

LLM/MA IN: LLM in International Human Rights Law

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DISSERTATION TITLE

Seeking the reconciliation of Shariah Law with the International Human Rights Law (IHRL) to ensure fundamental human rights of LGBT people in Muslim-Majority (MM) countries

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UNIVERSITY OF ESSEX

SCHOOL OF LAW

LLM in International Human Rights Law

2018-2019

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Registration Number (optional):1806730

Number of Words: 17083

Date Submitted: 10.09.2019

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Chapter 1: Introduction

Since the early 2000s, the issues of Lesbian, Gay, Bi-sexual and Transgender (LGBT) people have come into the international spotlight. With the modernisation of society, more people started to come out about their sexual orientation and gender identity. That is when they started to face the backlash from the society and the state. Most Muslim-majority (MM)¹ states have ratified the Universal Declaration of Human Rights (UDHR) and at least one of the two major Covenants² of human rights. Despite their legal obligation of ensuring fundamental human rights, they are reluctant to protect the rights of LGBT people because of their rigid adherence to Shariah law. Many of them are even hesitant to accept that LGBT people are qualified to the rights which are in purview of the Covenants.³ The concept of Lot and sodomy law are the basic sources of Shariah law which make homosexual acts haram and prohibited. On the other hand, MM states are more tolerant towards transsexuals because they can undergo sex reassignment operations and engage in heterosexual relationships after marriage which is not considered as sin in light of Shariah Law. However, this acceptance towards homosexuals is not completely flawless. MM states are inclined to force transition of transsexuals disregarding their basic rights, such as- right to health and right to freedom of choice. This dissertation looked over the violations of LGBT rights in MM states and their justification of non-compliance with IHRL in depth.

Moreover, reformists have argued that the teaching of Quran and Sunnah which are the foundations of Shariah law can be reformed and interpreted in a way which is both compatible with modern context and International Human Rights Law (IHRL). This dissertation focuses on those reformative approaches to disprove MM states' claim that Shariah law cannot be made compatible with IHRL.

There are scopes for MM states to ensure fundamental human rights of LGBT people. Though they will face some barriers in their discourse, these can be outdone in accordance to the teachings of Shariah law and this issue will be inspected in detail in this dissertation.

¹ By "Muslim-Majority" state or country I refer to States in which numerically largest number of the population follow Islam as their religion or faith.

² International Covenant on Civil and Political Rights (1966); International Covenant on Economic, Social and Cultural Rights (1966)

³UN Human Rights Committee (HRC), *Consideration of reports submitted by States parties under article 40 of the Covenant: Concluding observations of the Human Rights Committee - Islamic Republic of Iran*, 29 November 2011, CCPR/C/IRN/CO/3, para 10, available at: <https://www.refworld.org/docid/4ef9a38f2.html> (accessed 4 September 2019)

Objectives and Key research questions:

The main objective of this dissertation is to analyse Shariah's compatibility with IHRL in order to determine whether the national legislation of MM states are necessarily an obstacle in their way of implementation of human rights as they claim. I have not used case studies of any specific state to show the violations of LGBT rights, rather I have used sources from different countries as I intended to reflect how these violations are quite common in MM states and their approach to these violations. After exploring this issue, my final objective is to determine whether there are scopes through teachings of Shariah using which the states can ensure fundamental rights of LGBT people and how they can overcome the hurdles they might face while doing so.

The following research questions posed in this dissertation are framed around the above objectives:

1. What are the fundamental rights which LGBT people have in accordance with the International Human Rights Standards?
2. How are Muslim-Majority countries violating human rights of LGBT people and justifying those violations as compliance to Shariah Law?
3. What are the ways for Shariah Law to be reconciled with IHRL Standards?
4. To what extent Muslim-majority countries can respect LGBT rights despite the challenges?

Methodology :

With the view to addressing the key research questions, this dissertation focuses on the two major covenants and relevant international documents along with caselaws to identify the fundamental human rights of LGBT people. National legal documents of different MM countries and civil society assessments have been used to support analysis of the violation of the LGBT rights and the use of Shariah Law as a justification by MM states. The most recent scholarly and juristic writings and the texts from Quran and Shariah Law have been used to assess the pathways to reconciliation of Shariah Law with IHRL and the obstacles in the way of their implementation. Readings from Quran and Shariah and also arguments of some scholars have been used to scrutinise the scope of ensuring LGBT rights by MM states and the challenges they might face. The importance of right to privacy and non-discrimination in Quran and Shariah have been examined to find solutions of the challenges faced by states.

Chapter Outline:

In this dissertation, Chapter 2 first outlines the main provisions of the two most important IHRL covenants and other instruments which ensure human rights of every human being and how LGBT people are entitled to those rights. It also examines what kind of violations of their fundamental rights they face and how intersectionality impacts on those violations. Chapter 3 then analyses how MM states violate their rights by enacting discriminatory laws and how social norms of some MM states can also lead to violation of their rights. It also reflects the acceptance of transgenders in MM states which is not free of violations either and how these states reject the acknowledgment of their rights and justify their violence in light of their religious views i.e Shariah law. After that, in Chapter 4 I move on to explore the possible ways which can be used to reconcile Shariah law with IHRL to ensure MM states' compliance with those standards and how willing states will be to adopt them. Finally, Chapter 5 presents the scope of ensuring rights of LGBT people by MM states and how they can overcome the challenges they might face in order to do so.

Ultimately, this dissertation concludes that states are under a legal obligation to ensure fundamental human rights of LGBT people. They are not allowed to deviate from their obligation in the name of religious or cultural relativism as there are options to reconcile Shariah law with IHRL.

Chapter 2: LGBT rights in International Human Rights Law and the challenges or controversies surrounding those rights

Every state acquires an obligation to respect, protect and fulfil the rights that are included in the major treaties of IHRL by ratifying them. They owe these rights to every citizen of their state and are not allowed to disregard anyone's rights on the basis of any status. LGBT people faced some challenges in trying to establish their rights under these international instruments, but nevertheless they were successful in their endeavour. Different international human rights treaty bodies have asserted their entitlement to these rights in different times and different ways.

Main provisions of protections:

The application of IHRL is guided by the principles of universality and non-discrimination enshrined in Article 1 of the Universal Declaration of Human Rights (UDHR). It states that "all human beings are born free and equal in dignity and rights and freedoms set forth in UDHR, 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". In Articles 2 of both major covenants, International Covenant on Civil and Political Rights (1966) (ICCPR) and International Covenant on Economic, Social and Cultural Rights (1966) (ICESCR), an obligation has been imposed on States to respect and ensure all individuals the recognized rights without distinction of any kind.

The Vienna Declaration and Programme of Action(1993) also confirms that while the significance of national and regional "particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms".

The specific grounds of discrimination referred to in the major human rights treaties do not include "sexual orientation" and "gender identity". For the first time in *Toonen v Australia*⁴, this issue came into consideration where it was argued that sexual orientation and gender identity fall in the "other status" ground of discrimination. But the Human Rights Committee held that States are obligated to protect individuals from discrimination on the basis of their sexual orientation and the ground "sex" includes

⁴ *Toonen v Australia*, communication No. 488/1992 (CCPR/C/50/D/488/1992)

sexual orientation. This position is reflected in later decisions of the Committee.⁵ The grounds of discrimination are not exhaustive and intentionally have been left open by using the phrase “other status”.⁶ All people including lesbians, gays, bisexuals and transgenders (LGBT) are eligible for all the rights recognized by the human rights treaties because they are human beings and their sexual orientation and gender identity are not considerable factors while establishing their entitlement.

The treaties only comprise of the provisions and the rights that an individual can claim and it says a little about the obligations of a state. General comments are published to elaborate each of those provisions and to give guidance to the state parties as to implementation of their obligations. Articles 2 of ICCPR and ICESCR imposes both negative and positive legal obligation on the ratifying states. States must refrain from violation of the rights recognized by the Covenants and any restrictions can only be justified under the relevant provisions.⁷ They are also obligated to take necessary legislative measures to give effect to the Covenant rights in the domestic order and it also means changing domestic laws which do not meet the standards imposed by these Covenants.⁸ Economic, social and cultural progress is a continuing process and therefore, states are expected to take steps to meet their goals in a reasonably short time⁹ and they must ensure effective remedy for those whose rights and freedoms have been violated.¹⁰

Article 26 of ICCPR does not merely duplicate the guarantee already provided for in Article 2 but provides in itself an autonomous right.¹¹ It prohibits discrimination in law or in fact in any field regulated and protected by public authorities and therefore the application of the principle of non-discrimination

⁵ *Young v. Australia*, communication No. 941/2000 (CCPR/C/78/D/941/2000), para. 10.4; *X v. Colombia*, communication no. 1361/2005 (CCPR/C/89/D/1361/2005)

⁶ United Nations Human Rights Council, *Report of the United Nations High Commissioner for Human Rights on discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*, U.N.Doc. A/HRC/19/41, (17 November, 2011)

⁷ UN Human Rights Committee, General Comment 31: The nature of the general legal obligation imposed on States parties to ICCPR, (2004), para 6

⁸ *ibid*, para 7 and 13

⁹ UN Committee on Economic, Social and Cultural Rights, General Comment 3: The nature of States parties' obligations under article 2(1) ICESCR (1990), para 2
<http://www.ohchr.org/en/hrbodies/cescr/pages/cescrindex.aspx> (accessed- 17 July 2019)

¹⁰ *Ibid*, para 5

¹¹ UN Human Rights Committee (HRC), *CCPR General Comment No. 18: Non-discrimination*, 10 November 1989, available at: <https://www.refworld.org/docid/453883fa8.html> (accessed- 19 July 2019)

contained in article 26 is not limited to those rights which are provided for in the Covenant. Even while adopting legislation, states are required to make its content non-discriminatory. Article 17 provides protection against arbitrary or unlawful interference with his privacy and interference authorized by States can only take place on the basis of law only if the law itself is compatible with the provisions, aims and objectives of the Covenant.¹² This protects individuals from the oppression of arbitrary and discriminatory laws. The concept of arbitrariness must also fulfil the “reasonable in particular circumstances” test.

None of these general comments mentions about “sexual orientation” and “gender identity”. However, some of the relatively newer general comments included sexual orientation and gender identity as the grounds of discrimination. The Committee on Economic, Social and Cultural Rights observed that “other status” included sexual orientation and gender identity is recognized as among prohibited ground of discrimination.¹³ Similarly, according to the Committee against Torture, states are obliged to protect all persons from torture and ill-treatment regardless of their sexual orientation or transgender identity.¹⁴

Human rights violations targeted toward persons because of their actual or perceived sexual orientation or gender identity constitute a global and entrenched pattern of serious concern. Those violations include and not limited to extra-judicial killings, torture and ill-treatment, sexual assault and rape, invasions of privacy, arbitrary detention, denial of employment and education opportunities, and serious discrimination in relation to the enjoyment of other human rights. They are often compounded by experiences of other forms of violence, hatred, discrimination and exclusion, such as those based on race, age, religion, disability, or economic, social or other status.

The Human Rights Committee, being concerned about this issue, have passed three resolutions regarding violence and discrimination based on sexual orientation and gender identity. It strongly

¹² UN Human Rights Committee (HRC), *CCPR General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation*, 8 April 1988, available at: <https://www.refworld.org/docid/453883f922.html> (accessed- 19 July 2019)

¹³ UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, 2 July 2009, E/C.12/GC/20, para 32, available at: <https://www.refworld.org/docid/4a60961f2.html> (accessed 17 July 2019)

¹⁴ UN Committee Against Torture (CAT), *General Comment No. 2: Implementation of Article 2 by States Parties*, 24 January 2008, CAT/C/GC/2, para 21, available at: <https://www.refworld.org/docid/47ac78ce2.html>, (accessed- 20 July 2019)

deplored acts of violence and discrimination, in all regions of the world, committed against individuals because of their sexual orientation or gender identity.¹⁵

It also decided to appoint, for a period of three years, an Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity.¹⁶ On the basis of the request made in the Resolution, the UN High Commissioner for Human Rights documented discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity¹⁷, in all regions of the world, and how international human rights law can be used to end violence and related human rights violations based on sexual orientation and gender identity.¹⁸

The International Commission of Jurists and the International Service for Human Rights, on behalf of a coalition of human rights organizations undertook a project to develop a set of international legal principles on the application of international law to human rights violations based on sexual orientation and gender identity to bring greater clarity and coherence to States' human rights obligations. These principles are Yogyakarta Principles¹⁹ which address a broad range of human rights standards and their application to issues of sexual orientation and gender identity. The Principles affirm the primary obligation of States to implement human rights. Each Principle is accompanied by detailed recommendations to States. In its preamble, sexual orientation and gender identity were defined for better understanding.

¹⁵ [United Nations Human Rights Council](#) Session 32 *Resolution 32/2*. [Resolution adopted by the Human Rights Council on 30 June 2016—32/2: Protection against violence and discrimination based on sexual orientation and gender identity A/HRC/RES/32/2](#) 15 July 2016. (Accessed 27 July 2019)

¹⁶ *ibid*

¹⁷ UNHRC Report of the UN High Commissioner, (n 3)

¹⁸ United Nations Human Rights Council, Session 17, Resolution 17/19: Human rights, sexual orientation and gender identity, A/HRC/RES/17/19, 14 July 2011

¹⁹ International Commission of Jurists (ICJ), *Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity*, March 2007, available at: <https://www.refworld.org/docid/48244e602.html> (accessed- 25 July, 2019)

The principle of non-discrimination explained that any distinction, exclusion, restriction or preference based on sexual orientation or gender identity is unacceptable.²⁰ Principles on the right to life, right to security and right to privacy requires the abolishment of death penalty for consensual sexual activities between two persons who are above the age of consent.²¹

There are some specific fundamental rights of LGBT people which are violated frequently even though these are the most important human rights. These rights are- right to life, right against torture, right to privacy and right to non-discrimination.

Right to Life:

Consensual same-sex conduct is punishable by death in the Islamic Republic of Iran, Mauritania, Saudi Arabia, the Sudan and Yemen, and parts of Nigeria and Somalia. Death is also the prescribed punishment for homosexuality in the revised penal code of Brunei, although reportedly relevant provisions have yet to take effect.

These discriminatory laws fuel stigma, legitimize prejudice and expose people to family and institutional violence and further human rights abuses, such as hate crimes, death threats and torture. "Such legislation and regulations reinforce gender stereotypes and foster a climate where hate speech, violence and discrimination are condoned and perpetrated with impunity by both State and non-State actors."²² They contribute to a social environment that explicitly permits and tolerates violence and discrimination based on sexual orientation or gender identity, creating a breeding ground for such acts.²³

The combination of social prejudice and criminalization has the effect of marginalizing lesbian, gay, bisexual, trans and gender non-conforming persons and excluding them from essential services, including health, education, employment, housing²⁴ and access to justice.²⁵ In countries where same-

²⁰ *ibid*

²¹ *ibid*

²² United Nations Human Rights Council, *Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity*, U.N.Doc. A/HRC/38/43, (11 May 2018)

²³ *ibid*

²⁴ A/HRC/29/23, para. 59

²⁵ A/HRC/35/36, para. 59

sex sexual conduct is criminalized, where laws and policies are used to discriminate against lesbian, gay, bisexual, trans and gender non-conforming persons, or where stigma and prejudice are widespread, the probability that victims will dare to report abuses is very low, owing to fear of prosecution, stigma, reprisals or victimization, unwillingness to be “outed”, or lack of trust.²⁶

While laws targeting LGBT persons may be written to criminalize specific sexual acts rather than the broader identities of persons with a diverse sexual orientation or gender identity, some offices noted that such laws may nonetheless be used to prosecute individuals who identify as LGBT.²⁷ A respondent in a country in the Middle East and North Africa region reported, for instance, that “some LGBTI people have been convicted by the authorities solely for their presumed sexual orientation”, despite the fact that only same-sex activity, rather than LGBT identity, is criminalized in the country of operation.²⁸

Since in *Toonen*, 1994, the Human Rights Committee has held that laws used to criminalize private, adult, consensual same-sex sexual relations violate rights to privacy and to non-discrimination. The Committee has rejected the argument that criminalization may be justified as “reasonable” on grounds of protection of public health or morals, noting that the use of criminal law in such circumstances is neither necessary nor proportionate.²⁹

Right against Torture

Since 1999, the **Special Rapporteur on extrajudicial, summary or arbitrary executions** has regularly referred to persons being subjected to death threats or killed because of sexual orientation and gender identity³⁰

The mandate holder had highlighted the murders of at least 31 LGBT persons in Honduras during an 18-month period, including a transgender person found dead in a ditch, her body beaten and burned, showing evidence of rape and blows to her face from stoning so severe as to render the remains virtually

²⁶ A/HRC/38/43/Add.1, para. 52

²⁷ United Nations Human Rights Council, *Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity*, U.N.Doc. A/HRC/35/36, (19 April 2017)

²⁸ UNHCR, “Protecting persons with diverse sexual orientations and gender identities: a global report on UNHCR’s efforts to protect lesbian, gay, bisexual, transgender and intersex asylum seekers and refugees”, p. 13.

²⁹ CCPR/C/50/D/488/1992, paras. 8.3-8.7

³⁰ See E/CN.4/1999/39, para. 76, A/HRC/4/20 and Add.1, A/HRC/4/29/Add.2, A/HRC/11/2/Add.7, A/HRC/14/24/Add.2 and A/HRC/17/28/Add.1.

unrecognizable.³¹ In Jamaica, a man was allegedly stabbed and stoned to death after police, who reportedly participated in the attack, urged others to beat him because he was homosexual.³²

The **Special Rapporteur on violence against women** has also highlighted the targeted murder of lesbians in South Africa, including a case in which two lesbians were beaten, stoned and one stabbed to death.³³

LGBT persons are also among the victims of so-called “honour” killings, carried out “against those seen by family or community members to have brought shame or dishonour on a family, often for transgressing gender norms or for sexual behaviour, including actual or assumed same-sex sexual activity.³⁴ While women are generally the targets of this sort of punishment, these attacks can be directed at individuals of any sex.

The Special Rapporteur on violence against women recently reported alleged incidents of gang rapes, family violence and murder experienced by lesbian, bisexual and transgender women in El Salvador, Kyrgyzstan and South Africa,³⁵ where the Rapporteur noted that “lesbian women face an increased risk of becoming victims of violence, especially rape, because of widely held prejudices and myths”, including “for instance, that lesbian women would change their sexual orientation if they are raped by a man”.³⁶ Both the Committee on the Elimination of Discrimination against Women and the Special Rapporteur on violence against women, its causes and consequences have addressed so-called “curative” or “corrective” rape, perpetrated by men who claim their intent is to “cure” women of their lesbianism³⁷.

The Independent expert has expressed his serious concern at allegations of unlawful detention, torture, ill-treatment and extrajudicial killing of individuals in Chechnya in the Russian Federation, investigation

³¹ See A/HRC/17/28/Add.1, pp. 114-117

³² E/CN.4/2005/7/Add.1, para. 371

³³ A/HRC/4/34/Add.1, paras. 631-633

³⁴ See A/61/122/Add.1, para. 124, E/CN.4/2002/83, paras. 27-28, A/HRC/4/34/Add.2, para. 19; and A/HRC/4/34/Add.3, para. 34. See also “India: Haryana widows battered to death”, available from www.bbc.co.uk/news/world-south-asia-13125674 (accessed 28 July 2019); “They Want Us Exterminated: Murder, Torture, Sexual Orientation and Gender in Iraq”, Human Rights Watch report, 17 August 2009; and “Was Ahmet Yildiz the victim of Turkey’s first gay honour killing?”, available from www.independent.co.uk/news/world/europe/was-ahmet-yildiz-the-victim-of-turkeys-first-gay-honour-killing-871822.html (accessed 15 August, 2019)

³⁵ See A/HRC/14/22/Add.2, paras. 37-38, and A/HRC/17/26/Add.2, paras. 28-29

³⁶ A/HRC/4/34/Add.1, paras 623-633

³⁷ See, for example, The concluding observations of the Committee on South Africa³⁷, para. 39; and on the report of the Special Rapporteur on her mission to Kyrgyzstan (A/HRC/14/22/Add.2), para. 38.

and prosecution of military personnel in the Republic of Korea, and persecution, unlawful arrests and detentions, torture and ill-treatment in Azerbaijan, Egypt and Indonesia. Forced anal examinations amount to torture or ill-treatment³⁸: this medically worthless procedure whereby a doctor or other health personnel insert their fingers or other objects into the anus of a person suspected of same-sex conduct to “prove” or “disprove” homosexuality, has been reported in Cameroon, Egypt³⁹, Kenya, Lebanon⁴⁰, Tunisia⁴¹, Turkmenistan, Uganda the United Republic of Tanzania and Zambia⁴².

Conversion therapies” are treatments supposedly able to change an individual’s sexual orientation. Such practices are harmful to patients and may cause severe pain and suffering and lead to depression, anxiety and suicidal ideation. Despite being widely repudiated by major mental health organizations, only a few States Members of the United Nations actually ban them. They are practiced not only by some health-care professionals but also by clergy members or spiritual advisers in the context of religious practice.⁴³ A recent study revealed the extent of this practice at the global level: in the United States of America alone, some 698,000 lesbian, gay, bisexual, trans or gender non- conforming persons have received “conversion” therapy at some point in their lives, and over half of them reportedly when they were adolescents.⁴⁴

Moreover, trans persons are also victim of violence in health-care settings. In order to practice their right to recognition before the law, they are regularly forced into involuntary psychiatric evaluations, unwanted surgeries, sterilization or other coercive medical procedures, often justified by discriminatory medical classifications.⁴⁵

Right to privacy

Actions of violence extend to private spaces: for example, the Independent Expert received reports about the use by security services of social media and GPS-enabled applications, commonly used by

³⁸ A/HRC/31/57, para. 36

³⁹ CAT/C/CR/29/4, para. 6 (k)

⁴⁰ CAT/C/LBN/CO/1, paras. 14–15

⁴¹ CAT/C/TUN/CO/3, paras. 41–42; see also A/HRC/36/5, paras. 67, 125.48, 127.36 and 127.41

⁴² A/HRC/37/14, para. 131.98

⁴³ UNHRC Report of the Independent Expert, (n 19)

⁴⁴ Christy Mallory, Taylor N.T. Brown and Kerith J. Conron, “Conversion Therapy and LGBT Youth”, Williams Institute, January 2018 and Jack Drescher et al., “The Growing Regulation of Conversion Therapy”, *Journal of Medical Regulation*, vol. 102, No. 2 (2016).

⁴⁵ see A/HRC/19/41, para. 57 and A/HRC/29/23, para. 54

gay persons to connect with each other, in order to locate and arrest them.⁴⁶ Several reports also referred to the use of personal data stored in mobile phones, including the history of live communications and messages, to identify other persons suspected of being gay, leading to arrest and detention.⁴⁷

Right to non-discrimination

Though everyone has the right to equality and non-discrimination, LGBT people face different types of discrimination only because of their sexual orientation and gender identity. The biggest discrimination that they face is the criminalisation of consensual same sex activities. 76 countries around the world criminalize same sex conduct which is a direct discrimination based on sexual orientation.⁴⁸ They also face discrimination in the field of employment and challenges to these discriminations result into success than challenges to law against same sex relationships.⁴⁹ Transsexuals also face this discrimination because they are unable to identify them as male or female.⁵⁰ Whether gays and lesbians may serve openly in the armed forces is an issue that continues to confront courts and legislatures around the world.⁵¹ A significant volume of research documents both the harms suffered by LGBT individuals at the hands of State and non-State actors and how LGBT claims for asylum have fared in various national systems.⁵²

Intersectionality

Intersectionality plays an important role in determining what kind of violence a LGBT person might face and the reason behind it. Therefore, the Independent Expert is guided to an intersectional approach that remains aware of all conditions that create the substantively distinct life experience of an

⁴⁶ UNHRC Report of the Independent Expert, (n 19)

⁴⁷ *ibid*

⁴⁸ Eddie Bruce-Jones & Lucas Paoli Itaborahy, "State-sponsored Homophobia: A world survey of laws criminalising same-sex sexual acts between consenting adults" (ILGA May 2011)..

⁴⁹ *Morrison v State Board of Education*, Supreme Court of California, United States (20 December 1969); *Padula v Webster* (Director, FBI), United States Court of Appeals for the District of Columbia (26 June 1987); *Sentencia C-481/98*, Constitutional Court of Columbia (9 September 1998);

⁵⁰ *Schroer v Billington*, Unuted States District Court for the District of Columbia (19 September 2008)

⁵¹ *Sentencia 0023-2003-AI/TC*, Constitutional Tribunal of Peru (9 June 2004); *Log Cabin Republicans v United States District Court for the Central District of California* (12 October 2010)

⁵² See, for example, Amnesty International, *Crimes of hate, conspiracy of silence, torture and ill-treatment based on sexual identity* (London 2001); Eric D. Ramanathan, 'Queer Cases: A Comparative Analysis of Global Sexual Orientation-Based Asylum Jurisprudence' (1996), 11 *Geo. Immigration Law Journal* 1; Arwen Swink, Note, 'Queer Refuge: A Review of the Role of Country Condition Analysis in Asylum Adjudications for Members of Sexual Minorities' (2006), 29 *Hastings Int'l & Comp. L. Rev.* 251, 253

individual.⁵³ As one stakeholder stated to the mandate holder, “we hold many identities in one body”, and violent actions against a person will often result from intersecting factors that create a continuum of violence and a dynamic of disempowerment; for example, a woman feeling profound emotional, affective and sexual attraction for other women may choose to self-identify as a lesbian or as bisexual, but will also relate to other equally relevant factors that shape who she is in the context in which she lives, such as race, ethnicity, religion or belief, health, status, age, class and caste, as well as migration or economic status.

Discrimination based on sexual orientation cannot only be seen as a gay-lesbian issue. To the extent that the exclusion of race and class distorts the truth, it conflicts with this goal of revealing the intricacies of heterosexist bias. Multidimensional oppression must be included in order to fully address gay and lesbian issues. "To recognize multidimensional oppression, however, is not to suggest that every event of poor gay people of colour results from a plethora of subordinating forces. Rather it merely acknowledges that in most instances multiple sources of disempowerment affect their lives in concrete ways."⁵⁴ Furthermore, even within the gay and lesbian community, awareness of how multiple identities, such as race, ethnicity, class, and gender expressions, affect discrimination is needed to minimize division within the LGBT community, just as the women of colour are divided from the feminist community when their unique experiences are not acknowledged.⁵⁵

Intersection of different identities can contribute in making the situation worse for a LGBT person and for that reason their identity as a person in whole must be taken onto account while asserting their rights and remedy for any violation of those rights.

⁵³ UNHRC Report of the Independent Expert, (n 19)

⁵⁴ Darren Lenard Hutchinson, “Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse”, 29 CONN. L. REV. 561, 564-65 (1997), p 636

⁵⁵ Ahmadi, S,” Islam and Homosexuality: Religious Dogma, Colonial Rule, and the Quest for Belonging,” 26 J. C.R. & ECON. DEV. 537 (2012), p 546

Chapter 3: Violations of LGBT rights by Muslim-Majority countries in light of International Legal Standards

Seventy-six countries retain laws that are used to criminalize people on the basis of sexual orientation or gender identity. Such laws, including so-called “sodomy laws”, are often relics of colonial-era legislation. They typically prohibit either certain types of sexual activity or any intimacy or sexual activity between persons of the same sex. In some cases, the wording used refers to vague and undefined concepts, such as “crimes against the order of nature” or “morality”, or “debauchery”. What these laws have in common is their use to harass and prosecute individuals because of their actual or perceived sexuality or gender identity. Penalties range from short-term to life imprisonment, and even the death penalty.

MM states with discriminatory laws:

Iran remains one of the few countries on earth where consensual same sex relations between two men is punishable by death.⁵⁶ The Islamic Republic of Iran also considers being “homosexual” - both for men and women- a crime, punishable by 74 lashes.⁵⁷ The government has banned any discussion of sexual orientation-including homosexuality and bi sexuality- in print publications, online media and broadcast programs. Individuals have been arrested, harassed and persecutes for talking publicly about these issues.⁵⁸

As for transsexuality, Iran requires trans individuals to undergo sex re assignment surgery in order for them to be legally recognized, while no legal and practical measures are in place to protect individuals from discrimination and abuse based on gender identity.

There is no codified Penal Law in Saudi-Arabia. Instead, the country applies strict Islamic Sharia law. All sexual relations outside of marriage illegal in Saudi-Arabia according to the Sharia law and sodomy is criminalised. For a married man the penalty is death by stoning, while the penalty for an unmarried

⁵⁶ Article 234 of Islamic Penal Code of Iran

⁵⁷ Article 237 of Islamic Penal Code of Iran

⁵⁸ Item 6- UPR Adoption- Iran- Statement by: International Lesbian and Gay Association, Joined by International Gay and Lesbian Human Rights Commission- March 19,2015

man is 100 blows of the whip as well as banishment for a year. For a non- Muslim, who commits sodomy with a Muslim, the penalty is death by stoning.

Sudan criminalizes homosexual relations and the punishment can be 100 lashes, imprisonment of five years or death penalty depending on the number of that person's conviction.⁵⁹

In Afghanistan, new Penal Code came into force on 14 February 2018. While the new legislation was welcomed as "a milestone in the country's criminal justice reform", it explicitly criminalises same-sex sexual conduct though the punishment has been reduced. Previously, Article 427 of the 1976 Penal Code imposed a long imprisonment term for the offence of "pederasty".

In Tunisia, it is a criminal offence to establish sexual relations with someone of the same sex and punishable by three years of imprisonment.⁶⁰

There are some MM states which do not explicitly discriminate against individuals on the basis of sexual orientation and/or gender identity. However, there are numerous examples of discriminatory applications of other laws being used against LGBT persons. In addition, the lack of explicit legal protection for LGBT individuals has amounted to a tacit legal endorsement of acts of violence and discrimination.

For example, in March 2012, Turkey passed the Law to Protect Family and Prevent Violence against Women.⁶¹ While the effort of the Government of Turkey in passing this law is commendable, it should be noted that it leaves important terms undefined. It contains no definition of either "gender-based discrimination" or "gender-based violence". Moreover, there is no reference to the terms "gender", "gender identity", or "sexual orientation" in this or any other Turkish law.

Consensual same-sex sexual acts are neither explicitly prohibited under Egyptian law. However, the law on prostitution and the law against debauchery, among others, have been used liberally to imprison gay men in recent years.⁶²

⁵⁹ Sudan Penal Code (Act No. 8, 1991), Article 148

⁶⁰ Tunisia Penal Code (1913), Article 230

⁶¹ Law to Protect Family and Prevent Violence Against Women, Law Nr. 6284 (Turk.), 20 March 2012.

⁶² "Egypt's Wipe-Out-the-Queers Bill", *A paper bird*, October 2017; "LGBT Egyptians Go Into Hiding As Regime Cracks Down", *BuzzFeed News*, September 2014.

There are some states which do not explicitly criminalise homosexuality, but rather label it as “carnal intercourse” or “acts against the order of nature”. For instance-The Pakistan Penal Code (Act XLV of 1860), Article 377 (“Unnatural Offences”) states: “Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment of either description for a term which shall not be less than two years nor more than ten years, and shall also be liable to fine”.

As part of the Islamicisation of Pakistan, the Hudood Ordinances were enacted in 1977, stipulating severe punishments for adultery, fornication, consuming alcohol and same-sex sexual acts. The amendments included primitive forms of penalization like whipping of up to 100 lashes and death by stoning.

Similarly, in Malaysia, sexual relations between same-sex adults are a criminal offence as an act against the order of nature and punishable by twenty years of imprisonment and whipping.⁶³ And Morocco criminalizes any lewd or unnatural acts between individuals of the same sex and it is punishable by imprisonment and fine.⁶⁴

How discriminatory laws lead to violation of rights of LGBT people :

The discriminatory laws against LGBT people leads to the violation of their fundamental human rights in Muslim-majority States. For example, on July 11, 2000, three men were beheaded for what the Saudi interior ministry described as “the extreme obscenity and ugly acts of “homosexuality, marrying among themselves and molesting the young.”⁶⁵

⁶³ Malaysian Penal Code (Consolidated version 1998), Article 377A and 377B

⁶⁴ Moroccan Penal Code (26 November 1962), Article 489.

⁶⁵ Kim Krisberg, Saudis Beheaded for Sodomy, WASH. BLADE (Jan.4,2002), www.sodomylaws.org/world/saudi_arabia/saudinews15.htm (accessed- 2 August, 2019)

More recent reports of human rights violations in Arab countries continue to include murder, torture, and arbitrary detention. In addition, in June 2009, sixty-seven men were arrested in Riyadh, Saudi Arabia for wearing women's clothing.⁶⁶

One of the major consequences of these laws and penalties is that many homosexuals are subjected to harsh treatment from the police, whether it involve raids, entrapment methods, blackmail, or torture.⁶⁷ In 2005, police arrested more than one hundred men after raiding a party in Jeddah, Saudi Arabia, that was described as a "gay wedding," where the men-all Saudis-were reported to have been "dancing and 'behaving like women."⁶⁸

Similarly, an LGBT Pakistani may face either secular or Islamic, or in some cases both, punishments. Although, all of the known recorded cases of these laws being used against LGBT Pakistanis suggest that the more common punishment involves harassment and sporadic blackmail by the police, then the imposition of fines and jail sentences.

The Immigration and Refugee Board of Canada (IRBC) noted in January 2014 that, according to the country advisor of the International Gay and Lesbian Human Rights Commission (IGLHRC), if an LGBT person who faced threats from family or community members went to the police, the police 'may become an accomplice rather than protector.' The IRBC further reported that 'According to the President of Neengar Society, incidents of threats or violence from family members against LGBT people are usually unreported and are resolved within the family; there is usually an unspoken agreement that no one will involve the police, and an LGBT person will not report incidents, even if they are "badly beaten".

In 2004, an American adviser to the Afghan government was purportedly arrested for consensual same-sex sexual acts with a local man.⁶⁹ In 2011, a video of police officers harassing a transgender person

⁶⁶ Saudi Arabia: Drop 'Cross-Dressing' Charges', HUM. RTS WATCH (June 24, 2009), www.hrw.org/en/news/2009/06/24/saudi-arabia-drop-cross-dressing-charges (2 August, 2019)

⁶⁷ Jayesh Needham, *After the arab spring: new opportunity for lgbt human rights advocacy*, Duke Journal of Gender Law Policy, 20(2),(2013) 287-324.

⁶⁸ Saudi Arabia: Men "Behaving Like Women" Face Flogging, HUM. RTS. WATCH (Apr. 7, 2005),

⁶⁹ "American Arrested in Afghanistan on Suspicion of Homosexuality, Soliciting, Officials Say", PakTribune, 1 September 2004.

was published online.⁷⁰ Police violence is not uncommon, which includes the use of “honey traps” to arrest persons because of their perceived sexual orientation.⁷¹

How social norms violate fundamental rights of LGBT people:

In Muslim-majority states, where there is no explicit laws against the LGBT people, the prejudicial perspective and norms of the society leads to the violation of their rights.

For example- According to Article 29 of the Turkish Criminal Code, “A person committing an offense with effect of anger or asperity caused by an unjust act is sentenced to imprisonment from eighteen years to twenty-four years instead of heavy life imprisonment, and to imprisonment from twelve years to eighteen years instead of life imprisonment”. The Code does not define or set criteria for what constitutes an “unjust act”, leaving it up to the sentencing judge to determine whether an assault or murder was the result of “unjust provocation”. As a result, judges have routinely used Article 29 to reduce the sentences of those who have killed LGBT individuals.⁷² As recent as February 26, 2014, a man who killed a trans woman was given an “unjust provocation” sentence reduction from life to 18 years. According to the verdict, the “unjust act” was the victim’s “being a transvestite”.⁷³

Turkish military’s Medical Competence Regulation continues to use the antiquated Diagnostic and Statistical Manual of Mental Disorders (DSM) from 1968, which labels homosexuality and transsexuality as psychosexual illnesses. On that basis, those who self-identify as gay, bisexual, or transgender are deemed “unfit to serve” after a gruelling process of interviews with military and hospital personnel.⁷⁴ Not only does this constitute unjustifiable State-sponsored discrimination on the basis of sexual

⁷⁰ Nushin Arbabzadah, “Will Afghanistan learn that cross-dressers are not criminals?”, The Guardian, 13 November 2011.

⁷¹ “Fear, secrecy and danger a way of life for Afghan gays”, Inquirer.net, 5 November 2016.

⁷² European Commission, Turkey Progress Report 2013, at p. 59 (2013).

⁷³ LGBTI News Turkey, “Killing a Trans is Reason for Reduced Sentences”, 6 May 2014, available at: <http://lgbtnewsturkey.com/2014/06/05/killing-a-trans-is-reason-for-reduced-sentences/> (accessed- 11 June 2019)

⁷⁴ LGBTI News Turkey, “The Case of S.C.: Discrimination in Employment”, 2 December 2013, available at: <http://lgbtnewsturkey.com/2013/12/02/case-of-s-c-discrimination-in-employment/> [accessed 11 June 2019] and LGBTI News Turkey, “The Case of Halil Ibrahim Dincdag: Discrimination in Employment”, 29 November 2013, available at: <http://lgbtnewsturkey.com/2013/11/29/case-of-halil-ibrahim-dincdag-discrimination-in-employment/> [accessed 11 June 2019]

orientation and gender identity, it also intensifies social stigmatization against LGBT individuals and violates their right to privacy.

While homosexuality is not banned in Turkish society, it is largely viewed as immoral and unnatural behaviour. The government does not have anti-discrimination laws that prohibit discrimination on the basis of sexual orientation and gender identity. As a result, the discrimination and violence experienced by LGBT individuals remain institutionalized problems.

Between January 2010 and November 2014, 47 individuals were killed in Turkey due to their sexual orientation and gender identity.⁷⁵

The stigma, discrimination, and violence experienced by transgender individuals are, of course, not unique to Turkey. A low tolerance regarding their gender expression leads to a lack of employment opportunities for many transgender women and to living their lives below the poverty line. While race, class, and gender can be seen as different axes of social structure, individual persons experience them simultaneously.⁷⁶

The social norms of the states which criminalize homosexual acts lead to the violations of their rights most and it also worsens the society's hatred towards them.

The norm in Middle Eastern societies is to denounce any real or perceived homosexuality. This is true both within the Muslim majority, as well as within minorities such as Coptic Christians in Egypt, and the Christian Maronites in Lebanon. Within communities and family groups, homosexuality is considered to bring shame upon the person and his or her entire family, with consequences for every friend and family member. As a result, honour killings of homosexual family members in an attempt to restore honour to the family can occur in many areas of the Middle East.

A number of countries in the Middle East are Islamic states and homosexuality in such states is condemned.⁷⁷ Contemporary Islamic scholars see homosexuality as sinful and as a perverted

⁷⁵ Bilginsoy, Zeynep. "Evaluating Hate Murders Based on SOGI in TURKEY: Shortcomings and Proposals." Available online: <http://lgbtnewsturkey.com/2014/11/30/infographic-hate-murders/> (accessed on 6 August 2019).

⁷⁶ Crenshaw, Kimberle. "Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color." *Stanford Law Review* 43 (1991): 1241–99.

⁷⁷ Meehan, Sumayyah. "Homosexuality in the Middle East : The Muslim Observer." *Muslimmedianetwork.com*. 8 Nov. 2007.

deviation, from the heterosexual norm, though different followings of Islam prescribe different responses to the “sin” of homosexuality.⁷⁸

The Immigration and Refugee Board of Canada (IRB) reported in January 2014 that, according to Inter-Press Service, Pakistan's “conservative Muslim society” views homosexuality as a sin. A survey conducted by the Washington-based Pew Research Centre published in June 2013 showed that 87 percent of respondents in Pakistan were of the opinion that ‘homosexuality should be rejected by society’. Several sources indicated that gay men and lesbians were rarely open about their sexual orientation.

The Canadian IRB noted in a report of 9 January 2015 that, according to the BBC, “homophobia has wide social and religious sanction” and that according to the International New York Times, discrimination and prejudice against sexual minorities “run deep” in Pakistani society. Other media sources described the gay community in Pakistan as “underground”. The Pakistan country advisor for the IGLHRC said that transgender people are the only “visible” sexual minority in Pakistan, while there is “a lot of invisibility” among gay men and lesbians, who keep their sexual orientation hidden. According to the IGLHRC and WEWA representatives, LGBT people faced discrimination in the workplace and in finding rented apartments.⁷⁹

In April, the National Council of the Medical Order of Tunisia issued a statement strongly condemning “any medical examination that is unjustified and/or that touches the dignity or the physical and mental integrity of the person examined”, including forced anal and genital exams aimed to “prove” ‘homosexuality’, and clarifying that doctors must inform people that they have the right to refuse them.⁸⁰

In September, Minister for Human Rights, Mehdi Ben Gharbia, stated that “[anal] exams can no longer be imposed by force, physical or moral, or without the consent of the person concerned”.⁸¹ Yet, Human Rights Watch warned about “the possibility that someone accused of same-sex conduct might ‘consent’ to an anal exam under pressure from police, because they believe their refusal will be held against

⁷⁸ Islam and Homosexuality." Mission Islam. Feb. 2011

⁷⁹ Immigration and Refugee Board of Canada (IRB): Pakistan: Incidents of violence or mistreatment involving sexual minorities in Islamabad, Karachi and Lahore; loss of employment or inability to rent housing due to sexual orientation (2014) [PAK105027.E], 09 January 2015

⁸⁰ “Tunisia doctors urged to stop forced anal examinations to ‘prove’ homosexuality”, *International Business Times*, 12 April 2017.

⁸¹ “Tunisia bans forced anal exams for homosexuality”, *News 24*, 22 September 2017.

them, or because they believe it will prove their innocence”.⁸² Credible sources revealed that the practice was still taking place in 2018.⁸³ A 2018 report further highlighted discrimination and violence from family and community members and, particularly, from law enforcement agents.⁸⁴

Same-sex sexual relations, both amongst men and amongst women (vastly under-reported) are not uncommon in Afghanistan. A researcher noted that men in Afghanistan would sometimes have consensual same-sex sexual relations, though they would not identify as gay in the Western sense; these relations are culturally accepted, as encapsulated in a common phrase that “women are for babies, men are for sex”.⁸⁵ Yet across Afghanistan, people who identify as gay or LGBT, particularly if in any way public, are faced with significant discrimination.⁸⁶

Acceptance of Transgenders and its drawbacks:

Some Muslim-majority states are more accepting towards transsexual people than homosexuals. For example- Under the Transgender Person (Protection of Rights) Act 2018, Pakistanis may choose to self-identify as male, female, both or neither. They may express their gender according to their own preferences, and they may have their gender identity of choice reflected on their documents, "including National Identification Cards, passports, driver's licenses and education certificates." The act ensures transgender people's "fundamental rights to inheritance, education, employment, vote, hold public office, health, assembly, and access to public spaces and property. It confirms that they enjoy all the rights that the nation's constitution grants to its citizens."

Discrimination based on gender identity in employment and public accommodations is forbidden under the new law. The Government is assigned broad obligations to provide medical and psychological assistance, small business loans and vocational training, sensitivity training for police and helping

⁸² "Tunisia: Doctors Oppose 'Anal Test' for Homosexuality", *Human Rights Watch Website*, 12 April 2017.

⁸³ "Tunisia: Privacy Threatened by 'Homosexuality' Arrests", *Human Rights Watch Website*, 8 November 2018; "Tunisia's Assault on Gay Men's -and Everyone's- Right to Privacy", *Human Rights Watch Website*, 3 December 2018.

⁸⁴ Arab Foundation for Freedoms and Equality (AFE) and OutRight Action International, *Activism and Resilience: LGBTQ Progress in the Middle East and North Africa. Case studies from Jordan, Lebanon, Morocco and Tunisia* (2018), 43-54; "Two men in Tunisia sent to prison for owning women's clothing and make-up", *Gay Star News*, 16 March 2017; "Tunisia: 'Homophobic' nightclub provokes controversy", *76crimes Website*, 3 July 2017; "Homophobic crime in Kef: Salih the hairdresser tortured and killed" (in French), *Kapitalis*, 15 September 2017.

⁸⁵ Michael Luongo, "What It's Like Growing Up Gay in Afghanistan", *The Daily Beast*, 7 December 2016.

⁸⁶ Frud Bezhan, "Fake Life': Being Gay In Afghanistan", *RadioLiberty RFE*, 12 September 2017.

professionals, separate prison facilities, and safe houses. This is relatively a new and commendable law and its implementation is yet to happen.

However, some states pressurize transsexuals to undergo sex reassignment surgeries without properly informing them about the procedure and the consequences. This leads to the violation of their right to health and freedom of choice.

State authorities within Iran consider homosexuality to be an “illness”. Transgendered individuals are considered to have a Gender Identity Disorder. Reports indicate that if, after the full range of therapeutic treatments has been undertaken, medical professionals conclude that the person cannot be cured of his or her sexual orientation, the individual will be approved for sex reassignment surgery.⁸⁷

Sex reassignment operations are legal in Iran according to a fatwa (or religious ruling) pronounced by the Supreme Leader, Ayatollah Khomeini, in 1987.⁸⁸

The high rate of year surgeries undertaken within Iran raises cause for concern, as documentation suggests that coercion may be a contributing factor to individual’s decision to undergo sex reassignment surgery and surgeries are undertaken with haste and often are not fully completed.⁸⁹ Reports also suggest that where malpractice has occurred, there is a clear lack of access to legal recourse.⁹⁰ This indicates an additional violation of the right to an effective remedy under international law.

While Iranian doctors submit that sex reassignment surgeries are applicable as a “cure” for persons with a “Gender Identity Disorder” (transgendered persons), documentation suggests that gay, lesbian and bisexual men and women may identify as transgendered, or feel pressured to undergo treatment as the only avenue to legitimize their identity.⁹¹ This inability to understand, form and affirm one’s own

⁸⁷ Raha Bahreini, “From Perversion to Pathology: Discourse of Gender Policing in the Islamic Republic of Iran”, (2008)5(1) Muslim World Journal of Human Rights, 20-22
available at: <http://www.worldwewant2015.org/node/287187> ; (Accessed- 29 July 2019)

⁸⁸ International Gay and Lesbian Human Rights Commission and Iranian Queer Organization, Submission to the 20th Session of the UN Universal Periodic Review (2014), p.4,
available at: <http://iglhrc.org/sites/default/files/UPRSubmission.pdf> ; (Accessed- 29 July 2019)

⁸⁹ Iranian Queer Organization, Heartland Alliance and International Human Rights Clinic at Harvard University, “Shadow report submitted to the Committee on Economic, Social and Cultural Rights” (IQO/HA/IHRC) [2013],p 13-14 Available at -

http://hrp.law.harvard.edu/wpcontent/uploads/2011/01/JointHeartlandAlliance_IRQO_IHRC_Iran_CESCR50.pdf [regarding post surgery alienation from families].(Accessed- 29 July 2019)

⁹⁰ Ibid p15

⁹¹ UN General Assembly, Written statement submitted by Verein Sudwind Entwicklungspolitik,

identity has significant effects upon the right to informed consent, as integrated into the right to health (article 12 ICESCR).

Information provided to the Human Rights Council's Universal Periodic Review on Iran in 2010 indicates that medical professionals responsible for performing these surgeries do not always provide persons with comprehensive information regarding international reassignment standards on sexual and often misrepresent the possible complications involved in obtaining a procedure of this kind. The lack of information given to individuals contemplating sex reassignment surgery violates the right of all persons to "seek, receive and impart information" (article 19 ICCPR).⁹²

Justification in the name of Sharia'h Law:

Shariah has always been an important factor in determining Muslim States' adherence to international human rights treaties and the normative conflict between Shariah and human rights is often considered to be behind the States' reluctance to be part of these instruments.⁹³ States often use Shariah as justification while refraining from voting on or ratifying human rights treaties and limiting the impact of those instruments by entering broad or specific reservations.

According to the provisions of 1993 Vienna World Conference Declaration and Programme of Action on Human Rights, regional, historical, national, cultural and religious particularities of different regions and countries need to be taken into consideration in implementing of human rights standards. Muslims states refer to this provisions while justifying their non-compliance with international human rights law regarding the rights of LGBT people in the name of religious and cultural diversity.

Islamic Republic of Iran considers itself obliged to adhere to laws of Islamic Sharia. It relies on the principle of cultural diversity in regards to any change or adjustments and see the rights of LGBT people

A/HRC/24/NGO/112, p. 2, available at: <http://daccessddsny.un.org/doc/UNDOC/GEN/G13/167/77/PDF/G1316777.pdf?OpenElement> ; (Accessed- 7 August 2019)

⁹² This violation is also relevant to LGBT individuals with regard to prevention of HIV transmission. (IQO/HA/IHRC, (n 34) p16)

⁹³ Nisrine Abiad, "*Sharia, Muslim states and international human rights treaty obligations: A comparative study*", British Institute of International and Comparative Law, (2008), p59

as the Western standard of human rights which it is not willing to accept and adopt because of pressure or demand of other countries.⁹⁴

Pakistan and Saudi Arabia voted against the adoption of all the three Sexual Orientation and gender Identity (SOGI) resolutions. They even voted in favour of the amendment which tried to block financial resources allocated to the Independent Expert of SOGI.

Many Muslim states do not even mention about the discriminations LGBT people are facing in their countries in the national reports in the Universal Periodic Review(UPR) sessions and do not include them in the section of “vulnerable group” in those reports.⁹⁵

Though many of these states received recommendations about decriminalizing consensual same-sex relationships and enact legislations to stop discriminations based on sexual orientation and gender identity from other states in second and third UPR cycles, most of them rejected those recommendations.⁹⁶ For example- Morocco and Turkey. Most notably, Saudi Arabia has never received recommendations on SOGIESC issues in any of its 3 UPR cycles.⁹⁷ Iran and Pakistan adopted the recommendations regarding transsexuals but rejected the recommendations related to decriminalisation of homosexual acts and ensuring their rights.⁹⁸ In its 2nd cycle of the UPR Tunisia received three recommendations to decriminalise consensual same-sex sexual acts and repeal Article 230. It rejected all these recommendations and states that, “it would be possible to conduct an objective and transparent national dialogue on the subject. However, it was not ready at this stage to adopt a decision”.⁹⁹

⁹⁴ HUMAN RIGHTS COUNCIL-Working Group on the Universal Periodic Review Seventh session, “NATIONAL REPORT SUBMITTED IN ACCORDANCE WITH PARAGRAPH 15 (A) OF THE ANNEX TO HUMAN RIGHTS COUNCIL RESOLUTION 5/1” Islamic Republic of Iran- A/HRC/WG.6/7/IRN/1, 18 November 2009

⁹⁵ International Lesbian, Gay, Bisexual, Trans and Intersex Association: Lucas Ramon Mendos, *State-Sponsored Homophobia 2019* (Geneva; ILGA, March 2019).

⁹⁶ *ibid*

⁹⁷ Universal Periodic Review Report of the Working on the Universal Periodic Review: Saudi Arabia, A/HRC/11/23, 4 March 2009. Report of the Working Group on the Universal Periodic Review: Saudi Arabia, A/HRC/25/3, 26 December 2013; Report of the Working Group on the Universal Periodic Review: Saudi Arabia, A/HRC/40/4, 26 December 2018.

⁹⁸ Mendos, (n 40)

⁹⁹ *Report of the Working Group on the Universal Periodic Review: Tunisia, A/HRC/21/5*, 9 July 2012.

Moreover, comments of different state officials and human rights defenders of Muslim-majority states reflect their religious reason behind not ensuring the fundamental human rights of LGBT people. For instance- in September 2018, Malaysia's Prime Minister Mahathir Mohamad, stated that the country cannot accept LGBT culture or rights such as same-sex marriage, dismissing them as "Western" values.¹⁰⁰In an interview with the Wall Street Journal in the same month, Mahathir added that Malaysia would not decriminalise sodomy because "we are a Muslim nation, and we do not tolerate sodomy. The rest of the world may tolerate it, but we cannot. That is against our religion."¹⁰¹

Human Rights Minister Mustapha Ramid, 2017: "We are in Morocco, if we keep talking about [homosexuals] we will give them value, [They are] trash."¹⁰²

Since 2012, Rainbow Sudan runs an online magazine on LGBT issues. Its editor explained that "to understand the gay community in Sudan you have to understand the religious factor here... it is a big taboo and regarded one of the biggest sins possible."¹⁰³ He added: "we are just at the very first steps to start discussing about homosexuality. We move at the pace of a baby. Currently the country is not ready to open up to LGBTQ issues, but we have not lost hope of succeeding."¹⁰⁴

MM states consider the acceptance of homosexuality contrary to Shariah law and disregard the rights of LGBT people claiming that IHRL norms regarding LGBT people are not compatible with their religious and cultural perspective. However, there are some ways which can be used to make Shariah law compatible with IHRL standards which will be discussed in the next chapter.

¹⁰⁰ "LGBT or same-sex marriage not for Malaysia, says Dr M", *The Star Online*, 22 September 2018.

¹⁰¹ "Malaysia will not repeal anti-sodomy laws", *New Straits Times*, 29 September 2018.

¹⁰² "Mustapha Ramid Responds to Homophobia Accusations: 'Homosexuality Disgusts the Public'", *Morocco World News*, 19 October 2017.

¹⁰³ Dan Littauer, "New magazine and hope for LGBT people in Sudan", *Pink News*, 30 March 2012

¹⁰⁴ Pier Cesare Notaro, "LGBT rights in Sudan: someone fights for the rainbow", *ilgrandecolibri*, 13 January 2013.

Chapter 4: Approaches to reconciling Sharia'h Law with the International Human Rights Law Standards

Having demonstrated how Muslim-Majority States prioritise Shariah Law over their International human rights obligations and justify their non-compliance of these norms relying on the principle of cultural relativism, reconciliation of Shariah Law with the international human rights standards is undoubtedly the most needed step. Unless both laws can be made compatible with each other, it is not possible to bring the state practice of Muslim-majority states in line with international human rights standards. There are some ways how human rights activists can approach the states to reconcile the Shariah Law with international human rights law.

Secular State:

The institutional separation of Islam and the state is necessary for Shariah to have its proper positive and enlightening role in the lives of Muslims and Islamic societies. This view can also be called "the religious neutrality of the state," whereby state institutions neither favour nor disfavour any religious doctrine or principle. The object of such neutrality, however, is precisely the freedom of individuals in their communities to accept, object to, or modify any view of religious doctrine or principle.¹⁰⁵

Secularism is able to unite diverse communities of belief and practice into one political community precisely because the moral claims it makes are minimal.¹⁰⁶ The state must remain neutral in all matters of religion for believers to follow their own convictions and accept religious responsibility for their actions and omissions.¹⁰⁷

¹⁰⁵ Abdullah A. An-Naim, *'Islam and the Secular State: Negotiating the Future of Sharia'*, (Cambridge, Mass., Harvard University Press, 2008), p4

¹⁰⁶ Ibid, p41

¹⁰⁷ Abdullah A. An- Naim, "Epilogue: The Normative Relevance of Sharia in the Modern Context", in Joseph Runzo; Nancy M. Martin and Arvind Sharma (eds), *'Human rights and responsibilities in the world religions'*, (Oneworld, c2003), p314

It is, of course, legitimate for Muslims to strive for their religious values to be reflected in state policies and legislation, but that is a matter of politics and should be sought through civic reason and the democratic process, and not as a matter of religious imperative.¹⁰⁸

“The separation of Islam and the state does not prevent Muslims from proposing policy or legislation stemming from their religious or other beliefs. All citizens have the right to do so, provided they should support such proposals with civic reason.”¹⁰⁹ Civic reason means that the rationale and the purpose of public policy or legislation must be based on the sort of reasoning that most citizens can accept or reject and where every citizen must be able to make counterproposals through public debate without being open to charges about their religious piety.¹¹⁰

The underlying notion of secularism as mediation is that religious issues which are not in compliance with IHRL are debated and negotiated among social and political actors through consensus-building and compromise rather than total victory for one side and utter defeat for another. This should be as true for Muslims regarding Shariah as it is for other societies and their religious traditions. In all cases, issues of public policy and legislation should be the subject of negotiations within the imperatives of constitutionalism, human rights, and citizenship.¹¹¹

The possibility of consideration of Sharia jurisprudence through civic reason and democratic process enables Muslims to persuade others for legislation consistent with their religious beliefs without asserting that belief as the rationale of state law enforcement.¹¹² “A plausible example of this is that Muslims can lobby for a legal ban on charging interest by trying to persuade other citizens of the economic or social benefits of such a ban through reason and reasoning that all citizens can debate freely, rather than asserting their own religious conviction or cultural affiliation as categorical justification.”¹¹³

Sharia norms and state law are two fundamentally different normative systems, Sharia being religious and state law being political.¹¹⁴ By passing through the determinative and enforcement processes of

¹⁰⁸ Ibid, p312

¹⁰⁹ An-Naim, (n105), p7

¹¹⁰ ibid, p8

¹¹¹ Ibid, p 40

¹¹² An-Naim, Epilogue, (n 107), p317

¹¹³ ibid

¹¹⁴ Ibid, p311

the state, a legal opinion is no longer simply a potential- it has become an actual law, applied and enforced. The applied and enforced law is not God's law, it is the state law.¹¹⁵

This difference in the source of authority means that all state law is secular because it is dependent on the political authority of the state, even when it claims to "enforce" a Sharia norm. If that is true, then there is no religious obligation on Muslims to enforce Sharia norms as the positive law of the state. That realization will be profoundly liberating for Muslims everywhere, enabling them to see that any effort to enforce a Sharia norm through state law is political and not religious.

Allowing Shariah principles to play a positive role in public life without permitting them to be implemented through state institutions simply because that is the belief of some citizens is a delicate balance that each society strive to maintain for itself over time.¹¹⁶ Coercion negates the quality of piety in religious practice which must be voluntary and deliberate and the integrity and validity of religious experience itself requires the religious neutrality of the state, which is the definition of a secular state. For example: French's public policy regarding the headscarf is rationalised in the name of the state's protection, when in fact it is driven by irrational fear of the Muslim alien even if legally a citizen, instead of being founded on civic reason.

Given the diversity of opinion among Muslim jurists, whatever the state elects to enforce as positive law would be the personal preference of ruling elites, which might well be contrary to the view of some Muslims in the country.¹¹⁷ We can see this in Saudi Arabia, for instance, where Wahhabi views of Sharia are imposed on Shiite citizens, in addition to likely disagreement among the Sunni population as well. The imperative of certainty and uniformity in national legislation requires the enactment of majority's view over minority's, but the outcome can only be the political will of the state and not the religious belief of Muslims. Therefore, it is unwise and probably dangerous trying to push Sharia out of the public domain as it will not negate its powerful cultural and political role in the lives of Islamic societies.¹¹⁸

¹¹⁵ Khaled Abou El Fadl, "The Human Rights Commitment in Modern Islam", in Joseph Runzo, J; Nancy M Martin, and Arvind Sharma (eds), *Human rights and responsibilities in the world religions*, (Oneworld, c2003), p325

¹¹⁶ An-Naim, (n 105), p38

¹¹⁷ An-Naim, Epilogue, (n 3), p315

¹¹⁸ Ibid, p307

The proper response to religious pluralism is thus the accomplishment of a secular state and giving the same platform to every citizen of every religion to support their religious norms through civic reason in order to establish them as state enforced laws.

Pragmatic Approaches:

There is a separate group of Islamic scholars within the reformist group who believe that Islamic law can be reformed by re-analysis of the divine text: the Quran. They do not necessarily seek compatibility between Islamic and international human rights standards, but rather argue that the Quran is a living text and can be reinterpreted to meet contemporary needs of given Muslim societies.¹¹⁹

Fazlur Rahman argues that all the Quranic passages, revealed as they were in a specific time in history and within certain circumstances, were expressions relative to those circumstances. However, the message is not limited to that time or those circumstances historically. Muslims from other circumstances must make practical application in accordance with how the original intention reflects or manifests in new environments. In modern times, this is what the spirit of the Quran means.¹²⁰ Rahman's view is in line with that of Asghar Ali Engineer¹²¹, who makes a distinction between normative and contextual verses of the Quran. Engineer suggests that certain passages of the Quran are normative: they are universal and their applicability inheres at all times and in all circumstances. In contrast, contextual verses have cultural and social specificity, and their application is limited to periods of time and social contexts. Wan Mohd Wan Nor Daud argues that certain practices encouraged by the Quran may be restricted to that society which practiced them, but the Quran is not confined to or exhausted by one society and its history.¹²² These arguments suggest that normative verses may be given preference over the contextual ones, which were only applicable in that society, i.e. seventh

¹¹⁹ Niaz Shah "Women's Human Rights in Islam: An Interpretive Approach", Human Rights Quarterly 28 (2006), p881

¹²⁰ Fazlur Rahman, Islam & Modernity: Transformation of an intellectual Tradition 4–9(1982).

¹²¹ Asghar Ali Engineer, The Rights of Women in Islam 45 (1996).

¹²² Wan Mohd Wan Nor Daud, The Concept of Knowledge in Islam and its Implications for Education in a Developing Country , (1989)

century Arab society, and may not be applicable to the needs of contemporary societies.¹²³ The holistic method, which Wadud favors, is based on the contextualized analysis of the Quranic verses.¹²⁴

Contextualists who believe that the teachings of the Qur'an should be understood both in the way they were understood and applied in the early seventh century and as they might be applied in the modern context.¹²⁵ During the 1950s, Daud Rahbar, a Pakistani scholar, held that the eternal Word of God was addressed to a particular human situation during a specific time of human history (the Prophet's era). Rahbar argues that no divine message can be sent without reference to actual concrete situations, and that no divine language can be decoded unless it is couched in the linguistic, cultural, and religious values of its first audience.¹²⁶

Nasr Hamid Abu Zayd posits that the Qur'an is primarily a text that can only be understood if its author has composed it in such a fashion that it contains within it signs that could be deciphered by its audience. This audience includes its ideal recipient, the Prophet.¹²⁷ Following other scholars of the modern period, Abu Zayd maintains that God must have adapted the revelation to the language, the social situation, and the cultural tradition of the Arabs of Prophet Muhammad's period. He joins Rahman in asserting that even though there are valuable insights in the exegetical tradition, the goal of the interpreter resides in translating the message of the Qur'an into a code of language that is contemporary and unique to our situatedness.

Mohammed Arkoun asserts that speech - rather than text - is the "Quranic fact" (the event that all understanding must strive to attain). He suggests that this speech was deployed using a language and symbolic modes that had much to do with a specific historical situation of revelation. According to

¹²³ Shah, (n 15), p882

¹²⁴ Amina Wadud, *Qur'an and Woman: Rereading Sacred Text from A Woman's Perspective* 5 (1999).

¹²⁵ Saeed, A, '*Reading the Qur'an in the twenty-first century : a contextualist approach*', (Routledge, Taylor & Francis Group, 2014), p22

¹²⁶ Muhammad Daud Rahbar, "The Challenge of Muslim Ideas and Social Values to Muslim Society", *The Muslim World*, 48, 4 (1958), 274-85.

¹²⁷ Nasir Hamid Abu Zayd, *Mafhum al-Nass: Dirasa fi 'U/um al-Qur'an* (Cairo: al-Hay'a al-Misriyya al-'Ammah lial-Kitab, 1990), 11-12.

Arkoun, as long as history continues, new interpretations and new meanings of the Quran will be uncovered.¹²⁸

Where verses of Quran are interpreted in isolation and out of the proper context, the result is a misinterpretation of the Quranic universal goal: a just society based on human equality. Riffat Hassan argues that this is the trap into which the conservative Islamic scholars fell: “[t]hey have taken Quranic verses out of context and read them literally, ignoring the fact that the Quran often uses symbolic language to portray deep truths.”¹²⁹

The interpretive approach has certain advantages over the other approaches of interpretative methodologies. First, it is an Islamic approach and should be acceptable to Muslims; any results of this approach will be implementable in Muslim states. It is an internal evolutionary drive, not an alien or Western imposition; simply put, it is an insider strategy. Second, this approach provides answers to the challenges posed by Islamic relativists and supports the universalists’ drive. It accommodates the views of the relativists, who argue that every culture and religion has its own rights system because the change would come from within Islamic culture. The theme of reconciliation with international standards in this approach also advances the argument of the universalists as to the universal application of human rights.

The foremost advantage of the interpretive approach is that it is achievable because Islamic law can be reformed through the mechanism of *ijtihad* (independent individual reasoning). It is practical and has the virtue of realism. Muslims will listen to and follow what is based on the Quran and the *Sunnah* (model behaviour of the Prophet). This approach can be used to reconcile Shariah Law of Muslim states and international human rights law.

Reformation of Islamic teachings:

Reformists have tried to avoid major contradiction by arguing for the overriding importance of Qur'anic principles such as justice and equality. These principles, which are themselves assumed to be timeless,

¹²⁸ Mohammed Arkoun, "The Notion of Revelation: From Ahl al-Kitab to the Societies of the Book", *Die Welt des Islams*, 28 (1988), 62-89.

¹²⁹ Riffat Hassan, consultation paper, *Members, One of Another: Gender Equality and Justice in Islam*, available at www.religiousconsultation.org/hassan.htm.

take precedence over specific rules, which represent necessary compromises with the conditions of Muhammad's seventh century Arab environment.¹³⁰ Shariah is conceived perfect and flawless in the mind of the God, but anything that is channelled through human agency is necessarily marred by human imperfection. Jurists ought to continue exploring the ideal of Shariah and expounding their imperfect attempts at understanding God's perfection. It is a work in progress that is never complete.¹³¹

At one extreme, this has meant discarding all legislative content and adhering only to theological doctrines. In this view, articulated most daringly by Sudanese scholar Mahmoud Mohamed Taha¹³², "some portions of the Qur'an are meant to be timeless (divine Sovereignty, human fallibility, the inexorability of judgement) while others are bounded in time (regulations governing slavery, for instance, or perhaps fighting with unbelievers)."¹³³

He advocated analysis of particular regulations to determine their intended purpose during Muhammad's lifetime. Once one had determined their original intent, one would then craft a new regulation to fulfil the same purpose in diverse modern contexts.¹³⁴

It would be possible to resolve conflicts between substantive human rights provisions and Islamic law if human rights advocates and Islamic law advocates both agreed to observe the limitations of "public reason." Public reason for Rawls is "a term of art that refers to a particular mode of reasoning that citizens use in their public deliberations on constitutional essentials and matters of basic justice. Public reason limits citizens to advance only such positions as they may justify on grounds that they reasonably believe others could reasonably accept as free and equal could."¹³⁵

Some rules of Islamic law are based on factual assumptions that are no longer true, even if they might have been true in the past. Such as rules permitting the marriage of minors. Interference with minors' autonomy interests in these cases was justified on empirical grounds.¹³⁶ Whereas pre-modern jurists

¹³⁰ Kecia Ali, "Timeless texts and modern morals - Challenges in Islamic sexual ethics" in Kari Vogt, Lean Larson and Christian Moe (eds), *New Directions in Islamic Thought: Exploring Reform and Muslim Tradition*, (London: IB Tarus, 2009), p 92

¹³¹ El Fadl, (n 115), p325

¹³² Mahmoud Mohamed Taha (Abdullahi A. An-Naim, trans. And intro.), *The Second Message of Islam* (Syracuse, NY: Syracuse University Press, 1996).

¹³³ *ibid*

¹³⁴ *ibid*

¹³⁵ John Rawls, *Political liberalism* (Columbia 1993).

¹³⁶ Mohammad H Fadel, 'Public Reasons as a Strategy for Principled Reconciliation: The Case of Islamic Law and International Human Rights Law' (2007) 8 CHI J INT'L L 1, p12

believed that marriage was necessary to secure a child's well-being, especially for a female child, radically changed social circumstances now allow children, including girls, the opportunity for material security outside of marriage, at least for all but the poorest and least-developed Muslim-majority jurisdictions. Accordingly, the grounds on which the interference in children's autonomy interests had been justified as a general matter no longer exist. It is justified to revise these rules which are in conflict of international human rights norms and public reason.¹³⁷

Another category of “problematic rules of Islamic consists of discriminatory rules that are grounded in theological justifications, and therefore cannot be revised by simply correcting an erroneous factual assumption. In these circumstances, a change in theological doctrine would be required in order for the rule of Islamic law to be brought into line with public reason.”¹³⁸

Muslim modernists such as Fazlur Rahman have argued that the rule of the Qur'an should not be interpreted as an eternally binding rule of law, but instead should be viewed in the context of numerous reforms that the Qur'an made improving the overall social status of women. On this reading of Qur'anic legislation, the aim of the Qur'an with respect to social relations was one of equality, but its specific rules represented the practical limit of how far such reforms could be taken in light of the circumstances of seventh-century Arabia.¹³⁹ However, the circumstances have changed and reforms of these discriminatory can be achieved now.

On the basis of public reason, secular law can be accommodated alongside the Shariah law of Muslim states¹⁴⁰. This accommodation argument can be better understood with regards to hudud offences.¹⁴¹

The justification for the hudud penalties is religious, insofar as they function as a means for a sinner to expiate his sin. For this reason, non-Muslims were not subject to the hudud unless the penalties used in connection with the hudud were also deemed to further a secular interest, for example, protecting property or security in the case of crimes such as theft or highway robbery. “This suggests that Islamic jurisprudence recognizes-at least for non-Muslims-an exemption from the hudud penalties on the theory

¹³⁷ Ibid, p13

¹³⁸ Ibid, p14

¹³⁹ Fazlur Rahman, A Survey of Modernization of Muslim Family Law, 11 Intl J Middle E Studies 451, 457 (1980).

¹⁴⁰ Ibid, (n 136), p12

¹⁴¹ The hudud offenses consist of seven crimes-adultery/fornication, slander, theft, brigandage, wine-drinking, apostasy, and rebellion-whose penalties are legally fixed and for which the state lacks any enforcement discretion once the elements of the crime have been proven. See Robert Postawko, Comment, Towards an Islamic Critique of Capital Punishment, 1 UCLA J Islamic & Near E L 269, 286-87 (2002).

that non-Muslims obtain no spiritual benefit from having such penalties applied to them. To the extent that Islamic law also applied these penalties to non-Muslims then, it did so for prudential reasons, not theologically motivated ones.”¹⁴²

Application of the hudud penalty can only be justified on prudential grounds as a means to further a secular interest (for example, the protection of property in the case of the punishment of a thief). If the punishment is being applied for prudential reasons, however, it should not be problematic to treat a dissenting Muslim in the same manner as Islamic law would treat a non-Muslim.¹⁴³ Accordingly, Islamic law should can be revised for the scope of the hudud penalties so that they are applicable only to persons who specifically consent to the application of the hudud punishment. If the hudud were to be applied only to those individuals who specifically consented to those penalties, they would arguably be consistent with the requirements of public reason and the penalty will lose its religious function and thus acquire secular purposes.¹⁴⁴ This can be applied to every religious punishments and the independence of the offender to choose between a secular penalty and religious penalty will ensure its compliance with international human rights standard.

There are some obstacles in implementing these approaches. For Example - Muslims tend to be hostile to the concept of secularism as they think it means exclusion of religion from the public life of a society.¹⁴⁵ They think it as a Western concept which is threatening to their religious views. However, it is a misconception and enforcement of Shariah norms as state law is rather counterproductive for religious purposes.

MM states do not contemplate that it is better for Muslims to live in a secular state where they have the proper of freedom of religion despite being the minority population in that state. Because most Muslims are indifferent to any specific legal regime so long as that legal regime does not compel them to undertake acts that they subjectively deem sinful or prevent them from fulfilling the devotional elements of Islam. Accordingly, Muslims would be indifferent to whether a state enacts positive legislation

¹⁴² Ibid, (n 136), p16

¹⁴³ Ibid, p17

¹⁴⁴ Ibid, 18

¹⁴⁵ An-Naim, (n 105) p36

mandating an Islamic vision of the good, so long as the state gives Muslims the freedom to live in accordance with that vision.¹⁴⁶

In regards to contextual interpretation of Islamic teachings and reformations, most MM countries are afraid to explore new ideas of reading these teachings in the fear of sins. But the framework and main principles of Shariah were developed as an ideal normative system by scholars and modern Muslims who enjoy greater religious, intellectual and political freedom and experience have a resource for in the development of models for reform.¹⁴⁷ Therefore, it is safe to say that there are opportunities and with time MM states might be more inclined to adopt these approaches.

¹⁴⁶ Ibid, p4

¹⁴⁷ John L. Esposito, "The Future of Islam", Oxford: University Press, 2010, p140

Chapter 5: Scopes and Challenges to respecting LGBT rights in

Muslim-Majority states

States has the responsibility of the protection of its citizen and leaving a part of it cannot be considered as fulfilment of their responsibility. There are some scopes using which the MM states can try to ensure fundamental human rights of LGBT people. They will face some challenges while doing so, but those can be defeated using the main legal principles embedded in Shariah law.

State compliance with human rights:

According to Abdullah An-Na'im, every state has the responsibility to remove any inconsistency between international human rights law binding on it and religious and customary laws operating within the territory of that state.¹⁴⁸ This responsibility is fully consistent with the principle of state sovereignty in international law, since it does not purport to force any state to assume legal obligations against its will and simply seeks to ensure that states effectively fulfil legal obligations they have already assumed under international law.¹⁴⁹

It is clear that the only viable and acceptable way of changing religious and customary laws is by transforming popular beliefs and attitudes, thereby changing common practice.¹⁵⁰ Because no government can afford to disregard the politically articulated wishes or positions of powerful groups or segments of its population who might want to maintain religious and customary laws.¹⁵¹ It is important to understand not only the behaviour of governments as political entities, who act within the context of specific political, economic, and social conditions, but also the power relations prevailing in the particular country.¹⁵²

“This transformation can be accomplished through a comprehensive and intensive program of formal and informal education, supported by social services and other administrative measures, in order to change people's attitudes about the necessity or desirability of continuing a particular religious or

148 Abdullah A. An-Naim, *Muslims and global justice*, (University of Pennsylvania Press, 2011), p 12

¹⁴⁹ *ibid*

¹⁵⁰ *Ibid*, p132

¹⁵¹ *Ibid*, p123

¹⁵² *ibid*

customary practice. To achieve its objective, the program must not only discredit the religious or customary law or practice in question but also provide a viable and legitimate alternative view of the matter. Such an alternative view of an existing practice can be either the simple discontinuation of the practice in question or the substitution of another¹⁵³ in compliance with international human rights law. In this case, an effective approach can be sufficient reform of Shariah in relation to universal human rights by citing sources in the Quran and Sunna which are inconsistent with universal human rights and explain them in historical context: while citing those sources which are supportive of human rights as the basis of the legally applicable principles and rules of Islamic law today.¹⁵⁴

An-naim has also stressed the importance of domestic cultural legitimacy for the successful implementation of international human rights standards in areas of conflict between human rights and Shariah through his “internal discourse-cross-cultural dialogue” model.¹⁵⁵

Muslim-Majority states can take similar steps to bring necessary reform to its Shariah law to persuade its general people for respecting fundamental rights of LGBT people and prioritize the fulfilment of its international obligations.

Scientific basis of homosexuality:

It is not very long ago when homosexuality was regarded as a psychiatric disorder or mental illness. In 1973, the American Psychiatric Association (APA) removed homosexuality from its official *Diagnostic and Statistical Manual of Mental Disorders* (DSM). This decision occurred in the context of momentous cultural changes brought on by the social protest movements of the 1950s to the 1970s: beginning with the African-American civil rights movement, then evolving on to the women's and gay rights movements.

¹⁵³ Ibid, p132

¹⁵⁴ Abdullah A. An-Na'im ; foreword by Voll, J 'Toward an Islamic reformation : civil liberties, human rights, and international law', (Syracuse University Press, 1990), p171

¹⁵⁵Kristine Kalanges, 'Religious Liberty in Western and Islamic Law', Oxford University Press 2012, p175

Alfred Kinsey's and colleagues' study on male and female sexuality marked the beginning of a cultural shift away from the view of homosexuality as pathology and toward viewing it as a normal variant of human sexuality. Kinsey had criticized scientists' tendency to represent homosexuals and heterosexuals as "inherently different types of individuals." He said, "Males do not represent two discrete populations, heterosexual and homosexual. The world is not to be divided into sheep and goats. It is a fundamental of taxonomy that nature rarely deals with discrete categories... The living world is a continuum in each and every one of its aspects."¹⁵⁶ Therefore, he introduced a 0 to 6 scale to classify sexual behavior or fantasy from "exclusively heterosexual" to "exclusively homosexual" (the "Kinsey Scale")¹⁵⁷. The "Kinsey Reports" found that 37% of males and 13% of females had at least some overt homosexual experience to the point of orgasm; furthermore, 10% of males were more or less exclusively homosexual and 8% of males were exclusively homosexual for at least three years between the ages of 16 and 55.

After that the World Health Organization removed homosexuality from its ICD-10, endorsed by the Forty-third World Health Assembly on 17 May 1990 which was listed as mental illness in its ICD-9 (1977)¹⁵⁸

Scientists still do not know certainly what determines an individual's sexual orientation, but they theorize that it is caused by a complex interplay of genetic, hormonal, and environmental influences and do not view it as a choice.¹⁵⁹ There is considerably more evidence supporting non-social, biological causes of sexual orientation than social ones, especially for males.¹⁶⁰ There is no substantive evidence which suggests parenting or early childhood experiences play a role with regard to sexual orientation. While some people believe that homosexual activity is unnatural,¹⁶¹ scientific research shows that

¹⁵⁶ Alfred Kinsey, "Sexual Behavior in the Human Male" (1948), p. 639

¹⁵⁷ "Kinsey's Heterosexual-Homosexual Rating Scale". *The Kinsey Institute*. Retrieved 8 September 2011

¹⁵⁸ "The decision of the World Health Organisation 15 years ago constitutes a historic date and powerful symbol for members of the LGBT community". *ILGA*. Archived from the original on 30 October 2009. Retrieved 24 August 2010.

¹⁵⁹ Mary Ann Lamanna; Agnes Riedmann; Susan D Stewart (2014). *Marriages, Families, and Relationships: Making Choices in a Diverse Society*. Cengage Learning. p. 82. ISBN 1305176898. Retrieved 11 February 2016.

¹⁶⁰ Bailey JM, Vasey PL, Diamond LM, Breedlove SM, Vilain E, Epprecht M (2016). "Sexual Orientation, Controversy, and Science". *Psychological Science in the Public Interest*. **17** (21): 45–101. doi:10.1177/1529100616637616. PMID 27113562. LeVay, Simon (2017). *Gay, Straight, and the Reason Why: The Science of Sexual Orientation*. Oxford University Press. ISBN 9780199752966.

¹⁶¹ Robinson, B. A. (2010). "Divergent beliefs about the nature of homosexuality". *Religious Tolerance.org*.

homosexuality is a normal and natural variation in [human sexuality](#) and is not in and of itself a source of negative psychological effects.¹⁶² Therefore, it is not a form of perversion.

Pathologization of LGBT adults and children - branding them as ill based on their sexual orientation, gender identity or gender expression - has historically been, and continues to be, one of the root causes behind the human rights violations that they face. It is also an obstacle to overcoming negative attitudes, stereotypes, and the multiple barriers for the realization of LGBT people's most fundamental human rights.

Pathologizing and stigmatizing medical classifications relating to gender identity and expression are used to justify subjecting trans people, even at young ages, to forced or coercive sterilization, hormone therapy, surgeries, and psychiatric evaluations, and in other ways abusively conditioning their human rights even though there is insufficient evidence to support the use of psychological interventions to change sexual orientation.¹⁶³

Muslim-majority states can take steps to accept homosexuality and transsexuality as a natural and biological variation in human sexuality over which a person has no choice and which is not a product of perversion or sickness of mind. This acceptance by the state will help the society to change their perspective about LGBT people and stop their patholization. It will also decrease significantly the amount of violations of their rights that LGBT people face now.

Right to privacy in Islam:

Right to privacy is sacred, inviolable and unalienable right in Islam. Privacy has been valued by Islam and can be asked as a matter of right.¹⁶⁴

There is a verse in the Quran which expressly prohibits suspicion, spying and backbiting:

¹⁶² "Therapies" to change sexual orientation lack medical justification and threaten health". *Pan American Health Organization*. Archived from the original on 23 May 2012.

¹⁶³ American Psychological Association: Resolution on Appropriate Affirmative Responses to Sexual Orientation Distress and Change Efforts

¹⁶⁴ Ms Mariam Sherwani, "The Right to Privacy under International Law and Islamic Law: A Comparative Legal Analysis", *Kardan Journal of Social Sciences and Humanities*, Volume 1, Issue 1, June 2018 [ISSN:2616-8707], p35

“O you believe! Avoid much suspicion; indeed, some suspicions are sins. And spy not, neither backbite one another. Would one of you like to eat the flesh of his dead brother? You would hate it. And fear Allah. Verily, Allah is the one who forgives and accepts repentance, Most Merciful.” (49:12)

This verse has three interrelated parts. The first part advises the believers to avoid much of suspicion as it is the cause and source of spying. By prohibiting suspicion, the root of spying is dealt with. Suspicion is harmful to the very life in society. Society is based on trust and good faith. Suspicion spoils the relations among people and between government and people.¹⁶⁵ The word “*tajassos*” which is here translated as spying means looking for other people’s affairs. Backbiting is to mention the faults and shortcomings of people to others in their absence. So, suspicion, spying and backbiting form a chain of behaviour. The third part provides a moral justification for the prohibitions. It makes recourse to intuition: eating the flesh of a dead brother is hateful. The behaviour chain deprives others from their personhood and by violating their reputation and personality assumes them as dead. One’s life is dependent on his/her reputation, dignity and social personality; violating these is tantamount to killing and destroying people’s lives.¹⁶⁶

The Quran also expressly forbids entering houses without permission:

“O you believe! Enter not houses other than your own, until you have asked permission and greeted those in them; that is better for you, in order that you may remember.” (24:27)

Most of the points raised in the above section apply equally to this verse. Seen from a human rights perspective, this verse gives an entitlement to all human beings to be let alone in their houses and residence.¹⁶⁷ It does not matter whether the houses people live in are their own. The prohibition of entry into houses without consent imposes a duty on all Muslims to respect the right of those inside to live as they please.¹⁶⁸ The prohibition is regardless of the purpose of intrusion.

¹⁶⁵ A hadith from the Prophet says that, “If the governor has suspicion on people he has spoiled them.” See, Yousef al-Qarzawi, *Al-Halal wa-l Haram fil Islam*, Dar Gharib li-Tiba’at (Cairo, 1976), p. 293, quoting from Sahih Abu Dawood and Sahih Nasa’i.

¹⁶⁶ A hadith from the Prophet says that, “God has prohibited a Muslim’s blood and property and to be subject of suspicion”. Muhammad Baqir Majlesi, *Bihar ul-Anwar*, Dar ul-Kutub ul-Islamiyyah (1403 hijrah, Tehran), vol. 72, p. 200.

¹⁶⁷ American Psychological Association, (n 17), p 43

¹⁶⁸ Ibid

The importance of right to privacy can also be understood from the evidential requirements while proving adultery or zina. Under the Shariah, sexual intercourse is only permitted within a marriage or between a slave woman and her master. Adultery or unlawful sexual intercourse (zina) is one of the seven Hudud crimes which is punishable by Had, which means that the penalty for them is established in accordance with “God’s rights” and is prescribed by the Quran. Prosecution and punishment for such crimes are mandatory, as opposed to Ta’azir offences for which they are discretionary.

The requirements for proving unlawful sexual intercourse (zina) are even stricter than for the other hadd offences. On the strength of Quran (24:4) full evidence for this crime requires the concurring testimonies of four male eyewitnesses. They must have seen the act in its most intimate details, i.e the penetration, or, in the terms of certain hadiths, the witnesses must have observed the act just like ‘a pencil going in to a kohl container (ka-l-mil fi al -mikhala) or a bucket into a well (ka-l-rasha fi al-bi’r).¹⁶⁹ If their testimonies do not satisfy the requirements, the witnesses can be sentenced to eighty lashes, the fixed penalty for unfounded accusation of fornication (qadhf). It is nearly impossible to satisfy the prerequisite for eyewitnesses, unless the act is performed openly and publicly. In such case the Had penalty is not exacted unless the adulterer confesses to having committed adultery and requests the penalty.¹⁷⁰

If Muslim-majority states give the same importance to the right to privacy of homosexual people, then they will have to refrain from interfering in their private lives. The states are not allowed to spy on them in their house and what they do inside their bedroom. In consequence, states will never have enough proof to punish them according to Shariah law. That is why, Marinos Diamantides argues that the social or public expression of homosexuality, rather than the state of being homosexual, is criminalized because Islamic law requires four male adults must be witnesses to the sexual act.¹⁷¹

¹⁶⁹ Rudolph Peters , *“Crime and punishment in Islamic law : theory and practice from the sixteenth to the twenty-first century”*, Cambridge University Press, 2005, p15

¹⁷⁰ M. Cherif Bassiouni, (editor), *“The Islamic criminal justice system”*, Oceana Publications, (1982)

¹⁷¹ Marinos Diamantides, *Le Jugement En Action-Ethnomethodologie Du Droit, De La Morale et De La Justice En Egypte Baudoin Dupret (Geneva: Librairie Droz, 2006)*, 32 POLAR: POL. & LEGAL ANTHROPOLOGY REV. 137, 142 (2009).

However, anti-homosexuals can raise a contradictory issue and argue that hisba doctrine gives them the right to interfere in the lives of homosexuals. The Qura'nic principle of hisba, to enjoin good and prevent evil, is primarily addressed to the individual and has been shouldered mainly by civil groups, not the state. Hisba takes for granted the individual's right to participate in public debates, give an opinion, be actively involved and criticize government policy.¹⁷²

Commanding what is right and prohibiting what is wrong and respecting the privacy of Muslims constitute what may be identified as "contrasting" or competing objectives.¹⁷³ The twin objectives of protecting the physical privacy of persons on the one hand and respecting the privacy of their residence on the other, require striking the right balance between them. Ideally, one should meet the requirements without going too far in either direction, in a way that causes the minimum disturbance to those being inspected while doing what can reasonably be expected to protect the chastity of Muslims.

However, striking the right balance has never been easy for the states. For example, when the Appeals Court ruled Abu Zayd an apostate and ordered separation from his wife based on its interpretation that the principle of hisba can be applied in matters of personal status, it emboldened Islamists to file hisba lawsuits against a number of intellectuals, including Naguib Mahfouz, seeking to separate them from their wives on grounds of apostasy. Under strong pressure from public, Egypt passed a law regulating the procedures for filing hisba lawsuits, without infringing upon the right of every Muslim to do so.¹⁷⁴ It shows how applying the hisba doctrine leniently can create unrest in a state and harm the public order. For this reason, many states have showed reluctance in applying this doctrine and the Muslim-majority states should follow that.

Considering the other sides of Lot concept:

Contrary to the common belief, the Quran does not use any terms corresponding to "homosexuals" or "homosexuality" within the entirety of its text. There are no terms used within the Quran which specifically refer to same-sex relations, although there are certain terms that are frequently interpreted

¹⁷² Tar q al- Bishri, 'Mu'assasat-al-Dawlah' , 41-2

¹⁷³ Mohammad Hashim Kamali, "The right to Personal Safety and the Principle of Legality in the Sharia'h," Islamic Studies, Vol.39, Number 2, p249

¹⁷⁴ Fauji M. Najjar, "Islamic Fundamentalism and the Intellectuals: The Case of Nasr Hamid Abu Zayd", British Journal of Middle Eastern Studies, 27:2, 177-200, p 192

and are associated with same-sex practices.¹⁷⁵ Nor indeed does the Quran prescribe death or any form of punishment. For consensual homosexual or lesbian activity as an offense and of homosexuality Juristic interpretation sanctifying stoning by death (rajm) is derived from the narrative of the struggles of Prophet Lot with his people. As zina is prohibited in Islam, it is therefore not surprising that there is unanimity¹⁷⁶ amongst scholars of the major Islamic schools of thought (Sunni and Shi'a) that homosexuality is forbidden (haram) while at the same time considered to be a moral, physical, and psychological disorder.¹⁷⁷

Gay, transgender, and lesbian Muslims resist this singular focus on same-sex acts and charge that focusing only on this actually distorts one's reading of the story. They argue that the story is really about infidelity and how the Tribe of Lot schemed for ways to reject his Prophethood and his public standing in their community. Same-sex acts were only one of a range of actions that constituted their infidelity- from murder and robbery (as mentioned in Q. 29:29) to other repugnant acts in their assemblies (which commentators claim included public nudity, gambling, and idolatrous worship).¹⁷⁸

Ibn Hazm¹⁷⁹ notes that it is impossible that Lot's Tribe was destroyed solely or primarily because of male-to-male sex, because Lot's wife was also destroyed along with all the women and children of their tribe (Qura'n 66:10). Lot's wife was guilty of infidelity and betrayal for denying her husband's role as Prophet, just as the men in her community were guilty, and so she was destroyed with them.¹⁸⁰

The men who attacked Lot's guests with the intent to rape them had wives and children, as they do the men in lust besides the women [*min dun al-nisa'*], as the Quran (27:55) emphasizes through its grammar. It makes definite both "the men" whom they are sexually assaulting and "the women" with whom they already have sexual relationships. Kugle opines that He is not talking about men in general who have sex with other men in general i.e homosexual men rather He is denouncing the men who

¹⁷⁵ SCOTT SIRAJ AL-HAQQ KUGLE, *HOMOSEXUALITY IN ISLAM: CRITICAL REFLECTION ON GAY, LESBIAN, AND TRANSCENDER MUSLIMS* 50 (2010), p50

¹⁷⁶ Javaid Rehman; Eleni Polymenopoulou, *Is Green a Part of the Rainbow: Sharia, Homosexuality, and LGBT Rights in the Muslim World*, 37 *FORDHAM INT'L L.J.* 1 (2013), p10

¹⁷⁷ KHALED EL-ROUAYHEB, *BEFORE HOMOSEXUALITY IN THE ISLAMIC ARAB WORLD, 1500-1800*, at 19 (2005)

¹⁷⁸ Kugle, (n 28), p51

¹⁷⁹ Ibn Hazm, *Al-Muhalla*, vol.1, p.393

¹⁸⁰ *ibid*

sexually assault these specific men (those who are vulnerable as strangers and taken under his protective hospitality) while leaving aside the sexual relationships they already have with the women who are their wives.¹⁸¹ The acts would appear analogous to soldiers using rape as a weapon or to interrogators using sexual acts as tools of domination. Applying a psychological theory of sexual orientation, it appears that the men of Lot's Tribe were actually heterosexual men attempting to aggressively assert their power against other vulnerable men (the angels).¹⁸² Their attempt to rape the men was motivated by their wish to reject the Prophetic authority of Lot and assert their own egoistic status and power, rather than by sexual desire and bodily pleasure.¹⁸³ The same story with guests who are female would exert the same force and convey the same moral message, if the Islamic imagination allowed angels to appear as women.¹⁸⁴

This arguments bear more importance when it is read with Sura An-Nur (The Light), verse 31, in which the believing women are asked to lower their gaze and be modest and not to reveal their adornments to the public. However, amongst the select group of men for whom this restriction does not apply are those men "who have no desires for women." There could not be any clearer assertion that the Quran recognizes the existence and appreciates the value of men with different sexual orientation.¹⁸⁵ These men, by definition, would include homosexuals, eunuchs, men with no sexual drive, or impotent men.¹⁸⁶ Relying upon this verse, Farik Malik makes the incisive comment "the Quran recognizes that some men are "without the defining skills of males" and so, as domestic servants, are allowed to see women naked."¹⁸⁷

On the other hand, there is no definite punishment for homosexual relationships in Quran. Still, some argue that God created all human beings as heterosexual which is revealed by Quran and claiming to

¹⁸¹ Kugle, (n 175), p55

¹⁸² Ibid, p54

¹⁸³ ibid

¹⁸⁴ Ibid, p56

¹⁸⁵ Rehman, (n 176), p27

¹⁸⁶ ibid

¹⁸⁷ Faris Malik, Queer Sexuality and Identity in the Quran and Hadith, WELL.COM

be homosexual is a perversion of God-given nature.¹⁸⁸ According to others, Quran reveals that God wills a norm which is heterosexuality and homosexuality is deviation from morality and sinful.¹⁸⁹

Regarding the punishment for homosexuality, there is a consensus among the four leading Sunni schools of thought and most Islamic scholars that homosexual acts are a major sin (fahicha) and may be punishable by death which is similar to the Hudud offence of Zina.¹⁹⁰ Hudud offences are acts prohibited by God and punished by defined mandatory penalties because the acts violate a right protected by the Quran. As Ibn Hazm noted that the Quran does not forbid it in language that implies the legal force of specific punishment for homosexuality and its analogy to adultery or heterosexual fornication are not justified.¹⁹¹ He also concluded that sodomy should be prevented by discretionary punishment (Ta'azir crimes).¹⁹² Retribution and deterrence play a crucial role in selecting the appropriate punishment for Ta'azir crimes¹⁹³ and death penalty need not be the only fitting punishment for homosexual relationships.

From the above discussion, it is imperative to say that the basis of homosexuality as a sin and its punishment is not very transparent. The legal scriptures against homosexual acts which are an integral part of the Shariah are not based upon clear and compelling language in the Quran, they are rather based immediately on decisions of Prophet's followers and later upon hadith that circulated in the Prophet's name. Therefore, punishing homosexual people with death penalty in this case would go against the basic legal principle of justice of Islam and Muslim-majority states should hold themselves back from committing such grave injustice.

¹⁸⁸ Kugle, (n 175), p70

¹⁸⁹ ibid

¹⁹⁰ Rehman, (n 176), p12

¹⁹¹ Hazm (n 179), p 397

¹⁹² ibid

¹⁹³ Peters, (n 169), p66

Chapter 6 : Conclusion and Recommendations

Every human being is entitled to the rights enshrined in the human rights instruments regardless of any status including sexual orientation and gender identity. The state has the duty to protect and ensure these rights of its citizens equally and without any discrimination. Many MM states have failed to accomplish their task of ensuring the rights of the LGBT people and violated them as outlined in this dissertation. They are more willing to accept transgenders but by forcing them to choose a gender and undergo treatments and surgeries without their fully informed consent. That leads to further violations of their rights. MM countries' discriminatory laws against LGBT people exacerbate the stigma and bias that already exist in the societies of those countries.

Though MM states claim that Shariah law is not compatible with IHRL, it has been proved in this essay that it is untrue. They are hesitant to attempt to adopt those reformative approaches because to some extent they fear that they might be going against the will of Allah. In their fear, they forget the fact that Islam is the religion which promotes kindness and piety towards mankind (Quran 5:2). Discriminating and committing violence against LGBT people can never be acceptable in Islam as these goes against the principles of due process and peace.

The religious basis of MM states' hatred towards homosexuality are not concrete. There are some grey areas which have been demonstrated in this dissertation. There are significant doubts about the prohibition of consensual same sex relationships in Shariah law which is completely a biological aspect and not a matter of choice or born out of perversion. Besides, the punishment for homosexuality is not mentioned in Quran like other Hudud offences. Still, criminalising homosexuality and making it punishable by death penalty goes beyond the objective of Hudud offences. It is unjust to take someone's life or even threaten to take life based on an unclear religious basis. LGBT people should be granted the benefit of doubt and homosexuality should be decriminalized in MM countries in order to give them a proper chance at life.

State should not impose its own views on its citizens and give them full freedom of choice to lead a fulfilling life as long as they are not infringing upon the rights of others. Restricting their freedom and

punishing them for a state's own religious views cannot be justified.¹⁹⁴ Legalisation of same-sex marriage is a very far-fetched concept for MM states now and this is not even the demand of the human rights community. But at the least, they can decriminalise homosexuality which will make the society to accept them as one of their own. This will significantly reduce the number of violence and discrimination they face in MM states every year.

In light of the issues I have discussed above, I propose the recommendations mentioned below:

1. MM states should decriminalize homosexual acts and repeal all the legislations which are used against them.
2. MM states should give full freedom to transgenders in regards to choice of their gender and ensure their right to health in case they willingly choose to undergo sex reassignment surgery.
3. MM states should enact laws prohibiting any kind of discrimination based on sexual orientation and/or gender identity.
4. MM states should ensure effective remedy to LGBT people if they face any kind of violation of their rights.

¹⁹⁴ UN General Assembly, *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, 25 November 1981, A/RES/36/55, available at: <https://www.refworld.org/docid/3b00f02e40.html> (accessed 7 September 2019)

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