



# **OIC DECLARATION ON HUMAN RIGHTS: CHANGING THE NAME OR A PARADIGM CHANGE?**

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**OIC DECLARATION ON HUMAN RIGHTS:  
CHANGING THE NAME OR A PARADIGM CHANGE?**

Mohammad Hossein Mozaffari<sup>1</sup>

**Abstract**

Since the adoption of the Cairo Declaration of Human Rights in Islam (CDHRI) in 1990, there was an ongoing debate between Western and Muslim states regarding the compatibility of its provisions with human rights standards. The cultural divide reached its zenith when the Organization of Islamic Conference (OIC, since 2008, Organization of Islamic Cooperation) sponsored a series of resolutions on the prohibition of defamation of religions in Human Rights Council. However, there appeared to be a paradigm shift in the OIC human rights discourse when it adopted a ten-year program of action in 2005. Accordingly, the statute of organization was amended in 2008 and protection of human rights and fundamental freedoms were incorporated into its objectives. The OIC, consequently, compromised with Western states on the notion of defamation of religions in the Human Rights Council.

Moreover, the establishment of Independent Permanent Human Rights Commission (IPHRC) in 2011 paved the way for the revision of the CDHRI which materialized as the OIC Declaration on Human Rights (ODHR) in 2020. This article shall review the background and the internal and external factors of paradigm shift in OIC human rights politics with a descriptive and analytical method. It will also examine the content of the ODHR and its implications for the OIC human rights agenda. The paper finally concludes that the paradigm change may seemingly bring OIC human rights rhetoric in alignment with UN human rights language, but it is less likely to improve human rights situation in member states.

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**Keywords:** Organization of Islamic Cooperation (OIC), Human Rights, Cairo Declaration of Human Rights in Islam (CDHRI), Independent Permanent Human Rights Commission (IPHRC), OIC Declaration on Human Rights(CDHR).



**Abbreviations**

CDHRI	Cairo Declaration of Human Rights in Islam
OIC	Organization of Islamic Cooperation
HRC	Human Rights Council
IPHRC	Independent Permanent Human Rights Commission
ODHR	OIC Declaration on Human Rights
TYPoA	Ten-Year Program of Action
UDHR	Universal Declaration of Human Rights
CFM	Council of Foreign Minister
Charter-1972	Charter of the Islamic Conference
Charter-2008	Charter of the Islamic Cooperation
CRCI	Covenant on the Rights of the Child in Islam
OCRC	OIC Covenant on the Rights of the Child
UN	United Nations
OHCHR	Office of the High Commissioner for Human Rights
TPA	Twin Pillars Arrangement
CEDAW	Convention on the Elimination of all Forms of Discrimination against Women
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights



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## I. Introduction

Since the adoption of Cairo Declaration of Human Rights in Islam in 1990 (CDHRI)<sup>3</sup>, there has been an ongoing debate between the Western and Muslim states regarding the compatibility of provisions set forth in the CDHRI with human rights standards.<sup>4</sup> This process of cultural divide and civilizational clash reached its zenith when the Organization of Islamic Conference (OIC, since 2008, Organization of Islamic Cooperation) sponsored a series of resolutions on the prohibition of defamation of religions in Human Rights Council (HRC), turning various organs of the UN into the frontline for legal and political battles between the two sides of the debate.

Interestingly, almost at the same time when the dispute was being intensified at international forums, developments inside the OIC seemingly started to move in another direction. A paradigm shift seemed inevitable when the OIC adopted the Ten-Year Program of Action (TYPoA) in 2005.<sup>5</sup> Unlike the CDHRI which deliberately avoided making any reference to the Universal Declaration of Human Rights (UDHR)<sup>6</sup>, TYPoA-2005 ironically focused much of its attention on international human rights language. As a result, the promotion of human rights increased significantly in the OIC programs and activities.

The reforms that were introduced led to drastic changes in the structure of the organization and resulted in OIC paradigm shift to international issues such as human rights, humanitarian aid, development and the environment. It called upon the Council of Foreign Minister (CFM) to “*consider the possibility of establishing an independent permanent body to promote human rights in the Member States, in accordance with the provisions of the Cairo Declaration on Human Rights in Islam and also call for the elaboration of an OIC Charter for Human Rights*”.<sup>7</sup> Thus, the TYPoA-2005 inevitably required a Twin Pillars Arrangement (TPA) necessary for a paradigm shift in OIC approach to human rights: elaboration and adoption of OIC Charter

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<sup>3</sup> The Cairo Declaration on Human Rights in Islam, Aug. 5, 1990, U.N. GAOR, World Conf. on Hum. Rts, 4th Sess., Agenda Item 5, U.N. Doc. A/CONF.157/PC/62/Add.18 (1993).

<sup>4</sup> Hashemi, Kamran; Religious Legal Tradition, International Human Rights Law and Muslim States, Martinus Nijhoff Publishers, ION: AN EARLY ASSESSMENT, 2008, p. 108.

<sup>5</sup> OIC Ten Year Programme of Action, Ten-year Programme of Action to Meet the Challenges Facing the Muslim Ummah in the 21st Century, Third Extraordinary Session of the Islamic Summit Conference, 7–8 December 2005,

<sup>6</sup> Universal Declaration of Human Rights, G.A. Res. 217 A (III), U.N. GAOR Res. 71, U.N.Doc. A18 10 (1948).

<sup>7</sup> TYPoA-2005, chapter 1, Section VIII, paragraph 2.



of Human Rights as a binding instrument and the establishment of regional arrangement of human rights as an observatory mechanism.

According to the TYPoA-2005, the Charter of the Islamic Conference (Charter-1972) was amended in 2008<sup>8</sup> and therein, promotion of human rights and protection of fundamental freedoms were incorporated into its objectives. In 2011, the OIC finally decided to make a compromise with Western states when it ceased to insist on resolutions on prohibition of defamation of religions by the adoption of a resolution on *combating intolerance, discrimination and violence against individuals on the basis of religion or belief*.<sup>9</sup> The compromise laid the ground for more major reforms especially when an Independent Permanent Human Rights Commission (IPHRC) was established in 2011.<sup>10</sup> On the 50<sup>th</sup> anniversary of the establishment of the OIC and 30<sup>th</sup> anniversary of the CDHRI, the OIC Declaration of Human Rights (OHRD) was revised by the IPHRC and submitted to the CFM. The OHRD was eventually adopted on 28 November, 2020 and it was described as a "monumental success for the OIC and member states".<sup>11</sup>

However, there is considerable lack of transparency in the process of decision-making in the OIC that casts serious doubt on the optimistic expectations that celebrated the adoption of ODHR as a monumental achievement.<sup>12</sup> The real reforms in human rights agenda cannot be achieved unless the participation of civil society is genuinely provided. There is no doubt that the OIC is a state-centric organization, but ironically even the participation of government delegations is not conducted in a democratic fashion. The adoption of ODHR has blatantly demonstrated the lack of clarity and non-existence of democratic process. While, the IPHRC has enthusiastically celebrated the adoption of ODHR, the CFM has announced:

*Given the absence of the Islamic Republic of Iran at the last meeting of the OIC intergovernmental Working Group to review the Draft Cairo Declaration on Human Rights due to the non-issuance of*

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<sup>8</sup> Charter of the Islamic Conference. Adopted by the Third Islamic Conference of Foreign Ministers at Djidda, on 4 March 1972, Registered by the General Secretariat of the Islamic Conference, acting on behalf of the Parties, on 1 February 1974.

<sup>9</sup> Resolution 16/18 on combating intolerance, discrimination and violence against individuals on the basis of religion or belief; A/HRC/RES/16/18.

<sup>10</sup> Statute of the OIC Independent Permanent Human Rights Commission (adopted 30 June 2011) OIC Doc OIC/IPCHR/2010/STATUTE.

<sup>11</sup> Report of the IPHRC on the participation in the 47th Session of OIC Conference of Foreign Ministers in Niger, available at (accessed on 15/12/2020): [https://oic-iphrc.org/web/index.php/site/view\\_news/?id=472](https://oic-iphrc.org/web/index.php/site/view_news/?id=472)

<sup>12</sup> It might come as a surprise that the title of the revised declaration is still a matter of dispute and there has been a discrepancy in the title of the declaration after its adoption. In resolution No. 63/47 POL it was entitled 'the Cairo Declaration of the Organization of Islamic Cooperation on Human Rights' which is in fact a preposterous title, while the IPHRC has called it "OIC Declaration on Human Rights" which may sound more appealing.



*entry visas for the members of the Iranian delegation by the host country, Iran was not able to submit its comments and amendments on the draft text of the ODHR. Therefore, the Islamic Republic of Iran is not in a position to join consensus on the resolution No.63/47 POL.<sup>13</sup>*

Therefore, it is not clear yet, whether the ODHR has been adopted or it is still under consideration for further elaboration. This is the reason why the CFM did not attach the text of the revised declaration to its resolution. More importantly, it has attached the revised OIC Convention on the Rights of the Child which has not been adopted yet. The IPHRC has reported that:

*Furthermore, the CFM acknowledged the revised draft of the 'OIC Covenant on the Rights of the Child in Islam' prepared by IPHRC, and tasked the OIC General Secretariat to constitute an Intergovernmental group to discuss the revised draft for subsequent adoption during the next CFM Session.<sup>14</sup>*

This research work looks at the background and the process that eventually led to the adoption of the ODHR and it might be, however, difficult to assess whether the adoption of the ODHR is a "monumental success" that will actually lead to the promotion of human rights in member states or it is merely a change of OIC human rights rhetoric. This essay makes a number of nuanced contributions to the existing literature on the OIC human rights policies and builds upon my previous research work on the "strategy of Muslim states on human rights discourse"<sup>15</sup> and the work of scholars such as Petersen,<sup>16</sup> Cismas,<sup>17</sup> and Kayaoglu<sup>18</sup> who have examined the structural reform of the OIC, including the establishment of the IPHRC and its implications for the international human rights system. Thus, it will provide new revealing insights on the growing body of literature on the OIC human rights policies.

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<sup>13</sup> Report of the 47th Session of the Council of Foreign Ministers (CFM), NIAMEY, REPUBLIC OF NIGER (27-28 NOVEMBER 2020), at: 21.

<sup>14</sup> Ibid.

<sup>15</sup> Mozaffari, Mohammad Hossein, The Strategy of Muslim States in Human Rights Discourse, Hekmat Quarterly Journal, An International Journal of Academic Research, Canadian House of Wisdom, Vol. 1, No, 3 Winter 2010, pp. 3-22. Available at: [http://hekmat.ca/en/issue\\_03/content/15](http://hekmat.ca/en/issue_03/content/15)

<sup>16</sup> M. J. Petersen; Islamic or Universal Human Rights? The OIC's Independent Permanent Human Rights Commission, (DIIS Report, 2012: 03).

<sup>17</sup> Cismas, I. The Statute of the OIC Independent Permanent Human Rights Commission, International Legal Materials, (2011), 50(6), 1148-1160.

<sup>18</sup> Kayaoglu, T. The Organization of Islamic Cooperation's Declaration on Human Rights: Promises and Pitfalls. POLICY BRIEFING, (Brookings Doha Centre, SEPTEMBER, 2020).





In the first part, it will scrutinize the internal and external contexts of the process of paradigm change in the OIC human rights discourse and will highlight the points that have not been accounted for by the existing literature. It will not only demonstrate that the highlighted points are significant from the procedural aspects of OIC human rights agenda, but it will more importantly elaborate its main features and the specific challenges in promoting human rights in member states. Part two will address the perspectives and challenges of the process of paradigm change through comparative study of the text of the CDHRI and the ODHR. It will examine the changes made in the outlook, form and content of CDHRI and its effects in terms of alignment with the international human rights discourse and its practical results in terms of promotion of human rights in member states. Finally, it concludes that even though the drastic paradigm change might terminate the parallel functions of the OIC human rights arrangements with the UN human rights system and reduce the normative conflicts between the OIC human rights instruments and international standards, one might hardly expect that it would markedly improve the advancement of human rights in the member states.

## **II. Paradigm Change; the Process and the Problems**

During the drafting process of the UDHR, Muslim states were not in a position to form a political camp in the UN and religious affiliation could hardly have an impact on the political positions of Muslim state. It should also be pointed out that only 10 Muslim states were among 58 members of the UN at the time of adoption of UDHR and with the exception of Saudi Arabia (abstained) and Yemen (absent), Muslim states voted in favor of the UDHR. Notwithstanding, in 1980s the UN human rights agenda has helped them take a unified approach on human rights issues in accordance to their common historical, cultural and religious background. This outlook toward the UN human rights system was not essentially affirmative and surrounded with uncertainty and suspicion. The failing attempts of Muslim states to make a constructive contribution to the UN human rights system persuaded them to strive for separate human rights agenda.

The adoption of CDHRI was in fact an attempt to establish a separate arrangement for human rights in parallel to the UN human rights system. In fact, the OIC managed to create an alternative discourse at triple layers of conceptual, normative and structural levels which was not in alignment with international human rights discourse. Nonetheless, the internal rivalries along with external pressure eventually



resulted in the paradigm change in the OIC human rights politics that shaped a complementary approach. The paradigm shift initially emerged in the TYPoA-2005 which envisioned a TPA consisting of a human rights commission and a human rights charter. According to TYPoA-2005, the OIC Charter was amended in 2008 and therein, promotion of human rights and protection of fundamental freedoms were incorporated into its objectives.

The process of paradigm change in the OIC human rights agenda was initiated in 2005 and has gradually developed over one and a half decade. The process is consummated when *ODHR* was adopted in 2020 by the 47th Session of the CFM and it is called “a monumental success for protection and promotion of human rights”.<sup>19</sup> The ODHR is regarded as a significant development in many respects: At the conceptual level, the ODHR has shifted from religious notions to human rights language. At the normative level, it moved from Sharia-based particularism to an inclusive universalism. At the structural level, it abandoned the parallel arrangement to the UN human rights system and defined a complementary function for OIC human rights arrangement which leads to the coexistence of regional and international systems.

Indeed, the OIC human rights agenda was primarily delineated in 1980 when the CFM decided to develop a human rights declaration in Islam.<sup>20</sup> After the adoption of CDHRI in 1990, the CFM decided to retain the CDHRI in the agenda of its regular session and called Member States and the General Secretariat “to facilitate the promotion of all Islamic values in the field of human rights” and also “to coordinate their positions during the World Conference on Human Rights to be held in 1993 on the basis of the guidelines contained in the Cairo Declaration on Human Rights in Islam.”<sup>21</sup> It was implied that the OIC decided to develop a human rights arrangement in parallel to the UN human rights system. The concerted efforts of OIC member States during the World Conference on Human Rights in Vienna emphasized the recognition of the CDHRI as an alternative to the UDHR and the Office of the High Commissioner for Human Rights

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<sup>19</sup> The 47th Session of OIC Conference of Foreign Ministers in Niger adopted the revised “OIC Declaration on Human Rights”, available at (accessed on 11/12/2020): [https://oic-iphrc.org/web/index.php/site/view\\_news?id=472](https://oic-iphrc.org/web/index.php/site/view_news?id=472)

<sup>20</sup> FINAL COMMUNIQUÉ, 11th Session of the Council of Foreign Ministers, Islamabad, Islamic Republic of Pakistan, from 2 to 7 Rajab, 1400 H, corresponding to 17-22 May, 1980 at: 108.

<sup>21</sup> FINAL COMMUNIQUÉ, 20th Session of the Council of Foreign Ministers Istanbul, Republic of Turkey (5 Dec 1991), at: 54 and also: FINAL COMMUNIQUÉ, 21th Session of the Council of Foreign Ministers, KARACHI, ISLAMIC REPUBLIC OF PAKISTAN (25-29 APRIL 1993) at No. 73.



(OHCHR ) consented to the inclusion of the CDHRI in the Regional Instruments that was published prior to the Golden Jubilee Celebrations of 1998.<sup>22</sup>

After the Golden Jubilee Celebrations, in the next session of CFM, they urged the need to "*formulate and codify Islamic standards and values in Islamic conventions on human rights.*"<sup>23</sup> Then, from 2000 to 2005, it was retained in the Agenda of CFM and had repeatedly called on the Inter-governmental Group of Experts "*to start drawing up Islamic Conventions on Human Rights*" on the basis of the provisions of the CDHRI.<sup>24</sup> A sub-committee was formed in order to draft human rights covenants in Islam<sup>25</sup> and, the draft of the Convention on the Rights of Child in Islam (CRCI) was endorsed in 2005.<sup>26</sup> It indicates that the idea of drafting a Human Rights Charter in Islam has been on the Agenda of the CFM for several years and subsequently, penetrated into the TYPoA-2005. However, the competing forces within the OIC obstructed the progressive development of the process.

The unfolding events demonstrated that the competing forces within the OIC along with the external pressure eventually interrupted the process. The conflicting views led to the emergence of a complementary approach in post-2005 that intended to bring the OIC human rights arrangement in alignment with the UN human rights system. On the occasion of Human Rights Day celebrations in 2007, the Ambassador of Pakistan claimed that the CDHRI "*is not an alternative, competing worldview on human rights. It complements the Universal Declaration as it addresses religious and cultural specificity of the Muslim countries*".<sup>27</sup>

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<sup>22</sup> Human Rights, A Compilation of International Instruments: Volume II: Regional Instruments, Office of the United Nations High Commissioner for Human Rights (New York and Geneva, 1997).

<sup>23</sup> FINAL COMMUNIQUÉ OF THE TWENTY-SIXTH SESSION OF THE ISLAMIC CONFERENCE OF FOREIGN MINISTERS (SESSION OF PEACE AND PARTNERSHIP FOR DEVELOPMENT) OUAGADOUGOU – BURKINA FASO 15 TO 18 RABI'UL AWAL 1420H (28 JUNE TO 1 JULY 1999), No. 121.

<sup>24</sup> FINAL COMMUNIQUE OF THE TWENTY-SEVENTH SESSION OF THE ISLAMIC CONFERENCE OF FOREIGN MINISTERS (SESSION OF ISLAM AND GLOBALIZATION) KUALA LUMPUR – MALAYSIA 24-27 RABI'UL AWAL 1421H, 27– 30 JUNE, 2000, No. 123.

<sup>25</sup> FINAL COMMUNIQUE OF THE TWENTY-NINTH SESSION OF THE ISLAMIC CONFERENCE OF FOREIGN MINISTERS (SESSION OF SOLIDARITY AND DIALOGUE) KHARTOUM — REPUBLIC OF THE SUDAN 14-16 RABIUL THANI 1423H (25-27 JUNE 2002), No. 65.

<sup>26</sup> FINAL COMMUNIQUÉ OF THE THIRTY-SECOND SESSION OF THE ISLAMIC CONFERENCE OF FOREIGN MINISTERS (SESSION OF INTEGRATION AND DEVELOPMENT) SANA'A, REPUBLIC OF YEMEN 26-28 RABIULTHANI 1425H (28-30 JUNE 2005), No. 63.

<sup>27</sup> The Ambassador of Pakistan on Human Rights Day in 2007 claimed that the Cairo Declaration of Human Rights in Islam "*is not an alternative, competing worldview on human rights. It complements the Universal Declaration as it addresses religious and cultural specificity of the Muslim countries*". Found in: A/HRC/7/NGO/96.



There have been two significant competing trends within the OIC member states that gradually shaped the process of OIC paradigmatic shift in human rights discourse: while the forceful Endogenously-Oriented Trend attempted to indigenize international standards in the form of a Charter in order to advance human rights in member states, the rival force of Exogenously-Oriented Trend wanted to revise the CDHRI. The latter trend had a vision of bringing the OIC human rights norms in alignment with international standards perhaps to mitigate the external criticisms. The Endogenously-Oriented Trend was leading the process of human rights development from 1980 up until the establishment of IPHRC in 2011. The idea of drafting Islamic human rights conventions in parallel to those of UN human rights system has been frequently emphasized in the CFM decisions. However, when the Exogenously-Oriented Trend took the lead, a drastic turn has occurred that interrupted the progressive development of drafting a charter and replaced it with the idea of thoroughly revising the CDHRI. In the following, it will be illustrated that the Secretary General made a crucial decision when he made an attempt to dismantle the TPA by not complying with the provisions that were meticulously defined in the TYPoA-2005 for the promotion of human rights in member states.

#### **A. The Collapse of Twin Pillars Arrangement**

The main objective of regional human rights arrangements is basically to facilitate the implementation of human rights standards at regional level. It is typically implemented through indigenization of the conceptions, values and norms in order to decrease the resistance against incorporating external values and norms into the domestic legal systems. Also, a supervisory body is usually established to ensure the implementation of human rights standards. There is also a common procedure in human rights systems that the indigenization and standard setting are carried out at the first stage by the adoption of a declaration. Then, this process is completed by the adoption of a covenant on human rights and creation of an observatory body.

Hence, the TYPoA-2005 introduced the TPA comprising of Human Rights Charter and Commission, and the CFM called upon the sub-committee to continue its work during the year 2006 in order to prepare the *“Islamic Charter on Human Rights”* and *“the Covenant on the Rights of Women in Islam”* and also to consider the possibility of establishing an independent body to promote human rights in member States. The OIC, therefore, followed a similar procedure for its human rights arrangement and it was widely



expected that the OIC would elaborate on a Human Rights Charter as a main component of the Twin-Pillars Arrangement. In addition, according to a Memorandum of Understanding signed in 2006 between the OIC and the OHCHR, it was agreed that they would cooperate to draft the OIC Human Rights Charter.<sup>28</sup> The Idea of TPA was truly a turning point in the OIC human rights agenda and could make major improvements if it was to be implemented accordingly. Perhaps, none of the scholars participating in drafting the TYPoA-2005 would imagine that the inclusion of two paragraphs in TYPoA-2005 would bring about such dramatic developments in the OIC human rights agenda. It is most unfortunate; however, that the decision to revise the CDHRI interrupted the process of drafting the Human Rights Charter and we eventually witnessed the collapse of the TPA. The alternative process involved a non-compliance conduct with regard to the provisions of the TYPoA-2005 and an illegitimate measure in revising the CDHRI. We will elaborate on both accounts to check the legitimacy of the measures that have in fact interrupted the realization of a relatively effective human rights arrangement.

It is not clear, however, what was the real cause that ultimately led to the collapse of the TPA. Even though it is impossible to pinpoint a single cause, it could be argued that the following developments were the real reason behind this significant decision. In spite of the fact that the Secretary General boldly turned a blind eye to the provisions of the TYPoA-2005 that were adopted by the Islamic Summit as the highest authority of the Organization, neither the IPHRC, nor human rights institutions of member states raised an objection to the ill-fated decision. In addition, the Secretary-General actually ignored the promise he made with the High Commissioner for Human Rights for drafting a human rights charter.<sup>29</sup>

Furthermore, the TYPoA-2005 also mandated the CFM with the task of “*elaboration of an OIC Charter for Human Rights.*” But, the CFM not only did not accomplish the mandated task, but it actually approved the replacement of drafting the Charter of Human Rights with the project of revising the CDHRI. Afterwards, the IPHRC prepared the draft declaration and it was submitted to the CFM for adoption. The question is whether the decisions made by the IPHRC or OIC Secretary General, which were in fact contrary to the decisions of the highest authority of the organization, can be deemed valid?

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<sup>28</sup> Hashemi, Kamran; Muslim States, Regional Human Rights Systems and the Organization of the Islamic Conference, *The German Yearbook of International Law*, Vol. 52 (2009), p. 103

<sup>29</sup> Ibid.



Thus, the legitimacy of decisions made by the Secretary General and the IPHRC is highly disputed in two respects: non-compliance with the provisions of TYPoA-2005 in respect to human rights charter, and replacing the charter with a declaratory instrument. According to the provisions of the OIC Charter, “[*The Islamic Summit shall deliberate, take policy decisions and provide guidance on all issues pertaining to the realization of the objectives as provided for in the Charter*”<sup>30</sup> and it is also obvious that the CFM is responsible “*for the implementation of the general policy of the Organization*”.<sup>31</sup> Therefore, the CFM also did not comply with the provisions that were adopted by the Islamic Summit with respect to Human Rights Charter.

The OIC’s reluctance to adopt a human rights charter as instructed by the TYPoA-2005 obviously indicates the futility of the attempts to create a regional arrangement. Because, the most important task of a regional human rights arrangement is to advance human rights in member states. However, not only the OIC failed to accomplish its obligations as articulated in its Charter and in other instruments, but also the IPHRC’s conduct in the almost past decade has proved that it has adroitly disguised its failure in masterful diplomacy and political maneuvers. Even though the real cause of non-compliance behavior is not clear, the subsequent events provide substantial evidence that might just explain the real reason behind the ill-fated decision. Undoubtedly, once the implementation mechanism is taken away, the proliferation of declaratory instruments would be devoid of any substance and will turn the paradigm change into a new rhetoric that might only engage human rights scholars for another thirty years with a boring academic exercise.

Hence, there is a considerable degree of uncertainty about the legitimacy of the actions taken by the CFM and by the OIC Secretary General in relation to the provisions of the TYPoA-2005. As noted earlier, it had instructed the CFM to establish IPHRC with the task of promoting human rights in the Member States “*in accordance with the provisions of the Cairo Declaration on Human Rights in Islam*”.<sup>32</sup> Even though the CFM carried out the mandated task by creating the IPHRC, it also adopted the IPHRC’s Statute<sup>33</sup> which has

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<sup>30</sup> The OIC Charter, art. 7.

<sup>31</sup> The OIC Charter, art. 10 (4).

<sup>32</sup> The OIC TYPoA-2005.

<sup>33</sup> RESOLUTION No. 2/38-LEG ON THE ESTABLISHMENT OF THE OIC INDEPENDENT PERMANENT HUMAN RIGHTS COMMISSION (IPHRC) adopted by the 38th Session of The Council of Foreign Ministers Astana, Republic Of Kazakhstan (28 – 30 June 2011)



granted it the authority to refine the CDHRI, instead of observing its provisions. In the next part, we will look at some challenges that have occurred in the process of the adoption of OHRD and its implication for the advancement of human rights in member states.

## **B. To Refine or to Revise?**

It was noted that the issue of drafting a human rights charter remained in the Agenda of CFM until 2011 when the IPHRC was established and the process was abruptly interrupted before the ten-year period of the TYPoA-2005 expired. The reorientation policy initially appeared in the first session of the IPHRC where the Secretary General stated that *“the complexity of the fields of human rights inevitably call for the need to refine the 1990 Cairo Declaration on Human Rights in keeping with the current global human rights discourse.”*<sup>34</sup> He employed the term “refine” that had already been used in Article 17 of the Statute to uphold justifiably the legality of substituting the charter with a declaration. But, he also disclosed the replacement policy and used the term “revise” as follows: *“if the Commission intended to promote human rights, then the first step is to revise the Cairo Declaration.”*<sup>35</sup> As will be demonstrated later, the revision of CDHRI falls beyond the broad interpretation of the term “refinement” that was used in Article 17.

The ambiguities surrounding the unfortunate decision that led to the fall of the TPA persuaded concerned authorities to replace it with a new arrangement in TYPoA-2015. It consists of an introduction and two sections each of which covers a wide range of topical issues. The first section identifies the OIC priority areas for the next decade and the second section defines strategic goals for every priority area. Although it sounds promising that the OIC put human rights in its priority area, it is, however, discouraging that they turned the effective arrangement of TYPoA-2005 into abstract promises. While acknowledging its commitment *“to promoting and protecting all universally accepted human right”* the TYPoA-2015 has promised *“that these commitments are translated into concrete actions on the ground.”*<sup>36</sup>

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<sup>34</sup> Statistical, Economic and Social Research and Training Centre for Islamic Countries, HUMAN RIGHTS STANDARDS AND INSTITUTIONS IN OIC MEMBER STATES, (SESRIC, 2019), p. 53.

<sup>35</sup> Hashemi, Kamran; Muslim States, Regional Human Rights Systems and the Organization of the Islamic Conference, op. cit.

<sup>36</sup> The OIC TYPoA-2015 adopted by The 13th Islamic Summit Conference (Unity and Solidarity For Justice and Peace) Istanbul, Republic of Turkey (14-15 April, 2016), Available at: <https://www.oic-oci.org/docdown/?docID=16&refID=5>



Surprisingly, in the second section of TYPoA-2015 which defines the Goals of each priority area, it has defined some concrete Goals for the first part concerning the “*commitment to promoting and protecting all universally accepted human rights*” in order to establish a legitimate foundation for the decisions that they have already made before 2015 and instructs that it will “*Update and refine, in consultation with OIC Member States, the existing OIC human rights instruments vis-à-vis universal human rights instruments, as and where required.*”<sup>37</sup> It has been illustrated that the measures that were taken to revise the OIC human rights instruments before the adoption of TYPoA-2015 had been a matter of debate and this provision intended to provide the legitimate ground for the revision of “*the existing OIC human rights instruments.*” Nonetheless, there is much irony in the fact that it did not define a Goal for the promise that was made in order to materialize these commitments into concrete actions. This is evidence which shows that it just turns its commitment into an empty promise and reveals the reasons behind non-compliance behavior.

Furthermore, it is ironic that both the Statute of IPHRC and the TYPoA-2015 have employed the term “*refine*” to provide the possibility of making some changes to the CDHRI to improve the text of the Declaration. However, IPHRC has seemingly misinterpreted the provisions of the Statute in order to replace the CDHRI with an alternative declaration. It is to be recalled that the Cambridge English Dictionary mentions two meanings for the word “*refine*”: “*to make something pure or improve something, especially by removing unwanted material*” and “*to improve an idea, method, system, etc. by making small changes.*”<sup>38</sup> Now, we will look at both definitions to see to what extent each of meaning may be appropriately fitting to the text of Article 17 of the Statute which reads: “*It may also submit recommendations on refinement of OIC human rights declarations and covenants.*”<sup>39</sup> If we take the first meaning of the term “*refinement*” into consideration which means “*to make something pure or improve something, especially by removing unwanted material*”, it would imply that the IPHRC had the right to delete some words or sentences in order to “*refine*” the declaration. On the other hand, if we take the second definition of the term “*refinement*”, Article 17 would permit the IPHRC to submit recommendations on the refinement of CDHRI by making small changes to the provisions of CDHRI in

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<sup>37</sup> Ibid.

<sup>38</sup> The Cambridge Advanced Learner’s Dictionary, (Cambridge University Press, reprinted in 2008), p. 1194.

<sup>39</sup> The Statute of IPHRC, art. 17.





order to improve of the text of the declaration. The very meaning of the term “*refinement*” would, thus, only authorize the IPHRC to improve the text of CDHRI, either by deleting the unwanted words, sentences and even the norms and concepts, or by making small changes in the text. This is the very reason that the researchers at the IPHRC have argued that there is a variety of inconsistencies in the CDHRI in terms of legal, linguistic and conceptions that need to be reviewed and modified.<sup>40</sup> For instance, the term “*Islam*” in the title of the declaration, Islamic shari’a or shari’a related norms and religious concepts in the text, were removed from the CDHRI.

Should this be the case, the IPHRC has gone far beyond its mandated task as it simply copied and pasted the whole article in the declaration which falls beyond the domain of the term “*refinement*”. Even though, the IPHRC avoided to add a new article in the revised declaration, it is, nonetheless, a matter of debate that the revising process of the CDHRI has gone beyond the strict meaning of the term “*refinement*” as defined in Article 17 of the Statute. The IPHRC, therefore, might have exceeded the authority of the Statute and consequently all measures that were taken to revise the CDHRI fall beyond its discretions and have no legitimate foundation. Similarly, the Secretary General also had exceeded the terms of the Statute when he used the term “*revise*” on several occasions. These remarks might call into question the legitimacy of the process that has eventually led to the adoption of ODHR.

The adoption of the IPHRC Statute in June 2011, therefore, is considered a point in which the tide was turned towards Exogenously-Oriented Trend and subsequently it was able to marginalize the other competing trend. Even though it is hard to trace these developments in the OIC official records, the hybridity language usually shows the impact of rival trends in the resolution of the subsequent sessions of the CFM. For instance, in 2012, it reiterates “*the need to strengthen the current mechanisms at the OIC to explore ways and means to advance and protect human rights through the adoption of various approaches including the evolvement of a set of Islamic covenants on human rights*”.<sup>41</sup> It means that there should be the possibility for drafting the Human Rights Charter as envisioned in the TYPoA-2005. But, it immediately requests “*the IPHRC to review OIC Human Rights Declaration against existing universal*

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<sup>40</sup> Statistical, Economic and Social Research and Training Centre for Islamic Countries (SESRIC), HUMAN RIGHTS STANDARDS AND INSTITUTIONS IN OIC MEMBER STATES, op. cit. p. 6.

<sup>41</sup> RESOLUTIONS ON LEGAL AFFAIRS, 39th Session of The Council of Foreign Ministers Djibouti, Republic Of Djibouti (15 - 17 November 2012)



*human rights instruments*".<sup>42</sup> This set of contradictory provisions not only demonstrates the influence of competing forces, but also it proves that the IPHRC falsely substituted drafting of human rights charter with revising the CDHRI before the conclusion of TYPoA-2005. It was another slap on the face of the TPA when the CFM instructed the IPHRC "to review OIC Human Rights in Islam", a clause that has been used in the Statute. Yet, when the host country belonged to the Endogenously-Oriented Trend, it returns back to the CDHRI:

*to promote and protect internationally-recognized human rights, while taking into account the significance of their religious, national, and regional specificities and various historical and cultural backgrounds, and with due regard to the "Cairo Declaration on Human Rights in Islam."*<sup>43</sup>

It seems that the OIC organs have noticed the challenges of illegitimate decisions and made an attempt to eliminate the negative aspects of their earlier decisions by incorporating the term "refinement" in the TYPoA-2015.<sup>44</sup> Thus, the Exogenously-Oriented Trend not only succeeded to eliminate the task of drafting a Human Rights Charter from the TYPoA-2015, but also incorporated the "refinement of the existing OIC human rights instruments" in its provisions.

The process of replacing of drafting a Human Rights Charter began during the end of the ten-year period of the TYPoA-2005; however the adoption the TYPoA-2015 accelerated the process. In 2018, the CFM calls the Inter-Governmental Working Group (IGWG) "to discuss the revised draft of the Cairo Declaration of Human Rights in Islam, titled 'The OIC Declaration of Human Rights (ODHR)'."<sup>45</sup> Finally, the revised "OIC Declaration of Human Rights" was adopted by the 47th Session of the CFM and it is praised as "a monumental success for protection and promotion of human rights".<sup>46</sup> In the following, we will delve into the historical background that led to the process of revising the CDHRI.

In view of the uncertainty and confusion surrounding the novel reorienting human rights agenda, it is important to identify the reasons that led to the Collapse of Twin-Pillars Arrangement and its implications

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<sup>42</sup> Ibid.

<sup>43</sup> RESOLUTIONS ON LEGAL AFFAIRS, 41st Session of the Council of Foreign Ministers Jeddah, Kingdom of Saudi Arabia (18 - 19 June 2014).

<sup>44</sup> The OIC Ten Year Programme of Action-2015, OIC/SUM-13/2016/POA (TYPoA-2015), The 13th Islamic Summit Conference (Unity and Solidarity For Justice and Peace) Istanbul, Republic of Turkey (14-15 April 2016).

<sup>45</sup> RESOLUTION No. 1/45-IPHRC ON MATTERS PERTAINING TO THE WORK OF THE OIC INDEPENDENT PERMANENT HUMAN RIGHTS COMMISSION, op. cit.

<sup>46</sup> The website of IPHRC (accessed on 11/12/2020) available at: [https://oic-iphrc.org/web/index.php/site/view\\_news/?id=472](https://oic-iphrc.org/web/index.php/site/view_news/?id=472)



for member states. In the following, we are throwing some new light on various aspects of the alternative arrangement and the perception of future prospects that might help release the OIC from confusing or incoherent human rights policies.

### **C. Confusing in Between**

The structural reforms described so far has significantly speeded up the process of paradigm change that started since the adoption of TYPOA-2005. However, there seems to be various inconsistencies in the post-2005 OIC instruments, leaving human rights standards to oscillate between contradictory requirements. Contrary to the CDHRI which subjected human rights to Islamic Shari'a, the provisions of subsequent instruments have not coherently drafted. Yet, the TYPOA-2005 mandated IPHRC to "*promote human rights in the Member States, in accordance with the provisions of CDHRI*"<sup>47</sup> which did not depart much from the traditional approach. However, where the TYPOA-2005 deals with the "*Rights of Women, Youth, Children, and the Family in the Muslim World*", it advances the idea of protecting the rights of women in accordance with Islamic values and by "*adhering to the provisions of the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW)*"<sup>48</sup>, *in line with the Islamic values of justice and equality*".<sup>49</sup> Similarly, it encourages Member States to ratify the CRCI and "*the Convention on the Elimination of All Forms of Discrimination against Women and its Optional Protocol with regard to the Girl Child*".<sup>50</sup> It seems that the drafters were of the conviction that human rights standards enshrined in CEDAW can be reconciled with Islamic values and the OIC human Rights instruments.

The new OIC human rights outlook of post-2005 is actually based on a hybrid form, wandering between human rights standards and Islamic values. This hybrid form of discourse has continued to dominate the OIC subsequent instruments. The confusing provisions have then penetrated into the provisions of the revised Charter. The preamble of OIC Charter-2008 has emphasized that it would promote human rights and fundamental freedoms in Member States "*in accordance with their constitutional and legal systems.*" Again, when we look more closely at Article 15 of the OIC Charter-2008, it stipulates that IPHRC "*shall*

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<sup>47</sup> The OIC Charter, TYPoA-2005.

<sup>48</sup> Convention on the Elimination of Forms of Discrimination against Women (CEDAW) New York, 18 December 1979.

<sup>49</sup> The OIC TYPoA-2005.

<sup>50</sup> Ibid.



*promote the civil, political, social and economic rights enshrined in the organization's covenants and declarations and in universally agreed human rights instruments, in conformity with Islamic values.*"<sup>51</sup>

It should also be noted that both of the TYPoA-2005 and the Charter-2008 have been adopted by the Islamic Summit, the highest authority of the Organization. It is, therefore, important to recognize and resolve the apparent contradictory requirements that have been stipulated in different instruments, particularly the variety of requirements of the Charter-2008. Once, we summarize and combine the variety of requirements, it might be assumed that international human rights are recognized as accepted norms if they can pass through a triple test of compatibility with national constitutions and legal systems, compliance with the provisions of Islamic covenants and declarations, and conformity with Islamic values. If these variations are examined more thoroughly, it becomes obvious that a wide range of requirements have been developed in different instruments which make them difficult to perceive or understand, and one might be well confused about the possibility of reconciling some highly irreconcilable criteria and different formulations ranging from the provisions of the national constitutions to OIC human rights instruments.

While acknowledging the contradictory requirements, certain OIC organs attempted to justify and explain the contradictory criteria prevailing in various instruments. In a document on OIC human rights standards and institutions, it has been argued that *"[The] trend of placing Sharia at the center of OIC's human rights documents declined and an approach of compatibility of Islamic values with universal human rights gained prominence."*<sup>52</sup> It is, therefore, beyond the shadow of a doubt that the post-2005 discourse has shifted from Islamic Shari'a rhetoric to the discourse of compatibility with Islamic values. But, the question remains unresolved in consideration of the contradictory formulations that have remained in the Charter-2008. On the occasion of the adoption of IPHRC statute, the OIC Secretary General, emphasized that the statute seeks *"to strike a delicate balance between Islamic human Rights instruments, notably the Cairo Declaration and CRCI and international human rights instruments"*.<sup>53</sup> This statement indicates that he was fully aware of the contradictory formulations that exist in the OIC different instruments and attempted to suggest a mechanism that might remove the apparent contradiction. But, the simplicity of the formula for

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<sup>51</sup> The OIC Charter, art. 15.

<sup>52</sup> Statistical, Economic and Social Research and Training Centre for Islamic Countries (SESRI), HUMAN RIGHTS STANDARDS AND INSTITUTIONS IN OIC MEMBER STATES, op. cit. P. 7.

<sup>53</sup> Cismas, Ioana; Religious Actors and International Law, (Oxford University Press, 2014), p.296



a rather complex task is misleading. It is certainly desirable and even inevitable “to strike a delicate balance” between different requirements, but the main difficulty is to explain how the IPHRC can make a balance between contradictory requirements. Again, the TYPoA-2015 continued to put emphasis on the importance of balancing Islamic values to flow together with human rights:

*It is important that the observance of all human universal rights and freedoms flow together with Islamic values thus offering a coherent and strong system aimed at facilitating the full enjoyment of all human rights”.<sup>54</sup>*

It seems that the TYPoA-2015 employed a rhetorical irony to specify how this hypothetical conflict between human rights norms and Islamic values will be resolved. It is, however, obvious that the rhetorical irony cannot resolve the paradoxes prevalent in the OIC core instruments. Thus, the ODHR has attempted to develop a new formula for resolving the apparent paradox by shifting from Islamic Shari’a to the principles of Islamic Shari’a.

#### **D. “Monumental Success” or “Chiefly Symbolic”?**

The new prescription is well explained in the preamble of the ODHR, which states: “[The] Member States of the Organization of Islamic Cooperation (OIC), proceeding from the deep belief in human dignity and respect for human rights, and from the commitment to ensuring and protecting these rights as safeguarded by the principles of Islamic Shari’ah”. In comparison with the preamble of OIC Charter-2008 which subjected human rights to the conformity with “constitutional and legal systems” of member states, and also by analogy with Article 15 of the Charter-2008 that recognized the human rights as “enshrined in the organization’s covenants and declarations and in universally agreed human rights instruments, in conformity with Islamic values”,<sup>55</sup> a significant development can be observed in relation to the Charter and other post-2005 instruments. Even though, it might be a matter of debate in consideration of the strict meaning of the term “refine”, it is expected, however, that the new rhetoric can be described as a departure from hybrid form that was predominant in the post-2005 instruments. But, it immediately returns to the specific formula which states that the commitment will be carried out by:

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<sup>54</sup> The OIC TYPoA-2015.

<sup>55</sup> The OIC Charter, art. 15.



*Taking into account the OIC Charter which provides for the promotion of human rights and fundamental freedoms [...] in Member States in accordance with their constitutional and legal systems, their international human rights obligations”.*<sup>56</sup>

It is unclear yet to tell whether the new prescription is a cure for the complex multiple criteria or the remedy is worse than the problem. Although this formula is a new penetration into the OIC human rights instruments, it appears that the debate over the principles of Islamic Shari’ah has surfaced in the constitutional change after the Arab Spring. It is, thus, imperative to understand its implications for the legal systems of Islamic countries in order to explore its relevance for human rights discourse. The problem of conformity of the positive legislations with Islamic shari’a initially emerged during the constitutional movement in Iran. Article 2 of the amendment of the Constitution of Iran stipulates that *“at no time in the ages should the legislations of the National Assembly be contrary to the sacred rules of Islam”*.<sup>57</sup> Also, Article 72 of the Constitution of the Islamic Republic of Iran articulates that enactments of the parliament should not be in contradiction with the laws and principles of the official religion of the country.<sup>58</sup>

With the independence of the Muslim territories and the development of the constitutional movement, other Islamic countries also followed the Iranian Constitution by incorporating the repugnancy clause into their constitution. For example, in the first constitution of Pakistan (1956) the issue of conformity of the enactments with Islamic law was included, and with minor modifications, maintained in Article 227 of the 1973 Pakistan Constitution. Article 2 of the constitution of Iraq stipulates that Islam is the source of legislation and the positive laws must not be in conflict with Islamic law.<sup>59</sup> However, Hamoudi has subtly argued that the place of Islamic law in the legal system of many Islamic countries is *“chiefly symbolic”* and hardly constrain the legislation activity.<sup>60</sup> It seems that this argument is rather evident in the legal jurisprudence of some Islamic countries where Islam is recognized as the official religion within the framework of a secular legal system or an authoritarian political system.

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<sup>56</sup> The preamble of the ODHR.

<sup>57</sup> The amendment of 1906 Constitution of Iran, adopted on 14th Dhul Qada al-Haram 1324 / 30 December 1906 Art. 2.

<sup>58</sup> The Constitution of the Islamic Republic of Iran, Art. 72.

<sup>59</sup> Shaheen, Sardar Ali; *Modern Challenges to Islamic Law*, (Cambridge University Press, 2016), p. 54-65.

<sup>60</sup> Hamoudi, Haider Ala; *Repugnancy in the Arab World*, *Willamette Law Review*, 2012, Vol. 48, p. 431.



The debate over Islamic Shari'a in the Constitution resurfaced in the Arab world in the course of Arab spring. It is worth mentioning that the Egyptian 1971 constitution was amended in 1980 which recognized the principles of Islamic Sharia (مبادئ الشريعة الإسلامية) as the main source (and not the only source) of legislation (Article 2).<sup>61</sup> However, it was not an easy task to ascertain what constitute the principles of Islamic Sharia until the Supreme Constitutional Court (SCC) of Egypt developed a theory that provides legislators with a wide margin of appreciation in order to harmonize the positive legislations with the principles of Islamic Shari'a. In a ruling in 1993, the SCC refined its opinion by declaring that principles of Islamic Shari'a are those rules that "strives to protect religion, life, reason, honor, and property [...] basic objectives of the Shari'a (مقاصد الشريعة الإسلامية)".<sup>62</sup>

After the Arab Spring, the Egyptian constitution has been frequently amended, and even though the 2012 Constitution maintained Article 2 which declared the principles of Islamic Shari'a as the main source of legislation, it had essentially expanded the domain of the principles of Islamic Shari'a by incorporating an additional article to declare its opposition to the opinion of the SCC.<sup>63</sup> When the Salafists failed to have the 'principles' (مبادئ) removed from Article 2, they insisted to add another article (Article 219) in the Constitution which interprets the principles of Islamic Shari'a to include "*general evidence, foundational rules, rules of jurisprudence, and credible sources accepted in Sunni doctrines and by the larger community*".<sup>64</sup> If the principles of the Shari'a are interpreted to mean general evidence, the basic rules and the rules of jurisprudence, then they cannot be applied to authentic sources of Shari'a. Consequently, when the new constitution finally was adopted in 2014, Article 2 was retained and Article 219 was deleted

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<sup>61</sup> The Egyptian Constitution 1971 as amended in 1980, Art. 2: Islam is the religion of the State and Arabic is its official language. The principles of Islamic Sharia are the main source of legislation. But, the Arabic version is subject to interpretation:

المادة 2: الإسلام دين الدولة، واللغة العربية لغتها الرسمية، ومبادئ الشريعة الإسلامية المصدر الرئيسي للتشريع.

<sup>62</sup> Vogel, Frank E. Conformity with Islamic Sharia and Constitutionality Under Article 2: Some Issues of Theory, Practice and Comparison; in: Eugene Cotran and Adel Omar Sherif (eds.) *Democracy, The Rule of Law and Islam*, (Brill 1999), p. 535.

<sup>63</sup> The Egyptian Constitution 2012, Art. 2.

<sup>64</sup> The Egyptian Constitution 2012, Art. 219:

مبادئ الشريعة الإسلامية تشمل أدلتها الكلية وقواعدها الأصولية والفقهية ومصادرها المعتمدة في مذاهب أهل السنة والجماعة.

For further study, see: Anthony F. Lang, Jr., "From Revolutions to Constitutions: The Case of Egypt" *International Affairs* (The Royal Institute of International Affairs, 2013), 89: 2, p. 360.



from the Constitution. It appears that the opinion of the SCC which made a distinction between religious rulings and the principles of Islamic Shari'a will remain valid.<sup>65</sup>

In opposition to the CDHRI which had subjected human rights to Islamic Shari'a, the ODHR has borrowed the idea from the constitutional developments in the post-Arab spring in order to harmonize human rights with the principles of Islamic Shari'a. While, the repugnancy clause in the Constitution of Islamic countries tries to bring the positive legislations in conformity with Islamic norms, the ODHR attempts to bring human rights standards in conformity with the principles of Islamic Shari'a. However, we have observed that the principles of Islamic Shari'a are subject to a variety of interpretations. Thus, not only it will not remove the ambiguities of the multiple criteria, but also it would make it even more complicated. In contrast to the principles of Islamic which might be subject to interpretation, the Islamic values clause that was mentioned in the Charter is more practical and they were noticeably defined in the OIC core instruments.

Furthermore, the function of the repugnancy clause in the legal system of some Islamic countries, to borrow from Hamoudi, is "*chiefly symbolic*",<sup>66</sup> and the same argument seems to be applicable to OIC human rights instruments. Article 24(a) of the ODHR stipulates that: "*[W]ithout prejudice to the principles of Islamic Shari'ah and the law, everyone has the right to exercise and enjoy the rights and freedoms set out in the present declaration*". Irrespective of the perplexed criteria that were defined in the preamble of the ODHR, "*the principles of Islamic Shari'ah*" clause in Article 24(a) is considered superfluous. Because, if the law of land has recognized the Islamic Shari'a as the source of legislation, the observance of human rights standards are subjected to Islamic Shari'a in the domestic law.

It might be beneficial; however, to consider the possibility of borrowing a theory from domestic legal systems of Islamic countries in order explain the observance of human rights standards in conformity with Islamic values. The brief review of the provision of various OIC instruments demonstrates the difficulty surrounding the task of the IPHRC to understand the various terms in the post-2005 instruments. The efforts have been made to define the OIC objectives by striking a balance between international discourse such as the principles of the UN Charter, international law, and protection of human rights and

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<sup>65</sup> Nisrine, Abiad; Sharia, Muslim States and International Human Rights Treaty Obligations: A Comparative Study, (British Institute of International and Comparative Law, 2008), pp. 47-48.

<sup>66</sup> Hamoudi, Haider Ala; Repugnancy in the Arab World, op. cit.





fundamental freedoms with Islamic values. However, the OIC instruments neither defined the theories that can be applied to resolve the conflict of values, nor explained the mechanisms of striking a balance and making the compromise between the conflicting values. Therefore, it is necessary to elaborate on the theories of resolving the existing conflict and the mechanisms devised for maintaining the balance in human rights matters.

The publicists usually discuss the conflict of norms in both private and public international law. The International Law Commission has specifically addressed the three-dimensional conflict of principles, norms and concepts of human rights at regional and international levels.<sup>67</sup> This is the reason why Sir Robert Jennings has noted that public international law has a universal quality and it applies to all countries irrespective of their cultural and religious background and socio-political conditions.<sup>68</sup> He however, reiterated that:

*"[Universality] does not mean uniformity. It does mean, however, variant is part of the system as a whole, and not a separate system, and it ultimately derives its validity from the system as a whole".<sup>69</sup>*

*The International Law Commission* therefore, proposed the idea of coexistence of legal systems in human rights debates. Any regional international law must be considered within the system as a whole and it is not tantamount to zero "regional variation" and absolute "uniformity". Another dimension of the conflict will probably emerge when a universal or a regional norm is to be applied at domestic level. There are a variety of procedures for resolving the conflict as far as the enforcement of a foreign rule is concerned. For instance, at regional level the European Court of Human Rights has followed an established procedure which allows the application of regional norm with a "*wide margin of appreciation*" when the conflict exists between the provisions of the European Convention on Human Rights and domestic laws.<sup>70</sup> There is also the possibility of borrowing the idea from private international law. If we seek to apply the theories

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<sup>67</sup> Koskenniemi, Martti; *FRAGMENTATION OF INTERNATIONAL LAW: DIFFICULTIES ARISING FROM THE DIVERSIFICATION AND EXPANSION OF INTERNATIONAL LAW*, (Erik Castrén Institute of International Law and Human Rights, 2007), pp. 102-103.

<sup>68</sup> Jennings, Robert; *Universal International law in a Multicultural World*, in: *Collected Essays of Sir Robert Jennings* (The Hague: Kluwer, 1998), p. 341.

<sup>69</sup> *Ibid*

<sup>70</sup> Legg, Andrew; *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality*, (Oxford University Press, 2012), pp. 70-73



of conflict resolution in private international law, the enforcement of foreign judgments in a legal system is based on the principle of courtesy and the decision of a foreign court is applied if it does not conflict with the fundamental principles and essential values of the domestic legal system.<sup>71</sup> Thus, the departure from Islamic Shari'a to the principles of Islamic Shari'a will definitely settle the three-dimensional conflict of principles, norms and concepts of human rights at regional and international levels. Nonetheless, its application by member states involves the domestic legal systems that must independently be addressed. The importance of this debate lies in the fact that the preamble of the OIC Charter (2008) as well as many other OIC instruments lay emphasis on reconciliation between human rights standards and Islamic values. It has been presumed that the fundamental norms of human rights are not in direct conflict with the essential values of Islam or if so can be reconciled. Notwithstanding, the failure to explain the theories of resolving this conflict makes the task of reconciliation more complicated. Therefore, the impacts of this negligence are conspicuous in the implementation program of the TYPOA-2015 in the human rights section which fluctuates between the two discourses, in spite of underlining that the international human rights law will be implemented in harmony with Islamic values.<sup>72</sup>

The theorizing rhetoric of OIC human rights has again failed after adoption of the ODHR, when the IPHRC blatantly reversed its invented formula in the opposite direction. While appreciating "*the adoption of 'Cairo Declaration of the OIC on Human Rights'*"<sup>73</sup>, the IPHRC declared that "*the normative structure of the OIC human rights framework [...] established the compatibility of the Islamic values and norms with the universal human rights standards*".<sup>74</sup> In contrast to theories that emphasized that "universality does not mean uniformity"<sup>75</sup> and in opposition of the provisions of the OIC Charter, the IPHRC celebrated the idea of "*compatibility of the Islamic values and norms with the universal human rights standards*".<sup>76</sup> To conclude, not only the new prescription of replacing "Islamic Sharia" with the "Principles of Islamic Sharia"

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<sup>71</sup> Michaels, Ralph; Private International Law and the Question of Universal Values, In Franco Ferrari and Diego P. Fernández Arroyo (eds.) Private International Law: Contemporary Challenges and Continuing Relevance, (Edward Elgar Publishing, USA, 2019), pp. 150-158.

<sup>72</sup> TYPOA-2015.

<sup>73</sup> The webpage of the IPHRC (accessed on 11/12/2020) at:  
[https://oic-iphrc.org/web/index.php/site/view\\_news?id=475](https://oic-iphrc.org/web/index.php/site/view_news?id=475)

<sup>74</sup> Ibid.

<sup>75</sup> Jennings, Robert; Universal International law in a Multicultural World, in: Collected Essays of Sir Robert Jennings, op. cit.

<sup>76</sup> Ibid.



cannot resolve the apparent paradox that dominates the core OIC instrument, but, it actually added an extra condition which exacerbated the terms for reconciling the irreconcilables.

### **III. Main Features and Key Distinctions**

It was noted that at a time before the conclusion of the ten-year period of the TYPoA-2005, the Secretary-General put the revision of the CDHRI on the agenda of the IPHRC by invoking to Article 17 of the Statute, ignoring the provisions of the TYPoA-2005 that were adopted by the Islamic Summit. This has already been illustrated that most of the changes in the CHRI were made through deleting the unwanted terms, notions and provisions. It means that religious conceptions have been omitted and replaced by human rights notions and norms. For example, the word "*Islam*" has been removed from the title of the Declaration, and the term "*Islamic Sharia*" in Articles 24 and 25 of the CDHRI has been replaced by the "*Principles of Islamic Sharia*".<sup>77</sup>

Moreover, Article 21 which forbids the act of taking hostage has been removed altogether, as it was considered irrelevant to the ODHR. Articles 24 and 25 have been incorporated into one article after certain modifications. Needless to say that the revision has not been made through addition of an article or incorporating certain rights that are missing in the CDHRI. In spite of the fact that the right to self-determination has been recognized in Article 19, but other collective rights such as freedom of assembly and association are missing. It appears evident that the IPHRC was not willing to incorporate these missing rights and freedoms into the OHRD, or it might have interpreted that the term "*refinement*" implies only minor changes are permitted, rather than adding some notions or incorporating additional articles to the text which would go beyond the domain of "*refinement*". Also, in terms of structural amendments, religious liberty and freedom of expression have been moved to Articles 18 and 19, respectively, in order to comply with international instruments.

With regard to the changes that were made in the content of the CDHRI, we will briefly refer to certain articles. Article 1 reaffirms human dignity and the principles of freedom and equality. While the CDHRI emphasizes that "*[A]ll men are equal in terms of basic human dignity and basic obligation and*

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<sup>77</sup> ODHR, art. 24(a).



responsibilities,"<sup>78</sup> the ODHR emphasizes that "[T]hey are equal in terms of human dignity and basic rights'.<sup>79</sup> In addition, the phrase "[T]rue faith is the guarantee for enhancing such dignity along the path to human perfection"<sup>80</sup> and paragraph (b) which actually included religious concepts regarding acquired dignity, have been completely omitted. Concerning the right to life, the CDHRI emphasizes that "[L]ife is a the God-given gift and the right is guaranteed to every human being" and "it is prohibited to take away life except for a shari'ah prescribed reason."<sup>81</sup> The corresponding article in the ODHR emphasizes that "No one shall be arbitrarily deprived of this right,"<sup>82</sup> It goes on to say that "Sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime."<sup>83</sup> Thus, the provisions that were rooted in the Islamic jurisprudence have been removed to comply with international standards.

Contrary to the CDHRI which defines the right to education as "an obligation" and as an individual duty,<sup>84</sup> the ODHR declares that "[E]ducation is a fundamental human right and essential for the exercise of all other human rights. Human Rights Education is an integral part of the right to education,"<sup>85</sup> Then, Article 8(a) of the ODHR assumes that "seeking of knowledge is an obligation and the provision of education is a duty for society and the State."<sup>86</sup> More importantly, the purpose of education in the CDHRI is defined to become "acquainted with the religion of Islam and the facts of the universe for the benefit of mankind."<sup>87</sup> The ODHR in a revolutionary fashion declares that the purpose of educational institutions is to "promote respect for human rights, understanding, tolerance and friendship among all nations, racial or religious

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<sup>78</sup> CDHRI, art. 1(a): All human beings form one family, whose members are united by submission to God and descent from Adam. All men are equal in terms of basic human dignity and basic obligation and responsibilities without any discrimination on the grounds of race, color, language, sex, religious belief, political affiliation, social status or other consideration. True faith is the guarantee for enhancing such dignity along the path to human perfection.

<sup>79</sup> ODHR, art. 1(a): All human beings form one family. They are equal in terms of human dignity and basic rights without any discrimination on the grounds of race, color, language, sex, religion, political opinion, national or social origin or other status.

<sup>80</sup> CDHRI, art. 1(a).

<sup>81</sup> CDHRI, art. 2(a)

<sup>82</sup> ODHR, art. 2(a): Right to life is the supreme right of every human being, a God given gift, and shall be protected by law. It is the duty of States to protect this right from any violation. No one shall be arbitrarily deprived of this right.

<sup>83</sup> ODHR, art. 2 (b).

<sup>84</sup> CDHRI, art. 9 (a).

<sup>85</sup> OHRD, art. 8 (a).

<sup>86</sup> OHRD, art. 8 (b).

<sup>87</sup> CDHRI, art. 9 (a).



groups, as well as maintenance of international peace and security."<sup>88</sup> A clause that was borrowed from Article 13 (1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>89</sup>

#### **A. Limitation Clauses**

Human rights instruments have usually utilized two distinct techniques to strike a balance between human rights and fundamental freedoms and their limitations. The restrictions on rights and freedoms in the UDHR are provided for in Article 29(2) as a general limitation clause. On the other hand, the ICCPR utilized a specific limitation clause which is specifically defined in every article. As a result, human rights instruments in defining restriction clauses either have followed a general or a specific restriction clause. It must be borne in mind that the CDHRI has followed UDHR by imposing a general restriction clause in Article 24. The OHRD employed an exceptional method in its limitation clauses which has no precedent in human rights instruments. This specific feature lay in the fact that it has utilized the specific limitation clause only in Article 19, while the remaining articles have followed the CDHRI modality which applied a general limitation clause in Articles 24.

In contrast to Articles 24 and 25 of CDHRI, the content of the limitation clause has apparently made a departure from Islamic Sharia to the principles of Islamic Sharia. It seems likely that the revised article might facilitate the coexistence of the OIC human rights arrangement with the UN human rights system. In spite of the fact that the ODHR has attempted to reconcile the disputed areas with international human rights standards by avoiding the rhetoric of Islamic Sharia, however it referred the problem to domestic law where Islamic Sharia is, in certain states, the main source of legislation or their ratification of human rights conventions are subject to Islamic Sharia. Although the general limitation clause has refrained from using the term "*Islamic Shari'a*" in order to limit the rights and freedoms, there appears to be a legal trick behind all this rhetoric which leaves us with a notion that is completely empty. It is, therefore, a remedy that pays a lip service to the western states, failing to actually address the contradictory criteria prevalent in the OIC core instruments.

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<sup>88</sup> OHRD, art. 8 (d).

<sup>89</sup> Adopted by General Assembly resolution 2200A (XXI) of 16 December 1966 and entered into force 3 January, 1976.



Contrary to the CDHRI which recognized Islamic Sharia as the only source for interpretation of the provisions of the CDHRI, Article 24 (a) of ODHR has acknowledged that the interpretation of the provisions of the declaration should not undermine the rights and freedoms guaranteed by domestic legislations and human rights conventions:

*Nothing in this declaration may be interpreted or amended in such a way as to undermine the rights and freedoms safeguarded by the internal legislations of Member States, and their obligations under international and regional human rights instruments.<sup>90</sup>*

Again, it appears that Article 24 (a) OHRD has properly guaranteed the rights and freedoms that were recognized in the declaration, however, it also referred the issue to the domestic law.

In addition, there has always been a heated debate over certain issues of human rights in the UN between representatives of Islamic countries and Western delegations. There have been quite a number of occasions when Muslim delegations desperately spared no effort to change a term and their counterparts did their best to keep that single word. However, the text of the declaration not only did abandon the areas that they struggled to acquire, preposterously they simply copied and imported the text right from Article 18 of ICCPR. In the following, we provide a nuanced examination on the three contentious topics which deserve special consideration: freedom of religion, freedom of expression and women's rights.

## **B. Freedom of Religion**

Freedom of religion was the main source of controversy between the Muslim states and Western delegations during the drafting process of the UDHR. On several occasions, the representative of Saudi Arabia directed critical remarks to the members of the drafting Committee for including a contentious sentence in the text of article 19 (18) of the draft declaration on freedom of religion: *'only the first sentence of article 19 (18) should be retained as it sufficiently safeguard freedom of thought, conscience and religion.'*<sup>91</sup> Thus, the article would be accepted, he expressed, when those words were omitted. Other delegations from Muslim states, Asia and Latin America believed that the second sentence was in fact included to serve missionaries and in order to avoid and eliminate all doubts about the existence of a

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<sup>90</sup> OHRD, art. 24 (a).

<sup>91</sup> Year Book of the United Nations 1948-49, United Nations, Department of Public Information, New York, p. 532.



hidden agenda, it must be deleted.<sup>92</sup> Even the Danish delegate abstained in voting on Article 18, as he believed that the adoption of the second sentence might prevent the representatives of the Muslim world to support the draft Declaration. John P. Humphrey, the author of the initial draft of the Declaration also states:

*'Much thought and discussion was given at every stage of the drafting to Article 18, which recognizes and defines the right to freedom of thought, conscience and religion. Predictably, the article gave rise to controversy. In the Drafting Committee, Charles Malik- a citizen of a country the population of which was almost evenly divided between Christians and Moslems- had obtained the insertion in the article of the principle that freedom of religion includes the right to change one's religion or belief'.<sup>93</sup>*

Eleanor Roosevelt, the United States delegation stated that in the final vote in the third Committee on presenting the Declaration to the General Assembly, the delegates of four Muslim countries abstained. Because they believed that the article on freedom of religion was contrary to Qur'an. She pointed out that they consulted Sir Zafarullah Khan, the foreign minister of Pakistan, the largest Muslim nation in order to mitigate such challenges. He declared that *"our Pakistan delegate has mis-interpreted the Kor'an"*.<sup>94</sup> She also reported that *'the speech of the Foreign Minister of Pakistan, the largest Muslim state at that time, before the General Assembly brought along to the affirmative side all Arab Muslim states except Yemen, which was absent'*.<sup>95</sup> Sir Mohammed Zafarullah Khan, argued that the Qur'an expressly said: *"Let he who chooses to believe, believe, and he who chooses to disbelieve, disbelieve"*.<sup>96</sup> He stated that because of the misconduct of the missionaries of certain other religions, some delegations had expressed their concern over the text of Article 19 (18):

*"Islam had proclaimed the right to freedom of conscience and had declared itself against any kind of compulsion in matters of faith and religious practices and his delegation, therefore vote for article 19 without any limitation on its provisions"*.<sup>97</sup>

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<sup>92</sup> Ibid.

<sup>93</sup> Ibid. p. 913. See also: Year Book of the United Nations 1948-49, p. 532.

<sup>94</sup> Annotations on the text of the draft International Covenant on Civil and Political Rights, op. cit. at: 105-116.

<sup>95</sup> U.N. GAOR, 15th session, 1021<sup>st</sup> mtg. (1960), at 6 and 7.

<sup>96</sup> U.N. GAOR, 15th session, (part I) 125<sup>th</sup> mtg. (1948), p.370.

<sup>97</sup> U.N. GAOR, 56th Sess., 183<sup>rd</sup> plen. mtg (part I), 10 December 1948, p. 912.



Contrary to the Eleanor Roosevelt's testimony, all Arab Muslim states did not come to the affirmative side. The Egyptian delegation pointed out that the "*text of article 19 (18) did not confine itself to proclaiming freedom of thought and religion and the second sentence included to serve the efforts which try to convert the population of the Orient*"<sup>98</sup>. He concluded, however, if those "*remarks were inserted in the summary record, his delegation would vote in favor*".<sup>99</sup> As noted earlier, the Yemen delegation even did not take part in the voting and was absent in the final vote. This situation placed the representative of Saudi Arabia in a dire condition and he finally declared that Article 18 of UDHR is incompatible with Islamic law and abstained from voting, along with the Soviet bloc and the Union of South Africa.

Time and again, the unresolved dispute resurfaced during the drafting process of the International Covenant on Civil and Political Rights (ICCPR).<sup>100</sup> The Secretary-General in a note on the text of the draft of ICCPR briefly referred to discussions on matters related to freedom of religion. He emphasized that much of the discussions involved on whether the article should contain explicit reference to change one's religion or belief or these words do not need to be specifically mentioned. It was argued that the right to change one's religion was already implicit in the concept of "*freedom of religion*" and the covenant should not support any religious body or encourage proselytizing and missionary campaigns. Furthermore, the provision would create uncertainty or difficulty for those States whose constitutions or basic laws are derived from religious norms.<sup>101</sup>

During the discussions in the Third Committee, the Saudi Arabia delegation reminded that article 18 of the draft Covenant had evolved from the corresponding article of Universal Declaration that his delegation had opposed in 1948 because of the inclusion of a controversial sentence.<sup>102</sup> As his suggestion for omitting the disputed sentence had frequently failed, he proposed the addition of an independent clause to Article 18 in order to prevent coercive conversion. Again, other delegations supported the idea and advised that it must be formulated more concisely, so that the highly important principle contained in the first sentence might retain its strength, and the last clarification was superfluous and could only weaken the

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<sup>98</sup> Ibid. p. 913;

<sup>99</sup> Year Book of the United Nations, 1948-49, p. 532.

<sup>100</sup> International Covenant on Civil and Political Rights was adopted by General Assembly resolution 2200A (XXI) of 16 December 1966 (entry into force 23 March 1976).

<sup>101</sup> Annotations on the Text of the Draft International Covenants on Human Rights, Document A/2929, ANNEXES, TENTH SESSION, NEW YORK, 1955, at: 105-116,

<sup>102</sup> U.N. GAOR, 15<sup>th</sup> Sess., 3<sup>rd</sup> Committee 1021<sup>st</sup> mtg., 1960, at 6 and 7.





strength of the preceding statement.<sup>103</sup> They reminded that the question had arisen difficulties in the Asian countries during the period of expansion of Europe, owing to the fact that they sought to impose Catholicism on the indigenous people. In addition, it has been argued that there was a great difference between a declaration, and a covenant which would be a binding instrument. Accordingly, it was undesirable that the draft Covenant would place such legal emphasis on the text that might be interpreted as favoring missionary campaigns of conversion.<sup>104</sup>

Since the Committee was seemingly divided on the original text, it was suggested that an alternative text for the second sentence of paragraph 1 in order to narrow the existing gap as follows: *“This right shall include freedom to have a religion or belief of his choice”*.<sup>105</sup> Yet, it was also suggested that the words ‘or to adopt’ be inserted after the words ‘to have’ in the above text. On the other hand, Muslim delegations could finally add a new clause which prohibited the coercion as follows: *“No one shall be subject to coercion which would impair his/her freedom to have or to adopt a religion or belief of his choice”*.<sup>106</sup>

Time and again, during the adoption of the *“Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief”*<sup>107</sup> the controversial aspect of freedom of religion was a topic of ongoing debate between the two sides. While the western states consistently emphasized the standards they had successfully formulated in UDHR, Muslim delegations were trying to cast doubt on the legitimacy of the established norms. Finally, the attempt of Muslim delegations resulted in deleting the controversial words *“or to adopt”*. Article 1 of the 1981 declaration indicates that: *“right shall include freedom to have a religion or whatever belief of his choice”*. In addition, the wording of the second clause also reformulated by deleting the words *“or to adopt”* to appease the Muslim delegations and convince them to adopt the declaration.

Despite the significant success that Muslim states have made in changing the language of the established norms in both UDHR and ICCPR, they have never been wholly content with the outcome. As noted earlier, they eventually decided to create a separate human rights system which finally was materialized by the

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<sup>103</sup> U.N. GAOR, 15th Sess., 3<sup>rd</sup> Committee 1022<sup>nd</sup> mtg., 1960, at: 17.

<sup>104</sup> U.N. GAOR, Agenda item 34: draft International Covenant on Civil and Political Rights, 15th session, Document A/4397, at: 42-58.

<sup>105</sup> U.N. GAOR, 15<sup>th</sup> Sess., 1024<sup>th</sup> mtg., Third Committee, 1960, at: 8-11.

<sup>106</sup> U.N. GAOR, 15<sup>th</sup> Sess., 1027<sup>th</sup>. Third Committee 1027<sup>th</sup> mtg. (1960), at: 1-5.

<sup>107</sup> Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, G.A. res. 36/55, 36 U.N. GAOR Supp. (No. 51) at 171, U.N. Doc. A/36/684 (1981).



adoption of CDHRI. This is exactly why Article 10 of CDHRI is absolutely focused on their concerns of both material and nonmaterial forms of coercion, rather than concentrating on freedom of religion:

*Islam is the religion of unspoiled nature. It is prohibited to exercise any form of compulsion on man or to exploit his poverty or ignorance in order to convert him to another religion or to atheism.*<sup>108</sup>

Considering the historical background of the debate, it is really important to know how the ODHR will resolve such a highly polemic issue which separated Muslim states from their Western counterparts for several decades. As a matter of fact, the revising process of CDHRI was aiming at bringing its human rights norms in alignment with international standards. They had then to select one of the existing formats of ICCPR or the 1981 declaration. However, it might come as a surprise that the drafters have followed the format of the ICCPR in both freedoms and limitation clauses, instead of subsequent instrument of 1981 declaration. Although, the latter is a more recent instrument that Muslim states' delegations put much effort to refine its provisions and it has been the product of many years' efforts, the substantive provisions were almost copied and pasted from Article 18 of ICCPR. The only difference between the two is that the second sentence of paragraph 1 of Article 18 of ICCPR has been deleted<sup>109</sup> and was replaced by paragraph 3. More importantly in a gesture of good faith, they even adopted its numbering pattern by placing freedom of religion in Article 18 as follows:

*a. Everyone shall have the right to freedom of thought, conscience and religion. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.*

*b. No one shall be subject to coercion which would impair his/her freedom to have or to adopt a religion or belief of his choice.*

The brief review of the preparatory works on Article 18 of the ODHR might raise scores of interesting questions for human rights scholars. It is ironic that the Muslim delegations who made every attempt to ensure that the words “*or to adopt*” be removed from the corresponding article in the 1981 Declaration, have simply decided to copy and paste the text of Article 18 on the ODHR. In addition, an important

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<sup>108</sup> CDHRI, art. 10.

<sup>109</sup> The deleted sentence is as follows: Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.



objective of drafting regional instrument is to indigenize the alien concepts and norms into the cultural context of their respective region in order to facilitate its implementation. Otherwise, most of the OIC member states have already signed and ratified many of human rights conventions and incorporating the same texts seems to be redundant and inessential. Moreover, the IPHRC was mandated “to refine” or “to update and refine” the CDHRI, yet it is evident that the IPHRC has exceeded its authority where it exactly copied and imported the text of Article 18, instead of refining the text on freedom of religion. It seems that the members of the IPHRC adopted the unification theory of international law which cannot accommodate the distinctive characteristics of their nations.

### **C. Women’s Rights**

Women’s Rights also has been an important subject of controversy between the Muslim and Western States since the adoption of UDHR up until present day. During the deliberations on the UDHR, Muslim delegations declared that Article 14 (16) on equal rights as to marriage is in conflict with their domestic legislations. The Saudi representative emphasized that:

*“the authors of the draft declaration had for the most part taken into consideration only the standards recognized by Western civilization and had ignored more ancient civilizations...the institutions of which, for example marriage, had proved their wisdom through the centuries”*.<sup>110</sup>

The representative of Egypt also expressed that “[A]rticle 17 referred to the freedom to contract marriage without any restrictions as to race, nationality or religion. In Egypt, as in almost all Muslim countries certain restrictions and limitations exists regarding the marriage of a Muslim women with a person with another faith.”<sup>111</sup> Although still the dispute had not been settled, Article 16 (1) of the UDHR was adopted which contains that men and women of full age have the right to marry “without any limitation due to race, nationality or religion” and the controversy faded away for a while. When the deliberations on the draft of ICCPR started, there was a sharp disagreement between delegations concerning equal rights of men and women as to marriage such as domicile, nationality and the right to work. Although the preamble and provisions of both Covenants emphasized the principle of equality before the law, the substantive

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<sup>110</sup> U.N. GAOR, 3<sup>rd</sup> Sess., 183<sup>rd</sup> Third Committee, 125<sup>th</sup> mtg (part I), 1948, p. 370.

<sup>111</sup> U.N. GAOR, 56<sup>th</sup> Sess., 183<sup>rd</sup> plen. mtg (part I), 10 December 1948, p. 912.



provisions did not contain gender equality and there was no corresponding article on marriage similar to Article 16 of the UDHR in the draft text of ICCPR prepared by the Commission.

The UN Commission on the Status of Women suggested adding a separate article to the ICCPR corresponding to Article 16 of the UDHR. In subsequent discussions, some members of the Commission reiterated the same arguments previously made by the representatives of Islamic countries in the Third Committee of the General Assembly. The Yemen delegation noted that the draft did not take into account the differences between the laws of different countries, especially regarding the laws of marriage, divorce and inheritance. It has been argued that such inequalities are rooted in ancient traditions and religious beliefs that cannot be easily changed and also it requires radical changes of civil laws in many countries. Moreover, the equal responsibilities of men and women should be considered.<sup>112</sup>

The Commission removed a phrase that contained a prohibition of discrimination on the ground of race, religion and nationality and the text of Article 23 (2) of the ICCPR was eventually adopted by deleting the words “*without any limitation due to race, nationality or religion*”<sup>113</sup> which was a matter of disagreement between different delegations when the text of Article 16 of UDHR was under deliberation. In addition, a phrase containing “*equality of rights and responsibilities of spouses as to marriage*” was incorporated into paragraph 4 of Article 23 of ICCPR in order to balance the viewpoints of the two sides.<sup>114</sup>

Time and again, the controversy resurfaced in the UN when Human Rights Commission started to discuss the draft of the CEDAW and submitted the draft to the General Assembly. While some delegates were insisting that the text could be passed by a majority vote, other delegates mainly from Muslim and catholic countries believed that it needed more deliberations in order to remove the substantive defects of the text and ensure that it would achieve its objectives. But, the proponents of the text wanted to speed up the adoption of the convention by a majority vote and it was not possible to stop them. In view of the immaturity of the text, all those opposed to the adoption of the convention decided to either abstain or vote against.<sup>115</sup> Some other delegates also declared that it is unfortunate that the representatives of some

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<sup>112</sup> Waltz, Susan, *Universal Human Rights, the Contribution of Muslim States*, Human Rights Quarterly, Vol. 26, 2004, p. 822.

<sup>113</sup> Bossuyt, Marc J.; *Guide to the "travaux Préparatoires" of the International Covenant on Civil and Political Rights*, Martinus Nijhoff Publishers, 1987, p. 442.

<sup>114</sup> *Ibid.* p. 445.

<sup>115</sup> U.N. GAOR, 28<sup>th</sup> Sess., 3<sup>rd</sup> Committee 2009<sup>th</sup> Meeting, 1973, at: 3-4.



countries do not understand that it is important to make a delicate balance between the existing legal systems and it is not appropriate to impose a particular attitude on others. Due to the lack of mutual understanding, Islamic countries did not welcome the adoption of the CEDAW.<sup>116</sup> Some Catholic representatives directed even more critical remarks and voted against the convention. It has been argued that a convention of particular importance cannot be ratified more quickly than usual and the text of the draft convention has not yet been revised and prepared for approval.<sup>117</sup>

Although many Islamic countries have now ratified the CEDAW, some of them have inserted general reservations which have seriously challenged the validity of the Convention. However, Islamic countries finally incorporated their observations into CDHRI. While acknowledging the equality of human dignity, Article 1 (a) of CDHRI puts emphasis on equality of men and women in "dignity" and "responsibility" and forgets to mention equal rights.<sup>118</sup> Article 6 (a) reiterates that "*women are equal to men in human dignity and they have rights which correspond to their responsibilities*".<sup>119</sup> Thus, it has always been considered as one of the major disadvantages of the CDHRI and Article 1 (a) of ODHR intends to address the same concern:

*All human beings form one family. They are equal in terms of human dignity and basic rights without any discrimination on the grounds of race, color, language, sex, religion, political opinion, national or social origin or other status.*<sup>120</sup>

It is worth noting that the OIC human rights declaration has shifted from equality in dignity and responsibilities to equality in dignity and basic rights in order to be in harmony with international standards. On the other hand, Article 5(a) of CDHRI stipulates the right of men and women to marry without distinction as to race, color or ethnicity. It neglects to mention religion in order to comply with Islamic Shari'a:

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<sup>116</sup> Ibid. at 7.

<sup>117</sup> Ibid. at 7.

<sup>118</sup> CDHRI, art. 1 (a).

<sup>119</sup> CDHRI, art. 6 (a).

<sup>120</sup> ODHR, art. 1(a).



*The family is the foundation of society, and marriage is the basis of making a family. Men and women have the right to marriage, and no restrictions stemming from race, color or nationality shall prevent them from exercising this right.*<sup>121</sup>

Thus, CDHRI expresses the same distinctions as set forth in UDHR by removing "religion". Whereas, the OHRD deleted the contentious phrase in order to reach a compromise. Article 5(a) stipulates that women and men have the right to marry and to found a family according to the rules and conditions of marriage:

*It is based on marriage between a man and a woman. Men and women of marrying age have the right to marry and to found a family according to the rules and conditions of marriage. No marriage can take place without the full and free consent of both spouses. The laws in force regulate the rights and duties of the man and woman as to marriage, during marriage and after its dissolution.*<sup>122</sup>

It is worth noting that in most Islamic countries the substantive provisions concerning family relations are derived from Islamic Shari'a that are deeply rooted in religious traditions. Nonetheless, it was possible for the drafters of OHRD to incorporate the respected provisions from the ICCPR as they have done with freedom of religion in order to bring it in alignment with international standards, since we are fully aware that the provisions articulated in subsequent instrument (CEDAW) cannot be incorporated into the declaration in view of the general reservation that many Muslim states inserted to it. However, the drafters used the most common technique by referring the disputed matters to the domestic law of the member states.

#### **D. Freedom of Expression**

In contrast to freedom of religion and women's rights, freedom of expression was not a polemic issue between Western and Muslim states when UDHR and ICCPR were being adopted. The publication of the Satanic Verses in 1988, however, was the root cause of a dispute that suddenly emerged between Muslim and Western states over freedom of expression. This is exactly why the OIC was resolutely determined to address the problem in Article 22(a) and (c) of CDHRI:

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<sup>121</sup> CDHRI, art. 5(a).

<sup>122</sup> ODHR, art. 5(a).



*a. Everyone shall have the right to express his opinion freely in such a manner as would not be contrary to the principles of the Shari'ah.*

*c. Information is a vital necessity to society. It may not be exploited or misused in such a way as may violate sanctities and the dignity of Prophets, undermine moral and ethical values or disintegrate, corrupt or harm society or weaken its faith.<sup>123</sup>*

It is plain that the provisions articulated in CDHRI on freedom of expression are in contradiction with Western interpretation of international standards. Indeed, OIC deliberately decided to stipulate certain norms to prevent the employment of freedom of expression for the defamation of religions and incitement to violence which, in their opinion, lead to discrimination against Muslims. However, the controversy over freedom of expression frequently reemerged up until the late 1990s when it turned into a new frontline between Western and Muslim delegations at the UN. In 1999, the delegation of Pakistan, on behalf of OIC submitted a draft resolution to the Human Rights Commission on the prohibition of vilification of religions. This resolution remained for several years on the agenda of the Human Rights Commission and subsequently its successor, the Human Rights Council.<sup>124</sup>

Since 2005 on behalf of OIC, the delegation of Yemen submitted the resolution to the General Assembly. The OIC delegations believed that vilification of Islamic faith often resulted in discrimination against Muslim minorities in Western countries.<sup>125</sup> Western delegations, however, considered the resolutions in contradiction with freedom of expression and an attempt to universalize anti-defamation domestic laws. The European Union therefore in 2006 made critical remarks with regard to the adoption of the UN General Assembly resolution on combating defamation of religions:

*The European Union does not regard the concept of defamation of religion as an accepted and valid concept in human rights discourse. From a human rights perspective, members of a faith or religious communities should not be considered members of a homogeneous identity. The rules of*

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<sup>123</sup> CDHRI, art. 22(a) and (c).

<sup>124</sup> U.N. Econ. & Soc. Council [ESOSOC], Comm'n on Human Rights, Draft Res.: Racism, Racial Discrimination, Xenophobia and all Forms of Discrimination, U.N. Doc. E/CN.4/1999/L.40 (April 20, 1999).

<sup>125</sup> The General Assembly adopted the Resolution 60/150 on Combating defamation of religions, on 16 December 2005 G.A. Res. 60/150, 61/164, 62/154, U.N. Doc. A/Res/60/150, A/Res/61/164, A/Res/62/154.



*the international human rights basically protect the rights of individuals to practice their religion or belief freely, not religion itself.*<sup>126</sup>

It was noted that in 2011, the OIC compromised with Western delegations in Resolution 18/16 on “*combating intolerance, discrimination and violence against persons based on religion or belief*” and ceased to insist on the adoption of resolutions against defamation of religions. As a result, the language of this resolution shifted from defamation of religion to religious discrimination and the combat against hate speech. The compromise is well reflected in the ODHR when it followed the pattern adopted by the ICCPR with regard to limitation clause, but also in placing freedom of expression in Article 19. Article 19(a) stipulates that freedom of expression “*remains an integral part of the universal human rights*” which “*carries with it special duties and responsibilities*”.<sup>127</sup> Moreover, it innovated a new pattern by incorporating Articles 20 of ICCPR into Articles 19(c) that clearly defines the limitation categories.

It goes without saying that despite the innovatory changes we specified, Articles 19(d) did not abandon the rhetoric of Article 22 (c) of CDHRI and articulates that freedom of expression “*should not be used to violate sanctities of the dignity of prophets, religions, religious symbols or to undermine moral and ethical values of society*”.<sup>128</sup>

The new pattern used in Articles 19 (a) is an important innovation. Because Article 20 of ICCPR does not define a human rights in a separate article, rather mentions a justifying reason for restricting freedom of expression and therefore is properly incorporated into Article 19 of ODHR. On the other hand, it should be acknowledged that the ODHR not only combine all limitation clauses into Article 19, but also reconciled between conflicting outlooks. With that said, it should be taken into account that articulating all of the provisions pertaining to freedom of expression and its limitations in one article might have resulted in the prolongation of Article 19.

#### IV. **Conclusion**

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<sup>126</sup> Statement by Portugal on behalf of the European Union to the December 18, 2007 session of the GA, as quoted in a February 24, 2008 statement by the International Humanist and Ethical Union to the Human Rights Council, available at <http://www.iheu.org/node/2949>.

<sup>127</sup> ODHR, art. 19 (a).

<sup>128</sup> CDHRI, art. 22 (c).





This essay has showed that the OIC human rights paradigmatic change was completed in a process that had not moved on a progressive pace, being disrupted by the competing trends within the OIC in one and half decade. This process that was initiated by the TYPoA-2005, has been completed by the adoption of ODHR in 2020 and was praised “as a monumental achievement for the OIC and the Member States”. There can be no denial that the new rhetoric has been regarded a significant development composed of triple layers of conceptual, structural and normative levels that is expected to bring the OIC human rights discourse in alignment with the UN human rights system. At conceptual level, the ODHR has shifted from religious notions to human rights language, at normative level, it moved from Sharia-based particularism to an inclusive universalism and at structural level, it abandoned the parallel arrangement to the UN human rights system and defined a complementary function for OIC human rights arrangement which might lead to the coexistence of regional and international systems.

However, it might be difficult to assess whether the process that has eventually amounted to the adoption of the ODHR is considered to be a paradigm change that will actually lead to the promotion of human rights in member states or it is merely a change within OIC human rights rhetoric. Even though the OIC post-2005 instruments employed a new rhetoric that might bring it in alignment with international human rights system, a multitude of requirements have been introduced, ranging from national legislations to Islamic values, that make the reconciliation a particularly challenging task. To resolve the problem, the ODHR has attempted to develop a new formula by shifting from Islamic Shari’a to the principles of Islamic Shari’a. This new rhetoric will not only resolve the prevalent paradoxes, but also will add another requirement that complicates the problem.

This new prescription that has been mainly developed at the theoretical level, actually refers the conflict to the domestic law. Looking through a cynical lens, one might see it as a window dressing attempt with no genuine substance. To remove such negative impressions, it is imperative to address the many unique challenges of standard setting at regional level and accelerating efforts to devise adequate mechanisms for the advancement of human rights in member states. Being hopeful or cynical of these efforts depends on the conduct of the IPHRC and the following suggestions are proposed to improve its conduct:

1. At normative level, the IPHRC has been accredited with two distinct mandates that can rarely be found in other regional systems. It has been mandated with the main task of advancing human rights in member



states and also with a subordinate task of protecting human rights of Muslim minorities in non-member states. While the IPHRC has the authority to monitor human rights violations of Muslim minorities residing in non-member states, its jurisdiction over member states is limited only to consultative function. It is imperative to find a procedure for conducting the main task of the Commission. This essay will demonstrate that the legitimate ground for conducting the neglected task was provided for in the TYPoA-2015.

2. At structural level, the IPHRC has established a mechanism for monitoring human rights violations in non-member states, but it is failing to devise a procedure for protecting human rights in member states. While considering the reluctance of member states to give monitoring authority to the IPHRC, it is imperative to engage national human rights institutions in member states in order to make use of other means and mechanisms for the accomplishment of its main task.

3. At practical level, the IPHRC spared no effort to remove the adoption of Human Rights Charter which was adopted by Islamic Summit, the highest authority of OIC through conducting diplomatic maneuvers, including revising of the CDHRI. In spite of the fact that the process of revising the CDHRI is a matter of debate, but after the adoption of ODHR, it is imperative to take into consideration the remaining tasks provided for in the TYPoA-2015 to ensure that human rights commitments “are translated into concrete actions on the ground”. To this end, the IPHRC should return the human rights charter to its agenda.

4. One important challenge to the function of IPHRC is its engagement with the proliferation of human rights instruments. It seems more appropriate if the IPHRC move from standard setting to implementation process. Otherwise, the possibility of writing and revising human rights instruments might put the OIC in a sequence of reciprocal trends and series of adopting and revising processes with no genuine outcomes.

5. Another challenge to the effective functioning of the OIC human rights system is the lack of transparency which harms the public trust. It is imperative to shift from human rights diplomacy and window dressing to genuine human rights commitment. The OIC might have used an adroit diplomacy in cooperation with the UN human rights system, but it cannot impact the public opinion of Muslim nations unless civil society of member states is actively engaged.