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RE-CONSIDERING THE THEORY OF UNIVERSAL HUMAN RIGHTS IN LIGHT OF THE CLASH BETWEEN TWO UNIVERSALISMS: INTERNATIONAL HUMAN RIGHTS LAW AND ISLAMIC LAW

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It is argued that the Western world has long endeavored to explore and refine human rights law, and continues to do so. Nevertheless, many Islamic states have started claiming that Islamic law is capable of dealing with human rights law. These Islamic states express the belief that Western law has some deficits in practice and that it does not consider Islamic principles and values. Ultimately, both Western and Islamic laws claim universality. The paper will investigate these alleged universalisms and explore the negative consequences of such assertions. It will be concluded that it is detrimental to perceive the perspective of 'the other side' as threatening, or their upholders as enemies. Rather, each orthodoxy should value the efforts and cooperation of the other in attempting to apply laws that serve common desired aims.

1. INTRODUCTION

Although the concept of universal human rights is defended by many scholars, particularly after the announcement of the Universal Declaration of Human Rights (UDHR) in 1948, there are still issues to address. One problem is that proponents of universal human rights theory do not only insist that certain rights are of fundamental importance and therefore should be practiced universally; they also claim that any ideology that conflicts with their code of rights is categorically wrong. Conflict arises when new states and ideologies emerge alongside the Western states and become actively involved in the realm of human rights and human rights law. When the idea of universal human rights first arose with the establishment of the United Nations, the dominant civilizations lay in the West, namely the EU and USA, for which reason I shall henceforth refer to 'Western universalism'. With new states gaining their independence after colonialism, especially the Islamic ones, new ideologies have gained more power, throwing the dominance of Western ideology into question. Therefore, when we consider the concept of universalism, we must keep in mind that the world comprises more than 190 states and encompasses a multitude of ideologies and beliefs. For an idea to be deemed universal, it follows that all states and ideologies will have to agree with it; otherwise, such 'universality' counts for very little.

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Now, most international human rights documents stress the proposition of the universality of human rights, from the American Declaration of Independence to the UDHR. Such universalism is based on the belief that all humans have certain rights which have been acquired from the beginning of time, and that they cannot either be given away by their possessors, or taken away by someone else.¹ The purpose of this paper is to clarify that if an ideology creates certain rights or laws regarding how to live, and expects all human beings to follow them, that same ideology should provide ample evidence to support its claim. Thus, the paper will examine the possible foundations for such universality and explore the extent to which they provide a firm justification for the universality claim. The importance of such an investigation is not so much to undermine the notion of universality itself, rather, it is to establish the ways in which it is possible to persuade individuals who advocate another ideology of human rights, which may itself claim universality, of the importance of the universal nature of Western human rights. This can only be possible if we scrutinize the main foundations of the Western universality theory, examine its main sources, and make them clear to those who do not currently support them.

Ultimately, the idea of Western universal human rights should be able to defend itself in the face of different ideologies, which also claim universality for their principles, such as the Islamic ideology. For example, in 1981, the Universal Islamic Declaration of Human Rights (UIDHR) was declared by the Muslim World League.² It is argued that this declaration asserts that the Islamic world also has a code for human rights and that this code is universal in the same way that the UDHR is. That is to say that the Islamic ideology emphasizes the importance of a certain code of rights and expects all humans to adhere to it; anyone who conflicts the code will be wrong and morally corrupt. The paper will be concerned with examining the foundations of the universalism claim made by both the Western and Islamic ideologies and exploring a more appropriate way to deal with a situation in which many parties claim that its principles and values are universal.

2. THE WESTERN IDEOLOGY

The UDHR asserts that certain rights are fundamental and inalienable to all humans, and consequently, if humans are deprived of them, for whatever reason, they become degraded. James Nickel argues that the UDHR's assertion that certain rights are inalienable does not simply mean "that providing these things to all is a desirable goal or ideal; it is rather the much stronger claim that making these things available to all is obligatory."³ The Preamble of the UDHR reads that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world." It emphasizes the notion of universality and the argument that the rights within the declaration should be conferred to everyone in the world "without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

¹ David Stamos, *The Myth of Universal Human Rights: Its Origins, History, and Explanation, Along With a More Humane Way* (Paradigm Publishers 2013) 100

² The Muslim World League is an international non-governmental Islamic organization based in the Holy City of Mecca. It is engaged in conveying the religion of Islam and explaining its principles and values. Moreover, it attempts to shed light on issues raised against the religion.

³ James W Nickel, 'Are Human Rights Utopian?' in Carl Wellman (ed) *Human Rights and Universal Duties* (Routledge 2002) 184

2.1. THE BASIS OF THE WESTERN CLAIM OF UNIVERSALITY

The proposition of universal human rights is derived from the universal experience of being human. In other words, they are entitlements given to all humans on the basis of humanity and no other criteria is adopted to decide whether to confer them or not. By examining the origins of the Western universality claim, it is observed that the concept of universality finds its roots in natural law theory, which emerged in the seventeenth century under the influence of the Enlightenment theory.⁴ Both Article 1 of the Declaration of the Rights of Man and of the Citizen States⁵ and the opening of the United States Declaration of Independence⁶, assert the influence of natural law theory.

Although the precise influence of natural law and the Enlightenment movement on the modern theory of universal human rights is still debatable, the aforementioned articles clearly constitute a basis for the Western universality claim. Professor Iovane argues that Article 1 of the UDHR represents “the codification of the quintessential liberal conception of human rights as developed in Enlightening natural law doctrine.”⁷ The main proposition here is that all humans should have certain fundamental rights and everyone, differences in race, religion, etc. aside, possesses an inherent dignity that must be respected. Moreover, it is claimed that these rights should apply independently of the place or culture the individual belongs to. This argument asserts that certain rights are fundamental and inalienable to all humans, and consequently, if humans are deprived of them, for whatever reason, they become degraded. This proposition represents the essence of the Western universality claim, and is clearly adopted in the Vienna Declaration and Programme of Action,⁸ where paragraph five of Part I states that “All human rights are universal.” Therefore, it is ‘beyond question’ and there should be no place to claim otherwise.

2.2. EXAMINING THE WESTERN CLAIM OF UNIVERSALITY

Western scholars have made many attempts to prove the universality of certain codes of rights. Martha Nussbaum, for example, argues that universal human rights should be conferred to all humans on account of their capabilities, not simply their humanity.⁹ Another defense of universal human rights is that they are conferred to all humans not just because they are humans, but because humans have dignity. Such dignity entails conferring certain basic rights and equal treatment among all humans. Another crucial foundation for universalizing human rights is the acquisition of a global consensus. This notion confirms that all states and people in the world have agreed upon the idea of universal human rights by signing the UDHR and supporting the UN activities, which mainly advocate the universality claim regarding rights. This section will discuss each claim and assess whether it firmly stands for the idea of universal human rights to the extent that one can accuse others who do not follow them of being morally corrupt.

⁴ Massimo Iovane, ‘The Universality of Human Rights and the International Protection of Cultural Diversity: Some Theoretical and Practical Considerations’ (2007) 14 *International Journal on Minority and Group Rights* 231, 231- 232

⁵ “Men are born free and equal in rights”

⁶ “We hold these truths to be self-evident, that all men are created equal, that they are endowed by the Creator with certain unalienable rights.”

⁷ Iovane (n 4) 234

⁸ VDPA is a human rights declaration adopted by consensus at the World Conference on Human Rights in Austria in 1993.

⁹ Martha Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Harvard University Press 2006) 284-290

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A. Rights and Humanity

In this context, the defense provided for the universality of human rights is based on the proposition that humans, for the very simple fact of being humans, must be given human rights. Such rights will enable them to live their lives in a productive way. Any deviation from them is conceived as contradicting the essence of being a human being. It is argued that this concern for the human being is mainly derived from the oppression humans faced in the past in world wars, genocides and tyrannies. Such atrocities threatened the very essence of the human being, as Morton Winston asserts: “the human rights we now recognize have evolved in response to perceived threats to basic human values and interests as they have arisen in definite historical, political, and economic circumstances.”¹⁰

However, there are two issues at play if we are to accept humanity as a basis for universal human rights. First, what exactly does it mean to be a human being? Surely the meaning of human nature varies between different cultures and civilizations since different political and social factors influence understandings of what it means to be a human being.¹¹ Therefore, Jack Donnelly argues,

*‘Human nature’ is a social project more than a personal given. Just as an individual’s ‘nature’ or ‘character’ arises from the interaction of natural endowment, social and environmental influences, and individual action, human beings create their ‘essential’ nature through social action on themselves.*¹²

In other words, different perceptions regarding human nature generate different sets of rights, and this contradicts the essence of the universal human rights idea, which asserts that there are certain inalienable rights which must be bestowed upon everyone.

Second, even if a certain meaning of human nature is agreed upon by different ideologies, there remains another issue: why should humans be entitled to enjoy such special rights in the first place? The importance of this question lies in the fact that there are millions of species on earth which do not enjoy human rights.¹³ This calls into question the special position occupied by human beings – the rights that they enjoy, but from which all other species are excluded. Therefore, in order that the notion of universal human rights be backed up, it is necessary to appeal to certain features and traits that only exist in the human species and are lacking in all others. This situation would more likely justify the special priority given to humans over others. This leads to the next foundation, which concerns human dignity.¹⁴

B. Basic Rights, Dignity, and Equality

We have established that humanity alone cannot provide a solid foundation for universalism for two main reasons. First, definitions of humanity are elusive and controversial. For example, some may consider that humanity means the freedom to make our own decisions, while others may conceive humanity as a grace from God, shaped by obedience to His orders. Since, humanity alone

¹⁰ Morton E Winston, *The Philosophy of Human Rights* (Wadsworth Publishing Company 1989) 37

¹¹ Stamos (n 1) 33-34

¹² Jack Donnelly, *Universal Human Rights in Theory and Practice* (2nd edition, Cornell University Press 2003) 15

¹³ Stamos (n 1) 30-31

¹⁴ *ibid* 31-32

cannot survive as a solid basis for conferring universal human rights to all humans, especially if we are to persuade a Muslim who believe that God's rule is the perfect law as will be explained. Therefore, scholars started searching for features which distinguish humans from other species. One of those features is dignity. This dignity, as a basis for the universal human rights claim, means that humans should have moral worth solely for enjoying dignity, since such dignity enables humans to experience different feelings and emotions in a distinctive way from other species. As Jack Donnelly asserts, human rights express "a social choice of a particular vision of human personality, which rests on a particular substantive account of the minimum requirements of a life of dignity."¹⁵ Therefore, the 1966 International Covenant on Civil and Political Rights asserts that "the inherent dignity and the equal and inalienable rights of all members of the human family" is derived from "the inherent dignity of the human person."

Moreover, due to the inherent dignity of all humans, they must receive equal rights and respect.¹⁶ In Peter Singer's analysis of equality, he argues that people should receive equal moral consideration in spite of their different appearance and character, especially in the context of gender and race.¹⁷ Accordingly, one is obliged to treat the interests of those people in an equal way without giving priority to any skin color or gender or any other difference, since every human being has dignity.

Nevertheless, when one enquires about the foundation of having interests in the first place, Singer replies that "the capacity for suffering and enjoyment is a prerequisite for having any interests at all, a condition that must be satisfied before we can speak of interests in a meaningful way."¹⁸ This means that one can say that since humans possess dignity, and since they have the capacity to experience different feelings like suffering and joy, they must all have equal moral consideration and equal consideration of interests. As Jack Mahoney claims "'the wonder of our being' seems well suited to explain why human beings possess an intrinsic dignity, and are therefore worthy, or deserving, of the deepest moral respect, as bearers of moral human rights."¹⁹

In any event, opponents of universal human rights refer to two arguments when it comes to regarding dignity and equality as a foundation for the universality of rights. First, it is argued that the connection between the concept of inherent dignity and the concept of human rights is still not clear.²⁰ In other words, the question here is why having inherent dignity would necessarily entail one to enjoy human rights. This means that it is possible to have a situation in which one has dignity but still be deprived from certain rights, such as prisoners who are temporarily deprived from their right to freedom. As David Stamos affirms, "(...) not only humans but also higher animals such as dogs and cats have inherent dignity by virtue of certain mental capacities that they share in common, but no one would infer from this that dogs and cats have human rights."²¹ Therefore, it is essential to explain the connection between the very simple fact of inherent dignity on one hand, and conferring human rights and moral entitlements on the other.²²

Second, although equality makes sense if one is satisfied with the concept of inherent dignity, it is argued that equality itself as an independent principle from dignity poses some implications in

¹⁵ Donnelly (n 12) 17

¹⁶ Stamos (n 1) 35-36

¹⁷ Peter Singer, *Animal Liberation* (2nd edition, Pimlico 1995) 213-221

¹⁸ *ibid* 7

¹⁹ Jack Mahoney, *The Challenge of Human Rights: Origin, Development, and Significance* (Blackwell 2007) 150

²⁰ Stamos (n 1) 73-74

²¹ *ibid* 74

²² *ibid*

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practice. That is to say that although equality, as a basis for universal human rights states that all humans must be treated equally without discrimination, there are still some cases in which certain people are deprived from those basic rights without adequately justifying such deprivation. For example, in some states in the USA, prisoners are deprived from the right to vote on account of being criminals.²³ Some argue that this defies the principle of universal human rights since those prisoners, as humans, should be treated equally with others outside prison and practice their right to vote. Also, criminal conviction should not invalidate the right to vote and being treated equally with other fellow humans, since those rights are inalienable and universally guaranteed. In any case, what is essential in this debate is that proponents of a law that prohibits the right to vote for prisoners do not discuss the position of their dignity and whether criminal behaviors may suspend the enjoyment of one's freedom and dignity. And, if so, how can one draw other justifications for taking away the 'inherent dignity' and 'equal and inalienable rights' of any human being?²⁴

C. Reason and other Human Capabilities

As previously touched upon, scholars who defend the universality of human rights are challenged with the question of why humans are so special in comparison with other species to the extent that they deserve to be given a special set of inalienable rights. Therefore, scholars have resorted to illustrating those characteristics and capacities only humans have, which can create a basis for conferring them certain fundamental human rights.²⁵

In any event, it must be noted that most of the international human rights documents do not provide a complete list of these distinctive human traits. For example, although the preamble of the UDHR affirms its 'faith in fundamental human rights', it still does not provide the foundation that entails such faith. Even when one looks at the preamble of the 1981 African Charter on Human and Peoples' Rights, it is observed that it also explicitly states "that fundamental human rights stem from the attributes of human beings," but again without determining what type of attributes they mean. This undermines the universal human rights argument because it does not provide a solid foundation to support an important claim like that of universality. It would be difficult for someone who advocates a different ideology of human rights (such as the Islamic one) to understand such universality claim if there is no firm justification for an allegedly international proposition.

For this reason, proponents of the universality claim have turned to the study of human nature in order to discover the special attributes humans have that warrant a special set of universal rights. Jack Mahoney, for example, argues that humans are the only species who enjoy "intelligence, reasoning, reflection, imagination, consciousness, and self-consciousness, as well as the human power of rational choice."²⁶ On the other hand, Martha Nussbaum has developed a 'capabilities approach', which justifies the entitlement of human rights on the basis of capabilities only the human species possesses. Nussbaum argues that there are 'central human capabilities' which "have

²³ Jeff Manza and others 'Ballot Manipulation and the "menace of Negro Domination": Racial Threat and Felon Disfranchisement in the United States, 1850-2000' [2002] Northwestern University Institute for Policy Research 1-4

²⁴ Stamos (n 1) 35-38

²⁵ *ibid* 32

²⁶ Mahoney (n 19) 148

value in themselves, in making a life fully human.”²⁷ She asserts that there is no official list of human capabilities, however, she includes capabilities such as being able to live a normal life, having a shelter, having the choice to enter relationships, being able to love and be loved and having affection and feelings such as anger and happiness.²⁸

Although such theories help support the notion of universal human rights, it still suffers from an issue similar to that from which the dignity argument also suffers – the link between possessing special capabilities and being entitled to special rights remains unclear. In other words, if one enjoys a specific capability, why is one therefore entitled to a special set of rights?²⁹ As David Stamos explains, “a tiger, for example, has a central capability to eat animals like me for dinner, but that does not automatically mean that it has a moral claim and entitlement to kill and eat me.”³⁰ Even Nussbaum, when challenged by such an argument that animals do have certain capabilities which make them as distinctive as humans to some extent, she argues that animals have a special kind of dignity.³¹ They too have certain capabilities, she argues; they demonstrate that they are capable of ‘feelings’ and expressing themselves in various ways.³²

At this point, Nussbaum loses track of the idea of universal human rights. Although she provides a very capable approach to justify universal human rights by linking human capabilities with conferring them special rights, she undermines the universal theory by extending her argument to animals. Indeed the understanding of universal human rights enshrined in international human rights documents, including the UDHR, asserts that human rights are only applicable to humans and it is very rare to extend the same arguments made for humans to include animals. This is not to say that animals have no rights, rather, it is only to emphasize that the justifications for conferring rights to animals may be different to the ones for humans.³³ As Jack Donnelly confirms “if one is not a human being, then by definition one cannot have human rights.”³⁴ Therefore, such contradictions in the theory of universal human rights make one suspicious of the competence of the founding principles of the universality claim. This is because Nussbaum is not attempting to justify the universal theory of rights, rather, she is trying to expand the theory by making the consideration of animal rights one of the principles of the universal theory, which itself needs a proper justification.

D. International Consensus on Basic Human Rights

Due to the aforementioned arguments and counter-arguments regarding the proper justification for the universality theory of rights, there has been a new approach to deal with this issue. It is about attempting to gain the world's support on certain human rights principles and then making the

²⁷ Martha C. Nussbaum, ‘Human Rights Theory: Capabilities and Human Rights’ (1997) 66 (2) Fordham Law Review 273, 273-276 <<http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=3391&context=flr> > accessed 17 March 2015

²⁸ Stamos (n 1) 85-87

²⁹ *ibid* 93

³⁰ *ibid* 91

³¹ Martha Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Harvard University Press 2006) 327

³² *ibid* 337. Nussbaum essentially argues that “The sphere of justice is the sphere of basic entitlements. When I say that the mistreatments of animals is unjust, I mean to say not only that it is wrong of us to treat them in that way, but also that they have a right, a moral entitlement, not to be treated in that way. It is unfair to them.”

³³ Stamos (n 1) 92

³⁴ Donnelly (n 12) 25

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argument that since all humans agree on such rights, they must be universal. Therefore, the UN declared the UDHR in 1948, which contains the proposition that there are fundamental human rights to which all human beings are entitled. Almost all states in the world have signed this declaration. As a result, proponents of the universal theory claim that since all states agree on the proposition of human rights laid down in the UDHR, such a proposition logically becomes universal.

In this respect, Jack Donnelly's theory becomes relevant. Donnelly does not defend universal human rights with the traits of human nature; rather, he is concerned with seeing human rights as a social structure.³⁵ He makes the argument that, instead of basing the universal theory on dignity itself, we should consider human rights as 'needed' not for life but for a life of dignity.³⁶ Therefore, he thinks that human rights are universal because they are the only way to uphold the inherent dignity of the human being and thus "there is a remarkable international normative consensus on the list of rights."³⁷

Now, there are some points that need to be taken into account with respect to basing the universal theory of human rights on a global consensus. First, when one indicates something as universal, we might make the assumption that everyone agrees and follows it, including Muslims who represent over 1.5 billion of the world population. Indeed, the second largest inter-governmental organization in the world after the UN is the Organization of Islamic Cooperation (OIC), which includes 57 member states.³⁸ Therefore, logic dictates that in order for human rights to be universal, they must have the consent of Muslims, since they represent a significant portion of the world population. In order to universalize the proposition of human rights, one must consult all ideologies and cultures in the world. Otherwise, it cannot become universal. This leads us to the next point, which is the question of whether Muslims agree with the Western theory of universal rights.

It should be noted that the formulation of the language of rights was undertaken, for the most part, by a number of Western states, all of whom were members of the UN in 1945. That is to say that many states and communities, especially Islamic ones, did not participate in constructing the language of rights for reasons such as colonialism.³⁹ Although other states took part in the UN and participated in enacting subsequent human rights declarations at a later time, they did so on the basis of an already established system of rights based on philosophical assumptions made in their absence. It is argued that this situation has put pressure on the new members in the UN, who face the choice of either approving what has been agreed before them, or refusing the agreed framework and facing opposition from the majority of the world.⁴⁰ This means that some ideologies, like Islam, did not participate in the development of the concept of human rights, and this once again poses an impediment to the notion that they can be universal.⁴¹

³⁵ *ibid* 14

³⁶ *ibid*

³⁷ *ibid* 17

³⁸ For more information about the OIC, please visit <http://www.oicun.org/2/23/>.

³⁹ Abdullah Ahmed An-Na'im, 'Human Rights in the Muslim World: Socio-Political Conditions and Scriptural Imperatives' (1990) 3 *Harvard Human Rights Journal* 13, 15-17

⁴⁰ Bertrand Russell, *History of Western Philosophy* (The Committee of Publishing and Translation 1967) 57-63

⁴¹ Herbert Hart describes the dilemma faced by the new states by contending that: "it has never been doubted that when a new, independent state emerges into existence (...) it is bound by the general obligations of international law (...) Here the attempt to rest the new state's international obligations on a 'tacit' or 'inferred'

Third, even if we say that the entire world, including Muslims, agree on certain human rights for all humans, this does not necessarily mean that such a consensus is something positive.⁴² In other words, even if the consensus of the majority of countries on a certain doctrine is acquired, this does not justify calling it universal. As Amartya Sen confirms “universal consent is not required for something to be a universal value. Rather, the claim of a universal value is that people anywhere may have reason to see it as valuable.”⁴³ In a similar vein, Professor Miodrag Jovanovic asserts that the “claim to universality is often perceived as some kind of idolatry or – when taking the form of a stronger accusation – as a convenient ideological tool for promoting particular political interests of Western countries in certain parts of the world.”⁴⁴

Fourth, even if we argue that international consensus on something necessarily entails the rightness of that thing, the consensus still far from justifies the principle of universality itself. While consensus indicates that everyone agrees with the human rights theory, it does not explain why the theory itself should become universal. David Stamos provides the example that “even if we all agree when it comes to pointing to chairs that they each are chairs that does not settle the meaning of ‘chair’ in the sense of the cluster of criteria that determine correct or incorrect use.”⁴⁵ Besides, the fact that slavery was permitted at some stage in the past does not make slavery, by any means, a morally decent act. That is despite the fact that the practice of slavery gained the consensus of the majority of people at that specific time by viewing it morally permissible.

For all this, the consensus proposition fails to convince a Muslim, who believes in the law of God, of the importance of the Western universality of rights, since consensus “cannot in itself constitute moral validity (justification), which also requires good reasons supporting agreement about human rights.”⁴⁶ Therefore, proponents of Western universal human rights are less likely to be objective if they accuse Muslims of being wrong or morally corrupt for the very simple fact of not following such universal rights. That is since, as explained, the foundations of universal human rights are not solid enough to accuse others of being wrong if they do not follow them.

3. The Islamic Ideology

It is important to realize that one of the main reasons for concluding that the Islamic religion claims the universality of its obligations and rules is the fact that, as explained in the foreword of the UIDHR, “Islam gave to mankind an ideal code of human rights fourteen centuries ago.” The word ‘mankind’ is supposed to address everyone in the world and so it is concluded to be universal. In a similar vein, the Cairo Declaration’s Preamble admits the role of the Islamic *ummah* “to guide a

consent seems wholly threadbare.” H.L.A Hart, *The Concept of Law* (2nd edition, Oxford: The Clarendon Press 1961) 221

⁴² As David Duquette argues, “The moral views of the majority are not necessarily correct. For example, the ubiquity of racism and chauvinism does not make racism and chauvinism morally acceptable. Consensus does confer legitimacy when it has normative backing, which is provided by critical discussion and debate, including the provisions of explicit justification.” David A. Reidy and Mortimer N. S. Sellers, *Universal Human Rights: Moral Order in a Divided World* (Rowman and Littlefield Publishers 2005) 69-70.

⁴³ Amartya Kumar Sen, ‘Democracy as a Universal Value’ (1990) 10(3) *Journal of Democracy* 12- 14. <http://www.unicef.org/socialpolicy/files/Democracy_as_a_Universal_Value.pdf> Accessed 16 February 2015

⁴⁴ Miodrag A. Jovanović, ‘Are There Universal Collective Rights?’ [2010] 11(1) *Human Rights Review Springer Science* 17, 18.

⁴⁵ Stamos (n 1) 80.

⁴⁶ David A. Reidy and Mortimer N. S. Sellers, *Universal Human Rights: Moral Order in a Divided World* (Rowman and Littlefield Publishers 2005) 61.

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humanity confused by competing trends and ideologies and to provide solutions to the chronic problems of this materialistic civilization.” The declaration uses words such as ‘humanity’ and ‘human family’ to dictate a list of rights accompanied with certain interpretations, and expect all humans, including Westerners, to spontaneously follow them.

3.1. THE BASIS OF THE ISLAMIC CLAIM OF UNIVERSALITY

The UIDHR asserts that the rights mentioned in the declaration should be conferred on all human beings and do not depend on any authority. As its Preamble states, “these rights can neither be curtailed, abrogated or disregarded by authorities, assemblies or other institutions, nor can they be surrendered or alienated.” Everyone is entitled to rights simply by virtue of being human, just like the ‘inalienable’ rights of the UDHR.

Nevertheless, the basis this claim is considered from a religious perspective rather than a secular one. That is to say that the Islamic notion of universality and inalienable rights stems from the belief that humans are created by one God, and that all are equal before Him. On this basis, humans should be conferred equal rights and there should be no discrimination between them. The Islamic universality claim intensifies when we note that the UIDHR believes in “inviting all mankind to the message of Islam.”⁴⁷ This invitation applies even to individuals who do not believe in God, and parallels the UDHR’s call for all people to follow its secular approach to human rights. Just as the UDHR presupposes a secular starting point, the UIDHR presupposes the belief in certain Islamic principles or at least a belief in God. It is noted that the universalist claim in religions is based on the proposition that since all human are created equally by God, they deserve certain fundamental rights. As Jerome Shestack explains:

*(...) in a religious context every human being is considered sacred. Accepting a universal common father gives rise to a common humanity, and from this flows a universality of certain rights. Because rights stem from a divine source, they are inalienable by mortal authority. This concept is found not only in the Judeo-Christian tradition, but also in Islam (...)*⁴⁸

Therefore, it is obvious that Islamic law is based on the word of God, which is found mainly in the Holy Quran and *Sunnah*. It is believed that the Holy Quran was revealed by the Prophet Mohammad over the course of approximately twenty-three years.⁴⁹ The Quran contains 114 *Suras* (chapters) and 6236 *Ayahs* (verses)⁵⁰ and was revealed during two different periods: Makkah and Medina. On the other hand, *Sunnah* refers to the acts and sayings of the Prophet Mohammad. Essentially, it introduces us to how the Prophet treated people, and how he advocated rules of morality and sacrifice for others, to represent a guideline for every individual to follow.⁵¹ So, Muslims argue that any rights or laws taking from these sources should be binding and adhered to by all humans.

In addition, we should note that Muslim scholars cannot question the validity of the rights contained in the sacred texts because they believe God’s law is the perfect law. In other words, Muslims must submit to God’s law, and the very act of simply dismissing that law is unacceptable. In this respect,

⁴⁷ The Muslim World League. *The Universal Islamic Declaration of Human Rights*, 1981. The Preamble.

⁴⁸ Jerome J. Shestack, ‘The Philosophic Foundations of Human Rights’ (1998) 20 (2) *Human Rights Quarterly* 201, 205.

⁴⁹ Ibraheem Madcore, *the Islamic Thinking* (Samerco Publisher, 1984) 24-26.

⁵⁰ Yoosef Al-Badawi, *Ibn-Taimia’s Sharia Purposes* (1st Edition, Dar Al-Nafaes 2000) 13.

⁵¹ *ibid* 12-17.

Islamic doctrine builds such a proposition on three main points. First, the religion of Islam emphasizes the importance of the human mind and confirms its competitive capacity in understanding most phenomena in the world.⁵² Second, it is understood that this capacity is nonetheless limited compared to God's capacity and that there are issues which the human mind finds itself incapable of grasping. That is because it is believed that God has created the earth and all creatures in it, including humans, and so, humans should obey and listen to His commands regarding how one is supposed to live.⁵³ Therefore, if God confers certain rights for Muslims, they are more likely to accept them merely because they come from God. Third, Muslim scholars argue that just because the capacity of the human mind is limited does not offend the position of the human being in the world, rather, it only describes the limits of the human being and proves that he or she is simply a part of the world, not everything.⁵⁴ On this basis, when Islamic jurists establish a human rights system based on the Holy Quran, Muslims are more likely to adhere to such rights in spite of their content, solely to adhere to God's orders.

3.2. EXAMINING THE SOURCES OF ISLAMIC UNIVERSALISM

As is the case in most world religions such as Christianity, Judaism and others, what undermines the Islamic universality claim is the fact that the concept God's existence is still debatable in the eyes of those who do not believe in Him. Hence, the idea of universal Islamic human rights may not be universal, since it excludes those who do not believe in God or His capacity to create and control everything in the world.⁵⁵ Opponents of universal Islamic human rights argue that the existence of Earth, human beings or any other creatures do not necessarily indicate a creator, unless the human being can see and observe how those creatures are created. Moreover, opponents of Islamic universalism assert that truth can only be reached through reason and experience, rather than spiritual and supernatural thoughts. In other words, knowledge cannot be based on supernatural thoughts since they cannot provide practical evidence for someone who gives priority to science and reason.⁵⁶

On the other hand, what affects the Islamic universal claim is the fact that Muslims themselves cannot provide a particular code of rights that enjoys the consensus of all Muslims. In other words, different Muslim scholars are likely to provide different codes of rights, and therefore, it is impossible to ascertain which codes of rights should be universal, since there is such conflict between them. This issue relates to the fact that most of the Islamic teachings are mentioned in broad terms, and requires clarification by an individual's Islamic knowledge and expertise in dealing with religious texts.

In order to illustrate this, let us look at the main source of Islamic law the Holy Quran. It is noted that the quranic provisions should take one of two main shapes. First is 'doubtless shape', provisions that clearly indicate a particular matter in a way that does not leave any room for skepticism or uncertainty,⁵⁷ for example, the praying order. Second is 'probability shape'. Here, the provision is more likely to concern issues that can be interpreted in different ways, on account of uncertain language or the different backgrounds of interpreters such as the issue of abortion.⁵⁸

⁵² Ali Al-Dabbas and Ali Abu-Zaid, *Human Rights and Freedoms* (Dar Al-Thakafah 2005) 113-116.

⁵³ Arief Tamier, *Governing by God's Order* (Dar Al-Akhlaq 1982) 71-73.

⁵⁴ *ibid* 57-60.

⁵⁵ Al-Dabbas and Abu-Zaid (n 52) 40-41.

⁵⁶ *ibid* 44.

⁵⁷ Saed Qutob, *In the Shadows of Holy Quran* (Dar Ehea Al-Turath Al-Arabi 1967) 49-54.

⁵⁸ Mohammad Khalaf-Allah, *The Quran and State* (Al-Anjalo Library 1973) 17-21.

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Reisman endorses this view by arguing that the Quran can be understood either as a tolerant religion or a rigid religion since the type of thoughts and ideals maintained by the Muslim scholar may fundamentally affect the outcome of the interpretation process⁵⁹

Therefore, it depends on how the interpreter deals with the provisions. Indeed, the role of interpretation is crucial in determining the scope of the rights mentioned in the Islamic doctrine and in deciding when such rights may be restricted according to Sharia law. In addition, the clash between traditional and modern Muslims is of utmost importance in understanding human rights in the Islamic context. That is to say that the clash between traditionalists and modernists in dealing with Sharia texts could fundamentally influence which rights are conferred and on what basis a restriction can be imposed. Therefore, it is the process of applying 'human understanding' that can lead to an abuse of rights – a tendency either to confer too many, or on the contrary, to deprive individuals of their freedom. All rights mentioned in the Islamic declaration, either explicitly or implicitly, stem from Islamic law. However, Islamic law is not the issue; rather, the issue is how one interprets Islamic law, since most rights will ultimately result from such an interpretation.⁶⁰ Joshua White shows that different interpretations are more likely to generate different rights and duties. Consequently, he argues, the rights within the Islamic doctrine will not be stable:

*(...) there is no one ultimate authority in the interpretation of the Quran. There are many different schools of Islam and each has its own interpretation of the Quran and its own understanding of Islamic law. Different Islamic groups can act in contravention to the interpretation of other Islamic schools and still be following the Quran. There is no universal interpretation.*⁶¹

4. HOW TO RECONCILE THE CLASH BETWEEN TWO UNPROVABLE UNIVERSALISMS

It should be noted that differences in how to perceive certain rules of human rights are inevitable in a global society,⁶² since individuals resort to different factors when they attempt to understand and apply certain rules. These factors vary from one place to another according to the particular beliefs of that community. As Brooke Ackerly argues, "human minds do not all think alike, that language, culture, and conceptual schemes that we might use to understand what constitute 'reasonable' principles vary significantly across contexts."⁶³ That is to say that human nature is

⁵⁹ Indeed Reisman claims that '[The Quran] contains statements that could be interpreted to sustain the view that Islam is a tolerant and adoptable religion compatible with change and consistent with international human rights standards. The Quran also contains statements that can lead to the conclusion that Islam is a rigid and unforgiving religion, built on intolerance of diversity.'" H Reisman, 'Some Reflections on Human Rights and Clerical Claims to Political Power' (1994) 19 Yale Journal of International Law 509

⁶⁰ In this context, Fred Halliday asserts "The text is not, however, the main reason for the difficulties with human rights (...) What is far more intractable is the political and social context of interpretation, the manner in which these texts are conventionally interpreted, in the contemporary social and political conditions of the Islamic world (...)" Fred Halliday, 'Relativism and Universalism in Human Rights: the Case of the Islamic Middle East' (1995) 43 (1) Political Studies 152, 164

⁶¹ Joshua White, 'Mohammed and Madison: A Comparison of the Qur'an and the U.S. Constitution' (2002) 11 (2) Journal of Transnational Law and Policy 309, 317

⁶² Eun-Jung Katherine Kim, 'Justifying Human Rights: Does Consensus Matter?' (2012) Springer Human Rights Review 261, 275-276

⁶³ Brooke A. Ackerly, *Universal Human Rights in a World of Difference* (Cambridge University Press 2008) 119

viewed according to different factors, such as religion and culture. As Jack Donnelly argues, "culture can significantly influence the presence and expression of many aspects of human nature by encouraging or discouraging the development or perpetuation of certain personality traits and types."⁶⁴

For example, both the Western and Islamic ideologies stress the right to freedom of speech and its importance in developing one's personality. However, neither provides sufficient details regarding when such a right may be restricted and thus resort to what preserves the stability of its community and public order. This means imposing different restrictions, such as restricting the Holocaust denial in the West and restricting mocking any religious sensibilities in Islam. Ultimately, such differences should not be seen as morally corrupt or inherently wrong. Each ideology considers different factors in deciding when speech should be restricted, and one should not undermine the other's factors unless it can empirically prove its own. Given we are dealing with moral rather than factual notions, this seems unlikely.⁶⁵

Therefore, when people who practice different beliefs should be understood as just that – 'different' as opposed to 'wrong'. In the context of the universality claim, one should bear in mind that when an orthodoxy makes a universality claim for its values and principles, this does not mean that the universality claim is a guarantee of truth.⁶⁶ As Neville Cox argues 'truth (if such a thing does objectively exist) is an elusive concept precisely because there is no way of achieving any empirical acknowledgement that one is actually possessed of it.'⁶⁷

Accordingly and as we have seen, both Western and Islamic universality claims are incapable of providing empirical evidence to support the universality claim. This does not necessarily mean that both are wrong or correct, rather, it means that they are different, and this difference should not be discussed in the context of 'if you are not with me then you must be wrong.' Indeed, the only circumstances in which one can claim that someone else is wrong, is when one has the capacity to provide empirical evidence to convince them that you are right. However, none of this means that one should never judge the conduct of other ideologies and cultures. Instead, when we observe something different in another culture and believe that it is wrong, we should see it rather as a culture that is "deprived of the security and sympathy that has allowed us to create a culture in which rights make sense."⁶⁸ In such a way, one avoids the burden of proving the truth of one's beliefs and every culture does not see the other as a threat. Neville Cox provides an example:

*When we read of a woman being sentenced to death by stoning for adultery in Nigeria, we do not merely regard this as an unhappy event in a foreign country and are glad that we do not live there, we see it as something which should not happen (irrespective of its lawfulness in Nigeria) because it violates the rights of the woman in question.*⁶⁹

Therefore, it is important that each ideology considers the arguments made by the other ideologies and if it conflicts with them, words such as 'wrong' or 'irrational' should be replaced with others terms such as 'different' or 'inappropriate'. As Susan Bickford argues,

Fear may, in fact, be what allows us to question our convictions. Fear of being 'wrong' (of having an opinion that is incomplete or mistaken in some way) can contribute to our ability to listen...

⁶⁴ *ibid* 91

⁶⁵ Carl Wellman, *The Moral Dimensions of Human Rights* (Oxford University Press, 2011) 34-36

⁶⁶ Kim (n 62) 262-263

⁶⁷ Neville Cox, 'The Clash of Unprovable Universalism- International Human Rights and Islamic Law' [2013] *Oxford Journal of Law and Religion* 22

⁶⁸ Robert G. Patman, *Universal Human Rights?* (Macmillan Press LTD 2000) 46

⁶⁹ Cox (n 67) 7

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*Someone who never feels the possibility of incompleteness will have difficulty genuinely hearing someone else, but someone who is overtly frightened by it will be silent when she should speak.*⁷⁰

Therefore, since both Western and Islamic ideologies do not possess decisive evidence for their universality claims, they should not claim that what they present is the truth or accuse each other of being wrong, rather, each of them should be humble and patient in considering the other's arguments.

This leads to the consideration of not just the universality claim itself, but also the way in which it is presented and delivered. In other words, if the Western ideology frames its principles and values in the mind that other different ideologies are less competent, this will lead to those different ideologies taking a defensive position and resist such values from the West, even if they do in fact agree with the West. This usually happens when "in choosing for ourselves we choose for all humankind and intend that our fundamental value commitments be accepted by all others."⁷¹ This approach should be altered to respect diversity since the values endorsed by an ideology should not be 'imposed' on others which may be of the same stance, but by using a different approach and advocating different factors.⁷² As Chris Brown confirms, "the sense conveyed by some advocates of universal rights that they belong to a higher order of humanity than those they are preaching to may be more important in creating a reaction to the 'human rights culture' than the content of the sermon."⁷³

5. CONCLUSION

It is observed that the source of tension between Western and Islamic universalisms is the fact that each one claims the superiority of its values and beliefs, and insists that failure to adhere to certain rules necessarily indicates moral corruption. However, there is not enough evidence to support the superiority of one ideology over another, and such claims must be rejected if they cannot be practically proven. As David Stamos confirms "any community whatsoever could claim that its basic beliefs are properly basic, so that the claim is a version of relativism that loses credibility when all communities are taken together, each with their basic beliefs."⁷⁴

No one should be permitted to accuse the other of being wrong or irrational; instead, one should respect the other and consider the arguments presented. Indeed, in a situation where many competing ideologies exist, what is needed is not a comprehensive explanation of each ideology, but a genuine explanation of why someone who advocates an ideology should advocate another. Otherwise, different ideologies should be seen as seeking the truth of life through the adoption of different methods and principles. As Neville Cox argues "supporters of either ideology cannot proclaim their truth as a scientist might proclaim the 'truth' of the law of gravity, but instead must operate largely on a kind of faith."⁷⁵ Therefore, each ideology should appreciate the codes of rights

⁷⁰ Susan Bickford, *The Dissonance of Democracy: Listening, Conflict, and Citizenship* (Cornell University Press 1996) 151-153

⁷¹ Reidy and Sellers (n 46) 70

⁷² *ibid*

⁷³ Patman (n 68) 49

⁷⁴ Stamos (n 1) 64

⁷⁵ Cox (n 67) 4

imposed by the other and attempt to understand the other's point of view, rather than accusing it of being inherently corrupt.