The Success of Failure;

The Cairo Declaration of the Organization of Islamic Cooperation on Human Rights

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Abstract²

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 of Human Rights (CDOHR) 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. 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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I. Introduction

Since the adoption of Cairo Declaration of Human Rights in Islam in 1990 (CDHRI)³, 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. 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, 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 2005.⁴ Unlike the CDHRI which deliberately avoided making any reference to the Universal Declaration of Human Rights (UDHR)⁵, 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 in TYPoA-2005 led to drastic changes in the structure of the organization and resulted in a paradigm shift in its human rights agenda. 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”*.⁶ 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 of Human Rights as a binding instrument and the establishment of regional arrangement of human rights as an observatory mechanism.

³ The Cairo Declaration on Human Rights in Islam, Aug. 5, 1990, available at (accessed on 20/2/2021): https://oic-iphrc.org/ckfinder/userfiles/files/FINAL%20OHRD%20CLEAN%20%20VERSION%2024_12_2020.pdf

⁴ 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, available at (accessed on 20/2/2021): <https://www1.oic-oci.org/ex-summit/english/10-years-plan.htm>

⁵ Universal Declaration of Human Rights, G.A. Res. 217 A (III), U.N. GAOR Res. 71, U.N.Doc. A18 10 (1948), available at (accessed on 20/2/2021): <https://www.un.org/en/universal-declaration-human-rights/>

⁶ TYPoA-2005, chapter 1, Section VIII, paragraph 2.

According to the TYPoA-2005, the Charter of the Islamic Conference (Charter-1972) was amended in 2008⁷ 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*.⁸ The compromise laid the ground for more major reforms especially when an Independent Permanent Human Rights Commission (IPHRC) was established in 2011.⁹ On the 30th 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".¹⁰

This paper looks at the background and the process that eventually led to the adoption of the CDOHR and it might be, however, difficult to assess whether the adoption of the CDOHR 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. It aims to 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 of the new declaration and its challenges in promoting human rights in member states. First, I will examine the process of change that was demonstrated in TYPoA-2005 that established the Twin Pillars Arrangement. Then, I will offer some preliminary discussions of certain controversial aspects that resulted in the collapse of the Twin Pillars Arrangement. In particular, I will discuss the issues surrounding the revision of the CDHRI and the shift from of Islamic sharī'a to the principles of Islam in order to accommodate international human rights standards.

II. The Process of Change

⁷ 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.

⁸ Resolution 16/18 on combating intolerance, discrimination and violence against individuals on the basis of religion or belief; A/HRC/RES/16/18.

⁹ Statute of the OIC Independent Permanent Human Rights Commission (adopted 30 June 2011) OIC Doc OIC/IPCHR/2010/STATUTE.

¹⁰ 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

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.

Indeed, the OIC human rights agenda was primarily delineated in 1980 when the CFM decided to develop a human rights declaration in Islam.¹¹ 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. 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."*¹² 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 (OHCHR) consented to the inclusion of the CDHRI in the Regional Instruments that was published prior to the Golden Jubilee Celebrations of 1998.¹³

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."*¹⁴ Then, from 2000 to 2005, it

¹¹ FINAL COMMUNIQUÉ, 11th Sess. Of CFM, Islamabad, Islamic Republic of Pakistan, (17-22 May, 1980) at: 108.

¹² FINAL COMMUNIQUÉ, 20th Sess. Of CFM, Istanbul, Republic of Turkey (5 Dec 1991), at: 54.

¹³ 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).

¹⁴ THE 26th Sess. Of CFM, OUAGADOUGOU, BURKINA FASO (28 JUNE TO 1 JULY 1999), No. 121.

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.¹⁵ A sub-committee was formed in order to draft human rights covenants in Islam¹⁶ and, the draft of the Convention on the Rights of Child in Islam (CRCI) was endorsed in 2005.¹⁷ 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 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 *CDOHR* 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".¹⁸ The CDOHR is regarded as a significant development in many respects: At the conceptual level, the CDOHR 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.

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*

¹⁵ The 27th Sess. Of CFM, KUALA LUMPUR, MALAYSIA (27– 30 JUNE, 2000), No. 123.

¹⁶ THE 29th Sess. Of CFM, KHARTOUM, REPUBLIC OF THE SUDAN (25-27 JUNE 2002), No. 65.

¹⁷ THE 32th Sess. Of CFM, SANA'A, REPUBLIC OF YEMEN (28-30 JUNE 2005), No. 63.

¹⁸ The 47th Sess. Of CFM, NIAMEY, REPUBLIC OF 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

*rights. It complements the Universal Declaration as it addresses religious and cultural specificity of the Muslim countries”.*¹⁹

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.

Despite the consolidated efforts of the of the OIC Secretary General in the post-2005 to reconcile with the UN human rights system, 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 CDOHR as a monumental achievement.²⁰ 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 CDOHR has blatantly demonstrated the lack of clarity and non-

¹⁹ 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, available at (accessed on 20/2/2021): https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/7/NGO/96

²⁰ 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.

existence of democratic process. While, the IPHRC has enthusiastically celebrated the adoption of CDOHR, 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 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 CDOHR. Therefore, the Islamic Republic of Iran is not in a position to join consensus on the resolution No.63/47 POL.²¹

Therefore, it was not clear for a couple of months, whether the CDOHR has been adopted or it was under consideration for further elaboration. This is the reason why the CFM had not attached the text of the revised declaration when the final communique was adopted. 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.²²

It is undeniably clear that the Secretariat is routinely interfering in the function of specialized agencies, a situation which has been surrounded by suspicious activities and lacks the minimum clarity. Because, it can easily replace an adopted declaration with a convention that is going to be adopted in the next session. However, neither member states, nor specialized agencies are entitled to raise an objection or their objections are not considered.²³

III. 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

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

²² Ibid.

²³ In case, the Secretariat removes the above reference from the relevant page, you may enquire it from the author.

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.²⁴

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

²⁴ 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

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.

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?

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*”²⁵ and it is also obvious that the CFM is responsible “*for the implementation of the general policy of the Organization*”.²⁶ 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.

²⁵ The OIC Charter, art. 7.

²⁶ The OIC Charter, art. 10 (4).

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*”.²⁷ Even though the CFM carried out the mandated task by creating the IPHRC, it also adopted the IPHRC’s Statute²⁸ which has 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.

IV. 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*”²⁹ 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)*”³⁰, in line with the Islamic values of justice and equality”.³¹ 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*”.³² 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.

²⁷ The OIC TYPoA-2005.

²⁸ RESOLUTION No. 2/38-LEG ON THE ESTABLISHMENT OF THE OIC INDEPENDENT PERMANENT HUMAN RIGHTS COMMISSION (IPHRC) adopted by the 38th Sess. of CFM, Astana, Republic Of Kazakhstan (28 – 30 June 2011)

²⁹ TYPoA-2005.

³⁰ Convention on the Elimination of Forms of Discrimination against Women (CEDAW) New York, 18 December 1979.

³¹ The OIC TYPoA-2005.

³² Ibid.

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 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.”*³³

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.”*³⁴ It is, therefore, beyond the shadow of a doubt that the post-2005 discourse has shifted from from Islamic Shari’a rhetoric to the discourse of compatibility with Islamic values. But, the question remains

³³ The OIC Charter, art. 15.

³⁴ Statistical, Economic and Social Research and Training Centre for Islamic Countries (SESRIC) and the OIC Independent Permanent Human Rights Commission (IPHRC), “Human Rights Standards and Institutions in OIC Member States,” September 16, 2019, P. 7, available at (accessed on 20/2/2021): <https://sesric.org/files/article/674.pdf>

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”.³⁵ 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 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”.³⁶

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 new rhetoric cannot resolve the paradoxes prevalent in the OIC core instruments. Thus, the CDOHR has attempted to develop a new formula for resolving the apparent paradox by shifting from Islamic Shari’a to the principles of Islam.

V. Does New Rhetoric matter?

It was noted that the CDOHR has attempted to overcome the hybrid form of discourse that fluctuates between Islamic values and human rights standards. Therefore, in the final draft of the revised declaration, it replaced "Islamic Sharia" with the "Principles of Islamic Sharia". The new prescription is well explained in the preamble of the revised declaration in the following words: “[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”. However, in the final text of CDOHR, “the principles of Islamic Shari’ah” was substituted with “the principles of Islam”. However, it is evident that the replacement of "Islamic Shari’ah" with "the principles of

³⁵ Cismas, Ioana; Religious Actors and International Law, (Oxford University Press, 2014), p.296

³⁶ The OIC 2025 Ten Year Programme of Action (TYPoA-2015), available at (accessed on 20/2/2021): <https://www.oic-oci.org/docdown/?docID=16&refID=5>

Islamic Shari'ah" or "principles of Islam" will not eliminate the ambiguities of the post-2005 instruments, but indeed, it does add a general criterion.

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*",³⁷ 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:

*Reaffirming 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".*³⁸

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 the debate over the principles of Islamic Shari'ah has surfaced in the constitutional change after the Arab Spring, it appears that this formula is a new penetration into the OIC human rights instruments that has no precedent in the legal systems of the Muslim world. It is, thus, imperative to discover its historical background in order to explore its relevance to 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*".³⁹ Also, Article 72 of the Constitution of the Islamic Republic of Iran articulates that enactments of

³⁷ The OIC Charter, art. 15.

³⁸ The preamble of the ODHR.

³⁹ The amendment of 1906 Constitution of Iran, adopted on 14th Dhul Qada al-Haram 1324 / 30 December 1906 Art. 2.

the parliament should not be in contradiction with the laws and principles of the official religion of the country.⁴⁰

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.⁴¹ 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.⁴² 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.

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.⁴³ 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)”.⁴⁴

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

⁴⁰ The Constitution of the Islamic Republic of Iran, Art. 72.

⁴¹ Shaheen, Sardar Ali; *Modern Challenges to Islamic Law*, (Cambridge University Press, 2016), p. 54-65.

⁴² Hamoudi, Haider Ala; *Repugnancy in the Arab World*, *Willamette Law Review*, 2012, Vol. 48, p. 431.

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

⁴⁴ 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.

legislation, it had essentially expanded the domain of the principles of Islamic Shari'a in opposition to the opinion of the SCC. In fact, 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 interpreted 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"*.⁴⁵ It goes without saying that 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 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 in Egyptian legal system.⁴⁶

In opposition to the CDHRI which had subjected human rights to Islamic Shari'a, the revised draft declaration 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 CDOHR attempts to bring human rights standards in conformity with the principles of Islam. However, it is absolutely clear that the shift from Islamic shari'a to the principles of Islamic shari'a or to the principles of Islam will not eliminate the confusing criteria. Since, several terms are associated with shari'a in the provisions of CDHRI that makes such a distinction meaningless.

shari'a	Islamic shari'a	Tenet of shari'a	framework of shari'a	provisions of Islamic shari'a	norms of Islamic shari'a	principles of Islamic shari'a
art 2. a	art. 22.a	art. 7. c	art. 12	art. 23. b	art. 22. b	art 7. b
art. 2. C	art 24					art. 16
art. 2. d	art 25					art. 22. a
art. 19. d						

The phrase "principles of Islamic shari'a" was used twice in the preamble of the DD and once in Article 22 (a). However, in the final text CDOHR, the "Principles of Islamic Sharia" was replaced with the "Principles of Islam" and this phrase has been used once in the preamble and once in Article 25 (a). In addition, terms

⁴⁵ The Egyptian Constitution 2012, Art. 219:

مبادئ الشريعة الإسلامية تشمل أدلتها الكلية وقواعدها الأصولية والفقهية ومصادرها المعتمدة في مذهب 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.

⁴⁶ 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.

such as "Islamic teachings" and "Islamic principles and values" are also mentioned in the preamble. Regardless of several terms that were used in CDHRI, in the context of the OIC core instruments, they all have the same meaning. Thus, the use of the term "principles of Islam" not only does not remove the ambiguity of the multiple criteria, but also complicates the existing ambiguity by introducing a new criterion. Therefore, the phrase "principles of Islam" must be interpreted in the context of the OIC core instruments. Thus, the new formula i.e. the reference to "Principles of Islam, could only complicate the existing multiple criteria. In contrast to the principles of Islam which might be subject to interpretation, the Islamic values clause that was mentioned in the Charter is more appropriate 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*"⁴⁷ and the same argument seems to be applicable to OIC human rights instruments. Article 25(a) of the CDOHR stipulates that: "*[E]very one has the right to exercise and enjoy the rights and freedoms set out in the present declaration, without prejudice to the principles of Islam and national legislation*". There can be no denial that "*the principles of Islam*" clause in Article 25(a) of CDOHR is considered superfluous. Because, if the law of the land 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. On the other hand, if the legal system of a member state is secular, the "principles of Islam" clause in this article is still superfluous. Because, according to Article 25 (b) "*[Nothing] in this declaration may be interpreted in such a way as to undermine the rights and freedoms safeguarded by the national legislation or the obligations of the Member States under international and regional human rights treaties*". As a result, the phrase "principles of Islam" clause is superfluous and would make no sense either under Article 25 (a) or under Article 25 (b).

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 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

⁴⁷ Hamoudi, Haider Ala; Repugnancy in the Arab World, op. cit.

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.⁴⁸ 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.⁴⁹ 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".⁵⁰

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. 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.⁵¹

There is also the possibility of borrowing the idea from private international law. If we seek to apply the theories 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

⁴⁸ 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.

⁴⁹ Jennings, Robert; Universal International law in a Multicultural World, in: Collected Essays of Sir Robert Jennings (The Hague: Kluwer, 1998), p. 341.

⁵⁰ Ibid.

⁵¹ Legg, Andrew; The Margin of Appreciation in International Human Rights Law: Deference and Proportionality, (Oxford University Press, 2012), pp. 70-73.

conflict with the fundamental principles and essential values of the domestic legal system.⁵² Thus, the departure from Islamic Shari'a to the principles of Islamic Shari'a or to the principles of Islam 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.⁵³

The theorizing rhetoric of OIC human rights has again failed after adoption of the CDOHR, 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'*"⁵⁴, 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*".⁵⁵ In contrast to theories that emphasized that "universality does not mean uniformity"⁵⁶ 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*".⁵⁷ To conclude, not only the new prescription of replacing "Islamic Sharia" with the "Principles of Islam" 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.

⁵² 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.

⁵³ TYPOA-2015.

⁵⁴ The webpage of the IPHRC (accessed on 11/12/2020) at:
https://oic-iphrc.org/web/index.php/site/view_news/?id=475

⁵⁵ Ibid.

⁵⁶ Jennings, Robert; Universal International law in a Multicultural World, in: Collected Essays of Sir Robert Jennings, op. cit.

⁵⁷ Ibid.

VI. Conclusion

It might be difficult to assess whether the adoption of the CDOHR 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 CDOHR has attempted to develop a new formula by shifting from Islamic Shari'a to the principles of Islam. 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 little more than window dressing as it lacks genuine substance. More importantly, the ambiguities surrounding the adoption of CDOHR cast doubt on the validity of the revised declaration as it was not adopted by required consensus among the member-states nor by majority vote and, therefore, its validity is open to deliberation.⁵⁸ 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 has demonstrated that the legitimate ground for conducting the neglected task was provided for in the TYPoA-2015.

⁵⁸ Report of the 47th Session of the Council of Foreign Ministers (CFM), NIAMEY, REPUBLIC OF NIGER (27-28 NOVEMBER 2020), at: 21.

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 Human Rights Charter from its agenda 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 CDOHR, 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 in order to revive the TPA.

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.