Natural Right and Islam: a Bridge to Modernization

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Natural Right in Islam: a Bridge to Modernization

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Abstract: Natural right is a foremost factor of the dialogue in the Euro-Mediterranean World, a great regulator for building the democratic state, international relations and respect for human rights in general, and penal law. Secular and religious allegiances converge in acknowledging it as the key factor for acknowledging human rights and ensuring social pluralism; for sustaining the law’s primacy in the state-building process; for maintaining the counterbalance of civic duties and rights, without which no political leadership can be sustained; for promoting the supremacy of international law; and for legitimising the power of supranational organizations.

Introduction

As European Union and NATO strengthen their initiatives with South Mediterranean partners — the Barcelona Process since 1995, and the Dialogue for the Mediterranean since 2002 — evidence accumulates that soft power is sues hold the key to cooperation at different levels: a) multinational level; b) states and their respective national interests; c) private corporations with their goals in a market economy; d) institutions of civil society and their public goals. At every level of governance, cooperation revolves around understanding the nature and mutual potentialities and shortcomings of the co-operators. Dialogue between both shores of the Mediterranean needs to overcome misperceptions and allay mutual fears resulting from different stages of modernization and different perceptions of modernity itself, in both South and North. If societies do not equate the real issues of modernization they are condemned to "play with fire", assuming that migration from South to North is a fatality and missing opportunities of investment and industrialization in the South Mediterranean countries.¹

There are no few misunderstandings in this issue. Western culturalists conceive that the Islamic world cannot modernize because of religious-based priorities: faith over reason, community over the individual, Moslems versus "others".² European countries such as

¹ As Francis Ghilès argues in this book.
² See LEWIS, Bernard, What Went Wrong? The Clash between Islam and Modernity in the Middle East, New York, 2002. LEWIS coined the term "clash of civilizations" to describe the relations between the Muslim world and the West in a 1990 issue of the Atlantic Monthly. See also HUNTINGTON, Samuel P., "The Clash of Civilizations?" Foreign Affairs 72, no. 3 (Summer 1993); the Clash of Civilizations and the Remaking of World
France receive Maghreb migrants but do not give them representation rights. American exceptionalism, i.e. the US’s self-perception as being the "end of history" and the "centre of the world", runs counter to the multilateralism encouraged by the US. On Islam’s side the law known as Sharia, understood as an integral part of belief, and intruding upon the public and private lives is a tremendous obstacle to modernity. Its adoption, covering not only religious rituals, but also aspects of day-to-day life, politics, economics, banking, business or contract law, and social issues causes delays in modernization and may cause death penalties.

1. Multiple Modernities

The problem with these conventional approaches is that they operate within a narrow and deterministic concept of modernization understood as a convergence towards a uniform society, favoured by "progressives", abhorred by "traditionalists" or "fundamentalists". A framework of analysis for the Mediterranean countries' has much to benefit from what Shmuel Eisenstadt called "multiple modernities". Such a framework demonstrates that tradition is not necessarily an enemy of development. The disruption of traditional lifestyles does not assure the creation of a modern and viable society; sometimes, it only leads to disorganization and social delinquency. Some of the great successes of social and economical modernization - such as England and Japan - reached a compromise with traditional behaviours. The 20th century history of totalitarian regimes, USSR and China, showed that indicators of modernization, such as alphabetization, media diffusion, formal education and urbanization, did not originated neither nurtured the growth of liberating and "rational" institutions.

Thus, the "developmentalist" paradigm of modernization was destroyed by the acknowledgment of several paradoxes. Tradition can either hinder or facilitate transition to modernity; in contrast to the concept of "civilizational shock", the 'meeting between civilizations' has historically been more lasting and efficient; the modernization process does not necessarily follow the European standard. Tradition is a general reservoir of behaviours and symbols of each society whereas "traditionalism" or "fundamentalism" is a radical reaction to modernizing forces; concepts such 'society in transition', 'collapses of modernization' and 'failed states' are debatable because they assume a deterministic evolution; modernizing societies are able to reorganize traditional behaviours, symbols and forces, after the emergency of Western models.


1 Also Shar 'ah, Sharī'a, Shariah or Syariah, the Arabic word for Islamic law. Most Sunni Muslims follow variants of Sharia such as Hanafi, Hanbali, Maliki or Shafi'i, while most Shia Muslims follow Ja'fari.


Conventionally, "modernity" was understood as a historical period, the economic and socio-political transformation that followed the scientific and technological developments flowing from the rationalist way of thinking after the European Renaissance. This "great transformation" included a major shift from religion to democracy as the basis of political legitimacy. Actually, "modernity" or "modernization" is a civilizational process that emerged first in Europe but that was global, combining with national and regional identities, and with particular religions and traditions. Each contemporary society is a result among other possible outcomes; a linear process of evolution of societies does not exist; no course of events is the result of causes previously anticipated as necessary; in the world-system, each country or group of countries finds itself in a specific stage of modernization. As we adopt this approach, we overcome the narrow and deterministic concept of "modernity" as convergence towards a uniform society, and we get a framework to analyse the "great transformation" of the Euro Mediterranean world.

A key softpower factor of modernization is natural right. I presented some reflections on it Madrid, at the NATO ARW organized by CESEDEN on 21 March 2004, coincidentally the week following the terrorist attacks. In October 2004, in the foreword to *De Legibus* by Francisco Suárez, I explored natural law as a basis for alliance between secular and religious currents. In March 2005, at the Lisbon NATO ARW, jointly organized with Mohamed Khachani, I looked at the subject from a security perspective. After translating a book by young Moroccan thinker Rachid Benzine I returned to the issue at the *Christianity and Islam Colloquium*. Later, at the _Is' International Conference on the Mediterranean*, in Rome in October 2005, I looked at some of the praxeological perspectives. At the colloquium on *Natural Right and Historicity*, at the Oporto Faculty of Law on 8 November 2005, I introduced a dialogue with Islam.

In this article, I endeavour to emphasize that the modernization of the Muslim Mediterranean countries is facilitated by the natural right doctrine contained in the Qur'an and Sunna but hindered by Sharia. The authoritarian and democratic regimes in the Mediterranean arch from Morocco to Turkey are characterized by the predominance of the Executive power and the bureaucracy and by the reduced importance of the legislative bodies and parties. As those tutored democracies are pledged in modernizing societies and economic development, their governments prefer to deal directly with interest groups and watch closely social movements and expressions of public opinion. The discrepancy between the modernization goals and the persistence of traditional Islam compels them to adopt steady institutional framings. As this discrepancy favours fundamentalist eruptions, those regimes must choose between yielding to Islamist parties enforcing brutal repressive
measures, or strengthen modernization processes based on the rule of law. The predominance of this "third way" is reinforced by the natural right doctrines in the Qur'an and Sunna.

2. Modern Islam

It is easier to define natural right than to operationalize it. Beyond interests, subjective evaluation and arbitrariness, there are permanent norms for man’s behaviour as a part of humankind and member of a whole. Natural right is based on the principle that Man is a social being with inherent prior rights, irrespective of the rights that the state and society decide to grant. This stance may, or may not, be religiously grounded. The great Abrahamic religions confirm the primacy of the dignity of Man and, as such, natural right is a bridge between religions. Against the Positivistic and the Classical objective school, modern doctrine of natural right assigns it a variable content, both in history and in internal and international organizations. It is a fundamental source for establishing norms for public life across multiple cultures.

As the great regulator for building the democratic state, international relations, respect for human rights in general, and penal law, natural right is the foremost factor for the dialogue in the Euro-Mediterranean World. It is the key factor for acknowledging human rights, resisting breaches of human well-being and ensuring social pluralism; for sustaining the law’s primacy in the state-building process; for maintaining the counterbalance of civic duties and rights, without which no political leadership can be sustained; for promoting the supremacy of international law; and for legitimizing the power of supranational organizations.

Now, in Islam, there is a clear interdependence between the political and religious spheres, expressed in the concept of the community of believers (umma). If we are to understand about what happened in the past and is happening today in the Muslim world, we must appreciate the universality and centrality of religion as a factor in the lives of the

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15 Objective natural right is established by HERVADA, Javier, Introducción Crítica ai Derecho Natural (Pamplona 1981, 10th ed. Pamplona 2001) p. 8: "When one speaks of natural right, the purpose is to affirm that Man is society’s central reality, that Man does not stand before others as a being who can be treated according to their whims, but a worthy and demanding being, bearing rights inherent in his own being. The dignity of Man contains the basis of all law, such that beyond the scope of who Man is and whom he represents there is no right, but only domination and injustice, even if the instruments take the form of law. What creates right is not power, nor society, but rather what emanates from human beings; that is why the nucleus of right which is borne by Man marks the dividing line between legitimacy and illegitimacy, between legal action and anti-legal action of power and of social groups."

Muslims. In contrast to other great religions, "Islam from the lifetime of its founder was the state, and the identity of religion and government is indelibly stamped on the memories and awareness of the faithful from their own sacred writings, history and experience".¹⁷ For Moslems, religion "constituted the essential basis and focus of identity and loyalty".¹⁸ And "most of the significant political and social movements in modern Muslim history have drawn heavily on Islam as a unifying and motivating force".

Modern Islamic movements display a constant dimension of Renaissance or Awakening (Naha), which gives them a common methodology and ideology.

These 19th century movements arose in response to European colonization. They responded to the conquest of Egypt and the colonization of India by Britain; the colonization of the Maghreb countries by France and Italy; the dismembering of the Ottoman Empire by the Western powers in 1918; and the colonization by Britain and France of the Arab countries that had been under the Ottoman yoke. The creation of and Western support for the state of Israel, in 1948, the Suez War against Nasser in 1956, and the wars waged by the US and international coalitions against Iraq in 1991 and 2003 are part of a new historical panorama of independent Muslim nations and an American-led West.

The conquest of Egypt launched by General Bonaparte on 1 July 1798 was especially resonant for the renaissance of the Arab world. Although it only lasted three years, it revealed Muslim vulnerability and it instilled a desire to adopt Western techniques and values. The Enlightenment and the ideals of the French Revolution would become known before scientific ideas and rationalism. Sharia doctrinaire resisted, but other elites adopted European ideas that were compatible with and beneficial to Islam in countries such as Egypt, Tunisia and Turkey.

The Albanian sovereign Mehmed Ali (1769-1849), wanted to take Egypt into the modern world. Sheik Rashid Rida (1801-1873), from Al-Azhar University and educated in France, wanted to reform Shari'a in one with the French Civil Code model. The leading pro-Europeanization writer was Taha Hussein (1889-1973), who wrote that Egypt belonged to the Mediterranean and Western world. Tunisia secured autonomy from the Ottoman Empire and developed a close relationship with France from 1840 onwards. Khayr al-Din (1822-1890) established democratic-type institutions and overhauled the Muslim state. In Turkey, Sultan Abdulmagid (1839-1861) initiated reforms (Tanzimat) that were subsequently stifled by his successor's authoritarianism. After the fall of the Ottoman Empire in 1922, Mustapha Kemal Ataturk (1880-1938) secularized public life by separating State and mosque, but keeping the building of mosques, the training of imams and even Friday sermons centralized under the Directorate of Religious Affairs.

This policy of reforming Islam, from the mid-19th century until the Second World War, displays a healthy reaction to Islam's self-absorption. The intention was to reform political

life, society and religious knowledge. However, the results were frustrated by European hegemony and the internal decay of Muslim societies. The so-called "great reformers" — Jantai al-Din al-Afghani, Muhammad Abduh, Rashid Rida and Sayyid Ahmad Khan — tried to change the norms and values of Muslim societies in line with the criteria of the Enlightenment and the Industrial Revolution. However, their successors were not of the same calibre, for various reasons. The end of colonial conquests brought the substitution of Europe by the US. Since 1940, Muslim countries have found their new hopes frustrated, with the muddle of socialist pan-Islamic revolutions. From the early 1950s, Arab nationalist revolutions — thawras defined Third World and Socialist objectives.

The reformers opened the way to two major kind of movements, Islamist and modernizing. Hassan al-Banna (assassinated in 1949) founded the Muslim Brotherhood, and the Pakistani Abu Ala Mawdudi (1903-1979) founded Jama'at-i Islami ("the alliance of Islam"). The Indian Muhammad Iqbal (1877-1938) and the Egyptian Ali Abderraziq (1888-1966) founded critical Islamic movements. Hassan al-Banna strived to turn Egypt back to an Islamic society; its law would be based on the Koran and the Sunna, with a Muslim caliphate. He displayed a concern for social justice but rejected Western values. Sayyed Qutb (1906-1966, hanged at the order of Nasser) endowed the Muslim Brotherhood with a body of doctrine. Mawdudi, an observer of the clashes between Hindus and Muslims, regarded Islam as an alternative ideology.

An outstanding critical reformer is Muhammad Iqbal, the spiritual father of Pakistan. He embraced the best of the theological, philosophical and mystical inheritance of Islam and of Western philosophy in his work Rebuilding Religious Thought in Islam. Believing that religious thought results from inter-cultural exchange, he proposed an open Islam. Another outstanding reformer was Ali Abderraziq. In 1925, he published Islam and the Foundations of Political Power, in which he challenged the legitimacy of the caliphate tradition, the public relationship between the secular and holy, and the muddling of political and religious spheres, and of history and faith. Abderraziq saw the political role of Mohammad in Medina as an exception, and he rejects the traditional Islamic idea of power established by revelation. That "great illusion" had deprived the Muslim peoples of effective solutions. The "Islamic" state was a secular, not religious, entity. As the Egyptian Muhammad Saiis said in Islamism against Islam: "God wanted Islam to be a religion, but men tried to convert it into a policy".

The efforts of 19th century Islamic reformers opened the way for the secularization that prevailed in the 20th century. Sharia became a private affair in most Muslim countries after the end of WWII. Yet secularization was shaken by the failure to build states without taking account of religious institutions, as in the Iran of Reza Pahlevi, and to a lesser extent...
degree in Pakistan. Even Muslim societies that strive for a secular state — such as in Iraq and Syria, dominated by the Ba'ath party — must deal with the implications of Sharia as private law.

As Islamic doctrine demands jurisdiction over questions of morals, new thinkers and reformers of Islam struggle with a dilemma: either they infuse old doctrines with new life and adapt them to current needs, or they look for a non-religious source of inspiration. According to secularist Muhammad Abduh, in agreement with the goals of Abderraziq, Muslim societies should be free to organize their own government and institutions. However, a Muslim needs the cultural resources of Islam for his identity. The Koran is a monument to the Arabic language and poetry, and to Muhammad, its outstanding messenger. As Fazlur Rahman wrote, "the difficulty for the Islamic secularist is to have to prove the impossible, i.e. that Muhammad, as he acted as legislator or politician, acted in a secular and extra-religious way". 23

Of the two kinds of reforms of public law undertaken in the 19th century, James Norman Anderson says: "the Sharia was more and more widely displaced in practice — in such matters as commercial law, criminal law, and much else — in favour of codes of largely alien origin, applied by a system of secular courts; and secondly, that even in the sacred sphere of family law (administered as this still was, in most of the countries concerned, in specifically Sharia courts) a number of most significant changes were made in the way in which it [Sharia] was interpreted and applied". 24

Herbert Liebesny explained that Shari'a was dislocated by European-type secular legislation in successive phases. The first circle to fall was commercial law; then came penal law, property law, contract law and torts. Inheritance and family law have been less affected. 25 However, even the practical violation of Sharia has been disguised by keeping it unbroken in theory. As J. N. Anderson notes, for a Muslim it is a greater sin to deny divine revelation than to disobey it. Spoken homage to Islamic law may go hand in hand with the appeal to the doctrine of necessity (darura), rather than adapt to the requirements of contemporary life.

The emergence of "new voices of Islam" 26 or "new Islamic thinkers" 27 shows that using necessity (darura) as an excuse is no longer sufficient. The minority who propose the restoration of Sharia demand an end to any concessions to contemporary life. Much more numerous are those who take the benefits of modernity and the secularization of public life for granted. Self-determination, democratization and freedom of speech, belief and association would be destroyed by the return to full Sharia. As secular public law has developed, Muslim women have acquired educational, professional and civic opportunities that they will not abandon.

Given the premise that all Moslems believe in the fundamentals of Islam (which is why the term "fundamentalist" is questionable), "the question to be asked is not the crude,
falsely dichotomous 'Is Islam compatible with political development?' but rather 'How much and what kinds of Islam are compatible with (or necessary for) political development in the Muslim world?'

It is tangible policies that establish compromises between religious references and secular public right: "It is not easy to imagine a contemporary society in which Islamic institutions of another age continue to play a vital role as some proponents of an society' seem to champion, nor is a new identity without a prominent Islamic element very likely".

Currently, Islamic countries can be classified according to whether they aim to comply with the totality of Sharia, or review and revise it, as the source of right and law. For all, Sharia is "humanity’s duty", a moral and pastoral ethic and theology, a spiritual aspiration, and a ritualistic and formal observance. It embraces ali public and private law, hygiene, and even courtesy and good manners. The offence of apostasy (ridda) is variously persecuted in ali Islamic countries, particularly Iran, Sudan and Saudi Arabia. Most of the population considers it a heresy to repudiate any part of Sharia, which is a barrier to modernization and secularization. In the international sphere, Sharia authorizes the aggressive use of force to propagate Islam, and does not recognize equal sovereignty with non-Moslem states. Domestically, it breaches principles of human rights, and authorizes criminal persecution by decree (fatwah) for religious reasons, such as the notorious cases of Salman Rushdie and Abu Zayd.

"Old reformers" and "new thinkers" of Islam have overcome such obstacles, showing that Sharia does not have a divine origin, having been constructed by early jurists from Islam’s basic sources. It is the product of interpretation, and of a logical derivation of the wording of the Koran and the Sunna, as well as other traditions.

The deconstruction of those sources and such development shows that, as historically established, Sharia will never be a source of self-determination, and it creates insoluble problems in the modern world. The only way of facing up to these divergent imperatives is to show that the Koran and the Sunna support natural right, and that Sharia is a perversion. Secular public right in Moslem nation-states has opened the way for compatibility with international legal criteria. However, the construction of the state without religious humanism, as was seen with pan-Arab socialism, left out the jus-naturalist construction of

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31 The fact remains that apostasy is a capital offence in the various schools of Sharia as illustrated by the ongoing (April 2006) case of the Afghan Abdel Rahman. For an optimistic approach see KAMALI, Mohammad Hashim, Freedom of Expression in Islam p. 92: "The practice of early Islamic leaders, particularly the Rightly-Guided Caliphs, was consistently determined by the Qur'anic norms which seek to protect the integrity of the individual conscience."
32 Ayatollah Khomeini’s fatwah of February 1989 against Rushdie says: "I inform the pmud Muslim people of the world that the author of the Satanic Verses book which is against Islam, the Prophet and the Koran, and ali involved in its publication who were aware of its content, are sentenced to death". In 1994, Abu Zayd was divorced from his wife Ibtihâl, against the wishes of both, by Egyptian courts who judged him to be "apostate", and he took exile in the Netherlands.
33 Os Novos Pensadores do Islão, 01. 3.
the democratic state, of penal justice, and of human rights. Currently, Islam is showing that political and religious reform can be mutually supportive, provided natural right mediates them.

3. Rule of Law

The state’s structure and organization, and the division and exercise of its powers, are the starting point for any debate about public right in Islam. The constitutional structure determines the relationship between state bodies and citizens, and through this, individual rights, freedoms and guarantees are exercised and each state conducts its international relations.

Despite the religious unity resulting from Sharia, Moslem peoples are organized unto nation-states, and will be for the foreseeable future.\(^{34}\) Many sociological, economic and political issues are associated with political and legal constitutionalism. However, without minimizing their importance, the fact remains that the nation-state has taken root in the Islamic world ever since European colonization brought with it its power structures and concepts.\(^{35}\)

However, the nation state was not born of Muslim history and cultural traditions. As with other African and Asian peoples, there is a long process of adjustment and reformulation of institutions and practices before democratic rule of law is achieved. The guiding principles come from the Far Western European countries, such as Great Britain, France, Spain and Portugal.

Although in historical Islamic "constitutions" Sharia had a limited say as to how the organs of government functioned and their relationship with the population, early jurists and subsequent generations did not think in terms of "positive right" as distinct from religious and ethical matters, and still less in terms of constitutional law. Furthermore, historical "constitutions" were lacking as regards the rights and well-being of "citizens", because they excluded women, slaves and foreigners, which are fatal flaws from a constitutional viewpoint.

In current Islamic constitutionalism, public authority is exercised in accordance with the law. The government is responsible for law and not men, in une with the Western constitutional model. By conforming to universal standards, Modern Moslem nation-states ensure equal citizenship rights for their population, such as equality before the law and participation in governance. In addition, they provide the legal resources to develop and fulfill individual identities.\(^{36}\)

There are two strong arguments to back the validity of constitutionalism and its application to non-European political traditions: one moral and the other empirical. Moral justification is the principle of reciprocity, common to all cultural traditions, whereby one must treat others as one would want to be treated by them. Agreeing to place oneself in the

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\(^{34}\) Even not colonized Arab countries, as Saudi Arabia, adopted the governance structures of the modern nation-state.

\(^{35}\) PISCATORI, James, *Islam ia a World ofNationStates*, Cambridge, CUP, 1986, Ch. 2 and 3.

"other's" position and decide if one accepts his/her status is the supreme test of the universality of natural right. The empirical argument is that democratic constitutionalism is the free choice of the vast majority of the world's peoples. Thus, domestic and external indicators confirm that constitutionalism not only combines legitimate means and desirable ends in a rational and effective way, but that it must respect the procedures of rule of law and democracy, so as to balance the demand for social justice with individual freedom. That path has still to be completed by most Moslem states.

4. Penal Law

The state maintains public order and preserves citizens' security via the power of punishments affecting individual life, freedom and property. That such drastic consequences should be necessary to protect public and private security should not obscure the risks of abuse and manipulation. Imposing penalties does not just imply the possible loss of freedom and property, but also social stigma and psychological suffering. So it is no surprise that the administering of penal law is severely limited and subject to rigorous scrutiny by national constitutions and international agreements.

Sharia's principles and rules regarding penal law appear in general treaties on Islamic jurisprudence, and identify three categories of offence: hudud, jinayat and ta'zir. Hudud are offences for which a specific punishment exists, with no prior judgement nor appeal. Jinayat covers murder and bodily harm, and is punished either by pure retaliation (qisas) or payment of financial compensation to the victim and relatives (diya). Ta'zir relates to the discretionary powers of governors and judges to reform and discipline the accused. Given their nature, they do not take a specialized criminological approach to proof and procedure. Moreover, there are passages of the Koran and the Sunna that specify requirements for hudud-type offences. For example, the hadd (the singular of hudud) for fornication (zina) requires four male witness of the act of copulation, a requirement that is debated by jurists themselves.37

It is an acknowledged fact that penal law defined by Sharia contains the most glaring breaches of natural right. As illustrated by recent experience in Iran and Sudan, its implementation results in undesirable cruelty and negative political effects. However, the rudimentary nature of Sharia has always given plenty of leeway for judges whose job it is to implement it. Almost all modern Moslem states have long since superseded Sharia as their penal law, and have incorporated the rights arising from relevant international agreements into their national constitutions. The vast majority of Moslem states have adopted the Universal Declaration of Human Rights (1948) and the International Covenant on Civil and Political Rights (1966), even if to protect the rights of foreigners within their borders.

International criteria concerning penal law pertain above all to procedural aspects, to ensure a fair determination of the accused's innocence or guilt. Other safeguards relate to legal aid, the independence of the courts and the ability to (and conduct of an) appeal. But

beyond such procedural issues lie others, such as the principle of legality, and the punishment and treatment of prisoners. The principle of legality makes visible what is prohibited by penal law, so that everyone knows the rules. It is deemed unjust to punish those who break the law without having had sufficient opportunity to comply with it. Crime and punishment must be defined as precisely as possible, before punishment is imposed accordingly. As a corollary, courts must make the strictest possible interpretation of penal legislation. In line with the individual's fundamental freedom of action and presumed innocence, nobody must be punished unless it is for conduct which he/she knows to be forbidden.

Finally, there is a general principle underlying the state’s power to impose sanctions. Every society decides upon the reach of its penal law within a framework of constitutional legitimacy. Imposing sanctions and penalties is an exercise in national sovereignty, provided that such decisions are taken by legitimate representatives and within the appropriate bodies. But punishments and sanctions have to conform to social consensus, especially the expectations of ethnic, political and religious minorities. The dictatorship of the majority is all the more insufferable when it affects penal law. National sovereignty over the content of penal law is not a mask for imposing the beliefs of the majority on the minority. Under democratic rule of law, penal legislation must conform to the constitutional guarantee of basic rights. Any discrimination based on race, religion, or gender is unacceptable, as it is unconstitutional. If such legislation is decreed, it must be annulled via the body and procedure established for that purpose.

This is a problem of content, and not just the form of law, because the validity and compulsory nature of the criteria of penal law are based on a moral judgement, which is that of natural right. The best argument in favour of such criteria is this: as they are the minimum we would ask for ourselves, our conscience obliges us to demand them for others.

5. International Law

The purpose and function of international law is to regulate the relationship between member states of the international community in line with principles of mutual equality and justice before the law, so as to ensure the peaceful coexistence, security and well-being of states and their citizens. In the interest of world peace and justice, it is not only desirable but also imperative that states' actions conform to international law. Obviously, there is a chasm between the paradigm of international law and its practice, but the deep inadequacies of law in practice do not negate the paradigm; nor does the debate on the unacceptable status quo in international relations prevent a realistic view of the desired aims. In that sense, the definitive test of international law is each state’s ability to achieve national freedom without wounding the interests of the global community, as protagonists of international law.

States are the main entities with rights and duties, and with the capacity to act. Because it was developed by 17th century European nations, international law reflected their perceptions and interests: American, African and Asian peoples were not qualified to
belong to the civilized community of nations, and were not involved in its creation. Since the end of World War II, decolonized territories and peoples have begun making their contribution. Consequently, law has become truly international, reflecting the perceptions and interests of all nations.

The development of international law must be approached from the viewpoint of relationships of power between states. These are the bases for internal and external processes of international relations, including the formulation and implementation of international law. The validity and usefulness of such approaches are easier to understand in the jus-naturalist domain: not confusing what the law is with what it should be does not mean eliminating the reference to duty, says the jus-naturalist paradigm.

Each state's perceptions of its own national interest (formulated by the predominant political class) change over time. That change is shown by developments in contemporary international law, especially the right to self-determination, restrictions on the use of force in the international sphere, and the promotion of human rights.

In this sense, Moslem states have abandoned Sharia principles that contradict the essential aims and principles of international law. In one with the reciprocity principle, they recognize in all states, Islamic or otherwise, the same degree of sovereignty; they repudiate the "religious right" to use force to propagate Islam, and the clandestine use of force. For the overwhelming majority of Moslem citizens, the quality of Islam achieved via peaceful voluntary conversion is superior to that achieved by the use or threat of force. A Moslem community maintained by legitimacy and justice is superior to a community united by repression.

This positive evolution should not lead one to overlook the problems arising from the chasm between international law in theory and practice, nor to underestimate the tendency of powerful states to apply international law selectively. The process is dynamic, given that conformity by all participants generates positive developments, and the failure of some of them to comply leads to others' efforts being frustrated.

6. Human Rights

What are known as basic constitutional rights relate to human rights issues in the modern nation-state context, i.e. issues linked to democratic rule of law and penal law. However, there are also human rights recognized and promoted by international institutions, expounded in the context of the international legal system, especially those emanating from the United Nations. The universality of the principles set forth in Article 1.3 of the UN Charter obliges all states to cooperate in the indiscriminate promotion of respect for human rights and basic freedoms.

Following on from the UN Charter, regional declarations for Europe, the Americas, Africa and Asia set forth human rights criteria and how they should be implemented. This

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* SUÁREZ, Francisco, De Legibus, op. cit. Foreword, pp. 47-54.
* HAMIDULLAH, Muhammad, Muslim Conduct of State, Lahore, 1966.
* According to Mahmoud Taha, the Mecca model is superior to that of Medina. Cf. An-Na'im, passim.
is termed *jus cogens*, one of its main principles being the repudiation of genocide and all forms of religious, ethnic, language- and gender-based discrimination.

Within Islam, Sharia denied women and non-Moslems dignity equal to that of Moslem men. When Sharia was created by the founding jurists in the 8th and 9th centuries from original Islamic sources, it was natural to restrict the reciprocity rule. "Others" were deemed to be just Moslem men. The tendency at the time was to create a closed society. What made it unsuitable was its crystallization by Islamic power. It is true that the Koran and the Sunna were revealed as bearers of basic principles more or less similar to those of the Bible, and were expressed in the form of "cases" to be solved, always in a very precise context as regards place and time. It is also true that Moslem law subsequently created and developed Sharia itself over very many centuries, at every step referring to the personal opinion (ra'y) of its jurists (fugâlā), the analogous reasoning (gīyeis) that they widely practised, and the majority consensus (ijmâ) of the jurists of each canonical school. The development of secular law in Islam, especially since 1948, has widened "others" to include all human beings of any gender, religion, race or language. Moslem states abandoned the predominance of historic Sharia law as they began to exercise their right to self-determination without breaching the rights of other peoples and individuals. Signing of the convention on the final abolition of slavery dates from 1926, and condemnation of persecution and discrimination against religious minorities dates from the 1950s. Condemnation of gender-based discrimination took final shape in 1979. In September 1981, the Islamic Council for Europe presented the Universal Declaration of Human Rights in Islam to UNESCO, following the universal Islamic Declaration (12 April 1980) and a draft Islamic Constitution (10-12 December 1983). The Islamic Conference Organization approved the Universal Declaration of Human Rights in Islam, ratified in Cairo on 4 August 1990 by the 45 foreign ministers. The Arab League promulgated the Arab Human Rights Charter on 15 September 1994.

International declarations and treaties, which recognize universal human rights, are imperative for all states. In Islam’s case, what is important is that those rights be accepted as universal not only because they appear in declarations and treaties, but because they are recognized as natural human rights, which the Koran can support. For natural right to be effective in changing the attitudes and policies of Islamic majorities, recognition of "others" has to be valid and credible from the believer's point of view. Just as Western religious and cultural traditions managed to overcome limitations on "others" from the inside, so Islam has to overcome the hostility and resentment created by Sharia within its own cultural tradition.

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* A typical case in which morals and religion act as forces to close society and prevent an open society. BERGSON, Henri, *Les Deux sources de la morale et de la Religion*, Paris, 1929, Ch. 1.


Conclusion

The main obstacle to ensuring the effective implementation of jus-naturalist criteria — going beyond religious and cultural boundaries — is that each tradition has its framework of reference, and the validity of its precepts and norms is derived from internal sources. For each tradition to be able to relate to others without claiming superiority for itself, natural right supplies a standard: the principle of reciprocity. Universal human rights criteria are assumed to the extent that the principles of "giving to each what is his own", "harm nobody" and "live transparently" are articulated by each cultural and religious tradition.

The moral and logical strength of such principles can be understood by any individual, irrespective of cultural tradition or philosophical persuasion. The reciprocity principle invites us to put ourselves in the place of the "other" — someone of another race, gender, or religion — and ask ourselves what human rights we should demand. The universal answer is the basis of trans-cultural human rights. Starting from that basis, one can debate other major issues, such as the relationship between aims and means in the implementation of rights, the hierarchy of different rights, and the legitimacy of exemptions from specific obligations in emergency situations.

Natural right responds to the impoverishment of criteria for human action in the field of public governance. Whether expounded by objectivist or subjectivist jus-naturalists, the conclusion is the same: the triumph over "domination and empire" depends on the predominance of natural right. In the past, early modern Western rationalism was not constructed in opposition to faith, as it sought to counteract clear fallacies advanced by religious authorities. The vindication of subjective natural rights by Suárez, Grotius, Hobbes, Rousseau and Kant was not destructive of religion per se. Nowadays, the submission to God in Islam does not prevent progress and individual initiative, if the separation of the public and private domains, or politics and religion, is carried. The South Mediterranean challenge of modernity does not concern "the relevance and applicability of foreign models" but a new compromise between modernization and tradition as enshrined in natural right.