

# INTERNATIONAL LAW AND MIDDLE EAST FAMILY LAW: CONCILIATING THE IRRECONCILABLE

✉ By: Alejandra Rueda<sup>1</sup>

## **Abstract:**

*International Law has been shaped by the western family law tradition and so are the institutions that regulate the interaction of the international community. The fact that this set of rules has been created by a group of states with a determined set of mind different in many crucial aspects to more that the other half of the world's population is a major cause of conflict. The role of some of the international organizations is affected by the attempt of some states to homogenize the International System, the reaction this provokes on the states which are some how obliged by the system itself to converge in some matters by nature irreconcilable with the western perspective.*

## **Key words:**

*International Law, Middle East law, religion, politic views, social, war.*

## **Resumen:**

*El derecho internacional ha sido moldeado por la tradición de la familia del derecho occidental, al igual que las instituciones que regulan las interacciones de la comunidad internacional. El hecho de que este conjunto de reglas haya sido creado por un grupo de Estados bajo una óptica diferente en varios aspectos cruciales al de la otra mitad de la población mundial, es una causa de conflicto. El rol de algunas de las organizaciones internacionales*

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*se ve afectado por el intento de algunos Estados de homogenizar el sistema internacional, provocando una reacción en aquellos Estados que de alguna manera se ven obligados por el sistema a converger en asuntos que por su naturaleza son irreconciliables con la perspectiva de occidente.*

***Palabras claves:***

*Derecho internacional, derecho del medio oriente, religión, perspectivas políticas, social, guerra.*

This article presents some of the arguments defending and rejecting the western nature of International Law, analyzing from a social perspective the pros and cons of leaving a side the Middle East family. Possible reasons of this disregard and also possible consequences. As a student of International Business who has taken a curse on International Law, I will attempt to highlight the link between the social characteristics of states and International Law. I believe that the social element is fundamental for the development of international relations and as such it is also fundamental for International Law since it regulates these relations. Law is a discipline applied to human beings so inevitably it has to deal with social issues. This makes International Law's task a complex one, affected by a great deal of underlying matters and misleading actions.

I will focus mainly on three of those underlying matters; Human rights and religious and political views. The former three are to my regard the principal causes for confrontation between states and not only between them but among people in general. When it comes to this three neutrality is rarely found and instead the sentiment of rightness arises. Every person and at the international level every state seems to think of their opinion and their customs or inclinations as the right ones, the only ones worthy of emulation. To say that there is a single outstanding configuration for those three is to say that international Law should work to assure their prevalence over the others. But in social sciences there is no right or wrong there are just dissimilar characteristics equally valuable and important. Can International Law assume all these dissimilarities and work to defend them instead of becoming a mean to attack them?

To understand why the western and the Middle East family laws diverge, it is important to evaluate the current status of the international system. A review of Idealism and realism, the two most currently used theories can help this purpose.



## International system paradigms

The current configuration of the international system evidences a clear western influence. Institutions and the manner in which the system itself is managed is a reflex of western legal tradition. There is a set of rules that permeates the entire system and by which states must perform; these are shaped by the western tradition<sup>2</sup>.

The two most currently used International Relations paradigms are realism and idealism<sup>3</sup>. Hobbes's realism theory although formulated in another context and quite some time ago appears to be the theory which best explains International Relation's context. According to realism anarchy is the natural state of the International system. There are no ruling forces, no entities above the state. Peace is just a provisional stage previous to war, which is inevitable in this anarchical context. Kant's idealism on the other hand states that the international system must be ruled by the States cooperation, unlike realist theory idealism considers peace and harmony as the natural stage of the International system, because there is a primacy of the individual above the State in the international System and since individuals are highly ethical, they are capable of distinguish right from wrong actions and therefore will always choose to act with good actions because these are the vehicle to the greater good.

Realism and Idealism's subsequent theorists have not been blindsided, they have recognized the tangential changes in the International System and have reformulated parts of these theories in order for them to truly be helpful for explaining the current International System configuration. Realism and Idealism have become neo-realism and neo-Idealism.

Some argue that WWII proved realism to be true. States have gone to war in several occasions; individuals have been proved not to be able to choose the actions that follow the highest ethical standards<sup>4</sup>. But if one is to examine the outcome of WWII from another perspective Idealism is certainly not death or irrelevant. Woodrow Wilson believed in Kant's Idealism and set the precedents for the creation of a set of organizations and a set of mind in the state's leaders of the time, which did shape the course of the International System. To say that idealism has been proved wrong is to ignore Woodrow Wilson's work and the later work of those institutions that keep until this day working under Kant's principle.

Those international organizations are the ones that widen the westernized spectrum of the International System. Recognizing the importance of the State's and people's equality. Idealism is the theoretical approach that would better fit a pluralistic management of International Law. It would try to find the best law principles to regulate the interaction, one that regards

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2 Clara María Mira Gonzáles, José alberto Toro Valencia, "El paradigma occidental en el proceso de creación y aplicación del derecho internacional: ¿es posible la resistencia?" In *Relaciones Internacionales en contexto*, by Rafael Tamayo Franco - Compilador, 71-82. Medellín, Fondo editorial Universidad EAFIT, 2009.

3 *Ibid.*

4 *Ibid.*



difference as a positive constructive reality, instead of a constant conflict detonator. Realism instead would justify the homogenization as a consequence of the anarchical nature on the international system and will lead to the creation of laws that permit this homogenization.

Constrains and discrimination are present within different dimensions of social groups. Political views are also a major cause of clashes and most of them do end up in violent confrontation.

## Politic differences as a cause of violent confrontation

At the political level there are some values that incarnate the fulfillment of welfare. For the western society values such as democracy and capitalism have gain over the past years the status of parameters for the well being. Some sort of model of what is desirable and correct in terms of social and political configurations. Alternative models such as socialism are out of the question, in some cases even considered to be against the core values that promote the well being. But the truth is that this is not the last word on the matter, there are actually other State configurations, other forms of political power. Are they any better or worse that Democracy? Are they against the fulfillment of the human person? To answer that question it is a must to put under the scope each and every single one of those sates, as it is always necessary when dealing with anything relative to social beings. Generalizing is a dangerous mistake and can lead to the most dreadful consequences. What seems to be working in one context not necessarily will do so in a different one with a different configuration. Trying to force states to fit in the democracy or capitalism puzzle can result in confrontations and eventually in war. That is the reason why International law strongly defends the principle of self-determination. Nations should be the only ones entitle to choose which configuration they will follow; they are the only ones that truly know the nature of their group and will pursue the configuration that fits the best with their own particular context.

International law acts through different instruments in the search of international peaceful coexistence. Treaties have always been one of the most powerful instruments International Law relies on. Their binding character is some how a guarantee if not of complete fulfillment at least of not complete and open disregard of the obligations agreed upon with the treaty. This beneficial characteristic of treaties is especially important for issues such as human rights. Even though it is well known that there are in fact several violations to human rights, some of them carried out by sates themselves world wide, treaties are a fundamental figure in the recognition of those fundamental rights and they do help regulate their violation. As discouraging as this may sound, things could be much worse both at the national and international level without the regulating hand of treaties and International Law<sup>5</sup>.

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5 Beth Simmons, "Las Relaciones Internacionales en tiempos de crisis" *La movilización para los derechos humanos: el derecho internacional en la política doméstica*. Bogotá, a: Segundo congreso Red Colombiana de Relaciones Internacionales, 2011.



## Treaties: International Law's sculptors or constraints?

Treaties are one of the primary sources of International Law<sup>6</sup> and as such they shape the former. When states decide to adhere to a treaty they are limiting their actions to what they have agreed upon by expressing their consent and fulfilling all the requirements for the treaty to enter into force. The binding nature of treaties makes them one of the main instruments used by International Law to defend Human Rights. States have to fulfill the obligations they have committed themselves to by consenting to the treaty; any action that will go against the treaty can be legally punished. This gives a formal character to the fight of International humanitarian organizations.

Treaties have also a flexible character, by the use of reservations states could actually legally speaking be aligned in the human rights defense standards and at the same time undertake practices that go against the welfare of its citizens. International Law sources and instruments have been designed with the purpose of avoiding such practices. An example of this flexible character is the Genocide convention case of the International Court of Justice of 1951 in which is stated that:

“Reservations are permissible except to the extent that they are prohibited by the terms of the treaty itself or are contrary to its object and purpose”.

In the particular case of the Genocide convention, the objective was to secure a widespread agreement. Allowing reservations enabled a greater number of states to accept the treaty. States had the possibility to adjust the details of the norms to their particular needs, and still accept the central legal obligation of the treaty<sup>7</sup>, which is in general a legal possibility given by the Vienna convention on the law of treaties of 1969.

It can be very difficult to actually persecute a state that is trying to bad perform the law in this manner. The fact that there are some states that actually mislead International Law has created a phenomenon of paranoia upon people, and Arab states have suffered once more from the tendency to generalize and spread stereotypes. This problematic can cause a confusion between the use in bad faith of legal instruments as the reservations and the actual use in good faith of such instruments.

The aim of these legal instruments is to allow states to adapt their own particular realities into the law. The positivist character of law does not imply a rigid one. There is the possibility to shape law into specific contexts, always regarding the basic principles for which it stands. If this possibility didn't exist, International law would become something obsolete, useless and even harmful. Law must capture the necessities and essence of the social groups it intends to pro-

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6 Rosalyn Higgins, *Problems and Process, International Law and how we use it*, Oxford, Oxford university Press, 2004.

7 PaoloCarozza, “Subsidiarity as a Structural Principle of International Human Rights Law” *The American Journal of International Law*, vol. 97, no. 1, January 2003, p. 38.



tect, and even thought it works under some guiding general principles; it should do so always regarding the heterogeneity of the people it is trying to protect. Pluralism has to be one of the main concerns of International Law. The people in charge of shaping it must keep finding ways to successfully integrate diversity and welfare. The only way to do this is to perceive diversity as something that adds value to the human and states interaction. Instead of labeling it as the enemy or the opposition, fighting it or condemning it, integrating it to its essence, recognizing the power of that diversity and implementing mechanisms that will assure its continuum. Treaties have the power to make states go a step closer into this end, but they have to be carefully design because there is always the danger of them ending up actually doing the opposite. Instead of being a motor for human integration and tolerance for difference they could become a straitjacket that actually narrows the possibility of integration. If International Law ignores these vital differences, it will promote confrontation among social groups. There will be a favored group that regards itself as the one acting under the legal principles and therefore with the right to submit the other social groups to their rule and this of course will generate inconformity and violence.

Human rights can be affected by this situation too and as paradoxical as it might seem, the dependence and promotion of human rights could provoke violent confrontations of different natures.

## Human rights affected by homogenization

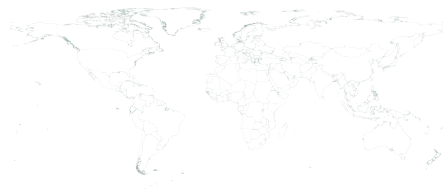
There seems to be a radical and irreconcilable difference between the concept of Human Rights and pluralism. Many consider that Human Rights should respond to a universal character, in order for them to truly assure the same rights to all people. But by doing so, they would be clearly going against the definition of pluralism<sup>8</sup>. Human rights would become an excuse to homogenize and persecute people from different cultural and religious backgrounds, trying to make them converge into one single group, with a standardized conception of welfare. This notion can and actually is highly debated. In reality people have different conceptions of welfare. What seems to be fundamental for some could be merely a banality for others or could even be conceived as something that is actually going against their own definition of welfare. In some cases these perceptual clashes are quickly made a side, not representing a true obstacle for international or intercultural approximation, but in some other cases these clashes generate major inconveniences, which when left unattended can result in such serious instances as war itself..

The misunderstandings generated by cultural and religious clashes are by far the biggest generators of violent confrontation<sup>9</sup>. Over the centuries social communities have fought each other because of religious differences; Jewish people crucifying Christians, Muslims and Christians killing each other in Crusades, Christians persecuting Jewish during the inquisition. The list goes on and

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8 *Ibid.*

9 Huntington, Samuel P. "The clash of civilizations?" *Foreign Affairs*, vol. 72, 1993, p. 22.



on. There is something deeply frustrating about these differences; it is the fact that there is no way to identify who is right or who is wrong. The reason why there is no way to settle this is because there just isn't a final single truth regarding these issues and there will never be.

Religious confrontations are latent, they are everywhere. One could even say that they are shaping the current International Relations' path and the reason why they have the power to do so, is because religious and cultural beliefs lie in the very core of human beings<sup>10</sup>. When one of these fundamental beliefs is even slightly disrespected, human beings are willing to fight no matter which are the consequences to preserve their beliefs. Bearing this in mind human beings can either recklessly keep fighting each other or try to find an understanding zone, one where there is no right or wrong, no model to be, just different paths for different people with different beliefs. But if instead members of different social groups decide to keep stereotyping the others, then nothing will change. Pointing out flaws at each other and pretending others will be better by following the precepts of one single social entity only helps to widen the gap between each side, making communication much more complicated and ineffective, more than useless, it is harmful for coexistence.

Social sciences have identified this complex problem and have been able to recognize its influence in interaction. This might be at least a first step into reconciliation. But in order for those differences to stop generating the same outcomes over and over, many disciplines have to be involved in the rapprochement process. The International System is a complex entity, which is affected and driven by many factors. International law is definitely one of the crucial points in this situation.

International law must deal with the setback that arises from cultural and religious confrontation, and here is exactly where the debate begins. Is it possible to assure some basic rights without falling into the standardization and homogenization of social groups? How to aim and work for a common end when it is not clearly defined? Until which point is the intervention intended to promote welfare justified? These are just some of the many elements playing in this case, a case with many parties, each defending their own ideal on how things should be managed and each claiming to seek the greater good, a case that easily falls into relativism, because it deals with such serious issues that a final single verdict no matter which will cause disconformities and objections. This makes the intervention of International law necessary and extremely complex at the same time. That is why many criticize international organizations. Some even label them as ineffective, but the truth is that these organizations have the arduous task of putting order within anarchy, of balancing the inherent unbalance of the International System. Without them complete chaos would have a free corridor to rule.

It is very important to analyze in a deeper manner the role of human rights in the international system, because they could have a dual character, they could be a double edged sword, which can be extremely harmful.

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<sup>10</sup> Geert Hostede, G.J. Hostede *Cultures and Organizations: software of the mind*. New York, McGraw-Hill, 2005.





## At the top of the international values' pyramid

Ever since the French revolution and the universal declaration of Human Rights, a universal concept of well being has been conceived and attempts have been carried on by the western societies to spread it into a globalized scope. In spite of the discussions that arise from the actual way in which some states protect its citizens' rights, there appears to be a general consensus on the essential character of Human rights and the importance of the human person. Thus all organizations must be at his service. Any thing that could represent harm for the human being or an obstacle for him to live in dignity is not well regarded and must be neutralized seeking the prevention of any further damage.<sup>11</sup>

Some might argue that there is some sort of hierarchy in terms of rights and by this logic; human rights must be at the top of the pyramid. But this is not the issue in which opinions diverge, is the application of those universally recognized human rights in which it does.

Some Islamic countries are highly criticized for being theocracies. The application of Sharia is pretty much condemned by the western societies. There are many claims of women's rights being violated by this law. Many of these claims might be accurate, but some others might just be the consequence of ignorance. Westerners tend to fear and reject the unknown and welcome what resembles them and theocracy and Sharia does not resemble western political or law tradition, at least not at first view. But catholic conservative States might in some aspects be as influenced by religion as Sharia follower States might be too.

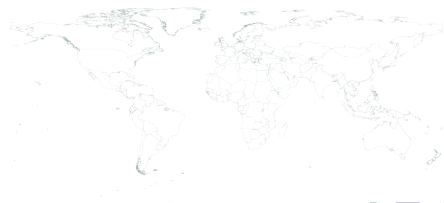
When a situation is evaluated only under a western perspective, there is a high risk of leaving a side many shades of the entire kaleidoscope of possible options and this makes interaction much more difficult and represents an obstacle to obtain a widely accepted settlement. There are at least two sides of one single confrontation, each sees their arguments as valid, International Law must then bring about the adequate conducts to conciliate this two sides. It must be such an impartial judge of the situation that there won't be any room for claims of favoritism for any social, political or religious group in particular.

Human rights are sometimes used as an excuse for some actions done by the States. Actions with hidden intentions, which go against the equilibrium of the international relations, therefore most of the time they also go against International Law.

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<sup>11</sup> Op. cit., "Subsidiarity as a Structural Principle of International Human Rights Law".





## Human rights' underlying issues

International organizations which have been created through international treaties work to promote and defend human rights. The UN is the clearest example of an international organization created through a treaty with the purpose among many others of

“...promoting and encouraging respect for human rights and for fundamental freedoms”<sup>12</sup>.

Now this is easy to say but hard to accomplish, especially when it seems as if the efforts to accomplish this go against some of the other basic principles of the organization itself such as:

“To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples...”<sup>13</sup>

Then again the homogenization aspect of one single definition of welfare seems to be in some degree against the notion of self-determination. There is the possibility that when States try to intervene into other States' context believing that they are some how “exporting” the right approach to matters such as human rights, they might actually be doing the opposite; violating some other rights of that State.

It seems quite clear for some that the neutralization of the treats to the so call universal values incarnated by human rights is something that must be accomplish even if it represents a direct intervention on the affairs of other States. The argument here would be that if there is something that keeps social communities from obtaining a common good in a self-sufficient manner, then the intervention of another community would be needed and justified by the good intention of achieving the greater good for this former community.

The United States invasion to Iraq was said to be intended to spread democracy into this territory. Although many speculations can and actually have been done on the true objective of this intervention, one thing is clear; this intervention violated one of the core principles of International Law, and even though it seems as if nothing would be done to persecute the main actors in this law break, it is widely recognized and pointed out even by international organizations such as the United Nations as a violation of the sovereignty principle and actions against those who lead the intervention will be taken. This invasion violated the specific conduct established by the United Nations' Security Council, which allows only some very specific and controlled exceptions to the use of force by states. This invasion was undertaken under the title of self-defense, but it was so deviated from the actual exception figure of self-defense set by the Security council that it actually generated a new figure of exception to the use of force known by the scholars as the anticipatory or preventive self-defense, figure which

12 Nations, United. “Charter of the United Nations.” San Francisco, 1945.Chapter I. Purposes and principles.Article 1, paragraph 3.

13 Nations, United. “Charter of the United Nations.” San Francisco, 1945.Chapter I. Purposes and principles.Article 1, paragraph 2.



is not accepted by the Security council and in general not by International Law. State's diversity implies an evaluation of each reality to decide the optimal implementation of law. International Law is constricted by its positivist nature to stick to some unchangeable rules. Therefore it is necessary the recognition of some basic objectives to trace the norms to follow in the search of those objectives.

## Choosing a direction without constraining rights

Positivism allows International law to materialize its objectives<sup>14</sup> and from there to draw a general plan of action. In consequence there must be some sort of consensus on which are the topics the law will seek to regulate and in which are the expected outcomes from such regulation, if not all efforts will be aimed at different directions and progress will be affected by the trace of a blurry goal. The former does not imply that all states must be ruled in the same matter or that all people must believe in the same things.

Human dignity, justice and equal and inalienable rights are some of the cornerstone values in which International Law traces its actions. Those are the foundation for freedom, which is one of the values that triggers the highest controversy in International Relations. For some, freedom is fundamental for the flourishing of the human being<sup>15</sup>; any attempt against freedom is also an attempt against human welfare. To force someone to do something that goes against their will, using either fiscal or psychological constraints will be a violation to their freedom.

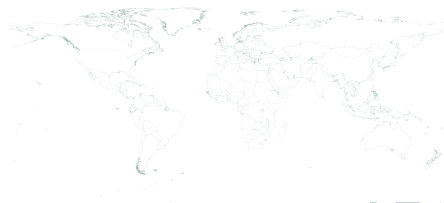
The freedom of religious belief is linked with the full development of the human personality. Therefore people should be free to believe and practice any cult. As long as they do not violate someone else's freedom, people should be able to choose their spiritual paths without being marginalized, such capacity is fundamental for human dignity. A pluralistic approach is necessary in here, since there will never be a consensus on religious matters, and the disrespect of these matters has caused all along human history conflicts between social groups and will always continue to do so.

The use of burqas and hijabs, which is extremely controversial, illustrates some of the western society's concerns regarding the violation of human rights, concern which can actually turn into discrimination itself. From a western perspective this is against women's rights it represents discrimination, ergo inequality between men and women and also a violation to freedom. But the Muslims argue that the use of burqas and hijabs are beneficial both for women and men. Under their perspective it protects women from being abused and men from being tempted. Beyond the social aspect of this issue lies the legal one. A final verdict supporting either one of these statements would cause a dichotomy. If International Law is to protect States and its people's freedom, then it would be mandatory to prohibit the use of burqas

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<sup>14</sup> Peter Malanczuk, "History and Theory" in Akehurt's modern introduction to International Law, New York, Routledge, 1997, p.15.

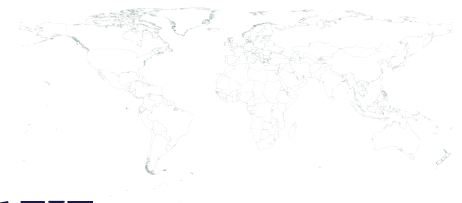
<sup>15</sup> *Op. cit.*, "Subsidiarity as a Structural Principle of International Human Rights Law".



and hijabs which promotes inequality. But by doing so it would be going against the free will of the women who want to use burqas and hijabs, therefore at the same time it would be a violation to their freedom. Not to mention that this would also violate the principle of self-determination.

International Law recognizes the importance of religious belief freedom promotes and protects it. People from many states still don't recognize it and attempt to violate this right. Both at the national level, when there are some individuals trying to constrain this freedom from other nationals and at the International Level, when both individuals and the government unite against another State's religious belief. Some times the clash materializes into violent actions and in these cases International Law has the power to regulate or punish such actions, but when the clash doesn't materialize into a violent action and merely stays in the psychological level International Law is unable to act since there is no evident proof of the discrimination. This International Law impossibility is worsening by the fact that it can provoke some of the worst and most violent reactions. The generalized discrimination against people from Arab States is one of those cases; most of the people associate Muslims with terrorist or with violent people. This is not only an unfair discrimination but also one with the potential to provoke a violent reaction from the Muslim community. It is unfair to judge all the members of such a broad religious community by the acts of a few. There are violent Muslims and violent Christians, peaceful Muslims and peaceful Christians and alternatively ethical people who live without religion following the law and unethical people who live without religion and break the law. Behavior is not determined by a religious view. Religious discrimination evidences a lack of knowledge of the true vast majority of the Muslims. This discrimination is psychological violence, but the victims of this violence have no possibility to claim against this violation. On the other hand a violent reaction caused by the provocation can be judge and punished. Now this disparity which International Law is unable to detect and tackle is present in the every day states' interaction. It's something that slips out of the domain of the law of the war. But from my perspective for these specific cases the blame should upon the provokers as well as on the authors of the violent action.

Peaceful coexistence requires many favorable conditions and assertive positions from all the parties involve. Until the day states recognize and value their diversity there will always be confrontation among them. Generalization is not an option, pluralism is and this pluralistic view must guide all institutions involve in the International System.



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