup>180</sup>

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## **Iraq**

Relevant constitutional provisions: The constitution of Iraq (IC) in its currently valid version from 2005 guarantees the religion of freedom in its Art 2 para 2: ‘*This Constitution guarantees the Islamic identity of the majority of the Iraqi people and guarantees the full religious rights to freedom of religious belief and practice of all individuals such as Christians, Yazidis, and Mandeian Sabeans.*’<sup>182</sup> Art 41 IC adds: ‘*Iraqis are free in their commitment to their personal status according to their religions, sects, beliefs, or choices, and this shall be regulated by law.*’<sup>183</sup> Art 42 IC specifies: ‘*Each individual shall have the freedom of thought, conscience, and belief.*’<sup>184</sup> And Art 43 IC, another constitutional provision specifying the freedom of religion, eventually details: ‘*The followers of all religions and sects are free in the: A. Practice*

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<sup>176</sup> See in *Berger M.S.*, *Apostasy and Public Policy in Contemporary Egypt: An Evaluation of Recent Cases from Egypt’s Highest Courts*, HRQ (2003), Vol 25 No 3, pp 720-740, p 720, with further references.

<sup>177</sup> *Ibid.*

<sup>178</sup> See also *El Fegier M.A.*, *Islamic Law and Freedom of Religion: The Case of Apostasy and its Legal Implications in Egypt*, MWJHR (2013), Vol 10, No 1, pp 1-26.

<sup>179</sup> *Ibid.*

<sup>180</sup> *Ibid.*

<sup>181</sup> In this context see also *Saeed A./Saeed H.*, *Freedom of Religion, Apostasy and Islam*, London & New York 2004; *Sookhdeo P.*, *Freedom to Believe, Challenging Islam’s Apostasy Laws*, Vienna (Virginia, U.S.) 2009; *Sedky A.*, *Understanding the Legal Framework of Apostasy in Egypt*, Chisinau 2021; *Masud M.K./Vogt K./Larsen L./Moe C.* (ed.), *Freedom of Expression in Islam, Challenging Apostasy and Blasphemy Laws*, London & New York 2021, esp the contribution by *El Fegier M.*, *Guarding the Mainstream: Blasphemy and Apostasy in Egypt*, pp 111-130.

<sup>182</sup> See the full text of the Iraqi constitution under [https://www.constituteproject.org/constitution/Iraq\\_2005.pdf?lang=en](https://www.constituteproject.org/constitution/Iraq_2005.pdf?lang=en) (last retrieved on 24 July 2022).

<sup>183</sup> *Ibid.*

<sup>184</sup> *Ibid.*

of religious rites, including the Hussein rituals. B. Management of religious endowments (waqf), their affairs, and their religious institutions, and this shall be regulated by law.’<sup>185</sup> Art 43 para 2 IC, similar to Art 10 IC, commits the state to guarantee the freedom of worship and the protection of places of worship. Finally, Art 37 para IC appears to be of relevance when it stipulates: ‘The State shall guarantee protection of the individual from intellectual, political and religious coercion.’<sup>186</sup> In other words, the government of Iraq provides the freedom of religion through several constitutional provisions. Despite defining Islam as state religion in its Art 2 para 1 IC, the constitution clearly gives a commitment to democracy and the basic rights and freedoms. Yet, reports state that restrictions on the freedom of religion remain widespread outside the Iraqi Kurdistan region, with Iraqi security forces committing acts of violence against members of religious minorities.<sup>187</sup> In an overall view, however, it seems that the conditions in terms of religious freedom are slowly improving and stabilizing – not exactly self-evident for a war-torn country having been facing ISIS terror and aggression for numerous years.

Applicable criminal law: Like Egypt, Iraq does have a regular criminal code, *i.e.* the *Penal Code* from 1969 (IPC, as amended on 14 March 2010).<sup>188</sup> The main norm in terms of religious freedom is § 372 IPC (under the section titled ‘Offences that violate religious sensibilities’) and criminalizes, *inter alia*, attacks on the creed of religious minorities or pouring scorn on religious practices (sec 1), willful disruptions of religious ceremonies (sec 2), the wrecking and destruction of sacred buildings and symbols (sec 3), and other form of religious hate crimes. Interestingly, the whole article focuses on and explicitly mentions religious *minorities* only, but not for example the state religion as such. However, in 2020, an Iraqi atheist was sentenced to two years in prison in accordance with § 372 IPC as he had committed a blasphemous act by posting obscene words against the Islamic prophet on Facebook.<sup>189</sup>

While the problematic application of blasphemy laws in Iraq remains on the watchlist of NGOs and foreign institutions such as, for instance, the *US State Department* and its *Office of*

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<sup>185</sup> Ibid.

<sup>186</sup> Ibid.

<sup>187</sup> See for instance the recent report by the *US Department of State*, 2021 Report on International Religious Freedom: Iraq, Office of International Religious Freedom, 2 June 2022, Washington, see on the following website: <https://www.state.gov/reports/2021-report-on-international-religious-freedom/iraq/> (last retrieved on 25 July 2022).

<sup>188</sup> See the full text of the Iraqi Penal Code for instance at [https://menarights.org/sites/default/files/2016-11/IRQ\\_Penal%20Code%201969%20as%20amended\\_eng.pdf](https://menarights.org/sites/default/files/2016-11/IRQ_Penal%20Code%201969%20as%20amended_eng.pdf) (last visited on 25 July 2022).

<sup>189</sup> See *Dri K.W.*, Iraqi Man Sentenced to 2 Years in Prison for ‘Insulting’ Prophet Mohammed on Facebook, 13 May 2020, *Rudaw Media Network*, see at <https://www.rudaw.net/english/middleeast/iraq/13052020> (last visited on 26 July 2022).

*International Religious Freedom*<sup>190</sup>, apostasy is not mentioned in the IPC and is generally considered rare in Iraq.

While the Iraqi government in principle endorses freedom of religion, unsettled conflicts within its borders made it difficult and have prevented an effective governance in several parts of the country. The government's capacity to protect religious freedom has been impeded, mostly by insurgent activities, sectarian aggression as well as terrorism. Compared to other countries in the region, the application of criminal laws against blasphemy is limited in Iraq, and apostates, if at all, mostly face social ostracism, but no criminal punishments.<sup>191</sup>

## **2. Equality of Rights Between Men and Women**

After an analysis of the situation concerning the freedom of religion, this chapter now asks how, and to which extent, gender equality forms part of national Arab legal systems.

The equality of rights between men and women or, better<sup>192</sup>, gender equality, from a historic point of view, can be located and contextualized back to the end of the 18<sup>th</sup> century CE when a courageous woman named *Olympe de Gouges* wrote the famous *Déclaration des Droits de la Femme et de la Citoyenne* (from 14 September 1791 to be precise), in English the *Declaration of the Rights of Woman and of the Female Citizen*, as response to the *Declaration of the Rights of Man and of the Citizen* from 1789. Gender policy or politics in a more modern sense, however, and in part influenced by feminism as important socio-political movement and ideology, is often considered to begin with the commencement and legal implementation of voting rights in the first half of the 20<sup>th</sup> century. Insofar, modern gender policy and the discussion about the equality of rights between men and women is mainly a topic of the 20<sup>th</sup> and 21<sup>st</sup> century CE. Globally, this matter is of utmost relevance as it contains repetitive and, from a human rights perspective, abhorrent criminal acts such as, but not limited to, femicides and other forms of violence against women and girls, sex trafficking, social and political oppression, unacceptable practices in the context of religious rituals like female genital mutilation (FGM), or – unacceptable from an economic point of view – the gender wage gap. All of these forms of violence and discrimination can be observed on a global scale, but do bear

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<sup>190</sup> See at the website <https://www.state.gov/bureaus-offices/under-secretary-for-civilian-security-democracy-and-human-rights/office-of-international-religious-freedom/> (last retrieved on 26 July 2022).

<sup>191</sup> See also *Harrison M.R.* (ed.), *Religious Freedom Issues in Iraq*, Hauppauge/New York 2010.

<sup>192</sup> 'Gender equality' (or equality of the sexes, sexual equality) is a more comprehensive term than 'equality of rights between men and women' as it also comprises sexes or sexual orientations such as trans/transgender, bisexuality or cis/cisgender. The author, however, focuses on the legal situation of women and men in member states of the League. Adding the topic of sexual orientations hereto would mean having to assess the (legal and social) situation of homosexuality, transsexuality, etc in the LAS, which would extend the quantity of this thesis considerably and beyond a regular scope.



a specific significance in the Middle East, North Africa and parts of Asia, and it is no coincidence that human rights literature dealing with the said region(s) regularly dedicates a considerable share of scientific research to questions around religious freedom and gender equality.<sup>193</sup> A closer look at the most recent global inequality index by country issued by the UNDP<sup>194</sup> or the WEF indicate that the said regions are in dire need to enhance gender equality and to invest more resources to swiftly improve the (human rights) situation.<sup>195</sup> The following sections shall give a brief overview on how three large members of the League, two with Sunni and one with a Shia majority, regulate this subject matter within their respective bodies of law.

### **Saudi Arabia**

The rights and the role of women in the society of Saudi Arabia are undoubtedly challenging and get heavily impacted by Islam, Islamic laws and local, tribal traditions and customs. The fact that the Saudi constitution doesn't mention the words 'woman' or 'gender' with a single word is telling and fits perfectly into this deplorable picture. 'Women' is at least mentioned once in Art 3 of the *Shura Council Law* (an important part of Saudi's constitutional framework) in which it is foreseen that female representation in the Council shall not be less than 20% of all members – in essence the only hint in Saudi's Basic Law that women shall play a certain role in the country's legislative process.

Things are changing though. Especially since the mid-2000s considerable progress has been achieved and rights for women were introduced, the denial of which having caused massive concern and appearing incomprehensible in many parts of the world. In 2005, the Saudi government legally banned forced marriages for example.<sup>196</sup> 2009 saw the first appointment of a female minister in the Saudi cabinet.<sup>197</sup> In 2012, Saudi women were allowed to join the Summer Olympic games for the first time.<sup>198</sup> 2013 marked the year where the kingdom's religious police allowed women to ride motorbikes and bicycles, however in restricted,

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<sup>193</sup> See e.g. *An-Na'im A.*, supra note 143, pp 265 et seq.; *Emon A.M./Ellis M.S./Glahn B.* (ed.), *Islamic Law and International Human Rights Law, Searching for Common Ground?*, Oxford 2012, pp 265-322; *El Demery A.M.*, supra note 41, pp 195 et seq.; *Mayer A.E.*, *Islam and Human Rights, Tradition and Politics*, 5<sup>th</sup> ed., London & New York, pp 85 et seq; *Hirsi Ali A.*, *The Caged Virgin, An Emancipation Proclamation for Women and Islam*, New York/London/Toronto 2015; *El Omari D./Hammer J./Khorchide M.* (ed.), *Muslim Women and Gender Justice, Concepts, Sources, and Histories*, London & New York 2020.

<sup>194</sup> See at <https://hdr.undp.org/data-center/thematic-composite-indices/gender-inequality-index#/indicies/GII> (last visited on 26 July 2022).

<sup>195</sup> See the most recent WEF stats and charts (the *Global Gender Gap Index 2021*) under the following website: <https://worldpopulationreview.com/country-rankings/gender-equality-by-country> (last retrieved on 26 July 2022).

<sup>196</sup> See at [http://news.bbc.co.uk/2/hi/middle\\_east/4437667.stm](http://news.bbc.co.uk/2/hi/middle_east/4437667.stm) (last retrieved on 26 July 2022).

<sup>197</sup> See at <https://www.theguardian.com/world/2009/feb/16/saudi-cabinet-woman-minister> (last visited on 25 July 2022).

<sup>198</sup> See under <https://edition.cnn.com/2012/07/12/sport/olympics-saudi-female-athletes/index.html> (last retrieved on 27 July 2022).

recreational areas only.<sup>199</sup> September 2017 was the month in which *King Salman* issued a decree granting women the right to drive a car.<sup>200</sup> 2017 was also the year where women were allowed to enter sport stadiums.<sup>201</sup> And in particular the past few years also saw a reduction of forms of discrimination against women associated with the concept of male guardianship (*wali*). Saudi Arabia was known for a comparably intense application of *wali* and has maintained such practices as enabled and prescribed by law, however in 2019 these laws were eventually changed, restrictions removed, and Saudi women can now legally obtain passports, travel freely without a male guardian, apply for jobs and work without permission, etc.<sup>202</sup> Linked to the former *wali* concept are also the newly introduced freedoms for women in 2021 to legally change their personal data<sup>203</sup> (family name, name of children, et al) or – being a single, divorced or widowed woman – living alone in a house without the permission of a male.<sup>204</sup> In terms of legal basis illustrative is a statement by the well-known Saudi journalist *Sabria Jawhar*, who has claimed in an interview that ‘*if all women were given the rights the Qu’ran guarantees us, and not be supplanted by tribal customs, then the issue of whether Saudi women have equal rights would be reduced.*’<sup>205</sup> This last statement is insofar relevant as more and more Arab lawyers and scholars, as will be explained in more detail in chapter VII, are convinced and do have strong arguments that a) many provisions in the Quran regarding the societal position of women actually *are* reconcilable with IHRL as they do grant women equal rights and freedoms, and that b) there is little evidence in Islamic sources that the Prophet had a problem with strong, self-confident and successful women.<sup>206</sup> Similar reconciliatory argumentation is by the way also used by progressive scholars in the context of religion of freedom.

With respect to labour laws, there has been progress, too. Not only that Art 28 of the Basic Law foresees that the State shall provide job opportunities to all ‘*able-bodied*’ people, also Saudi

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<sup>199</sup> See <https://www.cbsnews.com/news/saudi-arabia-allows-women-to-ride-bikes-sort-of/> (last retrieved on 26 July 2022).

<sup>200</sup> See at <https://www.bbc.com/news/world-middle-east-41408195> (last check on 26 July 2022).

<sup>201</sup> See for example <https://edition.cnn.com/2017/10/29/middleeast/saudi-arabia-women-sports-arenas/index.html> (last retrieved on 26 July 2022).

<sup>202</sup> See *e.g.* at the website <https://www.hrw.org/news/2019/08/02/saudi-arabia-important-advances-saudi-women> (last retrieval on 26 July 2022).

<sup>203</sup> See for instance <https://english.alarabiya.net/News/gulf/2021/01/02/Saudi-women-Saudi-women-no-longer-need-guardian-s-permission-to-change-personal-date-Report> (last visited on 25 July 2022).

<sup>204</sup> See, *inter alia*, at <https://www.independent.co.uk/news/world/middle-east/saudi-women-live-alone-male-guardian-b1864267.html> (last retrieved on 26 July 2022).

<sup>205</sup> See the very interesting interview with *Rob L. Wagner* on the website <https://sites.google.com/site/roblwagner/archives/saudi-female-journalist-defies-stereotypes> (last visited on 26 July 2022).

<sup>206</sup> In this context see *Ebiyar K.*, Reclaiming Tradition: Islamic Law in a Modern World, 18 August 2008, The International Affairs Review, available at <https://www.iar-gwu.org/blog/2008/08/18/reclaiming-tradition-islamic-law-in-a-modern-world> (last retrieved on 26 July 2022), in which the author describes the wives of the Prophet, *i.e.* their skills and strengths. Also interesting *Kendall E./Khan A.* (ed.), Reclaiming Islamic Tradition, Modern Interpretations of the Classical Heritage, Edinburgh 2016.

labour law provides for equality on the labour market. In the general provisions of chapter 2 of the Saudi Labor Law it is explicitly mentioned that *'work is the right of every citizen. (...) All citizens are equal in the right to work.'*<sup>207</sup>

Until today, Saudi Arabia does not have any dedicated anti-discrimination law or an anti-discrimination commission. It has been reported though that the Saudi *Ministry of Human Resources and Social Development* is currently working on a national anti-discrimination policy which shall be adopted in the near future.<sup>208</sup>

## **Egypt**

In contrast to the situation in Saudi Arabia, Egypt is more explicit and advanced, at least when it comes to legal wording. The Egyptian constitution contains several articles guaranteeing equality (Art 9) and equal rights and opportunities regardless of gender in all aspects of life (Art 11, also Art 53). Yet, the actual realities for Egyptian women are challenging. While holding positions in the public service area is accepted, discrimination against women in the private business sector is still quite common. In addition, despite the existence of statutory laws which should protect women, sexual violence (in particular domestic violence), sexual harassment and honor killings – often associated with the MENA region – are frequently observed in Egypt. Recent reports from earlier this year in Egyptian media informed about legislative efforts in Cairo regarding a draft law confronting violence against women, however it is not clear when that draft will be finalized and adopted in the Egyptian parliament.<sup>209</sup> Apparently, similar efforts are on their way to establish an independent Egyptian anti-discrimination commission, however, it is not foreseeable when that draft proposal will enter into force. In August 2021 the president ratified amendments to the EPC which upgrade sexual harassment to a felony offense (increasing the minimum sentences from 6 months to five years to now at least 2 years to 7 years).<sup>210</sup> However, in 2022 sexual harassment remains a serious problem. Other forms of substantial discrimination exist in Egyptian family law (Muslim women for instance cannot legally marry Non-Muslim men; Muslim women can legally divorce without their husband's consent but only by forgoing their financial rights, alimony payments, dowry, etc) and

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<sup>207</sup> Please see at <https://hrsd.gov.sa/sites/default/files/LABOR%20LAW.pdf> (last retrieved on 26 July 2022).

<sup>208</sup> See <https://www.saudigazette.com.sa/article/604318> from 10 March 2021 (last checked on 26 July 2022).

<sup>209</sup> See at the site <https://egyptindependent.com/details-of-unified-bill-to-confront-violence-against-women/> from 29 March 2022 (last retrieved on 26 July 2022). Also mentioned under the website <https://www.hrw.org/news/2020/10/13/human-rights-watch-submission-committee-elimination-discrimination-against-women>, submitted by *Human Rights Watch*, 13 October 2020.

<sup>210</sup> See <https://eg.usembassy.gov/egypt-2021-human-rights-report/>, *Bureau of Democracy, Human Rights and Labor*, US Dept of State, Washington 2021 (last retrieved on 26 July 2022).

inheritance law (Muslim women in general receive only one-half the amount of a male's heir inheritance; Christian widows of Muslim men have no inheritance rights, etc).<sup>211</sup> And beginning of 2021, the *Supreme Constitutional Court* of Egypt ruled that the EPC unconstitutionally discriminates against women by stipulating longer prison terms for women for the crime of adultery than for men<sup>212</sup> – another gross violation of principles enshrined in regional and IHRL.

## **Iraq**

The Constitution in Iraq contains two provisions which deal with women and gender equality. Art 14 defines: *'Iraqis are equal before the law without discrimination based on gender, race, ethnicity, nationality, origin, color, religion, sect, belief or opinion, or economic or social status.'*<sup>213</sup> In addition, Art 20 declares: *'Iraqi citizens, men and women, shall have the right to participate in public affairs and to enjoy political rights including the right to vote, elect, and run for office.'*<sup>214</sup> With regard to equal rights to employment, the constitution likewise couldn't be clearer when saying in its Art 22 1<sup>st</sup> section: *'Work is a right for all Iraqis in a way that guarantees a dignified life for them.'*<sup>215</sup> The known general reference to Islam (and thus Sharia) in Art 2 of the constitution leads to a result in which *'the situation of women in Iraq very much depends on the implementation of Islamic law and on the priorities and interpretations of male-led religious authorities.'*<sup>216</sup> Iraq ratified CEDAW in 1986, the CRC in 1994, and the ICCPR in 1971. *'Although Iraq is party to numerous international human rights conventions (...), substantial and long-standing impediments to domestic compliance with Iraq's treaty obligations remain.'*<sup>217</sup> *'Iraq's current discriminatory legislative provisions illustrate that constitutional provisions alone do not guarantee women the fulfillment of their rights.'*<sup>218</sup> *'Legislative change, coupled with active enforcement mechanisms, remains necessary to bring Iraq into full compliance with antidiscrimination instruments and ensure women's equal rights.'*<sup>219</sup> Though already 4 years old, *Oxfam's* assessment together with *UN Women* is still valid today.

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<sup>211</sup> Ibid.

<sup>212</sup> Ibid.

<sup>213</sup> See supra note 182, p 7.

<sup>214</sup> See supra note 182, p 9.

<sup>215</sup> See supra note 182, p 9.

<sup>216</sup> See *Vilarado V./Bittar S., Gender Profile – Iraq, A Situation Analysis on Gender Equality and Women's Empowerment in Iraq, Research Report, December 2018, Oxfam & UN Women*, see under the website of Oxfam <https://oxfamilibrary.openrepository.com/bitstream/handle/10546/620602/rr-gender-profile-iraq-131218-en.pdf;jsessionid=F78F83BC2B52BABBB2CDD0F7ABC39A95?sequence=1> (last retrieved on 26 July 2022), p 8.

<sup>217</sup> See *Oxfam*, supra note 216, p 9.

<sup>218</sup> Ibid.

<sup>219</sup> Ibid.

Though the IPC contains a number of protective rights in favour of women against a number of crimes (e.g. against rape or buggery, § 43 para 2 IPC, in the context of self-defense; seduction of a woman promising marriage, subsequently refusing marriage, § 395 IPC; sexual assault, § 396 IPC, regarding girls § 397 IPC; immodest or shameful acts vs women, § 400 IPC; indecent advances, § 402 IPC; kidnapping, § 423 IPC), this gets unacceptably thwarted by regulations such as § 41 para 1 IPC, which allows a husband – in exercise of his legal right (!) – to punish his wife within certain limits as prescribed by law or by custom. This provision opens the door for all kinds of forms of domestic violence and is to be abolished as soon as possible. Another disconcerting provision in the IPC is § 128 para 1, which defines ‘legal excuses’ and ‘legally extenuating circumstances’ *inter alia* as follows: ‘Notwithstanding these conditions, the commission of an offence with honorable motives or in response to the unjustified and serious provocation of a victim of an offence is considered a mitigating excuse.’<sup>220</sup> The interpretation of what constitutes an ‘honorable motive’ or an ‘unjustified and serious provocation’ lies in the hand of mostly male judges in Iraq. Thus, if a self-confident woman stands up against her (violent) husband, and her self-confidence and courage are qualified as some kind of impertinence or provocation by such judge, her judicial options may deteriorate right quickly. Parliamentary efforts to adopt a law against domestic violence are put on hold since 2019.<sup>221</sup> § 394 IPC likewise serves as basis for discrimination against women and even poses a risk to them: The paragraph makes it illegal to engage in extra-marital sex, obviously a violation of the essential human right to privacy. The main issue, however, is a possible disproportionate consequence for women as for instance a pregnancy can be deemed as evidence for a violation of § 394 ICP. Even more startling are cases where women report to the police of having been raped, only to potentially find themselves prosecuted under § 394 IPC. In other words, the law that is supposed to protect women and criminalize the acts of perpetrators – the Iraqi Penal Code – can (and does) lead to the opposite: The woman becomes the criminal. Closely related to this is a further legal regulation in § 398 IPC, which can only be described as legally absurd. The paragraph determines: ‘If the offender mentioned in this Section (note: the section in the IPC dealing with sexual assault, rape, etc) then lawfully marries the victim, any action becomes void and any investigation or other procedure is discontinued and, if a sentence has already been passed in respect of such action, then the sentence will be quashed. Legal proceedings will resume or the sentence will be reinstated, according to the circumstances if such marriage ends in divorce brought about by the husband without legal justification or in a divorce ordered

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<sup>220</sup> See supra note 188, p 34.

<sup>221</sup> See *Human Rights Watch*, World Report 2022, New York 2022, p 350.

*by the court for wrongs committed by the husband or for his bad behavior within 3 years following the cessation of the proceedings. (...)*<sup>222</sup> It is needless to say that such provision has no place in any modern criminal code. It represents a very distorted and disturbing perception of the relationship between women and men and how an atrocity could/should be corrected and remediated. The clue that this provision in itself poses a grave violation of the spirit and purpose of every reasonable criminal law and various human rights norms is obviously dispensable.

The key findings of this chapter IV can be summarized as follows:

- Member states of the League apply constitutional, criminal and other relevant norms in the context of religious freedom and gender equality in quite different ways. This is insofar remarkable as more or less all of these states refer to Sharia and Islamic law as being the sole source and foundation of their respective legal systems. This may serve as prove that the application of Islamic sources in the countries' legislative and especially judicial processes very often leads to incoherent, inconsistent, unpredictable and therefore somewhat arbitrary results.
- There appear to be considerable gaps between constitutional aspirations, claims and the general self-conception of how an Arab nation within the League wishes to be and what it aims at on the one hand, and how certain provisions in the constitution or, for instance, in the criminal justice system are actually applied on the other hand, not *de iure* – *de facto*.
- The correction and amendment of questionable or unacceptable provisions in LAS member states (and elsewhere in the Arab world) leading to injustice, legal uncertainty among the population, and constant arbitrary applications of the law (in violation of the rule of law), is not, and will not, be easy to do. In nations where religion, law, morals, society and culture are so intertwined and interwoven, shaped by written and unwritten religious rules and countless interpretations thereof, and where for example a critical comment against Islam in private or in public may be understood or perceived as an attack against the whole social order, the nation, the community or the aforesaid self-conception in the Muslim world, reform is a tremendous challenge.

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<sup>222</sup> See supra note 188, p 101.

## V. Human Rights Assessment – A Reality Check

One doesn't have to be specifically interested in human rights, international politics or international relations to *not* notice the human rights situation in Muslim-controlled nations in the Middle East, North Africa or Asia. Hardly a week passes without reading or hearing about an inapprehensible law having been passed in the Arab world, arbitrary arrests and detentions of regime critics, extra-judicial killings of individuals by a group of people, public executions, or other acts, which leave the reader or listener flabbergasted. The following two pages shall provide a brief overview of very recent human rights violations in the context of freedom of religion and gender (in)equality in member states of the League, *i.e.* abuses having occurred between 2020 or 2022.<sup>223</sup>

### Freedom of Religion

On 11 March 2022, the Saudi writer, activist and dissident *Raif bin Muhammad Badawi* was released from *Dhahban Central Prison* near Jeddah after what one can only call a 10-year legal nightmare. *Badawi* was arrested in 2012 on the charge of having insulted Islam and various other charges including, *inter alia*, apostasy. After his conviction in 2013 to 7 years in prison (and lashing) his sentence was amended in 2014 by an appeals court to 10 years imprisonment and a 1000 lashes including a fine. However, despite being free now, his legal issues are not over yet: He had to accept a 10-year passport ban and is not allowed to leave the country.<sup>224</sup> As of September 2020, another Saudi individual, Islamic scholar *Hassan Farhan al-Maliki*, is still in prison since 2017 on vague charges regarding his expression of his religious views.<sup>225</sup> In Egypt, members of Muslim minorities, Christians and Atheists were accused of and imprisoned for various blasphemy and terrorist charges.<sup>226</sup> In June of 2020, two Shia Muslims were sentenced to 1-year prison terms for practicing their faith in Egypt.<sup>227</sup> And in August of that same year, Egyptian security forces arrested the Quranist writer and blogger *Reda Abdel-Rahman*. He disappeared for more than 20 days, apparently as retaliation for religious writings of his relative who lives in exile.<sup>228</sup> On 25 November, an appeals court in Algeria sentenced the *Amazigh* and *Hirak* activist *Yacine Mebarki* to a year in prison and a fine for insulting Islam in

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<sup>223</sup> Human rights violations before 2020 are not taken into consideration hereunder as the author intends to provide a realistic and esp up-to-date picture of the status of human rights in LAS member states based on credible sources.

<sup>224</sup> See under <https://www.bbc.com/news/world-middle-east-60714086> (last check on 27 July 2022).

<sup>225</sup> See HRW, *supra* note 221, p 570.

<sup>226</sup> See *Amnesty International*, *Amnesty International Report 2020/21, The State of the World's Human Rights*, London 2021, p 151.

<sup>227</sup> *Ibid.*

<sup>228</sup> *Ibid.*

social media, allegedly criticizing a *Salafi* scholar.<sup>229</sup> In December 2020, in an Algerian village called *Tizi Ouzou*, a court sentenced 31 *Ahmadis* (i.e. members of the *Ahmadiyya* Muslim community) to 2-month suspended prison sentences due to their religious beliefs.<sup>230</sup> Another recent case of alleged blasphemy is reported from Morocco. A 23-year old, dual Italian-Moroccan citizen was sentenced to 3.5 years in jail (later revised and reduced to a 2-month suspended prison term) in *Marrakesh* on blasphemy charges. She was convicted for insulting Islam on Facebook, based on Art 267 para 5 of the *Moroccan Penal Code*.<sup>231</sup> Using the same legal basis in Morocco's Penal Code was the case of *Mohammad Awatif Kachchach*. He was arrested on 24 May 2020 after sharing a cartoon on Facebook that suggested that if the Prophet would claim to be the messenger of God today, he would be sent to a psychiatric facility. The authorities interpreted the cartoon as a case of punishable blasphemy and an insult of Islam. The *Court of First Instance and Appeals* in the city of *Safi* upheld the original conviction of a 6-month prison term and a fine.<sup>232</sup> In October 2020, Bahrain's top Islamic body, the *Supreme Council of Islamic Affairs*, 'has condemned, in the strongest words, the insult to the Prophet Muhammad (peace be upon him), stressing its categorical rejection of attempts to involve Muslim symbols and their sanctities in narrow agendas.'<sup>233</sup> The said council also reaffirmed 'that insulting the messengers of Allah and prophets (peace be upon them) does not detract from their virtue or their high standing with Allah the Almighty and their believers, but rather reflects behavior that contains racism and hatred, fuels extremism, ignites violence and conflict, and undermines efforts to achieve coexistence and peace among people.'<sup>234</sup> The council also emphasized 'that provoking and denigrating their sanctities and beliefs are unacceptable methods that cannot be accepted or tolerated, especially if they fall within the systematic frameworks of states and leaderships.'<sup>235</sup> The council calls 'for a serious, clear and urgent stance by all advocates of peace and good in the world to stop the aggression, encroachment and intellectual duplicity in order to maintain civil peace, preserve community security, respect religion, and protect people from falling into strife and conflicts.'<sup>236</sup> The council ends by

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<sup>229</sup> See *Amnesty International*, supra note 226, p 64.

<sup>230</sup> *Ibid.*

<sup>231</sup> See under <https://www.arabnews.com/node/1916026/middle-east> (last retrieved on 27 July 2022).

<sup>232</sup> Please see under <https://end-blasphemy-laws.org/2020/07/moroccan-authorities-should-quash-the-conviction-of-man-charged-with-insulting-islam/> (last visited on 27 July 2022). The article also contains the statement of *Kachchach*'s legal representative, who is cited as follows: 'The Moroccan constitution of 2011 gave great importance to human rights. Unfortunately there are chapters in the criminal code which limit these rights. Such as article 267(5) which clearly restricts freedom of belief and thought to the point of criminalizing them.'

<sup>233</sup> See at <https://saudigazette.com.sa/article/599591> from 26 October 2020 (last retrieved on 27 July 2022).

<sup>234</sup> *Ibid.*

<sup>235</sup> *Ibid.*

<sup>236</sup> *Ibid.*



stressing – in a quite telling way – ‘*the need not to use some pretexts, such as freedom of expression, to justify the offenses, provocations and contempt for religions and their followers.*’<sup>237</sup> The statement of the *Supreme Council of Islamic Affairs* of Bahrain is not only a clear warning to all critical minds in Bahrain (religious critics as well as political ones), but is also interesting and cited at length here as it represents a very typical example of a specific narrative being repeatedly used by governmental authorities in the Arab world. Using strikingly similar language, the *Ministry of Foreign Affairs and International Cooperation* of the United Arab Emirates strongly condemned (together with other GCC members) statements by the spokesperson for the Indian *Bharatiya Janata Party*, a few weeks ago (in June 2022), after allegedly having insulted the Prophet.<sup>238</sup> All these examples shall illustrate that the freedom of religion and the freedom of expression are a) under constant pressure in most LAS nations, b) violations thereof no isolated phenomenon but of a structural nature, and c) that any such human rights accusations by authorities may not only target (local, Muslim) individuals, but also foreigners, groups of people such as religious minorities, representatives of parties, etc, with no end foreseeable in the nearer future.

### **Gender Equality – Rights of Women**

The situation of women in LAS states and in other countries of the Arab world is not better, quite the contrary. It may be even worse, considering the *daily* discriminations Arab women (but also foreign female tourists) have to deal with on a *regular* basis – at their homes, at their workplaces, in the public sphere.<sup>239</sup> The human rights violations range from sexual assaults (rape), sexual harassments, domestic violence, and physical attacks to all kinds of psychological terror and mental suppression and cruelty. In addition, many LAS states’ legislations contain evident discriminations in various areas of law such as, but not limited to, family law, inheritance law, criminal law, labour law, and laws regarding citizenship and personal status.

On 30 June 2021, two male members of the Tunisian parliament physically attacked opposition MP *Abir Moussi*. As *Human Rights Watch* reports, *Moussi* already had been a victim of repeated

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<sup>237</sup> Ibid.

<sup>238</sup> See under <https://www.khaleejtimes.com/uae/uae-condemns-insulting-statements-of-the-prophet-in-india> (last retrieved on 27 July 2022).

<sup>239</sup> See e.g. *Darwish N.*, *Cruel and Usual Punishment: The Terrifying Global Implications of Islamic Law*, Nashville 2008; by the same author also *Darwish N.*, *Now They Call Me Infidel*, New York 2006, esp pp 17-92. Very interesting also *Khan M.* (ed.), *It’s Not About the Burqa, Muslim Women on Faith, Feminism, Sexuality and Race*, Basingstoke 2020; *Mayer A.E.*, *The Reformulation of Islamic Thought on Gender Rights and Roles*, in: *Akbarzadeh S./MacQueen B.* (ed.), *Islam and Human Rights in Practice, Perspectives Across the Ummah*, London & New York 2008; pp 12-32, with further references; *Akbarzadeh S./MacQueen B.*, *Islamic Reformism and Human Rights in Iraq: Gender Equality and Religious Freedom*, in: *Akbarzadeh S./MacQueen B.* (ed.), *Islam and Human Rights in Practice, Perspectives Across the Ummah*, London & New York 2008; pp 52-74, with further references.

physical and verbal attacks inside and outside of the parliament in Tunisia, *‘including gender-specific epithets.’*<sup>240</sup> Likewise in Tunisia, on 9 May 2021, *Refka Cherni*, a 26-year old mother, was shot five times by her husband. *Dahmani* covers: *‘Cherni had suffered from domestic violence for some time, just like an estimated one-third of Tunisian women. She even tried, finally, to put herself under legal protection by filing a formal complaint. That was three days before she was shot dead at close range.’*<sup>241</sup> *‘Although she presented a medical certificate and the attacker was an agent of the security forces, the deputy prosecutor on duty had not seen fit to arrest him.’*<sup>242</sup> *Dahmani’s* comprehensible conclusion being applicable in many parts of the Arab world: *‘At fault is a conservatism fed with religious preconceptions by pseudo exegesis who in the media dispense clichés and calls to violence without being contradicted. Their words are even used in popular Ramadan soap operas, whose heroines justify the rape and aggression suffered by women.’*<sup>243</sup> In Qatar, where the discriminatory male guardianship concept (as mentioned earlier with regard to Saudi Arabia) is incorporated in Qatari law, women continued to report also in 2021 that they were facing intimidation by governmental authorities for their tweets or other forms of online activity about women’s rights or other political issues, including through interrogations and by being asked to sign pledges not to publicly speak about the rights of women.<sup>244</sup> In 2021, reports by *Tadamon*, a Jordanian organization, informed that Jordanian men had killed more than 14 women between January and October 2021. And Jordan’s *Higher Population Council* reported in October 2020 *‘that it recorded a “dramatic increase” in domestic violence in 2020 with a total of 54.743 cases, with 82 percent perpetrated by husbands against their wives.’*<sup>245</sup> In 2020, as part of a baseline study, Yemeni women said they would not report violence *‘due to the fear of being killed, detained or being exposed to further violence.’*<sup>246</sup>

One could continue forever. All major human rights NGOs in their global reports from 2020 and 2021, in sections named *e.g.* *‘women’s rights’*, *‘gender equality’*, *‘gender identity’* or similar, report on wide-spread human rights abuses against girls and women, permeating all areas and levels of Arab society – in the member states of the League, but also beyond the

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<sup>240</sup> See *Human Rights Watch*, supra note 221, p 663.

<sup>241</sup> See in the very interesting and shocking article of *Dahmani F.*, *Femicide in Tunisia: Why a New Law Couldn’t Crack the Patriarchy*, 25 May 2021, see under <https://worldcrunch.com/culture-society/femicide-in-tunisia-why-a-new-law-couldn39t-crack-the-patriarchy> (last retrieved on 28 July 2022).

<sup>242</sup> *Ibid.*

<sup>243</sup> *Ibid.*

<sup>244</sup> See HRW, supra note 221, p 544.

<sup>245</sup> See HRW, supra note 221, p 379.

<sup>246</sup> See under <https://reliefweb.int/report/yemen/struggle-yemeni-women-between-war-and-harmful-social-norms> (last visited on 28 July 2022). See also *Ba-Obaid M./Bijleveld C.J.H.*, *Violence Against Women in Yemen: Official Statistics and Exploratory Survey*, *International Review of Victimology* (2002), Vol 9, No 3, pp 331-347, with further references.

borders of the LAS, esp in Muslim-controlled countries like Iran, Pakistan, Indonesia, Malaysia, Nigeria, Bangladesh, partly also CIS countries, and of course Afghanistan, where women and girls, in particular since the rise of the *Taliban* regime, are exposed to systematic, countless human rights violations, depriving them of nearly all basic rights and freedoms a human being needs to live a normal, safe and peaceful life.

Discriminatory laws are without doubt one important aspect or element of this whole tragedy<sup>247</sup>, but even more important in the opinion of the author, and as observed too many times in numerous Arab states visited – and insofar subscribing to *Dahmani*'s previous claim, – is the fatal *combination* of 1) discriminatory laws and (royal) decrees, 2) an oppressive, toxic culture consisting of elements of patriarchy, male dominance and (social as well as economic) power, and 3) an erroneous, unilateral and warped perception and interpretation of religious sources (Quran, hadith, fiqh, etc), which surely please and favor the male share of the population, but are evidently limiting or even denying the female population their most basic human rights, all of this too often ending in a) a *structural and deliberate* exploitation (sexually, in terms of labor, etc), b) suppression (economically/financially, politically, and socially) and, in the worst cases, c) repeated violations of women's and girls' right to life and right to physical integrity.<sup>248 249</sup>

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<sup>247</sup> See UNDP, in collaboration with *UN Women*, et al (ed.), *Gender Justice & The Law, Assessment of Laws Affecting Gender Equality in the Arab States Region*, New York 2018.

<sup>248</sup> For the purposes of this chapter also of use were for example *Azam H.*, *Sexual Violation in Islamic Law, Substance, Evidence, and Procedure*, Cambridge 2015; *Manjoo R./Jones J.* (ed.), *The Legal Protection of Women From Violence, Normative Gaps in International Law*, London & New York 2018; *Duderija A./Alak I.A./Hissong K.*, *Islam and Gender, Major Issues and Debates*, London & New York 2020, esp pp 6 et seq, pp 59 et seq, and pp 202 et seq; *Ahmed L.*, *Women and Gender in Islam, Historical Roots of a Modern Debate*, New Haven & London 1992 and 2021 resp; *Morrow J.A.*, *The Most Controversial Qur'anic Verse, Why 4:34 Does Not Promote Violence Against Women*, Falls Village 2020; *Idriss M.M./Abbas T.* (ed.), *Honour, Violence, Women in Islam*, Abingdon & New York 2011.

<sup>249</sup> National and international organizations fighting for women's right, against male violence, and for gender equality in the Arab world (and elsewhere) are, *inter alia*, the following, their websites, publications and reports forming a sheer inexhaustible source of information and relevant data: *UN Women* (Arab States branch), the *Center of Arab Women for Training and Research* (CAWTAR, based in Tunisia), Kafa (from Lebanon), the *Egyptian Association for the Development and Enhancement of Women* (ADEW), the *Arab Woman Organization* (AWO) of Jordan, the *Dubai Foundation for Women and Children* (DFWAC), the *Women's Islamic Initiative in Spirituality and Equality* (WISE, amongst others active in Egypt, Pakistan and Afghanistan), the *Moroccan Association Democratique des Femmes du Marocaines* (ADFM), the *Egyptian Centre for Women's Rights* (ECWR), *Musawah*, the London-based *Women Living Under Muslim Laws*, as well as AI and HRW.

## **VI. Compatibility Considerations in the Context of International Human Rights – A Multilayered Analysis**

### **1. Inconsistencies Between International and Regional Human Rights Frameworks**

In light of the observations and legal assessments so far, numerous inconsistencies and incompatibilities between IHRL and regional Arab human rights frameworks, *i.e.* the Cairo Declaration and the Charter, can be asserted. Apart from the problem with numerous *reservations* submitted by member states of the League to key human rights instruments such as CEDAW, CRC, and ICCPR, which will be dealt with in more detail in chapter IV 3. hereunder, the main issue with respect to the freedom of religion and gender equality, but also other human rights, are the explicit *references* in the regional human rights sources to the Sharia and Islamic Laws. The ICCPR, forming the basis for an enforceable individual right to freedom of religion in its Art 18, refers to the principles and ideals enshrined in the Charter of the UN (preamble and Art 1) and the UDHR (regarding religious freedom and non-discrimination see Articles 2, 16, and esp 18). The ACHR at first follows this example and explicitly refers to the UN Charter, the UDHR, and the ICCPR, but then, in the same section of the preamble of the ACHR, also takes into account and directly ties the ACHR to the CDHRI – exactly that text, which makes about 10 references to Islam and (Islamic) national/domestic legislation. Art 43 ACHR in this respect is equally problematic as mentioned earlier: Referring to both domestic law/legislation *and* IHRL is *per se* paradoxical as this provision tries to blend two bodies of law which pursue different legal and social goals and aspirations. In other words, while the CDHRI (in Art 20) and the ACHR (esp in Art 30) on the one hand very clearly emphasize and guarantee the freedom of religion, the drafters of these two legal sources instantly made sure that these assurances and confirmations of religious freedom and belief are relativized, conditioned and subjected to the laws of Islam – an elevation of a specific religion and a reference to a set of religious and legal norms, which cannot be compatible with IHRL as it evidently contravenes the very principles of *religious neutrality* and *religious pluralism*. These principles, however, represent a core element of the international legal order and form one of the main pillars of modern, secular nation-states. It appears as if the ACHR would intend to build a bridge between religious neutrality and freedom on the one hand and Islam as dominant faith in the Arab world on the other, however, immediately failing in doing so as such bridging in the end is a faulty, unworkable compromise being inadmissible under international human rights law and rendering the notion of freedom of religion blemished. Even though certain modern, progressive Muslim scholars argue that the regional point of reference – the Sharia, in particular with its

primary source, the Quran – *does* provide a credible basis for real religious pluralism, it is, in reality, not the case, neither practically, nor in terms of Islamic doctrine because there is no coherent, widely accepted perception and interpretation of the Quran in a such open, pluralistic sense in a member state of the LAS, let alone in the League as such.<sup>250</sup> In addition, it is argued here that the region also lacks the *political will* to adapt its policies towards more religious pluralism, diversity, freedom and, consequently, secularism and democracy, as this would not only pose a substantial political risk to the governments in charge, but would also run counter to the political and economic *interests* of the ruling elites in the member states of the League. In this context noteworthy is also the view of the ECtHR. In his in the meantime famous decision in *Refah Partisi (The Welfare Party) et al vs Turkey*<sup>251</sup>, the Court concurs with the Chamber's view *'that sharia is incompatible with the fundamental principles of democracy, as set forth in the Convention.'*<sup>252</sup> The ECtHR specifies that *'sharia, which faithfully reflects the dogmas and divine rules laid down by religion, is stable and invariable. Principles such as pluralism in the political sphere or the constant evolution of public freedoms have no place in it.'*<sup>253</sup> The Court *'notes that, when read together, the offending statements, which contain explicit references to the introduction of sharia, are difficult to reconcile with the fundamental principles of democracy, as conceived in the Convention as a whole.'*<sup>254</sup> The ECtHR continues and rightly states that *'it is difficult to declare one's respect for democracy and human rights while at the same time supporting a regime based on sharia, which clearly diverges from Convention rules, particularly with regard to its criminal law and criminal procedure, its rules on the legal status of women and the way it intervenes in all spheres of private and public life in accordance with religious precepts.'*<sup>255</sup> It seems important to understand what is at stake here for governments of LAS member states. It is not only about granting freedom of religion or freedom of expression. The matter goes beyond this because the more governments of the League open up and grant unrestricted access to rights like the two just mentioned, the more challenging it may get to control the diversity of opinions, choices, and views. It is in this light of a critical tradeoff or area of conflict in which certain references to Islam and to the rule of

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<sup>250</sup> A very valuable book while writing this thesis, and for provoking views and thoughts, was *Emon A.M., Religious Pluralism and Islamic Law, Dhimmis and Others in the Empire of Law*, Oxford 2012.

<sup>251</sup> See the ECtHR case *Refah Partisi (The Welfare Party) et al vs Turkey*, appl no 41340/98, 41342/98, 41343/98, 41344/98), judgment from 13 February 2003 (Grand Chamber), Strasbourg, at no 123.

<sup>252</sup> Ibid.

<sup>253</sup> Ibid.

<sup>254</sup> Ibid.

<sup>255</sup> Ibid. Also of interest are the Court's subsequent considerations in no 124-128. Download possible under the website <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-60936%22%5D%7D> (last check on 29 July 2022). See also *Mowbray A., Cases, Materials, and Commentary on the European Convention on Human Rights*, 3<sup>rd</sup> ed., Oxford 2012, pp 598 et seq, and p 744, with further references.

Islam need to be read. Sharia and Islamic law, as a set of religious and legal norms and rules, not only represent a framework for the faith of Hundreds of Millions of Muslims, but also give the region a political stability and fit well into the political agenda of countries in the Arab world. This is also one of the main reasons why for instance blasphemy charges are quickly raised against regime critics, and critical voices are silenced swiftly and harshly. *Raif Badawi* as an individual seeking to at least enable a discussion about liberalism in Saudi Arabia is a good example: The one raising his voice against the prevailing *political* system (monarchy, authoritarian regimes in the Arab world and their institutional arms such as a religious police or similar, though *Badawi* never directly criticized the ruling family or the king) is quickly stigmatized as *religious* and/or *social* agitator and troublemaker who needs to be removed. In such cases, freedom of religion and freedom of expression get perverted and in the eyes of political and religious elites are considered as instruments or weapons to not only question but potentially overturn the existing political order in states within the League. Against this background it might have been easier for governments of LAS member states to accept and adopt the ACHR.

A regional human rights instrument either grants real, unconditional religious freedom without any limitation (except for those restrictions as known from and accepted in IHRL, *i.e.* limitations being absolutely required to restore public safety and order, health, freedom of others, and so forth), or it is void. The freedom of religion is an absolute human right, *i.e.* its elemental, inviolable *internal* aspect in the sense of *Taylor*<sup>256</sup> is (only the *external* element 'manifestation' being restrictable under very specific circumstances as stated above), hence any such general fixation and conditioning of religious freedom as in the ACHR to another, restrictive and moreover incoherent legal system like the Sharia with its related differing interpretative methodologies, is incongruous and irreconcilable with IHRL and therefore inadmissible. The fact that the provisions of the ECHR, the ACHPR and the AmCHR manage to guarantee the freedom of religion *without* seeing a need to tie those norms to a specific religious framework or faith shows that a region, through a regional human rights instrument, can indeed grant its member states and their respective populations a fundamental right like religious freedom without thwarting such right with regulations and references which in the end weaken the concept of freedom of religion and belief. There can be no doubt that among the member states of the CoE, the AU (OAU) or the OAS, as diverse as these organizations are, numerous of those countries do have (mostly) intact legal frameworks ensuring religious

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<sup>256</sup> See *Taylor P.M.*, supra note 6, p 500, with further references.

freedom and pluralism with different faiths and beliefs within their borders, granting Millions of believers (and non-believers) a reasonable structure or framework in which they can practice their respective religions – all this *without* the necessity to incorporate and explicitly showing preference for one particular, the prevailing faith or religion.

A very similar line of argumentation can be applied to the question of gender equality in the Arab world. Also in this area the many affirmations and reaffirmations in the ACHR (Art 3 para 3, Art 33 para 1 and 2, Art 34 para 2, etc) not only lack credibility in view of the realities on the ground in combination with weak legal instruments being granted to potential victims of human rights abuses, but likewise appear to be legally inadmissible, if the actual exercise of equal rights for women and girls within the League is subject to two regional and the respective domestic laws, which both lead to limitations – factually and *de iure* – or even denial of basic rights for the female population. From a different angle it can be assessed that the current legal options for women are challenging at least in two ways: The provisions of the ICCPR and CEDAW only help, if a given LAS member state has ratified (one of) the two treaties and has not submitted a reservation to a relevant ICCPR or CEDAW provision that impedes women to make use of the respective complaint mechanism under the ICCPR or CEDAW. If a victim has no option under CEDAW or the ICCPR, the regulations of the ACHR aren't likely to help either as the ACHR does not know any individual complaint mechanism, but only a rather callow reporting mechanism between concerned state, SG of the League, and the Arab Human Rights Committee (as per Art 48 ACHR), which cannot be considered an effective human rights instrument for victims to ease their situation and to receive compensation for any discriminatory acts or omissions against women by governmental authorities. Insofar, human rights provisions in the ICCPR and CEDAW often remain unattainable and unenforceable for (female) victims in specific countries in the Arab world, and provisions in the ACHR hollow and of no avail.

## **2. Inconsistencies Between Regional Frameworks and National Laws**

The legal situation on the regional level is likewise not exactly encouraging. While the drafters of the CDHRI and in particular the ACHR, through the said provisions regarding freedom of religion and gender equality, try to accommodate the Arab regional human rights framework with well-established IHRL and other regional human rights instruments (as explicitly mentioned in Art 43 ACHR), that attempt or balancing act gets instantly foiled by that very legal source as it refers to domestic laws, *i.e.* Sharia and Islamic Law, which are in an even starker contrast to IHRL. As a rough legal assessment of selected national constitutional and especially criminal laws in chapter IV has shown, considerable gaps between the ACHR and

IHRL on the one hand and national legislations within the states of the LAS on the other hand can be ascertained – not only as a result of a literal or formal interpretation and evaluation, but also with respect to the worldview behind certain norms, in particular regarding the views and roles of women in Arab society. § 398 IPC represents one such elusive and upsetting example, which couldn't be any further from provisions of the ACHR and in particular IHRL as well as the idealism, visions and purposes absorbed in international treaties such as the ICCPR, CEDAW, CRC or UNCAT. As international and local/regional NGOs as well as academia prove on a regular basis, such vexing norms in domestic laws in the Arab world and their more than questionable application are no exception.

### 3. The Negative Impact of Reservations

In addition to legislative and judicial shortcomings on the local and regional level confining freedom of religion, gender equality and other fundamental rights and freedoms of IHRL, many Arab states within the League also make use of an instrument being accepted in international law: reservations. Unless an international treaty provides otherwise, states can enter into reservations.<sup>257</sup> Art 2 para 1 lit d) VCLT defines a reservation as *'a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.'*<sup>258</sup> This means that *'reservations allow states to limit the scope of their obligations; in practice, states often do.'*<sup>259</sup> Reservations to human rights treaties represent a sort of compromise, seeking *'to address the fundamental dilemma between sovereignty and the pursuit of collective goals.'*<sup>260</sup> And though *Bantekas/Oette* speak of a *'pragmatic device'*<sup>261</sup> in international law, that pragmatism of course comes with *'the price of fragmentation because the fact that not all states have the same obligations may (note: and does) undermine the integrity of a treaty and frustrate its objectives.'*<sup>262</sup>

Unfortunately, this is specifically true with reservations from Muslim-controlled countries to international human rights treaties. In the literature the term *'sharia reservations'* or *'Islamic*

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<sup>257</sup> See *Bantekas I./Oette L.*, *International Human Rights Law and Practice*, 3<sup>rd</sup> ed., Cambridge 2020, p 56, with further references.

<sup>258</sup> See *United Nations*, Vienna Convention on the Law of Treaties 1969, done at Vienna on 23 May 1969, entered into force on 27 January 1980, UNTS vol 1155, no 18232, pp 331 et seq, see also on the UNTS website at <https://treaties.un.org/doc/publication/unts/volume%201155/v1155.pdf> (last retrieved on 29 July 2022).

<sup>259</sup> See *Bantekas I./Oette L.*, supra note 257, p 56.

<sup>260</sup> See *Bantekas I./Oette L.*, supra note 257, p 57.

<sup>261</sup> Ibid.

<sup>262</sup> Ibid.



*reservations*’ has been established in the meantime.<sup>263</sup> Some facts: As per March 2020, out of 440 reservations to CEDAW, 274 (or 66%) are religion-based, entered by a total of 28 states, all of which belong to the OIC except for India, Israel, Malta, Micronesia and Singapore.<sup>264</sup> Out of 425 reservations to the CRC, 202 (or 48%) are religion-based, entered by a total of 23 states, of which all belong to the OIC except for Argentina, Canada, Guatemala, Kiribati, and the Holy See.<sup>265</sup> With respect to the ICCPR, 354 reservations were submitted, of which 37 (a bit more than 10%) are religion-based, entered by a total of 9 states, all of which belong to the OIC except for Israel.<sup>266</sup> *Salem* notes that ‘*Art 16 CEDAW accounts for the most reserved provision based on the prevalence of Sharia law among all human rights treaty provisions. This is due to the fact that Art 16 CEDAW entails an obligation to eliminate gender discrimination in family relations, particularly during marriage and dissolution, as well as the guardianship of children.*’<sup>267</sup> Numerous LAS member states have submitted partly far-reaching reservations to CEDAW: Algeria has done so, if and when CEDAW provisions contravene the *Algerian Family Code*; Bahrain claimed 5 reservations to the extent they conflict with the Islamic Sharia; Egypt followed Bahrain’s example on at least 4 occasions; Iraq and Jordan have submitted reservations; Kuwait likewise did so as provisions of CEDAW run counter to the *Kuwaiti Nationality Act* and the Sharia; Lebanon entered reservations without explicitly mentioning the Islamic Sharia; Libya, Morocco, the UAE, Oman, Saudi Arabia and Syria however do base their reservations *expressis verbis* on Islamic law and (Islamic) Sharia; and Tunisia sees various areas of conflict with CEDAW, especially in regard to the Tunisian Constitution, the *Tunisian Nationality Code*, and the *Tunisian Personal Status Code* (PSC).<sup>268</sup> States of the League utilize both general as well as specific reservations, some of them even including an explanation by the State concerned. A good example for a general one to Art 16 CEDAW comes from Saudi Arabia which determines: ‘*In case of a contradiction between any term of the Convention and norms of Islamic law, the Kingdom of Saudi Arabia is not under obligation to observe the contradictory terms of the Convention. The Kingdom does not consider itself bound by*

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<sup>263</sup> See e.g. *Salem N.*, supra note 80, pp 2 et seq; *Rao-Nebab K.S.*, Reservations Made by Muslim States Under International Law, Chisinau 2016; *Abiad N.*, Sharia, Muslim States and International Human Rights Treaty Obligations: A Comparative Study, London 2008, esp pp 63 et seq and pp 82 et seq; *Sawad A.A.*, ‘Islamic Reservations’ to Human Rights Treaties and Universality of Human Rights Within the Cultural Relativists Paradigm, *The Journal of Human Rights* (2017/2018), Vol 12, no 2, issue 24, pp 101-154.

<sup>264</sup> See *Salem N.*, supra note 80, p 2.

<sup>265</sup> *Ibid.*

<sup>266</sup> *Ibid.*

<sup>267</sup> *Ibid.*

<sup>268</sup> An excellent overview regarding CEDAW reservations see at *United Nations*, doc no CEDAW/SP/2006/2, New York, from 23 June 2006, Meeting of State Parties to the CEDAW, download possible at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N06/309/97/PDF/N0630997.pdf?OpenElement> (last retrieved on 30 July 2022).

paragraph 2 of article 9 of the Convention and paragraph 1 of article 29 of the Convention.<sup>269</sup> A specified reservation to Art 16 CEDAW – this time declared by Kuwait – looks as follows: *‘The Government of the State of Kuwait declares that it does not consider itself bound by the provision contained in art 16, paragraph 1 (f), inasmuch as it conflicts with the provisions of the Islamic sharia, Islam being the official religion of the State.’*<sup>270</sup> A reservation to Art 16 CEDAW including a brief explanation can be found in the UAE’s declaration, which states: *‘The United Arab Emirates will abide by the provisions of the article insofar as they are not in conflict with the principles of the sharia. The United Arab Emirates considers that the payment of a dowry and support after divorce is an obligation of the husband, and the husband has the right to divorce, just as the wife has her independent financial security and her full rights to her property and is not required to pay her husband’s or her own expenses out of her own property. The sharia makes a woman’s right to divorce conditional on a judicial decision, in a case in which she has been harmed.’*<sup>271</sup> Apart from the fact that such reservations are hardly acceptable for any reasonable human rights lawyer, it brings up the question whether, and to which extent, such reservations are actually admissible under international law. The relevant norm in this respect is Art 19 VCLT which clarifies that reservations are only allowed a) to the extent permitted under the respective treaty provisions, b) if the respective treaty provides that only specified reservations, which do not include the reservation in question, are admissible, or c) the reservation is incompatible with the object and purpose of the treaty, the last permissibility criterion being the trickiest and most debated one as it sometimes may not be fully clear what the object or the purpose of an international treaty or convention actually is. Thus, in 2011 the ILC has drafted and adopted a *Guide to Practice on Reservations to Treaties*.<sup>272</sup> In its § 3.1.5.1. (*‘Determination of the object and purpose of the treaty’*) it defines: *‘The object and purpose of the treaty is to be determined in good faith, taking account of the terms of the treaty in their context, in particular the title and the preamble of the treaty. Recourse may also be had to the preparatory work of the treaty and the circumstances of its conclusion and, where appropriate, the subsequent practice of the parties.’*<sup>273</sup> Despite this fairly clear and direct wording in the ILC’s guide, many reservations were (and are) accepted or declared admissible even though – when for example carefully reading and assessing both the

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<sup>269</sup> See UN, supra note 268, p 26.

<sup>270</sup> See UN, supra note 268, p 17.

<sup>271</sup> See UN, supra note 268, p 31.

<sup>272</sup> See *International Law Commission*, Report of the International Law Commission on the Work of its Sixty-Third Session, Guide to Practice on Reservations to Treaties, doc no A/66/10, United Nations, New York 2011. Also see in the *Yearbook of the International Law Commission*, 2011, vol II, part 2, or also at [https://legal.un.org/ilc/texts/instruments/english/draft\\_articles/1\\_8\\_2011.pdf](https://legal.un.org/ilc/texts/instruments/english/draft_articles/1_8_2011.pdf) (last retrieved on 30 July 2022).

<sup>273</sup> See ILC, supra note 272, p 32.

respective titles and preambles of international human rights treaties (be it CEDAW, the ICCPR or the CRC, etc) – no doubts whatsoever concerning object and purpose of a treaty can sustain. From the author’s point of view, many reservations coming from Muslim-majority nations do in fact contravene the spirit and very purposes of conventions, which seek to fight human rights violations in a given area.<sup>274</sup>

The repeatedly heard and read argument from Muslim-controlled countries, in particular from conservative Muslim scholars and lawyers, that many human rights conventions, and IHRL in general, only represent ‘Western values’ and ignore values, traditions and the faith of Islam, forming the basis of Billions of believers in North Africa, the Middle East and large parts of Asia, must be rejected.<sup>275</sup> Without being able to discuss the complex and interesting topic of cultural relativism and (alleged) Western imperialism in the context of human rights in detail here, the author claims that all sources of IHRL having relevance for this thesis are based on the principles of 1) democracy, 2) freedom, 3) human rights, 4) the rule of law, 5) gender equality, 6) religious pluralism and 7) the protection of minorities and vulnerable groups. It seems worth mentioning, in particular when reading documents such as the *World Happiness Report 2022*, that the application of these seven principles, which may be denounced by certain (groups of) individuals in certain parts of world, appears to guarantee that people in countries ruled by governments, which (try to) adhere to these principles, are happier, healthier, and safer.<sup>276</sup> Today, the author is not aware of any better model of governance than democracy, but it is interesting to see that the first twenty nations in the WHR all try to fully apply the said 7 principles.<sup>277</sup> In other words, following ‘Western’ conceptions, values or ‘constructs’ obviously cannot be all wrong. Whether ‘Western values’ or the ‘Western way of living’ in general and in all aspects leads to a more just or fairer world is a different question, which cannot be answered

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<sup>274</sup> See here esp *General Recommendation No 4* of the *CEDAW Committee* from 1987 (6<sup>th</sup> session) and the concerns expressed therein: <https://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm> (last check on 22 August 2022).

<sup>275</sup> In this context see for instance *Bielefeldt H.*, “Western” versus “Islamic” Human Rights Conceptions? A Critique of Cultural Essentialism in the Discussion on Human Rights, *Political Theory* (2000), Vol 28, No 1, pp 90-121, with further references; quite provocative and idiosyncratic, vehemently attacking the West is *Mawdudi S.A.A.*, *Human Rights in Islam*, Leicester 1976; *Pollis A./Schwab P.*, *Human Rights: A Western Construct With Limited Applicability*, in: *Pollis A./Schwab P.* (ed.), *Cultural and Ideological Perspectives*, New York 1979, pp 1-18; interesting and progressive *Alqaisi E.*, *Women’s Rights, Islam and Cultural Relativism*, *Women’s Rights: The Case of Contemporary Jordan*, Chisinau 2016; *Glacier O.*, *Universal Rights, Systemic Violations, and Cultural Relativism in Morocco*, New York 2013.

<sup>276</sup> See *Helliwell J.F./Layard R./Sachs J.D./De-Neve J.-E./Aknin L.B./Wang S.* (ed.), *World Happiness Report 2022*, Sustainable Development Solutions Network, New York 2022. The report with several annexes including a country ranking can be downloaded at <https://worldhappiness.report/ed/2022/> (last visited on 31 July 2022).

<sup>277</sup> *Ibid.* The LAS member states have the following ranks in the WHR 2022: Bahrain #21, UAE #24, Saudi Arabia #25, Kuwait #50, Libya #86, Algeria #96, Morocco #100, Iraq #107, Comoros #116, Tunisia #120, Palestine #122, Egypt #129, Ethiopia #131, Yemen #132, Mauritania # 133, Jordan #134, Lebanon #145. Oman, Qatar, Somalia, Syria and Djibouti do not show up on this year’s chart of the WHR.

at this point. Doubts seem justified. Coming back to the issue of Sharia reservations, one can agree with *Salem* if she concludes: *'Yet, reservations generally, and Sharia reservations specifically, fulfil a useful political function as they allow States – that otherwise may not do so – to accede to human rights treaties and subsequently be bound to a comprehensive human rights framework including its reporting duties.'*<sup>278</sup> *'Based on that commitment, the monitoring bodies then can engage with the reserving state in a constructive dialogue around the reservation's necessity and its withdrawal.'*<sup>279</sup> This strategy seems reasonable as it *'has proven to be a successful approach given that out of the 23 OIC Member States that have originally entered Sharia reservations to the core nine UN human rights treaties, all but four States have withdrawn at least one Sharia reservation in the past 20 years.'*<sup>280</sup>

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<sup>278</sup> See *Salem N.*, supra note 80, p 9 (at no 28).

<sup>279</sup> *Ibid.*

<sup>280</sup> *Ibid.*

## VII. Possible Approaches to Human Rights Reform

Whether a human rights reform within LAS member states can be achieved in the near future is difficult to anticipate. The problem is complex: A large region covering 22 nations in North Africa and the Middle East cannot be influenced easily, let alone at once. Each nation in the League has its own, very unique way of doing things: Governance (some young democracies, several kingdoms and monarchies), legislation and judiciary, the interpretation and application of laws (among Sunni-led states, but also along the lines of the complicated Sunni-Shia schism), tribal traditions vs more modern approaches, etc. On top of this the region has been, and is, shaped and characterized by multiple internal civil and military conflicts, many of which having their roots in *external* political and geostrategic decisions by states outside of the LAS. So the real question is: How can a human rights reform under such circumstances *realistically* look like?

The author is convinced that while it makes sense to keep up the pressure coming from the international political and diplomatic spectrum as well as through international civil society and INGOs such as HRW, AI, Oxfam, etc, the main change has to come from *within* Islam and the Muslim world. Liberalism and progressivism do have a tradition within Islam and involve countless Muslim scholars who already at the beginning of the 20<sup>th</sup> century CE (and partly even before) started to establish the basis of what was subsequently called *Islamic Modernism*.

The Egyptian Islamic jurist and religious scholar *Muhammad Abduh*<sup>281</sup> was one such key figure for example.<sup>282</sup> *Abduh* argued that Muslims should not rely on interpretations of Islamic sources provided by medieval Islamic clerics, but should choose a more reasonable and especially *rational* approach in dealing with and interpreting the Quran and the Sunnah.<sup>283</sup> Other famous liberal Qur'anic thinkers and writers were *Nasr Hamid Abu Zayd*<sup>284</sup>, *Mahmoud Mohammed Taha*<sup>285</sup>, *Mohammed Arkoun*<sup>286</sup> and *Tarek El-Bishry*. Amongst contemporary authors are *Fahmi*

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<sup>281</sup> See *Terebessy L.*, *Muhammad Abduh and the Reform of Muslim Education*, independ. publ. 2021; and very recently also *Scharbrodt O.*, *Muhammad 'Abduh, Modern Islam and the Culture of Ambiguity*, London, New York, Oxford et al 2022.

<sup>282</sup> A good first overview on the topic see e.g. in *Kurzman C.* (ed.), *Liberal Islam, A Sourcebook*, Oxford & New York 1998.

<sup>283</sup> See also *Gelvin J.L.*, *The Modern Middle East, A History*, 5<sup>th</sup> ed., Oxford & New York 2020, esp pp 151 et seq and pp 179 et seq.

<sup>284</sup> See *Abu Zayd N.H.*, *Critique of Religious Discourse*, New Haven & London 2018; *Abu Zayd N.H.*, *Rethinking the Qur'an, Towards a Humanistic Hermeneutics*, Amsterdam 2004.

<sup>285</sup> See *Taha M.M.*, *The Second Message of Islam*, Syracuse 1987.

<sup>286</sup> See *Arkoun M.*, *Rethinking Islam, Common Questions, Uncommon Answers*, ed. by *Lee R.D.*, London & New York 2019.

*Huwaiti*, *Abdolkarim Soroush*<sup>287</sup>, or *Abdullahi An-Na'im*. All these names stand for a modern interpretation of the Quran and the Shariah. They were and are convinced that a modern interpretation of the so-called holy sources of Islam is both possible and needed for modern Arab societies. They believe a reconciliation between Sharia and modern IHRL is possible as the Quran can, in fact, serve as a basis for democracy, human rights and religious pluralism. These various voices need to be supported, the intellectual debate in this regard promoted, and regular, open exchange between academics further encouraged and intensified.

Only if larger parts of the populations in the Arab world can be convinced that such reconciliation is not only feasible, but actually necessary and to the peoples' benefit as it will be leading to fairer and more coherent justice systems (criminal justice systems, family laws, inheritance laws, PSCs, etc), there is hope that progress will be achieved and – similar to the *gradual* approach sketched by *Salem* in regard to reservations – human rights conditions will improve in the medium and long term.<sup>288</sup> At the same time the author believes that such gradual evolvment will take a lot of time. While freedom of religion and religious plurality touch the very heart of Islam and the Muslim world in general, and will have profound religious and cultural consequences, the further realization of gender equality, apart from its religious implications, will mean a substantial social change. Given the current political orders in many states of the League and the repressive climate mentioned earlier in this thesis, the author argues that legal reforms improving the human rights situations of the populations in those nations – not only with respect to freedom of religion and the rights of women – , will not happen quickly. It's more likely that effective reforms in this area are not a matter of years, but need to be measured in generations.

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<sup>287</sup> See *Soroush A.*, *Reason, Freedom, and Democracy in Islam*, Essential Writings of Abdolkarim Soroush, Oxford 2000; *Ghamari-Tabrizi B.*, *Islam and Dissent in Postrevolutionary Iran*, Abdolkarim Soroush, Religious Politics and Democratic Reform, London & New York 2008.

<sup>288</sup> The literature on Islam and its reform is unmanageable. Some of the works used for this thesis are *e.g.* *Jamal A.A.*, *Islam, Law and the Modern State*, (Re)Imagining Liberal Theory in Muslim Contexts, London & New York 2018; *Warraq I.*, *Why the West is Best*, A Muslim Apostate's Defense of Liberal Democracy, New York & London 2011; *Warraq I.*, *Why I Am Not a Muslim*, 2<sup>nd</sup> ed., New York 2020; *Safi O.* (ed.), *Progressive Muslims on Justice, Gender, and Pluralism*, Oxford 2011; *Murtaza M.S.*, *Die Reformer im Islam*, Jamal Al-Din Al-Afghani – Muhammad Abduh – Qasim Amin – Muhammad Raschid Rida, Norderstedt 2015; *Yuksel E.*, *Manifesto for Islamic Reform*, London 2009; *An-Na'im A.A.*, *supra* note 143, pp 13 et seq, pp 47 et seq, and pp 345 et seq; *Ellis M.S.*, *Islamic and International Law, Convergence or Conflict?*, in: *Emon A.M./Ellis M.S./Glahn B.* (ed.), *Islamic Law and International Human Rights Law, Searching for Common Ground?*, Oxford 2012, pp 91-103, with further references; *Gabriel M.A.*, *supra* note 28, pp 261 et seq; *An-Na'im A.A.*, *Toward an Islamic Reformation*, Civil Liberties, Human Rights, and International Law, Syracuse 1990; *Douglass-Williams C.*, *The Challenge of Modernizing Islam, Reformers Speak Out and the Obstacles They Face*, New York & London 2019; *Alshamsi M.J.*, *Islam and Political Reform in Saudi Arabia, The Quest for Political Change and Reform*, New York & London 2011; and *Haddad M.*, *Muslim Reformism, Is Islamic Religious Reform Possible?*, Cham 2020.

## VIII. Conclusion

The Middle East and North Africa represent a vast region associated with comparably high numbers of human rights violations. One of the main reasons is how nations in this specific region, *in concreto* member states of the Arab League, are governed, and, closely tied to that, on which legal basis governmental authorities abusing and restricting human rights act: the sources of Islam, in particular the Sharia and Islamic law. Sharia and, forming a part thereof, Islamic law, not only form a *legal* basis for the LAS and its members, but also need to be seen as the essential *social* and *cultural* foundation of today's Arab societies. It has been shown that both the Sharia and Islamic laws deriving from primary and secondary sources of Islam do not qualify as a coherent set of legally binding norms that ensures a just, equal and comprehensible application of laws. What can be observed is that Sharia and Islamic laws are, quite in contrast to many modern legislations and jurisdictions in the rest of the world, a combination of legal *and* religious norms, written and unwritten, shaped by religious and cultural/tribal traditions and various differing legal interpretations of those sources by mostly conservative Muslim scholars in Sunni and Shia schools of thought, which form the essence of Islamic doctrine and jurisprudence. As a consequence, the judiciary within each LAS member state too often rules in a correspondingly arbitrary and incoherent fashion, resulting not only in injustice, but also in considerable legal uncertainty among the Muslim and Non-Muslim populations within the said nation-states. In this context, human rights are limited, restricted and abused in unacceptable ways and in stark contrast to IHRL, freedom of religion and the rights of women (gender equality) being two such fundamental rights under pressure.

This master thesis highlights that violations of the principles of religious freedom and gender equality in the Arab world are not occurring exceptionally, but are clearly of a *structural, deliberate* nature, committed by governmental authorities, which do not have to fear any form of accountability or criminal responsibility for their actions and omissions. Apart from regular discriminations against religious minorities in almost all member states of the Arab League, questionable charges of blasphemy or apostasy against individuals – Muslims as well as foreigners – are repeatedly used by ruling elites to silence, *inter alia*, regime critics and to exert control over the own populations.

The regular discrimination and oppression of women and girls is likewise to be considered a structural problem, increasingly becoming a subject of public controversy and debate. In both cases – religious freedom and belief as well as gender equality – violations and discriminations

are regularly based on distorted and false interpretations, legislations and subsequent applications of legal provisions in LAS member states (and beyond). Despite slight first human rights reforms in countries like Saudi Arabia, human rights of women and girls still get abused disproportionately as reports from international and national NGOs show. There is, however, a growing number of progressive Muslim scholars and Quranist thinkers who see admissible possibilities to reconcile Islam with modern IHRL. Various Muslim reformers in the Middle East and in North Africa do believe that the most important primary source in Islam, the *Quran*, is indeed compatible with modern international human rights treaties.

With respect to the human rights situation within the League today, it can be argued that in regard to religious freedom and gender equality the key regional human rights instrument – the *Arab Charter on Human Rights* – is undoubtedly incompatible with the ICCPR, CEDAW and the CRC. In addition, the ACHR – despite its bold claims as known from IHRL and other regional human rights instruments – is incompatible with national/domestic laws in member states of the League. Though its drafters have tried to strike a balance between IHRL and the Sharia, this attempt was immediately thwarted by several references in the Charter to the Sharia, Islamic laws and the principles of Islam. The ACHR, by elevating Islam above all other religions, and on numerous occasions referring to an incoherent legal system, not only ignores the international principle of religious neutrality and pluralism, but also provides a basis which is inapt to substantially improve the daily lives of women and girls in the Arab world.

The ACHR and its accompanying *Statute of the Arab Court of Human Rights* both need considerable revision and amendment. In times of globalization and an internationalization of laws, which also human rights benefit from, member states of the LAS need constitutional reform towards becoming more secular, pluralistic nations, and in parallel ought to adapt and modernize their constitutional, criminal, private law and other norms. With respect to IHRL, international human rights treaties and regional human rights instruments such as the AmCHR, the ACHPR or the ECHR, serve as good examples that an effective regional human rights framework can exist and make this planet a little more just without accentuating and touting one specific religion.

Or: One can be a decent human being and a good Muslim – *without* the necessity to place Islam and the words of the Prophet above all other religions and beliefs.



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## Kurzzusammenfassung

Die vorliegende Masterarbeit befasst sich mit der Frage, inwieweit die beiden Menschenrechte 'Religionsfreiheit' und 'Gleichheit der Geschlechter' im arabischen Raum menschenrechtlich verankert und mit internationalen Menschenrechtsquellen vereinbar sind. Nach einer sowohl in geographischer Hinsicht (Staaten der *Arab League*) sowie in Bezug auf die Quellen (ICCPR, CEDAW, ACHR, etc) vorgenommenen Eingrenzung und einer kurzen Einführung in das arabische Rechtssystem der *Sharia* bzw des islamischen Rechts, erfolgt eine Darstellung einzelner relevanter nationaler Rechtsquellen sowie der derzeit in den gegenständlichen Ländern feststellbaren Menschenrechtssituation im Hinblick auf die beiden genannten Rechte. Die Untersuchung gelangt zur Feststellung, dass die arabischen/regionalen Menschenrechtsquellen in teils krassem Widerspruch zu internationalen Menschenrechtsquellen stehen, aber auch innerhalb der arabischen Quellen erhebliche Inkonsistenzen und Widersprüche bestehen, deren Wurzeln nicht zuletzt im insgesamt inkohärenten Rechtssystem der *Sharia* zu suchen sind. Reformen werden als notwendig erkannt, allerdings sind realistisch betrachtet adäquate Schritte in Richtung einer Modernisierung des arabischen Menschenrechtsschutzes in gegenständlichem Themenbereich in nächster Zeit nicht zu erwarten.

## Abstract

The present master thesis deals with the question as to how, and to which extent, the human rights 'religious freedom' and 'gender equality' are stipulated in the Arab world and whether relevant Arab human rights sources are compatible with International Human Rights Law (IHRL). After a geographic delineation (states of the *Arab League*) and a clarification in regard to international and regional legal sources (ICCPR, CEDAW, ACHR, etc), a short introduction into the legal system of the *Sharia* and Islamic Law is given, followed by an analysis of relevant national laws and the human rights situation on the ground with respect to both said rights. The thesis concludes that there are several inconsistencies and incompatibilities between IHRL and Arab human rights sources, and that such incompatibilities also do exist *within* Arab sources, the roots of which are partly to be found in the incoherent legal *Sharia* system. Reforms are deemed necessary, however, realistically, adequate steps towards a modernization of the Arab human rights protection system in the context of gender equality and religious freedom cannot be expected anytime soon.