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Editor's Introduction

Welcome to the Nineteenth Volume of *Journal of Law and Social Deviance (LSD Journal)*, an independent, peer-reviewed journal. *LSD Journal* encourages submissions from a wide range of professionals, researchers, and scholars in a variety of fields. Within our broader interest in social deviance and the law, we are particularly interested in how law creates, inhibits, or challenges deviant behavior, especially as it evolves from, responds to, or inspires the animal kingdom, art, design, structure, pop culture, hate, religion, sex, illness, work, drugs, terrorism, and youth. Volume Nineteen is about conservation and utilizing organic means. Traditional schemas and renovative proposals celebrate methods that may save. Each article examines how best to protect and employ standard wisdom. Globalized, national, and acute pains are treated with cutting edge solutions to win new support. Solid strategies develop lasting paradigms. *LSD Journal* remains committed to publishing articles, essays, and book reviews that strongly represent the journal's niche and offer readers important, substantive, and useful literature.

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**BLIND RHYME:
THE REASONABLE PERSON
STANDARD VIOLATES THE FIRST
AMENDMENT**

Carmen M. Cusack

I. INTRODUCTION

An impotent man reacted poorly to the taunts of a prostitute.¹ He became violent.² Murder ensued.³ When tried, he claimed that a reasonable impotent man would similarly have reacted.⁴ The court held that the reasonable person standard is a fictitious standard unifying all people.⁵ *Ad hoc* adaptations would lead to inconsistencies.⁶ That persuasive explanation has guided the development of the law.⁷ Yet, several adaptations have arisen.⁸ Since *Bedder*

¹ *Bedder v. DPP*, 1 W.L.R. 1119 (1954).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Bedder*, 1 W.L.R. 1119.

⁸ *See* Section II.

v. *DPP*⁹, people have further classified themselves and others; and now, the classifications have become restrictive.¹⁰ Meanwhile, the reasonable person standard has constricted speech for those seeking to avoid penalization and liability.¹¹

The reasonable person standard challenges the First Amendment of the United States Constitution.¹² It may violate the First Amendment when the law requires people to define their persons or ideas according to standardized ideas.¹³ The First Amendment grants the right to free speech, but the reasonable person standard requires individuals to comply with social norms.¹⁴ Violation of norms incriminates and subjects violators to liability.¹⁵ Though behavior must be reasonable under the circumstances, circumstances are composed of subjective scenarios, facts, and observations.¹⁶ For

⁹ Bedder, 1 W.L.R. 1119.

¹⁰ *Id.*

¹¹ *Id.*

¹² Cal. Civ. Code Ann. §§1746–1746.5 (2009). U.S. CONST. AMEND. I.

¹³ U.S. CONST. AMEND. I.

¹⁴ Brown v. Entertainment Merchants Ass’n, 564 U.S. 786 (2011).

¹⁵ *Id.*

¹⁶ *Infra* Sections II and IV.

example, gender norms may create distinct standards of reasonableness.¹⁷ Overly broad standards and underinclusive polices may violate the First Amendment.¹⁸ This Article presents case law about the reasonable person in Section II.¹⁹ Section III discusses free speech standards, judicial review standards, and criminal law.²⁰ It asserts that the reasonable person standard violates the First Amendment because without fairness, a legal standard is an ambiguous prior restraint on speech that is overbroad.²¹ Restraints should be narrowly tailored and use the least restrict means.²² Section IV shows how the Equal Protection clause in conjunction with the First Amendment may be violated by the reasonable person standard.²³ It also discusses examples such as minority, competency, and mental state.²⁴ Gender, sex, and sexual

¹⁷ *Id.*

¹⁸ U.S. CONST. AMEND. I.

¹⁹ *E.g.* United States v. Stevens, 559 U.S. 460 (2010).

²⁰ *E.g.* Board of Airport Comm'rs of Los Angeles v. Jews for Jesus, 482 U.S. 569 (1987).

²¹ U.S. CONST. AMEND. I.

²² *Boos v. Barry*, 485 U.S. 312 (1988).

²³ U.S. CONST. AMEND. XIV.

²⁴ *Infra* Sections IV.

orientation are explored.²⁵ One question is how does a reasonable transperson understand and comply with a duty to disclose material facts to gain sexual consent?²⁶ Section V concludes.²⁷

II. REASONABLE PERSON STANDARD

Cases interpreted according to the reasonable person standard where speech was at issue, but not hate crimes or provocation, considered nuanced characteristics to determine whether behavior was reasonable.²⁸ Circumstances were described after the fact and standards were developed or applied in response to the public's classification of the individual or individuals whose conduct was under consideration.²⁹

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Infra* Section V.

²⁸ *Brown*, 564 U.S. 786. *Nevada Comm'n on Ethics v. Carrigan*, 564 U.S. 117 (2011).

²⁹ *Brown*, 564 U.S. 786 (2011).

In *Brown v. Entertainment Merchants Association*,³⁰ the Court considered the imposition of a reasonable person standard.

California Assembly Bill 1179 (2005), Cal. Civ. Code Ann. §§1746–1746.5 (West 2009) (Act), prohibits the sale or rental of ‘violent video games’ to minors, and requires their packaging to be labeled ‘18.’ The Act covers games ‘in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being, if those acts are depicted’ in a manner that ‘[a] reasonable person, considering the game as a whole, would find appeals to a deviant or morbid interest of minors,’ that is ‘patently offensive to prevailing standards in the community as to what is suitable for minors,’ and that ‘causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors.’ §1746(d)(1)(A). Violation of the Act is punishable by a civil fine of up to \$1,000. §1746.3.³¹

The Court maintained that the reasonable person standard served a limited purpose in First

³⁰ *Id.*

³¹ *Id.*

Amendment jurisprudence.³² Sprawling interpretations and applications could not be sustained in light of the First Amendment.³³ Although community standards could be used to determine whether material entering the community is obscene, and in need of redemption, a reasonable person standard could not be used to bar violent video games or prevent minors from acquiring violent video games.³⁴ No longstanding tradition to prevent minors from accessing violent video games had been demonstrated to require the Court to uphold the law under due process.³⁵ It had not been demonstrated that parents required the government's assistance to maintain their parental authority.³⁶ Though community standards could not prevent people from giving the games to their children, the interactive experience of playing video games

³² California Assembly Bill 1179 (Act), Cal. Civ. Code Ann. 1746-1746.5.

³³ *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656 (2004); *Ginsberg v. New York*, 390 U.S. 629 (1968); *Erznoznik v. Jacksonville*, 422 U.S. 205, 212-13 (1975).

³⁴ *Stevens*, 559 U.S. 460 .

³⁵ U.S. CONST. AMEND. V.

³⁶ *Brown*, 564 U.S. 786.

demonstrated that community members in nearby and distant communities viewed the games as social.³⁷ Playing the games was a reasonable activity for minors and adults.³⁸ Yet, the standard could not be used to defend the legislature's sensitivities toward synthetic depictions of non-sexual violence.³⁹ An overly broad application of an obscenity analysis to violent video games using a reasonable person standard resulted in an underinclusive persecution of violent video games.⁴⁰ For example, violent cartoons were not barred.⁴¹ The statute did bar depictions of sexual violence in video games sold to minors, but overextended to non-sexual depictions.⁴²

In *Nevada Commission on Ethics v. Carrigan*, a law was upheld that prevented public officers from voting on matters involving cronies or relatives or

³⁷ *Id.*

³⁸ *Id.*

³⁹ Stevens, 559 U.S. 460.

⁴⁰ Brown, 564 U.S. 786.

⁴¹ Brown, 564 U.S. 786.

⁴² *Id.*

any other persons who would influence the official.⁴³

The law relied on the reasonable person standard.⁴⁴

Nevada's Ethics in Government Law provides that 'a public officer shall not vote upon or advocate the passage or failure of, but may otherwise participate in the consideration of, a matter with respect to which the independence of judgment of a reasonable person in his situation would be materially affected by,' *inter alia*, '[h]is commitment in a private capacity to the interests of others.' Nev. Rev. Stat. §281A.420(2) (2007). Section 281A.420(8)(a)–(d) of the law defines the term 'commitment in a private capacity to the interests of others' to mean a 'commitment to a person' who is a member of the officer's household; is related by blood, adoption, or marriage to the officer; employs the officer or a member of his household; or has a substantial and continuing business relationship with the officer. Paragraph (e) of the same subsection adds a catchall to that definition: '[a]ny other commitment or relationship that is substantially similar' to one of those listed in paragraphs (a)–(d).⁴⁵

⁴³ Carrigan, 564 U.S. 117.

⁴⁴ *Id.*

⁴⁵ *Id.*

The Nevada Supreme Court struck the law on First Amendment grounds.⁴⁶

The United States Supreme Court upheld the law.⁴⁷ Though the law does not impinge on due process by requiring officials to recuse themselves from private relationships, it bars them from publicly defining their relationships.⁴⁸ They are unable to vocalize and affirm the limited scope of those relationships and maintain their impartiality.⁴⁹ They are forced by the reasonable person standard to accept that the government will portray their relationships as being more vital and influential than their commitment to the government and their work.⁵⁰ At any rate, the spirit of the law protects the public and constituency by requiring lawmakers to be impartial.⁵¹ Legislators must avoid cronyism and nepotism, and disclose financial interests while avoiding criminal enterprise.⁵² Yet, the reasonable

⁴⁶ Carrigan, 564 U.S. 117.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Carrigan, 564 U.S. 117.

⁵² *Id.*

person standard imposes constraints on their expression of personal identity.⁵³

In *Carrigan*, a city council member consulted the city attorney about whether he was required to disclose a business relationship with a consultant working for a company proposing to build a casino.⁵⁴ The attorney advised him to disclose the relationship and he did.⁵⁵ He voted on the matter and was censured.⁵⁶ Nevada’s Supreme Court protected voting rights and used strict scrutiny to find that the catchall provision “[a]ny other commitment or relationship that is substantially similar’ to one of those listed in paragraphs (a)–(d)” was overbroad.⁵⁷ The Court found that although the statute barred Carrigan from participating in any discussion about the proposal in the public forum, the restraint was a reasonable time, place, manner restriction.⁵⁸ The Court did not view voting as symbolic speech in this

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Carrigan*, 564 U.S. 117.

⁵⁸ *Id.*

context.⁵⁹ However, Carrigan's rejection of the reasonable person's interpretation of his capacities and sentiments was clearly unpopular and restrained speech.⁶⁰ According to the Court, Carrigan may have voted because he felt that he could express his wishes in the matter and was not intending to use his vote symbolically to describe his preference for certain individuals.⁶¹

In *Boos v. Barry*, the Court held that a police officer shares a reasonable belief about actions and intentions with other police officers.⁶² Although the reasonable person standard is evident, the legislator noted that the standard may be curtailed.⁶³ In *Carrigan*, a nuanced ethical rubric was defined by a general presumption.⁶⁴ The reasonable person would feel that certain relationships could be excessively persuasive.⁶⁵ The reasonable legislator, the

⁵⁹ *Id.*

⁶⁰ *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 573 (2002).

⁶¹ *Id.*

⁶² *Boos v. Barry*, 485 U.S. 312 (1988).

⁶³ *Carrigan*, 564 U.S. 117.

⁶⁴ *Id.*

⁶⁵ *Id.*

reasonable police officer, the reasonable family man, the reasonable bachelor, the reasonable businessperson, and the reasonable gambler may articulate distinct ideas.⁶⁶ Yet, the expressions of a reasonable member of any of these groups may not sufficiently represent protected, reasonable, important, or necessary ideas possessed by other members of the groups.⁶⁷

In *Reichle v. Howards*, the Court decided whether a First Amendment claim could be sustained for retaliation against speech when the speech appeared to have been made in conjunction with a crime and probable cause existed at the time of the arrest.⁶⁸ The Court also considered whether officers should be immunized.⁶⁹ The Court concluded that the speech was not relevant to the crime for which the defendant was arrested and a reasonable officer would not have believed that the First Amendment could be invoked in that instance to shield the

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Reichle v. Howards*, 566 U.S. 658 (2012).

⁶⁹ *Id.*

defendant from arrest.⁷⁰ A defendant was arrested for lying to the Secret Service.⁷¹ He approached the vice president at a mall and made anti-war comments.⁷² He touched the vice president's shoulder.⁷³ Secret Service agents working for the vice president believed that he had harassed the vice president.⁷⁴ The defendant claimed that their interrogation was retaliatory.⁷⁵ However, he denied touching his shoulder.⁷⁶ He had touched his shoulder, and was arrested for lying to the agents, but was not prosecuted.⁷⁷ Later, local officials brought charges for harassment.⁷⁸ Those charges were dropped.⁷⁹ He sued the Secret Service agents for retaliation.⁸⁰ The Court held that they had not retaliated because probable cause existed to arrest him for lying.⁸¹ A

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Howards*, 566 U.S. 658.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Howards*, 566 U.S. 658.

⁸⁰ *Id.*

⁸¹ *Id.*

reasonable agent would not have believed that his First Amendment right to protest against the vice president extended to a right to lie to the Secret Service.⁸² His suit before the U.S. Supreme Court did not challenge the charges brought by local officials.⁸³

Officials may be immunized when they reasonably believe that a right barring their conduct has not been clearly established.⁸⁴ Secret Service agents may have observed other people touching the vice president.⁸⁵ Their interpretation of the defendant's aggression and intent may have related to the content of the speech.⁸⁶ They may not have believed that it was reasonable to arrest him for harassment even though they felt that they were required to question him.⁸⁷ The context-specific reasonable person standard required them to participate in a cultural assessment of whether they as a group believed that the First Amendment clearly

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Howards*, 566 U.S. 658. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982)

⁸⁵ *Howards*, 566 U.S. 658.

⁸⁶ *Id.*

⁸⁷ *Id.*

could have been applied to protect the defendant from arrest.⁸⁸ Had they believed that his comments were not negative, then perhaps their perception of his physical conduct may have been different.⁸⁹ Yet, they may reasonably have interpreted the hostility of his remarks to be evidence of his intent to harass the vice president.⁹⁰ If the agents menaced the defendant in a manner that caused him to lie due to fear because they retaliated against him for making unwanted remarks, then their conduct was unreasonable.⁹¹ Yet, the reasonable person standard designed to protect officers and citizens was too vague in this case because the defendant was charged by a different organization for a crime that did not relate to his original arrest and seemed to hinge on whether the vice president felt harassed.⁹² Neither that fact nor a final factual description of the type of touch were included in the case.⁹³ Furthermore, the reasonable

⁸⁸ *Id.*

⁸⁹ *Grayned v. Rockford*, 408 U.S. 104 (1972).

⁹⁰ *Howards*, 566 U.S. 658.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *See, Hartman v. Moore*, 547 U.S. 250 (2006).

officer standard seems restrictive because any person would feel that an individual who makes physical contact after verbally challenging another may be stepping beyond the United States Constitution.⁹⁴ Therefore, the standard may need revision because it seems to require that officers only protect and serve harassed individuals when they believe that a suspect probably has committed some other crime.⁹⁵ In this case, their conduct may have violated his speech right and the requirement may have violated their right to explain that his conduct was offensive in conjunction with his intent to jostle the vice president.⁹⁶

The reasonable person standard may violate the First Amendment by requiring individuals to assume roles and make statements about their beliefs and perceptions.⁹⁷ Statements are inaccurate and subjective.⁹⁸ They are based on presumptions about

⁹⁴ *Howards*, 566 U.S. 658.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

others pertaining to similar classes.⁹⁹ The rule may undermine individuals' decency and sensitivity.¹⁰⁰ The standard allows the legislature to fabricate identity and restrict sound judgment and expressions of neutrality and impartiality.¹⁰¹ It causes people to look unfavorably on community members and the government.¹⁰² In some scenarios, a general ethos, which may be explained as a reasonable person standard, may be rational, important, or necessary.¹⁰³

III. FREE SPEECH

A. Relevant Governmental Purposes and Judicial Review Standards

Lawful speech is protected.¹⁰⁴ The government may regulate speech using content-based and content-neutral restrictions.¹⁰⁵ Content-based restrictions are subject to strict scrutiny.¹⁰⁶ They

⁹⁹ *Howards*, 566 U.S. 658.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ U.S. CONST. AMEND. I.

¹⁰⁵ *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986).

¹⁰⁶ *Id.*

must be narrowly tailored to allow as much speech as possible.¹⁰⁷ A content-based regulation of political speech in a public forum must be necessary to effectuate a compelling government interest.¹⁰⁸

The secondary effects doctrine, as originally intended, applies to local detriments incurred by the community when proprietors distribute pornography and provide access to other vices.¹⁰⁹ Regulations have been described in some cases as being content-neutral, for example zoning laws.¹¹⁰ The government attempted to suppress political speech in *Boos* using the secondary effects doctrine.¹¹¹ The U.S. Supreme Court decided that impingement on political speech was a content-based restriction.¹¹²

In *Boos*, demonstrators were required to maintain a distance of at least 500 feet from an embassy when their signs disparaged international policies or sided

¹⁰⁷ *Id.*

¹⁰⁸ *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37 (1983), at 45. *Jews for Jesus*, 482 U.S. 569. *Widmar v. Vincent*, 454 U.S. 263 (1981).

¹⁰⁹ *Id.*

¹¹⁰ *Playtime Theatres*, 475 U.S. 41.

¹¹¹ *Boos*, 485 U.S. 312.

¹¹² *Id.*

against the nation.¹¹³ The government claimed that the law was justified because it quelled violent protests and protected diplomats from indignity.¹¹⁴ The Court analyzed two clauses, a congregation clause and a display clause.¹¹⁵ It held that people could congregate and display signs outside embassies.¹¹⁶ Justices challenged the secondary effects doctrine as being a maneuver to chill speech and a method to suppress litigation.¹¹⁷ The indignity of being exposed to speech was addressed by Justices who surmised that speech is protected at times because it is critical and may offend.¹¹⁸ Emotional responses and intellectual realizations are not secondary effects.¹¹⁹ They may be primary purposes of speech.¹²⁰ Damaged self-esteem may be an intended wrench in a callous system.¹²¹ Visual bulk inspeech and unruly commentary demonstrates

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Boos*, 485 U.S. 312.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Boos*, 485 U.S. 312.

opposition.¹²² The regulation was not viewpoint-based, but impermissibly dismissed all controversy.¹²³ It prohibited the discussion of bothersome topics.¹²⁴

The government cannot bar the discussion of specific topics in public.¹²⁵ It may place content-neutral restrictions to keep the peace.¹²⁶ Those restrictions may relate to known effects of certain types of speech.¹²⁷ However, it cannot consider the expression of speech to be a secondary effect. Also, the primary effect of speech cannot be banned using inapplicable doctrines.¹²⁸

¹²² *Boos*, 485 U.S. 312. *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984)

¹²³ *Boos*, 485 U.S. 312.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.* *Playtime Theatres*, 475 U.S. 41.

¹²⁸ *Vincent*, 466 U.S. 789; *Schacht v. United States*, 398 U.S. 58, 63 (1970); *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 537 (1980).

B. Application to Criminal Law

The reasonable person standard varies throughout criminal law.¹²⁹ In some cases, a reasonable person symbolizes an objective standard.¹³⁰ In other cases, it represents prudent decision-making. Some laws require people to act in conformity with certain groups.¹³¹ Jurors may be asked to view defendants as reasonable men, women, children, etc.¹³² A reasonable person may be evaluated in light of his or her conduct, beliefs, or intent.¹³³ Groupings may be arbitrarily decided by the jurisdiction.¹³⁴ They may relate to some professions, such as standards of care (e.g., gross negligence), but not to other occupations (e.g., housewife).¹³⁵ They may evaluate the importance of some characteristics, such as blindness, but not other characteristics, such as low, yet normal,

¹²⁹ Boos, 485 U.S. 312.

¹³⁰ *Infra* note.

¹³¹ Bedder, 1 W.L.R. 1119.

¹³² *Id.*

¹³³ *E.g.*, Ariz. Stat. § 13-404 (2017).

¹³⁴ U.S. CONST. AMEND. XIV.

¹³⁵ United States v. Virginia, 518 U.S. 515, 568 (1996).

intelligence.¹³⁶ Height and weight may be relevant to reasonable person standards that are applied as a part of self-defense and provocation defenses.¹³⁷ A blind defendant may be defended under a reasonable person standard for the blind when claiming self-defense.¹³⁸ Yet, the standard suppresses authentic identification and unevenly classifies groups.¹³⁹

C. Application to Reasonable Person Standards

1. Equality

The Fourteenth Amendment states that no state can “deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”¹⁴⁰ Laws that discriminate on their face or in effect may be subject to strict scrutiny, intermediate

¹³⁶ *People v. Mathews*, 30 Cal. Rptr. 2d 330, 335 (Cal. Ct. App. 1994).

¹³⁷ *Rodriguez v. State*, 641 S.W.2d 669, 672 (Tex. Ct. App. 1982).

¹³⁸ *People v. Mathews*, 30 Cal. Rptr. 2d 330, 335 (Cal. Ct. App. 1994).

¹³⁹ *Boos*, 485 U.S. 312.

¹⁴⁰ U.S. CONST. AMEND. XIV.

scrutiny, or rational review depending on which class of persons have been subjected to discrimination.¹⁴¹ People who have consistently been victims of discrimination, such as racial minorities, may ask the Court to review the law to find that it preserves as much of their right as possible.¹⁴² The law must be necessary to perform a compelling governmental function.¹⁴³ People who regularly suffer discrimination, but have not sued as much as racial minorities (i.e., women), may ask the Court to examine laws to find that they substantially relate to an important governmental function.¹⁴⁴ All other claimants, complainants, and victims are at the Court's mercy under rational review.¹⁴⁵ Laws only need to be rational and reasonably related to a legitimate governmental interest.¹⁴⁶

The First Amendment protects people from the legislature's imposition of their reasoning about

¹⁴¹ Virginia, 518 U.S. 515.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

classes and equality, which may otherwise be used to force people to describe others, themselves, and their ideas in a manner that expresses the legislature's point-of-view.¹⁴⁷ The legislature may require people to express approval or disapproval for certain groups.¹⁴⁸ The Equal Protection clause may urge employers to express approval (e.g., part Native American heritage) and federal hiring requirements may require an expression of disapproval (e.g., crimes of dishonesty).¹⁴⁹ Although some forms of discrimination (e.g., race, sex, minority, disability, and nationality) may be illegal, other forms are legal (e.g., height, eye color, and odor).¹⁵⁰ People may express political opinions about any classifications.¹⁵¹ Government employees have limited speech rights within the scope of employment.¹⁵² They have the right to discuss

¹⁴⁷ Virginia, 518 U.S. 515.

¹⁴⁸ *Id.*

¹⁴⁹ U.S. CONST. AMEND. XIV. 49 CFR § 1572.103(b)(2)(iii).
Washington v. Davis, 426 U.S. 229 (1976); Davis v. Passman, 442 U.S. 228 (1979). 41 CFR 60-1.5(a)(7) (2020).

¹⁵⁰ Virginia, 518 U.S. 515.

¹⁵¹ U.S. CONST. AMEND. I.

¹⁵² Hansen v. Soldenwager, 19 F.3d 573 (11th Cir. 1994).

matters of public concern.¹⁵³ This includes discrimination and equality.¹⁵⁴

Police work may involve classification, group identification, and protection of equality.¹⁵⁵ A reasonable officer standard may impose on police the legislature's, defendant's, or community's belief system and classification system.¹⁵⁶ This may not benefit police, and may suppress police officers' speech.¹⁵⁷ Though police may not exercise their speech right or believe they have a right to discuss their departure from the reasonable person standard, their refinement of class-based observations benefits their profession.¹⁵⁸ Imposition of the standard erodes development of distinctions that rigidly bind the public to occasionally propitious or privileged, yet inaccurate and sometimes painful, classifications.¹⁵⁹

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Evans v. City of Indianola*, 778 F.Supp. 333 (1991).

¹⁵⁶ *Id.*

¹⁵⁷ *Evans*, 778 F.Supp. 333; *Garcetti v. Ceballos*, 547 U.S. 410 (2006); *Hansen*, 19 F.3d 573 (1994).

¹⁵⁸ *Garcetti*, 547 U.S. 410.

¹⁵⁹ U.S. CONST. AMEND. XIV.

Even officers' testimony is subject to impingements.¹⁶⁰ Their testimony is not fully protected by the First Amendment.¹⁶¹ Departmental needs weigh against full protection.¹⁶² Speech that is considered to be unprofessional may not outweigh compelling departmental needs.¹⁶³ The reasonable person standard, sometimes described as the reasonable officer standard, may determine which concepts an officer may express.¹⁶⁴ A police department's policies and judgment determine how speech will be restrained.¹⁶⁵ It may not be clear to officers until after they complain about restraints.¹⁶⁶ Complaints may be viewed as personal matters, even when they are voiced in the press.¹⁶⁷ They may be unprotected.¹⁶⁸

A reasonable police officer may be one who would profile a citizen according to particular

¹⁶⁰ *Boos*, 485 U.S. 312.

¹⁶¹ *Hansen*, 19 F.3d 573 (1994).

¹⁶² *Boos*, 485 U.S. 312.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Boos*, 485 U.S. 312. *Garcetti*, 547 U.S. 410.

¹⁶⁶ *Angle v. Dow*, 822 F. Supp. 1530 (S.D. Ala. 1993).

¹⁶⁷ *Boos*, 485 U.S. 312.

¹⁶⁸ *Id.* *Garcetti*, 547 U.S. 410.

groupings.¹⁶⁹ Expressing resentment, disagreement, new information, progressive attitudes, or alternative points-of-view may result in dismissal.¹⁷⁰ An officer giving testimony potentially could be fired for explaining a belief that suspects appeared to be mixed-race rather than merely White, Native, Asian, or Black.¹⁷¹ An officer accused of racial profiling of Black males may be unprotected under current First Amendment standards.¹⁷² It may be unreasonable to say that because the officer suspected them of committing a crime, he did not merely investigate under a pretext to discriminate against them because they are Black and male.¹⁷³ Though the defendants may identify with those classifications and may be identified that way by the community or the department, an individual officer may or may not have conformed to other officers, but independently may have viewed the suspects as possibly being transgender, female, mixed-race, or ethnic, and

¹⁶⁹ *Boos*, 485 U.S. 312.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* *Garcetti*, 547 U.S. 410.

¹⁷² *Boos*, 485 U.S. 312.

¹⁷³ *Id.*

possibly culturally aligned with an alternate racial upbringing or background.¹⁷⁴ The reasonable person standard may objectively measure the officer's accuracy and professionalism, yet fights against stereotypes about officers and citizens using the officers' reputation and alleged inferences.¹⁷⁵ Some of the benefits may not be necessary, and may not be used to abridge officers' speech.¹⁷⁶ Victims similarly may be situated.¹⁷⁷ Those who identify as mixed-race may fear an absence of protection when they identify with the roots of those who are less protected systemically or in practice.¹⁷⁸ The phenomenon extends to youth, age, competency, mental state, sexuality, gender, sex, and other self-described classifications and labels.¹⁷⁹ These examples suffice to show how criminal law suffers when imposition of the reasonable person standard results in an abridgment of speech.¹⁸⁰

¹⁷⁴ *Id.*

¹⁷⁵ *Whren v. United States*, 517 U.S. 806 (1996).

¹⁷⁶ *Id.*

¹⁷⁷ U.S. CONST. AMEND. XIV.

¹⁷⁸ *Id. Virginia*, 518 U.S. 515.

¹⁷⁹ *Boos*, 485 U.S. 312.

¹⁸⁰ *Id.*

2. Gender

Sexual or gender-based discrimination subject to evaluation under the reasonable person standard may cause hostile environments.¹⁸¹ Hostility and harassment may be primary and secondary effects of censorship.¹⁸² People who administrate may rely on reasonable person standards to communicate with subordinates.¹⁸³ Limitations in public and private workplaces that are subject to governmental regulations may affect the climate, culture, and standards. Reasonable person standards may not impermissibly impose distinct duties on various classes.¹⁸⁴ However, improved sensitivity to individuality, self-classification, inner-group oppression, and other forms of segregation, adversity, and hostility may emerge as a result of better constructed objective and subjective standards.¹⁸⁵ Improvement of the reasonable person

¹⁸¹ *Id.*

¹⁸² *Playtime Theatres*, 475 U.S. 41.

¹⁸³ *Garcetti*, 547 U.S. 410. *Boos*, 485 U.S. 312.

¹⁸⁴ *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 113 (1949). *Craig v. Boren*, 429 U.S. 190 (1976).

¹⁸⁵ *Boos*, 485 U.S. 312.

paradigm may protect those who express sensitive opinions that contravene restrictive standards fostering hostility and contributing to stagnant attitudes and policies.¹⁸⁶

a. Male

The male sex may be described as being both privileged in comparison to and disadvantaged by female sexuality.¹⁸⁷ Males are politically advantaged.¹⁸⁸ In the political realm they may dominate by asserting their force, patriarchal unity, and command over the home where women are falsely promised footholds.¹⁸⁹ Yet, they may complain that female or effeminate sexuality manipulates them and conquers their virtues.¹⁹⁰ In the workplace they are less likely to prevail using theories of homosexual or heterosexual sexual harassment or hostility because they are presumed to

¹⁸⁶ *Id.*

¹⁸⁷ *See* Stevens, 559 U.S. 460.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *See* Virginia, 518 U.S. 515.

be more politically powerful than women and gay men.¹⁹¹ Reasonable person standards may not take specific moral traditions under consideration.¹⁹² They may generalize the reasonable perspective of a homosexual male, homosexual female, heterosexual male, and heterosexual female.¹⁹³ The effect is that heterosexual males are unable to complain about the discomfort they feel.¹⁹⁴ A reasonable person may presume that males feel that they may complain without incurring disciplinary action.¹⁹⁵ Heterosexual males may not only feel disadvantaged because they are perceived as being unequally powerful, they may feel pressure to maintain a wall of silence to promote that image.¹⁹⁶ The image may provide the only sense of safety they feel in comparison to others whose sensitivities have been more publicly promoted in recent years.¹⁹⁷ While

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ Craig, 429 U.S. 190.

¹⁹⁴ *Id.*

¹⁹⁵ See Garcetti, 547 U.S. 410.

¹⁹⁶ See *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 113 (1949).

¹⁹⁶ Boos, 485 U.S. 312.

¹⁹⁷ Craig, 429 U.S. 190.

men may continue to prevent the equal treatment of minorities in the workplace, the conduct of some cannot permit those who have been harmed to feel unified or be grouped with those who aggress.¹⁹⁸ Limitations on speech distort discourse and do not maintain a standardized method for thinking or behaving.¹⁹⁹

b. Female

Anecdotally, women have expressed that they sporadically or predictably experience tremendous bursts of passion, worry, joy, fear, anxiety, and other emotions that prevent them from behaving in conformity with men.²⁰⁰ Although men may have benefited from workplace conditioning for a greater number of years and may guide social and behavioral standards, women have been expected to conform rapidly to dry sentiments throughout the brief duration of the development of feminism.²⁰¹ Their

¹⁹⁸ See *Virginia*, 518 U.S. 515.

¹⁹⁹ *Boos*, 485 U.S. 312.

²⁰⁰ *Virginia*, 518 U.S. 515.

²⁰¹ *Id.*

points-of-view may be feminist issues and political speech.²⁰² Few women capably politicize emotional femininity and when asked to identify their emotions in legal matters they may second guess their right to liberally divulge their thought processes.²⁰³ A reasonable person standard should consider the underlying unity between women and consider that betrayal may be despised.²⁰⁴ Women who treat other women as if they have fabricated their entitlement to feel dignified, overly emotional, sensitive to mistreatment, and receptive to good treatment are considered to be outsiders.²⁰⁵ Any standard that groups persecutors and neglectors with the majority may be constructed by those who seek to profit from the demise of sensitive, fair, and thoughtful individuals.²⁰⁶

²⁰² Boos, 485 U.S. 312.

²⁰³ Craig, 429 U.S. 190.

²⁰⁴ Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982).

²⁰⁵ See generally Mississippi Univ. for Women, 458 U.S. 718 (1982).

²⁰⁶ See Washington v. Davis, 426 U.S. 229 (1976); Davis v. Passman, 442 U.S. 228 (1979).

c. Trans

A trans identity may be complicated.²⁰⁷ A reasonable trans person may instinctively be able to identify and respond to transgender and cysgender presentation.²⁰⁸ Trans persons must disclose material facts, and yet a reasonable transperson may believe that one's gender has obviated itself.²⁰⁹ In private matters, a reasonable transperson may genuinely and responsibly believe that one party sufficiently informed the other party of one's sex, sexuality, and gender due to the conjunctive employment of four factors. First, information is communicated as a result of the language used. For example, "I'm really a man" or "I'm really a woman;" or "I'm not original. I am altered." Second, one must gain informed consent, for example by saying "Do you think it's OK for me to be trans?" Another example is, "Before we go further, you should know more about me. I am transsexual." Third, context intimates (e.g., meeting

²⁰⁷ *Bostock v. Clayton County*, 590 US _ (2020).

²⁰⁸ *See Virginia*, 518 U.S. 515.

²⁰⁹ *Id.*

at gay bar). Fourth, one's appearance may contribute to the communication of one's sex, sexuality, and gender. For example, a transman may be extraordinarily small, such as being 40 years old, 90 pounds, and five feet tall. A transwoman may be very tall, such as twenty two years old, 200 pounds, and six feet six inches tall.²¹⁰ A reasonable person knew or should have known that he or she was alternatively biologically identified by society and behaved reasonably under the circumstances; however some people do not know as a result of misinformation, intersex confusion, or state of mind.²¹¹ Any reasonable person would disclose one's true sex, not deceive using gender misrepresentation.²¹² Transpeople who do not engage in sexual conduct with suitors may rightfully argue that an overly broad reasonable person standard violates the right to privacy.²¹³ They may also argue that unsolicited attention (e.g., gift) that later invites the disclosure of

²¹⁰ Craig, 429 U.S. 190.

²¹¹ See generally Mississippi Univ. for Women, 458 U.S. 718 (1982).

²¹² *Id.*

²¹³ U.S. CONST. AMEND. V.

private information under the reasonable person standard may violate the First Amendment (e.g., best female actor prize).²¹⁴ In private, public, criminal, civil, and other contexts, one may possess a right to explain one's knowledge of one's self.²¹⁵ Would-be sex partners seeking to exercise sexual rights should seek information, yet reasonable person standards cannot abridge speech rights.²¹⁶ A penumbra extends the right to privacy to protect people from each other not just the government (e.g., intentional infliction of emotional distress and sexual battery tort).²¹⁷ Gender-presenting alone, without intent to misrepresent may not violate a reasonable person standard; generally, application of the standard to a transperson's detriment may violate free speech.²¹⁸

²¹⁴ U.S. CONST. AMEND. I.

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ U.S. CONST. AMEND. V.

²¹⁸ U.S. CONST. AMEND. I.

IV. CONCLUSION

The reasonable person standard cannot be applied to the detriment of free speech.²¹⁹ The First Amendment may protect people who explain themselves and express ideas that benefit the system.²²⁰ The First Amendment guarantees that unpopular, but not illegal, speech will not be subjected to the legislature's control.²²¹ Norms should not incriminate, but rather, should unify and allow liberty whenever possible.²²² Subjective observations and experiences, such as gender, importantly may create differences that will be articulated by those who do not conform to normalized standards of reasonableness.²²³ The First Amendment may not be violated by suppressive standards.²²⁴ This Article does not encourage exceptionalism, but recognizes changing barriers.²²⁵

²¹⁹ Cal. Civ. Code Ann. §§1746–1746.5 (2009). U.S. CONST. AMEND. I.

²²⁰ U.S. CONST. AMEND. I.

²²¹ *Brown*, 564 U.S. 786.

²²² *Id.*

²²³ *Id.*

²²⁴ U.S. CONST. AMEND. I.

²²⁵ *E.g.* *Stevens*, 559 U.S. 460.

The law must be uniform, but cannot be so rigid as to bind members of the system and citizens detrimentally to groups for the convenience of the government.²²⁶ Legal standards must conform to the spirit of the law, therefore, laws that abridge expression must be narrowly tailored and use the least restrict means.²²⁷ The Fourteenth Amendment protects vulnerable classes of people, but cannot be used to lure people from exercising their First Amendment right.²²⁸ The Article concludes thus that the reasonable person standard, and varied adaptations, may violate the First Amendment's guarantee.²²⁹

²²⁶ *E.g.* *Jews for Jesus*, 482 U.S. 569.

²²⁷ *Boos*, 485 U.S. 312.

²²⁸ U.S. CONST. AMEND. XIV. *United States v. Carolene Products Company*, 304 U.S. 144 (1938).

²²⁹ *Boos*, 485 U.S. 312.

LAW ENFORCEMENT EFFORTS REDUCING FLOOD RISK IN PALEMBANG CITY

Azhar Azhar*

I. INTRODUCTION

The constitution 1945 indicates that the enforcement of environmental laws is in the articles relating to human rights. One of the articles is article 28 paragraph 1 of the constitution 1945 stated as follows: "Everyone has the right to live in physical and spiritual prosperity, to live, and to get a good and healthy environment and the right to get health services."¹ The article is the basis that the environment must be important in the context of the protection of human rights in Indonesia. Thus, enforcement of environmental law is an important element in the protection of human rights. It is

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¹ Constitution 1945.

expected that the enforcement of environmental law in the community is capable and empowered to adapt to offset changes in the development process, which includes economic, social, cultural and ecological/ environmental aspects. One of the impacts of development related to ecological aspects is the phenomenon/ event of flooding.

In recent decades, flood events have increased globally.² As a result, an increase in the incidence of flooding also has had an impact on the risks that must be accepted by the community in terms of physical, social and economic aspects, such as the destruction of infrastructure, constraints on economic activities, loss of livelihoods, and not a few fatalities. The International Federation of Red Cross (IFRC) (2010) noted that among other types of natural disasters, flooding is a disaster that causes the most severe losses and damage. Floods have had a direct impact on an average of 99 million people per year

² “World Disaster Report 2010: Focus on Urban Risk,” International Federation of Red Cross and Red (IFRC) Crescent Socitye, Geneva (2010).

worldwide from 2000 to 2008. In fact,³ it noted that there were 178 million people who were directly affected by the flood disaster in 2010. The total losses caused by floods from 1998 to 2008 reached US \$40 trillion.⁴

As a center for social and economic growth from the local to the global level, urban areas are one of the areas on the surface of the earth that are vulnerable to floods. This is caused by social and economic activities of the community, such as rapid population growth, growth in economic activities, environmental degradation, and the process of urbanization in urban areas that are not supported by adequate urban planning and management.⁵

The risk of flooding increases with the emergence of slums in urban flood plains, densely populated settlements without catchment areas, and inadequate urban drainage capacity. Besides that,

³ Abhas K. Jha, Robin Bloch, & Jessica Lamond, *Cities and Flooding: A Guide to Integrated Urban Flood Riskmanagement for 21st Century*, WORLD BANK PUBLICATIONS (2012).

⁴ A. Jha, T. Minner, & Z. Z. G. Stanton, *Building Urban Resilience: Principles, Tools and Practice*, The World Bank (2012).

⁵ I. Adelekan, *Vulnerability Assessment of an Urban Flood in Nigeria: Abeokuta Flood 2007*, 56 NATURAL HAZARDS 215 (2011).

there are also factors of environmental change on a global scale such as increasing extreme rainfall, erratic periods of the rainy season, increasing frequency of extreme storms, and others. This contributes to the magnitude of the risk of flooding in urban areas.⁶

Compared to other Southeast Asian countries, Indonesia has large cities with more dynamic flows of urbanization, increased economic activity, and rapid growth in population proportions, such as Jakarta, Bandung, Medan and Surabaya.⁷ In some cities in Indonesia, land conversion efforts are also carried out by hoarding wetlands, such as swamps and peatlands, with dry land to expand the built-up area, such as housing, commercial, infrastructure, and/or agricultural land. Wetland landfill or reclamation efforts are commonly found in cities on the island of Sumatra and Borneo Island, such as

⁶ R. Findrabe, M. Arima, S. Inoue, & B. Kada, *Analyzing Flood Risk and Related Impacts to Urban Communities in Central Vietnam, Mitigation and Adaptation Strategies for Global Change* (2012).

⁷ H. Wang, P. Kuo, & J. Shiau, *Assessment of Climate Change Impacts on Flooding Vulnerability for Lowland Management in Southwestern Taiwan*, 68 NAT. HAZARDS 1001 (2013).

Pekanbaru, Jambi, Palembang, Pontianak and Banjarmasin.⁸

In fact, several studies have shown that the existence of wetlands can be a function of retention and filtration of water, local climate regulators, urban biodiversity habitats and prevention of flooding.⁹ As a flood controller, vegetation in wetland ecosystems can capture and release surface water and rainwater. This vegetation can also reduce the speed of flood water in flooded areas. Reduced wetlands in the flood plains of the city of Lagos (Nigeria) due to changes in the function of land into slums from 1986 - 2006 resulted in the emergence of floods in this area, such as in 2002 and 2006.¹⁰

Thus the conversion of land becomes a threat to the existence of swamps, dry land in the country especially in the City of Palembang. The City of

⁸ P. Guhathakurta, O. Sreejith, & P. Menon, *Impact of Climate Change on Extreme Rainfall Events and Flood Risk in India*, 120 J EARTH SYS. SCI. 359 (2011).

⁹ K. Trenberth, *Framing the Way to Relate Climate Extremes to Climate Change*, 115 CLIMATIC CHANGE 283 (2012).

¹⁰ D. Coumou & S. Rahmstorf, *A Decade of Weather Extremes*, 2 NAT. CLIMATE CHANGE 491 (2012).

Palembang is undergoing a change in wetlands to function as land built along with the development in the city metropolis. The development of Palembang City shows that there is a change in wetlands in the form of swamps to be built up land which causes a continuous reduction in the amount of swamps in Palembang City.¹¹ Changes that occur are in the form of the construction of housing, commercial centers, factories and government centers.¹² The urgency of this research is to find law enforcement by strengthening the licensing, supervision, and taking action to change the wetlands to become an awakened area to prevent flooding.

II. LAW ENFORCEMENT THEORY

According to Black law dictionary, it interpreted the act of putting something as a law into effect as the execution of a law.¹³ While “law enforcement

¹¹ S. Rowe & G. Villarini, *Flooding Associated with Predecessor Rain Events over the Midwest United States*, 8 ENVTL. RES. LETTERS 2 (2013).

¹² G. Jones, *Southeast Asian Urbanization and the Growth of Mega Urban Region*, 19 J POPULATION RES. 119 (2002).

¹³ B. A. Garner, BLACK LAW DICTIONARY (1999).

officer” means that those whose duty it is to preserve the peace.¹⁴ In the Kamus Besar Bahasa Indonesia,¹⁵ enforcers are the ones who establish, enforce. Law enforcers are those who enforce the law, in the narrow sense it only means the police and prosecutors which are then expanded to include judges, lawyers and prisons.

Furthermore, according to Soerjono Soekanto¹⁶ law enforcement is an activity that harmonizes the relationship of values outlined in the values/ views that are firm and manifests them in action as a series of final stages of value translation to create, maintain and maintain life's social peace. Concrete law enforcement is the enforcement of positive law in practice as it should be obeyed. Therefore, giving justice in a matter means deciding the law in concreto

¹⁴ C. Pulungan, *Fauna Ikan dari Sungai Tenayan, Anak Sungai Siak, dan Rawa di Sekitarnya*, 37 RIAU. BERKALA PERIKANAN TERUBUK 78 (2009).

¹⁵ A. Sa'ad, S. Sabiham, A. Sutandi, B. Sumawinata, & M. Ardiansyah, *Perubahan Penggunaan, Lahan Pasang Surut Setelah Reklamasi di Delta Berbak, Jambi*, 1 JURNAL HRPOLITAN 37 (2010).

¹⁶ H. Khaliesh, I. Widiastuti, & S. B. Budi, *Karakteristik Permukiman Tepian Sungai Kampung Beting di Pontianak: Dari Rumah Lanting ke Rumah Tiang*, Prosiding Temu Ilmiah IPLBI (2012).

in maintaining and guaranteeing the obedience of material law by using procedures stipulated by formal law.¹⁷

Josep Golstein¹⁸ distinguishes criminal law enforcement into 3 parts. Total enforcement, namely the scope of criminal law enforcement as formulated by substantive law of crime. Enforcement of criminal law in total is not possible because law enforcers are strictly limited by criminal law, which includes, among other things, the rules for arrest, detention, search, confiscation and preliminary examination. Besides that, it is possible that the substantive criminal law itself provides limitations, for example, a complaint is required as a condition for prosecution of complaint offenses (klachtdelicten). This restricted scope is called the area of no enforcement. Then, full enforcement, after the total scope of criminal law enforcement is reduced by the area of

¹⁷ D. Dahliani, *Konsep Pengolahan Tapak Permukiman di Lahan Rawa, Banjarmasin*, 1 LANTING J. ARCHITECTURE 96 (2012).

¹⁸ V. Lantz, P. Boxall, M. Kennedy, & J. Wilson, *The Valuation of Wetland Conservation in Anurban/Periurban Watershed*, REGIONAL ENVTL. CHANGE 1 (2013). Muladi, KAPITA SELEKTA SISTEM PERADILAN PIDANA, 40 (1995).

no enforcement in law enforcement, law enforcers are expected to enforce the law maximally. Finally, actual enforcement, is considered not a realistic expectation, because there are limitations in the form of time, personnel, investigative tools, funds and so on, all of which lead to the necessity of discretion and the rest is what is called actual enforcement.

Law enforcement is also divided into two, seen from the subject and object.¹⁹ From the point of view of the subject, the law can be divided into two, namely in the broadest sense and in the narrow sense. In a broad sense, the law enforcement process involves all legal subjects in every legal relationship. Anyone who runs normative rules or does something or does not do something by basing himself on applicable legal norms means that he runs or enforces the rule of law. Whereas in a narrow sense, law enforcement is only interpreted as an attempt by certain law to distinguish enforcement agencies to

¹⁹ H. Jia, H. Ma, & M. Wei, Urban Wetland Planning: A Case Study in the Beijing Central Region, 8 *ECOLOGICAL COMPLEXITY* 213 (2011).

guarantee and ensure that a rule of law runs as it should.

Whereas when viewed from the point of the object, namely in terms of the law itself can be held in the broad sense and in the narrow sense. In a broad sense, law enforcement encompasses the values of justice which contain the formal rules and values of justice that exist in society. In a narrow sense, law enforcement is only concerned with enforcing formal and written regulations.

According to Soejono Soekanto²⁰ there are several factors that influence law enforcement such as its own legality, namely legislation; law enforcement, the parties forming and applying law, facilities to support the enforcement of law, community, namely the environment in which the law applies or applies cultural factors, namely as a result of work, creativity, and a sense that is based on human intention in life. First the legal factor itself

²⁰ D. Kim, S. Kim, & T. Ahn, *Wetland Construction: Flood Control and WaterBalance Analysis*, 15 ENVTL. ENGINEERING RES. (EER) 197 (2010).

because in the implementation of law in the field there are times when there is a conflict between legal certainty and justice. This is due because the conception of justice is an abstract formulation, while legal certainty is a normatively determined procedure. Thus, a policy or action that is not entirely based on law is something that can be justified as long as the policy or action is not against the law. Then in essence the implementation of law does not only include law enforcement, but also peace maintenance, because the administration of law is actually a process of harmonization between values and real behavior patterns that aim to achieve peace.

In practice we see that there are laws and regulations that are mostly obeyed and there are also laws that are not obeyed. The legal system clearly collapses if everyone does not comply with the laws and regulations and the legislation loses its meaning. Now the effectiveness of laws and regulations tends to influence the timing of attitudes and quantity of non-compliance and has a real effect on legal behavior, including behavior of lawbreakers. This

condition affects law enforcement which guarantees certainty and justice in the community.

Second, the factor of law enforcement officials, namely those who form and implement laws that include motivation, competence of law enforcement officers, mentality or personality of law enforcement officers plays a very important role. Although the existing regulations are good, if law enforcement officials do not have competence in their field of work, do not have good motivation and mentality or corrupt personality and are not trustworthy and are dishonest, then it is not possible to enforce the law as expected. Therefore, one of the keys to success in law enforcement is the competence, motivation, mentality and/or personality of the law enforcer concerned. In addition to the number or ratio of law enforcement officers there is not enough standard.

The third factor is facilities supporting law enforcement. The facilities include software (Soft skills) and hardware (Hard skills). One example of software is science, education and competence in their field. Education and training received by law

enforcement officers today tends to be practically conventional. So that in many ways law enforcement officers experience obstacles in their duties. Among them are knowledge about environmental governance, computer crime, and special criminal acts which have been given to the authority of the public prosecutor. This is because technically the juridical law enforcement officers are considered not yet capable and not ready. Although it was also realized that the tasks that must be carried out by law enforcement officers are so wide and numerous. While hardware includes buildings, equipment, operational costs and inadequate salaries.

The fourth factor is the community where law enforcement officers come from the community and aim to achieve peace in the community and environment where the law applies or is applied. Every citizen or group has a little legal awareness, the problem that arises is the level of legal compliance, namely compliance law that is high, medium, or lacking. The existence of a degree of community legal compliance with the law in the

environment where the law is valid or applied, is one indicator of the functioning of the law concerned.

Finally, culture is a result of work, creativity, and taste based on human intention in life. Based on the concept of everyday culture, people often talk about culture. Culture according to Soerjono Soekanto, has a very large function for humans and society, namely regulating so that people can understand how they should act, act, and determine their attitude if they relate to other people. Thus, culture is a basic line of behavior which establishes rules regarding what must be done, and what is prohibited.

III. METHOD

A. Questionnaires

This research design is the approach of quantitative and qualitative collaboration. The consideration was that this approach would provide more detailed, comprehensive, and objective analysis instruments. The data were collected by disseminating the questionnaire toward 475

respondents in Palembang City through random sampling, in-depth interviews, focus group discussion, and observation. The primary and secondary data were analyzed and interpreted according to the main aim of this research. In the analysis, some displays are presented in the form of tables, graphs, and narratives.

B. Population and Sample

The study population is who lives in Palembang City. In order to represent the entire Palembang population, the study involved only 475 respondents in seeking views on law enforcement's effect on reducing flood risk. The study is randomly selected respondents from 14 sub-districts in Palembang City, namely sub-districts Ilir Timur I, Ilir Timur II, Seberang Ulu I, Ilir Barat I, Ilir Barat II, Sukarami, Sako, Kemuning, Kalidoni, Bukit Kecil, Gandus, Alang-Alang Lebar, Sematang Borang, and Kertapati.

C. Data Analysis

Quantitative data were analyzed descriptively, presented in tabular form and analyzed retained earnings depth. In addition, qualitative analysis is also conducted, which can reach the substance of the problem and problem solving.

IV. RESULT AND DISCUSSION

If we look at the data (Table 1) below, there is a regulatory vacuum in the execution of the main tasks of the Palembang City Service function such as measures for handling river water resources (watershed) and sub-rivers controlling water, provision of food agriculture land protection and empowerment of fish farming farmers, regulations for structuring industrial space planning and controlling air pollution.

The environmental regulation on irrigation affairs and management of the river basin in Palembang is indicated by a regulatory vacuum, even though the regulations related to it are like the

regional regulations of South Sumatra Province numbers 21/2010 and 5/2013, government regulations numbers 20/2006 and 38/2011, and laws numbers 11/1974 and 37/2014 are already available (Table 1 point 2) so that it is not surprising if there is always accumulation of tributaries and/ or water-carrying canals by people of various interests. If the landfill activity is not immediately managed properly and integrated, it will cause excess water (flooding) during the rainy season and drought during the dry season and the impact of the vulnerable leading to public health problems due to stagnant water. Thus, the effort to manage the watershed properly by synergizing development activities is very much needed not only for the sake of maintaining production capacity or the economy, but also the efforts to reduce flood risk.

The Environmental Regulation of Palembang City's Sustainable Food Agriculture (*PLP2PB* in Indonesian Language) land protection also indicates a regulatory vacuum. Even though the regulations related to it such as the regional regulations of South

Sumatra Province number 21/2014, government regulations number 1/2011, and laws number 41/2009 are available (Table 1 point 3). Palembang City's sustainable food agriculture is a system and process in planning and establishing, developing, utilizing and fostering, controlling and supervising food crops and their area in a sustainable manner. Increasing population growth and urbanization and economic and industrial developments have resulted in degradation, conversion and fragmentation of agricultural land into built-up land. This will contribute to excess water (flooding) in the City of Palembang.

Based on the findings in the field the apparatus involved in the field of flood prevention in Palembang city is the government of Palembang city, which consists of various agencies such as Civil Service Police Unit (*Sat-Pol PP*), SARS Team of Palembang City, Palembang Construction and Housing (PUPR) Office, Sub-District Head, and Lurah (head of village). Whereas law enforcement officers have the duty to enforce the law in the field

of flood risk mitigation based on Government Regulation No.16 of 2018 concerning Civil Service Police Unit Article 5 point A), Civil service units enforce Regional Regulations and Head of Regional Regulations, Point B) Carrying out public order and peace, and point C) carry out community protection.

The findings shows that the number of law enforcement officers enforcing Regional Regulations relating to flood risk amounted to 553 people. Viewed by Group consists of: 4 people in groups IV, 95 groups III, 89 groups II and 5 groups I. While based on the level of education, 9 people have a master degree (S2) in education, 72 people have an undergraduate degree (S1) in education, Diploma 1(D1) to Diploma 3(D3) 9 people, Upper Middle School as many as 98 people and 5 people are high school educated. According to staffing status, it consists of 193 Civil Servants, 353 contract employees and 3 freelancers.

Furthermore, the Civil Service Police Unit faces various obstacles to enforce the law in efforts to mitigate flood risk. In enforcing the local regulation

concerning building permit/permission to build a building (*IMB*), they faced individuals behind the *IMB* violators such as examples of cases, Palembang Icon buildings on POM IX street and hotel building on Letkol Iskandar street.

In addition, in terms of law enforcement against the Waste Management Regulations, there are no adequate facilities and infrastructure available. So that people throw carelessly like empty land and river watersheds. Then for the facilities and infrastructure consists of software (soft skills) and hardware (hard skills), for the software the majority of employees do not yet have the competence about flooding. As for the hardware, there are still findings in the field that many do not have an adequate garbage disposal station. It is proven that the lack of garbage disposal facilities causes people to be confused to dispose of garbage, so that garbage is disposed in inappropriate places.

To overcome the risk of flooding, the city government of Palembang launched a regional regulation on the transfer of wetland functions into

dry/built land, namely by stockpiling wetlands such as swamps and peatlands with dry land. In addition, in controlling floods, the government believes through this effort it can also expand the built area, such as housing, commercial, infrastructure, and/or agricultural land. However, based on the percentage of Palembang people who respond to the policy of shifting the function of wetlands (swamps) to dry land, there is disagreement.

Table 1. Function of Office Affairs Related to Environmental Regulations

No	Description of Environmental Regulations	Act	Government Regulations	Provincial Regulations	City Regulations
1	Spatial Planning	26/2007	15/2010		
	Spatial Plans			11/2016	15/2012
2	Irrigation .		20/2006	21/2010	- ● -
	Management of watersheds.		38/2011	5/2013	- ● -
	Guidance and supervision of liquid waste disposal.		82/2001	- ● -	26/2011
3	Sustainable food agriculture land protection	41/2009	1/2011	21/2014	- ● -
	Development of swamp control and utilization.		73/2013	- ● -	11/2012
4	Fishery;	45/2009	60/200		
	Protection and empowerment of fishing farmers and fish cultivators			5/2017	- ● -
5	Industry;	3/2014			
	Industrial business permit;		107/2015	18/2017	
	Industrial development plan.				- ● -
6	Forestry;	41/1999	63/2002		
	Prevention and eradication of forest destruction	18/2013	45/2004		
	Control of forest fires and/or land		4/2001	8/2016	
	City Forest.		63/2002		6/2007
7	Protection and management of the environment.	32/20093	27/2012	17/2016	- ● -
	Sustainable development;				2/2013
	Waste management;		81/2012	20/2014	3/2015
	Conservation of living natural resources and ecosystems	5/1990			
	Air pollution control.		41/1999		- ● -

Information: - ● - regulatory vacuum
 Source: BAPPEDA (Planning Agency) of Palembang City

Regard is given to the findings that the possibility of the local community has been alert to the transfer of the function of wetlands (swamps) to dry land. Dry land is effective for development purposes, such as housing, mall and industry but, in the future, it will exacerbate floods, not control them. Even against the procedures of licensing construction in Palembang as much as 48% of respondents disagree, and many others, namely 34%, are still undecided.

The community disagrees with the idea of the city government to rebuild from the results of wetland utilization (swamps), but if the community is associated with regulations in flood control in Palembang, the percentage of people who agree to increase to 20% states that they agree that regulations provide more attention to the issue of flooding in their city.

Concerning to the supervision of development permits, 29% of respondents said they did not agree to the supervision of development permits, 19% agreed, only 4% expressed enthusiasm that they strongly agreed to supervise the construction permit,

while the remaining 42% were hesitant. It can be concluded that not many agreed to the decision to supervise the construction permit, and the respondents who were hesitant were also quite large in expressing their uncertainty whether the policy was good or not for them.

The community provides an assessment of the performance of employees making development permits. The number of doubtful respondents occupies the largest percentage (43%) compared to respondents who agree that the performance is good, and do not agree that the performance of the employees in question is good (36%).

The respondents have doubts about the policy of transferring wetlands (swamps) to dry land, whether it will be effective as a flood control solution in Palembang, or even worsen it. A number of respondents stated that they doubt (43%) the staff competency of the building permit (IMB). This shows that they were hesitant about whether the efforts to transfer wetlands (swamps) to dry land would be good for their life gaps, but they still put

high trust that the apparatus assigned to enforce the law in an effort to reduce flood risk in their area is competent and has sufficient knowledge to bring good change to the City of Palembang (42%).

Regarding whether the government is committed to the issue of flood prevention, based on the respondent's assessment, the government's commitment in preventing floods is still not good enough. Respondents' assessment of the government's commitment was 43% not committed, 36% agree, 7% considered the government strongly not committed, 37% unsure (hesitant), 16% stated that the government was quite committed, and 4% said the government was strongly committed.

According to Soerjono,²¹ one of the factors that influence law enforcement is availability or facilities that support law enforcement. In the case of law enforcement in an effort to reduce the risk of flooding in the City of Palembang, the availability of supporting facilities or facilities such as culverts,

²¹ S. Soekanto, FAKTOR-FAKTOR YANG MEMPENGARUHI PENEGAKAN HUKUM (2005).

drainage, plaster, and retention ponds is very important. Based on the survey conducted, data were found as follows: data shows, 48% of respondents said that facilities or facilities such as culverts, drainage, plaster, and retention ponds in their environment were still inadequate; and 11% of the states that facilities or facilities in handling flood risk are available.

Availability of facilities and facilities such as culverts, drainage, plaster, retention ponds should function properly so that the risk of flooding can be minimized. However, based on the survey conducted, 30% of respondents stated that supporting facilities such as culverts, drainage, plaster and retention ponds in their environment were not functioning properly, and 19% said the facilities were not functioning properly. However, 20% of respondents stated that these facilities functioned well, and 5% stated that they functioned very well. The rest is doubtful whether culverts, drainage, plaster and retention ponds in their environment are functioning properly or not.

Apart from the availability of culverts, drainage, plaster and retention ponds in the community, the availability of adequate landfills is also very important. Report from Chief environmental services and City Cleanliness Palembang stated that in one day, the volume of waste produced from household and industrial waste can reach one thousand (1,000) tons. The high level of waste production is not comparable with the availability of landfills. This is acknowledged by respondents that 59% waste disposal place is inadequate in their area.

In addition to the availability of supporting facilities or waste disposal place, there are also community factors, namely the environment in which the law applies.²² This is related to community compliance with the law itself. For example, does the Palembang community dispose of garbage in its place or not. Based on City Regulation number 3 of 2015 concerning Household and Similar Waste Management, that anyone who disposes of waste not

²² Soerjono Soekanto, FAKTOR-FAKTOR YANG MEMPENGARUHI PENEGAKAN HUKUM (2004), 42-43.

in its place will be subject to a maximum criminal sanction of 6 months or a fine of 50 million rupiah. However, based on the survey, it was found data that the level of community compliance to dispose of garbage in its place is still very low (15%). And very few respondents stated that they had disposed of garbage in its place. So that people dispose or litter, such as on the roadside or in the river. For example, what happened in the sub-district in Palembang City close to the Ampera Bridge (Figure 1).

Community factors are also related to community legal knowledge and compliance. Here the researchers also asked the level of knowledge of the community regarding the distribution of the City of Palembang, for example knowledge of wetland areas in the City of Palembang, 73% respondents knew. The respondents knowledge of water catchment areas (which are prohibited areas of settlements) in the City of Palembang, for this question 63% of respondents stated that they knew that.

In an effort to find solutions to the law enforcement in reducing the risk of flooding in Palembang City, researchers also included questions related to whether people in Palembang live in wetland areas and whether the residence of the community has permits in accordance with the regional regulations of Palembang City. From the survey results, it was found that 59% of the population lived in wetland areas and 93% had building permits for their homes.

In addition, a cultural factor, that is as a result of work, creativity and a sense that is based on human intention in social life.²³ Culture is a behavior of the community that develops into a habit, both bad habits and good habits, which later becomes a common habit and developed in the community or also called

²³ J. Birkmann, M. Garschagen, F. Kraas, & N. Quang, *Adaptive Urban Governance: New Challenges for the Second Generation of Urban Adaptation Strategies to Climate Change*, 5 SUSTAINABILITY SCI. 185 (2010).

culture. An example is the culture of Palembang community related to disposing of garbage.

This research also raises questions to see the importance of the culture of disposing of garbage for the people of Palembang City. From the survey results it was found that respondents agreed that dumping garbage in its place is very important 95%. There are only 3% of respondents who say that disposing of garbage in its place is an unimportant action. In addition, 2% of respondents were hesitant about their attitude regarding the importance of disposing of garbage in its place. The survey results show that there are still people in the City of Palembang who are indifferent to the importance of disposing of garbage in its place. So that the government needs to provide socialization regarding the importance of disposing garbage in its place.

This awareness is also related to the culture of disposing garbage in the community. A good culture related to disposing of garbage is putting garbage in its place, for example in trash cans or places that have been determined by the government. In big cities like

Palembang, the availability of adequate waste disposal sites is a must. So there is no reason for the community not to throw garbage not in its place or even in the river. The river is often used as a community garbage dump, especially by people who live near the river.

From the survey results it was found that 7% of respondents often disposed of garbage in the river, 11% said they had, 32% said they never, 35% said they never dumped garbage at the river. The remaining 15% were doubtful about whether they had even thrown up in the river or not.

The data above shows that there are still many people in Palembang who have a habit of throwing garbage in the river. This also shows the attitude of disobedience to the community regarding the rules regarding landfills in accordance with the regulations of the Palembang City government.

Figure 1 shows the condition of the Musi river filled with garbage. The lack of public awareness of the importance of disposing of garbage in its place. The habit of people who dispose of garbage not in its

place becomes a bad habit that is considered a common thing in the community itself.



Fig 1. Musi river filled with garbage
Source: Private photo of researcher

This culture is also related to the culture of mutual cooperation owned by the Indonesian Nation. Mutual cooperation is a form of practice from the fifth principle of five principles (*Pancasila*), which is a form of mutual assistance between fellow humans. In this case it can be seen how the mutual cooperation culture of the Palembang community in maintaining the cleanliness of their living environment. The environment of residence is the property and shared responsibility. So that

cleanliness, safety and comfort are the responsibility of all people who live in the environment. From the survey results, it was found that 71% of respondents often worked together, 10% never, 3% never, the rest were undecided.

V. CONCLUSION

This study shows that Regional Regulation on Licensing the Transfer of Wetland (Swamp) Function to Dry Land by the government is ineffective efforts to control flood problems in Palembang City. Regarding Building Permits, almost half of the Palembang City population lived in wetlands (swamps), and the rest lived in dry areas, and the average majority had obtained permits for the buildings they occupied. This shows that the government's commitment to the issue of flood prevention is not good enough. The fact is that the conversions of wetlands (swamps) into settlements are careless actions which actually result in the emergence of floods and result in settlements becoming slums. This is because vegetation in the

wetland ecosystem can function to capture and release surface water and rainwater, so that the flood can be controlled. Vegetation is also able to reduce the speed of flood water in flooded areas. Decreasing wetlands causes flooding to worsen in an area.

In addition to government policy, the culture of maintaining the cleanliness of the community in 14 sub-districts in the City of Palembang which was used as the location in this study had a very large contribution to the problem of flooding. Field surveys show a very large percentage of people who do not orderly dispose of garbage in its place, almost half of the community is aware that disposing of garbage in its place is very important for their survival and flood risk in their area. On the other hand, half of the people who do not care and still throw trash improperly. There is still a pile of rubbish that is mounting in the community settlements, showing how badly it is processing waste. Disposable waste is also a category of waste that is difficult to recycle, and consequently settles in rivers around the settlements. This ultimately worsened the

face of the City of Palembang itself. When the rain comes, the condition of the streets, settlements in the city becomes floods.²⁴

Acknowledgments. The authors gratefully acknowledge that the present research is supported by Sriwijaya University in Competitive Research Skim of Year 2018.

²⁴ *Supra* S. Sagala, Dodon, D. Lutfiana, & R. Wimbardana, *Alih Fungsi Lahan Rawa dan Kebijakan Pengurangan Risiko Bencana Banjir: Studi Kasus Kota Palembang* (2013). Departemen Pendidikan dan Kebudayaan, *Kamus Besar Bahasa Indonesia*, Jakarta: Balai Pustaka (1998). S. Dellyana, *KONSEP PENEGAKAN HUKUM* (1998). A. M. T. & S.-G. Z. Jha, *Building Urban Resilience: Principles, Tools and Practice*, The World Bank (2012).

BRAIN IMMATURITY AND JUVENILE DELINQUENCY: EMPIRICAL EVIDENCE, AGE- RELATED LEGAL DEBATE, AND ETHICAL CONCERNS

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I. INTRODUCTION

Adolescent brain science has permeated people's social life, media, and the juvenile justice system through legal theory, advocacy, and lawmaking.² During the past decade, an increasing number of longitudinal brain development research has revealed that adolescence is a unique developmental

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² See generally Terry A. Maroney, *The False Promise of Adolescent Brain Science in Juvenile Justice*, 85 NOTRE DAME LAW REVIEW 89–176 (2009); Elizabeth Scott, Natasha Duell & Laurence Steinberg, *Brain Development, Social Context, and Justice Policy*, 57 WASH. UJL & POL'Y 13 (2018); Laurence Steinberg, *Adolescent Brain Science and Juvenile Justice Policymaking*, 23 PSYCHOLOGY, PUBLIC POLICY, AND LAW 410–420 (2017).

period for brain growth and change.³ Advances in noninvasive neuroimaging techniques have allowed researchers to quantify the structural and functional brain changes throughout adolescence and into adulthood, evidencing that the adolescent brain is immature and continues to develop until the age of 25.⁴ Evidence of adolescent brain immaturity challenges the general assumption that 18 is the legal and social age of adulthood in public policy.

Researchers also link brain immaturity to adolescent decision-making processes to explain juvenile delinquency, as well as their normative

³ See generally Jay N. Giedd et al., *Brain development during childhood and adolescence: a longitudinal MRI study*, 2 NATURE NEUROSCIENCE 861–863 (1999); Sara B. Johnson, Robert W. Blum & Jay N. Giedd, *Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy*, 45 JOURNAL OF ADOLESCENT HEALTH 216–221 (2009); Elizabeth R. Sowell et al., *Mapping Continued Brain Growth and Gray Matter Density Reduction in Dorsal Frontal Cortex: Inverse Relationships during Postadolescent Brain Maturation*, 21 THE JOURNAL OF NEUROSCIENCE 8819–8829 (2001).

⁴ Beatriz Luna & Catherine Wright, *Adolescent Brain Development: Implications for the Juvenile Criminal Justice System*, APA HANDBOOK OF PSYCHOLOGY AND JUVENILE JUSTICE. 91–116 (2016); Daniel Romer, Valerie F. Reyna & Theodore D. Satterthwaite, *Beyond Stereotypes of Adolescent Risk Taking: Placing the Adolescent Brain in Developmental Context*, 27 DEVELOPMENTAL COGNITIVE NEUROSCIENCE 19–34 (2017); Laurence Steinberg, *Should the Science of Adolescent Brain Development Inform Public Policy?* 64 AMERICAN PSYCHOLOGIST 739–750 (2009).

impulsive and risk-taking behaviors.⁵ The frontal lobe is associated with cognitive and executive functions, such as impulse control, planning, and decision-making.⁶ However, it is the last brain region to mature.⁷ While the frontal lobe develops inadequately and remains immature during adolescence, the limbic system becomes more mature and activates more effectively.⁸ Accordingly, adolescents may lack of cognitive and executive control over instinctive or emotional drives.⁹ They become highly sensitive to social reward, thereby exhibiting less rational, more risk-taking, more impulsive, and even delinquent behaviors.¹⁰ Also, an adolescent brain shows few structural and functional activations in the frontal lobe and inefficient neural connectivity between cognitive control and

⁵ Steinberg, *supra* note 4.

⁶ Daniel J. Simmonds, Michael N. Hallquist & Beatriz Luna, *Protracted Development Of Executive And Mnemonic Brain Systems Underlying Working Memory In Adolescence: A Longitudinal Fmri Study*, 157 *NEUROIMAGE* 695–704 (2017).

⁷ Johnson et al., *supra* note 3.

⁸ Betty Jo Casey, Sarah Getz & Adriana Galvan, *The Adolescent Brain*, 28 *DEVELOPMENTAL REVIEW* 62–77 (2008).

⁹ Laurence Steinberg, *A Social Neuroscience Perspective On Adolescent Risk-Taking*, 28 *DEVELOPMENTAL REVIEW* 78–106 (2008).

¹⁰ *Id.*

rewarding systems.¹¹ Both brain immaturity and brain development imbalance mirror the stereotypical image of adolescents' impulsive, risk-taking or sensation-seeking, and delinquent behaviors.¹²

The association between adolescent brain development and their behaviors has made great legal implications. An issue that cannot be ignored in connection with the legal debates on juvenile justice is age. Questions arise from how to set the minimum legal age for substance use, how to determine their criminal responsibility, how to handle juvenile offenders fairly, and how to punish delinquency properly. Some scholars advocate for raising the minimum legal age for alcohol consumption and smoking due to adolescent brain immaturity, while others have concerns about such policies' efficiency

¹¹ Casey et al., *supra* note 8; *see also* Elizabeth Scott, Richard J. Bonnie & Laurence Steinberg, *Young Adulthood As Transitional Legal Category: Science, Social Change, And Justice Policy*, 85 *FORDHAM LAW REVIEW* 641–666 (2016).

¹² Casey et al., *supra* note 8; *see also* Laurence Steinberg, *The Influence Of Neuroscience On US Supreme Court Decisions About Adolescent's Criminal Culpability*, 14 *NATURE REVIEWS NEUROSCIENCE* 513–518 (2012).

and usefulness in decreasing juvenile delinquency.¹³ Some researchers suggest that we should also raise the age for adult referral in the juvenile justice system, aiming to diminish potential harms and emphasize rehabilitation for juvenile offenders.¹⁴ Whereas, opponents warn its potential unintended consequences, such as over-population in juvenile facilities, ineffectiveness on offenders who simply offend after the cutoff age, and the fairness for offenders who have delayed brain maturing processes.¹⁵ These age-related legal debates with the

¹³ RICHARD J. BONNIE, KATHLEEN STRATTON & LESLIE Y. KWAN, PUBLIC HEALTH IMPLICATIONS OF RAISING THE MINIMUM AGE OF LEGAL ACCESS TO TOBACCO PRODUCTS (2015); Lonni Lanza-Kaduce & Pamela Richards, *Raising The Minimum Drinking Age: Some Unintended Consequences Of Good Intentions*, 6 JUSTICE QUARTERLY 247–262 (1989); Debra Jones Ringold, *Boomerang Effects in Response to Public Health Interventions: Some Unintended Consequences in the Alcoholic Beverage Market*, 25 JOURNAL OF CONSUMER POLICY 27–63 (2002).

¹⁴ David P. Farrington, Rolf Loeber & James C. Howell, *Young Adult Offenders: The Need for More Effective Legislative Options and Justice Processing*, 11 CRIMINOLOGY & PUBLIC POLICY 729–750 (2012).

¹⁵ Chris L. Gibson & Marvin D. Krohn, *Raising The Age: Issues In Emerging Adulthood And Adult Court Referral Of Youthful Offenders*, 11 CRIMINOLOGY & PUBLIC POLICY 759–768 (2012); see generally Christina L. Lyons, REFORMING JUVENILE JUSTICE: SHOULD TEENS WHO MURDER BE TREATED AS ADULTS? CQ RESEARCHER BY CQ PRESS (2015), <http://library.cqpress.com/cqresearcher/document.php?id=cqresrre2015091100>.

underlying reasoning about brain development have lasted over more than a decade and reached its plateau.

In addition, the application of brain science in legal system engenders moral and social concerns virtually from its initial stage. Although many of the ethical concerns are not unique to brain science, there are good reasons to be aware of and further discuss them. For example, how should people understand the connection between brain, mind, and behavior? How can we draw inferences from the brain development evidence, along with neurotechnology, in the real world? Should we use it to identify certain adolescents as at risk? Could law enforcement agents rely on neuro-predictive information to detain or arrest or punish adolescents who have not yet committed a crime? These ethical issues are still unresolved today.

Understanding the role of brain development in determining maturity in a legal context will help us explain adolescent behaviors in a comprehensive manner. Proactively discussing adolescence brain

development will prevent policymakers from engaging in a series of actions that researchers would not recommend because of some academic mistranslations into policies, such as zero-tolerance policy and school resource officers.¹⁶ Deliberate consideration of the implication of brain science will increase the effectiveness of prevention, intervention, or rehabilitation programs.¹⁷

In this Article, I focus on four aspects related to the relationship between adolescent brain research and legal implications: the evidence of brain research on adolescent immaturity; the evidence of adolescent brain development on our understanding of adolescent impulsive and delinquent behaviors; the implication of adolescent immaturity in two age-related legal debates; and the potential ethical concerns about applying brain science in law and justice system. For the purpose of this Article, I use “adolescents” to refer both adolescents and young

¹⁶ Johnson et al., *supra* note 3.

¹⁷ Theodore P. Beauchaine et al., *Ten Good Reasons To Consider Biological Processes In Prevention And Intervention Research*, 20 DEVELOPMENT AND PSYCHOPATHOLOGY 745–774 (2008).

adults aged from 16 to 24. When referring to “maturity,” I do not suggest the end of brain development but consider it as an attainment of adult-like capacities. In-depth and extensive reviews of brain development in adolescence and a more detailed discussion of the findings are beyond the scope of this review.

II. BRAIN DEVELOPMENT AND LEGAL MATURITY

Brain development research has challenged the long-time assumption that adolescent brain is fully mature by the age of 18.¹⁸ It has gradually changed the definition of maturity among laypeople, researchers, and policymakers. Currently, we lack consensus about using 16, 17 or 18 as the legal age cutoff for adolescence maturity in the juvenile justice system across states. Variations in defining legal maturity and determining the age cutoff exist when policymakers evaluate the age appropriateness for

¹⁸ Arthur W. Toga, Paul M. Thompson & Elizabeth R. Sowell, *Mapping Brain Maturation*, 29 TRENDS IN NEUROSCIENCES 148–159 (2006).

adolescents to drink alcohol, smoke, serve in the military, vote, and engage in other legal activities.

Although the brain is malleable, adaptive, and constantly developing over the lifespan, its structural and functional changes for maturation during adolescence are more dramatic and noteworthy.¹⁹ In general, four non-linear structural and functional changes occur in response to the social environments for adolescent brain maturity.²⁰ Understanding these changes can facilitate the current debate on redefining legal age for adolescence maturity in the juvenile justice system, as well as contribute to a different legal response to juvenile delinquency.

First, the density of gray matter experiences a shifting change.²¹ Although both density and thickness of gray matter increase during pre-adolescence, the density has been found to decline dramatically during adolescence to adulthood and remain relatively stable thereafter.²² The gray-matter

¹⁹ *Id.*, at 151; *see also* Steinberg, *supra* note 4.

²⁰ Mark H. Johnson, *Functional Brain Development In Humans*, 2 NATURE REVIEWS NEUROSCIENCE 475–483 (2001).

²¹ Toga et al., *supra* note 18; Johnson et al., *supra* note 3.

²² Giedd et al., *supra* note 3.

loss is the result of selective synaptic pruning. Selective synaptic pruning is the process of eliminating rarely used synapses and neural connections to make a brain more efficient and specialized.²³ By measuring the gray-matter density in frontal, temporal, parietal, and occipital lobes, researchers have demonstrated that the gray-matter loss starts from dorsal parietal lobe and primary sensorimotor regions, then moves to the lateral and caudal temporal lobe, and finally reaches to the frontal lobe.²⁴ Prefrontal cortex (PFC) is the last area to show structural changes for brain maturation during post adolescence.²⁵ The dynamic pattern of the decreased gray matter density has revealed that brain regions with advanced functions and higher-order connections, such as PFC, only mature after the lower-order areas associated with the most basic

²³ Johnson et al., *supra* note 3.

²⁴ Nitin Gogtay et al., *Dynamic Mapping Of Human Cortical Development During Childhood Through Early Adulthood*, 101 PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES 8174–8179 (2004).

²⁵ Sowell et al., *supra* note 3.

functions, such as somatosensory and visual cortices, from the age of 4 to 21.²⁶

Second, the volume of white matter increases linearly over time.²⁷ During adolescence, increased white matter volumes in PFC are reflective of axonal diameter and myelination, allowing nerve impulses to travel faster and more effectively and improving the integration of brain circuits.²⁸ As myelination continues to post-adolescence, volumes of white matter peak in early adulthood.²⁹ This increased efficiency of neural connections in PFC can lead to better cognitive and executive functions, such as learning from errors and previous experiences, planning ahead, delaying gratification, controlling impulsivity, and making legally relevant decisions.³⁰ However, myelination in the PFC may not occur until early 20s or even later.³¹ Since volume changes

²⁶ *Id.*; Gogtay et al., *supra* note 24.

²⁷ Johnson et al., *supra* note 3.

²⁸ Steinberg, *supra* note 12.

²⁹ Signe Bray et al., *Synergistic Effects of Age on Patterns of White and Gray Matter Volume across Childhood and Adolescence*, 2 *ENEURO* 1–13 (2015).

³⁰ Johnson et al., *supra* note 3.

³¹ *Id.*

in white matter mirror adolescence maturity more accurately, an estimation of adolescent maturity based on cortical thickness may be better to inform the legal age boundaries in the juvenile justice system than simply based on chronological age.³²

Third, the distribution and density of dopamine (DA) receptors change in the neuro-circulation between PFC and limbic system which is responsible for processing emotions, rewards, and punishments.³³ Dopaminergic pathway activates from ventral tegmental area, to ventral striatum (VS), and then ramifies into orbital and ventromedial frontal cortex.³⁴ As a result of DA neurons being active in VS long before in PFC, adolescents tend to exhibit more sensation-seeking behaviors, focus on rewards, and behave more impulsively and

³² Budhachandra S. Khundrakpam, Jussi Tohka & Alan C. Evans, *Prediction Of Brain Maturity Based On Cortical Thickness At Different Spatial Resolutions*, 111 NEUROIMAGE 350–359 (2015).

³³ Johnson et al., *supra* note 3; Steinberg, *supra* note 12.

³⁴ Romer et al., *supra* note 4; Dustin Wahlstrom et al., *Developmental Changes In Dopamine Neurotransmission In Adolescence: Behavioral Implications And Issues In Assessment*, 72 BRAIN AND COGNITION 146–159 (2010).

emotionally.³⁵ Although a DA pathway between striatum and orbitofrontal cortex exists before adolescence, the pathway for cognitive functions between striatum and medial prefrontal cortex only connects by early adulthood.³⁶ In addition, the densities of the DA receptor D1 and D2 increase more rapidly during adolescence than during both childhood and adulthood.³⁷ The significant increase of DA concentrations in both cortical and subcortical areas during adolescence specifically mirrors an adolescent's increased sensitivity to social reward and thrills.³⁸ In short, adolescence is a developmental period where the emotional (hot) brain matured before cognitive (cold) brain.³⁹ By the age of 18, the cognitive brain is more likely to be underdeveloped, but the hot brain may be mature enough.

³⁵ Steinberg, *supra* note 12; Scott et al., *supra* note 2; Fabien R. Naneix et al., *Parallel Maturation of Goal-Directed Behavior and Dopaminergic Systems during Adolescence*, 32 JOURNAL OF NEUROSCIENCE 16223–16232 (2012).

³⁶ Romer et al., *supra* note 4; Naneix et al., *supra* note 35.

³⁷ Wahlstrom et al., *supra* note 34.

³⁸ *Id.*; see also Romer et al., *supra* note 4; Scott et al., *supra* note 2.

³⁹ Romer et al., *supra* note 4; Steinberg, *supra* note 9.

Last, the connectivity between limbic system involving emotional processing and PFC is constantly strengthened after age of 18.⁴⁰ The neural connectivity between the amygdala, a limbic structure responsible for fear perception, and fear conditioning and the frontal lobe is denser during adolescence.⁴¹ The basic integration of emotional and cognitive brain areas is crucial for emotional regulation, self-control, and inhibition of impulsivity.⁴² Although these structural and functional connections do facilitate various brain circuits to communicate efficiently, the entire brain network is still less extensive and specialized during adolescence and early adulthood.⁴³ Apparently, the adolescent brain is not cognitively mature enough by the age of 18. Using 18 as a legal age cutoff in the

⁴⁰ Romer et al., *supra* note 4; Steinberg, *supra* note 12.

⁴¹ Miles Gregory Cunningham, Sujoy Bhattacharyya & Francine Mary Benes, *Amygdalo-Cortical Sprouting Continues Into Early Adulthood: Implications For The Development Of Normal And Abnormal Function During Adolescence*, 453 THE JOURNAL OF COMPARATIVE NEUROLOGY 116–130 (2002).

⁴² Johnson et al., *supra* note 3; Romer et al., *supra* note 4; Steinberg, *supra* note 12.

⁴³ Steinberg, *supra* note 12.

juvenile justice system may be problematic, let alone an even younger age.

Adolescence brain development, with considerations of individual differences, continues from adolescence to adulthood until at least the age of 25.⁴⁴ Compelling evidence from brain development research clearly challenges the traditional definition of adolescent maturity and the appropriate age cutoff in the juvenile justice system. When considering redefining legal maturity or resetting the legal age cutoff, policymakers should weigh more on the brain science evidence, as well as the associated cost and benefit, instead of one's ideology or normative rules. As brain science advances, it also provides valuable insights into the relationship between brain immaturity and antisocial/delinquent behaviors among adolescents and young adults.

⁴⁴ Toga et al., *supra* note 18; Romer et al., *supra* note 4; Steinberg, *supra* note 9.

III. BRAIN IMMATURITY AND JUVENILE DELINQUENCY

Brain immaturity is strongly associated with adolescents' limited abilities to make decisions and exert self-control.⁴⁵ Adolescents undergo structural and functional inefficiency or temporary deficits in brain activations and neural connectivity.⁴⁶ They are normatively unable to exert enough cognitive control over instinctive or emotional drives, thus behaving less rationally and more impulsively.⁴⁷

Two adolescent characteristics, inability to delay gratification and lack of cognitive control, significantly increase their probability of engaging in antisocial and delinquent behaviors, especially for those living in high risk families and disadvantaged communities.⁴⁸ Similarly, the brain imbalance model

⁴⁵ Casey et al., *supra* note 8; Steinberg, *supra* note 12.

⁴⁶ Romer et al., *supra* note 4; Scott et al., *supra* note 2.

⁴⁷ Steinberg, *supra* note 9.

⁴⁸ Frank D. Mann et al., *Sensation Seeking And Impulsive Traits As Personality Endophenotypes For Antisocial Behavior: Evidence From Two Independent Samples*, 105 PERSONALITY AND INDIVIDUAL DIFFERENCES 30–39 (2017); Madeline H. Meier et al., *Impulsive And Callous Traits Are More Strongly Associated With Delinquent Behavior In Higher Risk Neighborhoods Among Boys And Girls*, 117 JOURNAL OF ABNORMAL PSYCHOLOGY 377–385 (2008).

has revealed two dynamics: (a) PFC develops inadequately and stays immature during adolescence, and (b) limbic system activates more than PFC.⁴⁹ Brain developing imbalance has reflected the universal stereotype of adolescent's impulsive, emotional, uncontrollable, and hotheaded behaviors.⁵⁰ The model further has theoretical and legal implications in explaining and responding to juvenile delinquency, as well as informing future juvenile law.⁵¹

Impulsivity is defined as an individual's tendency to react rapidly and impetuously to internal or external stimuli without clear planning or deliberate thinking of the negative consequences.⁵² However, adolescent impulsivity consists of three forms: (a) motor impulsivity, in which impulsive action is reflective of a tendency to act without fully

⁴⁹ Casey et al., *supra* note 8.

⁵⁰ *Id.*; see also Steinberg, *supra* note 12.

⁵¹ Scott et al., *supra* note 2.

⁵² Samuel R Chamberlain & Barbara J Sahakian, *The Neuropsychiatry Of Impulsivity*, 20 CURRENT OPINION IN PSYCHIATRY 255–261 (2007); Gerard F Moeller et al., *Psychiatric Aspects of Impulsivity*, 158 AMERICAN JOURNAL OF PSYCHIATRY 1783–1793 (2001).

thinking about consequences,⁵³ (b) active impulsive choice, which indicates an adolescent's tendency to desire for relatively smaller but immediate rewards, instead of larger yet delayed gratifications,⁵⁴ and (c) active sensation-seeking or risk-taking behaviors.⁵⁵ Although research on impulsivity is across multiple disciplines, such as psychology, neuroscience, economics, neurochemistry, and behavioral genetics, this Article focuses on the perspective from adolescent brain development in juvenile justice and public policy.

A. Motor Impulsivity and Cognitive Control

Cognitive and executive functions, including an individual's ability to think, plan, working memory, and decision-making, are associated with prefrontal

⁵³ Naomi A Fineberg et al., *New Developments In Human Neurocognition: Clinical, Genetic, And Brain Imaging Correlates Of Impulsivity And Compulsivity*, 19 CNS SPECTRUMS 69–89 (2014).

⁵⁴ Romer et al., *supra* note 4.

⁵⁵ Casey et al., *supra* note 8; Steinberg, *supra* note 9.

cortex.⁵⁶ Given the fact that PFC has various substructures, in general, dorsolateral PFC (dlPFC) is associated with higher order executive and cognitive functions, while ventromedial PFC (vmPFC) is responsible for emotional regulations and motivational responses.⁵⁷ Specifically, the dlPFC development is associated with attention,⁵⁸ working memory,⁵⁹ long-term memory,⁶⁰ problem-solving ability,⁶¹ and decision-making about

⁵⁶ Monica Luciana, *Adolescent Brain Development In Normality And Psychopathology*, 25 DEVELOPMENT AND PSYCHOPATHOLOGY 1325–1345 (2013); Torfi Sigurdsson & Sevil Duvarci, *Hippocampal-Prefrontal Interactions in Cognition, Behavior and Psychiatric Disease*, 9 FRONTIERS IN SYSTEMS NEUROSCIENCE (2016); Daniel J. Simmonds, Michael N. Hallquist & Beatriz Luna, *Protracted Development Of Executive And Mnemonic Brain Systems Underlying Working Memory In Adolescence: A Longitudinal Fmri Study*, 157 NEUROIMAGE 695–704 (2017).

⁵⁷ Luciana, *supra* note 56; Sigurdsson & Duvarci, *supra* note 56.

⁵⁸ Michael J. Kane & Randall W. Engle, *The Role Of Prefrontal Cortex In Working-Memory Capacity, Executive Attention, And General Fluid Intelligence: An Individual-Differences Perspective*, 9 PSYCHONOMIC BULLETIN & REVIEW 637–671 (2002).

⁵⁹ David A Markowitz, Clayton E Curtis & Bijan Pesaran, *Multiple Component Networks Support Working Memory In Prefrontal Cortex*, 112 PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES 11084–11089 (2015).

⁶⁰ Robert S. Blumenfeld & Charan Ranganath, *Prefrontal Cortex and Long-Term Memory Encoding: An Integrative Review of Findings from Neuropsychology and Neuroimaging*, 13 THE NEUROSCIENTIST 280–291 (2007).

⁶¹ Sietske W. Kleibeuker et al., *Prefrontal Cortex Involvement In Creative Problem Solving In Middle Adolescence And Adulthood*, 5 DEVELOPMENTAL COGNITIVE NEUROSCIENCE 197–206 (2013).

automatic motor responses.⁶² Also, vmPFC is involved in emotions and emotion-related information processing, with and without the requirement of cognitive abilities.⁶³ Antonio Damasio's somatic marker hypothesis has emphasized that medial PFC plays a crucial role in affective cognition and emotional decision-making.⁶⁴ VmPFC shows significant activations for self-referential affective stimuli, thus being important for emotional regulation and reinforcement evaluation.⁶⁵ Furthermore, vmPFC activation is strongly correlated with emotional cue detections, such as deliberately computing and

⁶² Masamichi Sakagami, Xiaochuan Pan & Bob Uttl, *Behavioral Inhibition And Prefrontal Cortex In Decision-Making*, 19 NEURAL NETWORKS 1255–1265 (2006).

⁶³ Luan K Phan et al., *Functional Neuroanatomy of Emotion: A Meta-Analysis of Emotion Activation Studies in PET and fMRI*, 16 NEUROIMAGE 331–348 (2002).

⁶⁴ Antonio R Damasio, *The Somatic Marker Hypothesis And The Possible Functions Of The Prefrontal Cortex*, 351 PHILOSOPHICAL TRANSACTIONS OF THE ROYAL SOCIETY OF LONDON. SERIES B: BIOLOGICAL SCIENCES 1413–1420 (1996).

⁶⁵ John Douglas Steele & Stephen M Lawrie, *Segregation Of Cognitive And Emotional Function In The Prefrontal Cortex: A Stereotactic Meta-Analysis*, 21 NEUROIMAGE 868–875 (2004).

learning value signals from external and internal hints.⁶⁶

Motor impulsivity is negatively associated with working memory and rule-based cognitive control.⁶⁷ Adolescents with lower working memory capacities resulted from immature or deficient dIPFC development are not only more likely to behave impulsively without deliberate thinking, but also less able to behave appropriately by referring to predefined rules or specific instructions.⁶⁸ The inverse relationship is unique to motor impulsivity among adolescents because lack of attentional and rule-based control, inability to consider the alternatives, and inability to foresee the negative consequences are the major characteristics.⁶⁹

An age-related gap of adolescent brain development and functional connectivity between

⁶⁶ Phan et al., *supra* note 63.

⁶⁷ Eveline A. Crone & Nikolaus Steinbeis, *Neural Perspectives on Cognitive Control Development during Childhood and Adolescence*, 21 TRENDS IN COGNITIVE SCIENCES 205–215 (2017); *see also* Luciana, *supra* note 56; Romer et al., *supra* note 4.

⁶⁸ Noah A. Shamosh et al., *Individual Differences in Delay Discounting: Relation to intelligence, working memory, and anterior prefrontal cortex*, 19 PSYCHOLOGICAL SCIENCE 904–911 (2008).

⁶⁹ *Id.*

dIPFC and vmPFC also exists, with dIPFC maturing the last until adulthood.⁷⁰ The protracted maturation of dIPFC, compared to vmPFC, is manifested in adolescent under-developed cognitive and executive functions, yet relatively mature affective processing.⁷¹ The gap corresponds with the fact that adolescents are able to make decisions about their behaviors, but these decisions are just more likely to be sloppy, emotion-oriented, rule-breaking, and impulsive.⁷² Unlike adolescents, adults typically are able to perform deliberately evaluation and inhibitory control due to their relatively mature dIPFC, vmPFC, and other brain areas, such as anterior cingulate cortex (ACC), inferior frontal gyrus, fusiform gyrus, and frontal-striatal areas, as well as their functional connectivity.⁷³ A delayed

⁷⁰ Gogtay et al., *supra* note 24; Romer et al., *supra* note 4.

⁷¹ Steinberg, *supra* note 9.

⁷² Steinberg, *supra* note 12.

⁷³ Gogtay et al., *supra* note 24; Katya Rubia et al., *Linear Age-Related Functional Development Of Right Inferior Fronto-Striato-Cerebellar Networks During Response Inhibition And Anterior Cingulate During Error-Related Processes*, 28 HUMAN BRAIN MAPPING 1163–1177 (2007); for functional connectivity, see Kai Hwang, Katerina Velanova & Beatriz Luna, *Strengthening of Top-Down Frontal Cognitive Control Networks Underlying the*

development in dlPFC, compared to other subcortical regions for emotion processing, namely limbic system and VS, is generally linked to adolescent's motor impulsivity.⁷⁴ Undoubtedly, motor impulsivity can lead to a higher probability of adolescents engaging in unplanned, hotheaded, and delinquent behaviors.

B. Active Impulsive Choice

Inability to delay gratification or actively making impulsive choice is related to impulsivity concerning temporal discounting (TD).⁷⁵ Temporal discounting tasks estimate an individual's subjective preference for smaller immediate rewards over larger delayed ones.⁷⁶ While people usually prefer small immediate

Development of Inhibitory Control: A Functional Magnetic Resonance Imaging Effective Connectivity Study, 30 JOURNAL OF NEUROSCIENCE 15535–15545 (2010).

⁷⁴ Casey et al., *supra* note 8.

⁷⁵ Fineberg et al., *supra* note 53; Romer et al., *supra* note 4; Steinberg, *supra* note 9.

⁷⁶ Michelle Achterberg et al., *Frontostriatal White Matter Integrity Predicts Development of Delay of Gratification: A Longitudinal Study*, 36 THE JOURNAL OF NEUROSCIENCE 1954–1961 (2016); Erik de Water et al., *Neural Mechanisms Of Individual Differences In Temporal Discounting Of Monetary And Primary Rewards In Adolescents*, 153 NEUROIMAGE 198–210 (2017).

rewards and even know that delayed returns are greater, the TD of adolescents is significantly steeper than that of adults.⁷⁷ In other words, adolescents are more likely to choose the small but immediate rewards than adults are.⁷⁸

A voxel-based morphometry has revealed that greater TD is associated with lower gray matter volume in the vmPFC and insula, and greater gray matter volume in a subcortical region encompassing the VS.⁷⁹ Individuals with impaired vmPFC and insula tend to make disadvantageous choices and become insensitive to future rewards.⁸⁰ A significant age-related linear change in brain activations has

⁷⁷ Elizabeth A. Olson et al., *Adolescents' Performance On Delay And Probability Discounting Tasks: Contributions Of Age, Intelligence, Executive Functioning, And Self-Reported Externalizing Behavior*, 43 PERSONALITY AND INDIVIDUAL DIFFERENCES 1886–1897 (2007); Anouk Scheres et al., *Temporal Reward Discounting In Children, Adolescents, And Emerging Adults During An Experiential Task*, 5 FRONTIERS IN PSYCHOLOGY (2014).

⁷⁸ Anastasia Christakou, Mick Brammer & Katya Rubia, *Maturation Of Limbic Corticostriatal Activation And Connectivity Associated With Developmental Changes In Temporal Discounting*, 54 NEUROIMAGE 1344–1354 (2011).

⁷⁹ Scott Mackey et al., *Brain Regions Related to Impulsivity Mediate the Effects of Early Adversity on Antisocial Behavior*, 82 BIOLOGICAL PSYCHIATRY 275–282 (2017).

⁸⁰ *Id.*; see also Arthur D. Craig, *How Do You Feel? Interoception: The Sense Of The Physiological Condition Of The Body*, 3 NATURE REVIEWS NEUROSCIENCE 655–666 (2002).

indicated that the decline in TD from adolescence to early adulthood is associated with changes in the magnitude of those brain areas.⁸¹ During adolescence, an inability to avoid making impulsive and immature decisions is overall associated with age-related increased VS activations and immature vmPFC functions.

A series of maturational changes in the steepness of TD are also associated with the strength in functional connectivity between vmPFC, dlPFC, and insula.⁸² As mentioned before, the functional connectivity within-PFC substructures and between PFC and limbic system are not fully developed during adolescence. This further shows that the immaturity of an adolescent decision-making process may just be a consequence of the differential brain development trajectories.⁸³ Constantly making immature decisions or being vulnerable to immediate rewards will increase an adolescent's probability of engaging in antisocial and delinquent activities.

⁸¹ Christakou et al., *supra* note 78.

⁸² *Id.*

⁸³ Mackey et al., *supra* note 79.

C. Hot Cognition and Sensation-Seeking

Hot cognition refers to a network of brain regions regulating affective and motivational processes.⁸⁴ Cognitive control under cold cognition and sensation-seeking under hot cognition are linked with different neuronal circuits and have different developmental paths.⁸⁵ Sensation seeking is related to an individual's tendency to seek out novel and intense sensations and experiences.⁸⁶ Sensation-seeking behaviors may be high in subjective desirability, but also high in potential for harm.⁸⁷ Adolescents tend to engage in more risk-seeking behaviors overall, such as drive while drunk, drug experimentations, and unsafe sexual activities.⁸⁸ An inverted U-shaped pattern of sensation-seeking

⁸⁴ Thomas E Gladwin & Bernd Figner, *Hot Cognition And Dual Systems: Introduction, Criticisms, And Ways Forward*, NEUROECONOMICS, JUDGMENT, AND DECISION MAKING 157–180 (2015).

⁸⁵ Johnson et al., *supra* note 3.

⁸⁶ Marvin Zuckerman & D. Michael Kuhlman, *Personality and Risk-Taking: Common Bisocial Factors*, 68 JOURNAL OF PERSONALITY 999–1029 (2000).

⁸⁷ Stephanie Burnett et al., *Adolescents' Heightened Risk-Seeking In A Probabilistic Gambling Task*, 25 COGNITIVE DEVELOPMENT 183–196 (2010).

⁸⁸ Casey et al., *supra* note 8; Steinberg, *supra* note 9.

behaviors between childhood and adulthood, with its peak in adolescence, has been observed by many researchers.⁸⁹

However, adolescents do acknowledge the risks associated with their choice or behaviors, similar to adults.⁹⁰ They are simply more likely to make decisions on short-term proximal rewards rather than on long-term ones and are more motivated by positive reinforcement than by negative reinforcement.⁹¹ Because limbic regions are more mature vis-à-vis PFC, adolescent behaviors are mainly controlled by limbic system, compared to children whose limbic regions and PFC are both developing and adults whose brain developments are mostly completed.⁹² Since adolescents experience many high arousal situations and are more

⁸⁹ Jacques Dayan et al., *Adolescent Brain Development, Risk-Taking And Vulnerability To Addiction*, 104 JOURNAL OF PHYSIOLOGY-PARIS 279–286 (2010); see also Burnett et al., *supra* note 87; Steinberg, *supra* note 9.

⁹⁰ Dayan et al., *supra* note 89; Steinberg, *supra* note 9.

⁹¹ Jeffery Arnett, *Reckless Behavior In Adolescence: A Developmental Perspective*, 12 DEVELOPMENTAL REVIEW 339–373 (1992).

⁹² Adriana Galvan et al., *Risk-Taking And The Adolescent Brain: Who Is At Risk?* 10 DEVELOPMENTAL SCIENCE (2007); Casey et al., *supra* note 8;

susceptible to peer influences, their emotional system tends to take over their cognitive control system, potentially making adolescents more prone to risk-taking behaviors.⁹³

Furthermore, a neuroimaging study has indicated that neural circuitry undergoes major reorganization during adolescence, particularly in those brain regions related to the self and social cognition.⁹⁴ The “emotional brain” may play a significant role in this reorganization process. Developmental changes in brain regions involved in emotional processing (i.e., limbic system) in middle adolescence lead to heightened sensitivity to social and emotional rewards, as well as motivation toward reward-seeking.⁹⁵ The reward sensitivity is a crucial marker for an individual’s high sensation seeking and impulsive behaviors.⁹⁶ Adolescent’s increased

⁹³ Dustin Albert & Laurence Steinberg, *Peer Influences on Adolescent Risk Behavior*, INHIBITORY CONTROL AND DRUG ABUSE PREVENTION 211–226 (2011).

⁹⁴ Dayan et al., *supra* note 89.

⁹⁵ *Id.*; see also Albert & Steinberg, *supra* note 93.

⁹⁶ Anita Cservenka et al., *High And Low Sensation Seeking Adolescents Show Distinct Patterns Of Brain Activity During Reward Processing*, 66 NEUROIMAGE 184–193 (2013).

sensation-seeking behaviors may link to their more developed basal ganglia and VS.⁹⁷ A greater reward sensitivity is associated with increased activations in insula and nucleus accumbens in VS comprised of the brain reward system.⁹⁸

Several theories have tried to explain the association between VS and adolescent sensation-seeking behaviors. On the one hand, Linda Spear has argued that since VS is hyporesponsive to rewards during adolescence, increased reward-seeking behaviors are needed to reach the same level of activation or the same level of reward feeling as for adults.⁹⁹ On the other hand, researchers have suggested that VS or the reward system is hyperresponsive during adolescence, leading to more sensation-seeking behaviors.¹⁰⁰ The immaturity of

⁹⁷ Galvan et al., *supra* note 92.

⁹⁸ Cservenka et al., *supra* note 96.

⁹⁹ Linda P Spear, *The Adolescent Brain And Age-Related Behavioral Manifestations*, 24 NEUROSCIENCE & BIOBEHAVIORAL REVIEWS 417–463 (2000).

¹⁰⁰ R. Andrew Chambers, Jane R. Taylor & Marc N. Potenza, *Developmental Neurocircuitry of Motivation in Adolescence: A Critical Period of Addiction Vulnerability*, 160 AMERICAN JOURNAL OF PSYCHIATRY 1041–1052 (2003); *see also* Dayan et al., *supra* note 89.

adolescent cognitive control system may result in the disproportionately increased activation of the VS motivational pathway.¹⁰¹ This phenomenon may explain why adolescents are particularly susceptible to social rewards and motivated by immediate positive reinforcements. In turn, this association explains why adolescents have substantially more sensation-seeking or risk-taking behaviors, therefore leading to a higher probability of being delinquent.

D. Summary

Brain development research has shaped how people view juvenile delinquency today. All three types of impulsivity during adolescence: motor impulsivity, active impulsive choice, and sensation-seeking, are not just the results of negative social environmental influences, such as family adversity, neighborhood disadvantage, and school failure. Adolescent impulsivity and delinquency are also not unchangeable due to some permanent brain damages

¹⁰¹ Chambers et al., *supra* note 100.

or genetic deficits. Combining previous brain development evidence, a brain maturational gap and a developmental imbalance have been highlighted in explaining juvenile delinquency. Adolescents' impulsive and immature behaviors, as well as the resultant delinquency, may be more related to differential brain growth trajectories, a rapid maturation of the emotional/reward system and a slow, prolonged development of the cognitive control system.

As adolescents generally desire for independence, adult identity, and social acceptance when interacting with the social world, they may not only lack of the ability to inhibit their impulsivity and evaluate a situation incorrectly, especially a high arousal one, but also sensitize to the reward value of risky behaviors due to brain immaturity.¹⁰² This “nature” of adolescence makes them more likely to engage in impulsive, antisocial, and delinquent behaviors. However, as their cognitive control system matures, their ability to exert self-control,

¹⁰² Albert & Steinberg, *supra* note 93.

coordinate emotions and reason, and make thoughtful decisions will increase, thereby automatically reducing their probability of engaging in delinquent behaviors.

IV. ADOLESCENT BRAIN AND AGE-RELATED POLICY DEBATE

Unlike adults, adolescents and young people between the ages of 16 and 24 are not fully mature. Their brains are still developing, making them more likely to exhibit impulsive behaviors in social interactions and are more sensitive to social and nonsocial rewards. This developmental nature especially put adolescents and young adults in a restricted and vulnerable stage in terms of public policy and legal processing. One question is about raising the minimum legal age (MLA) for drinking and smoking, and the other is about raising the minimum age for juvenile courts or the recommended adult referral age in the juvenile justice system. At present, the debate on raising the MLA for the use of substances tends to be less

fruitful, and has almost reached a bottleneck, while raising the age of the juvenile court is in a hot stage.

A. Brain Immaturity and Raising the Minimum Legal Age for Substance Use

From juvenile delinquency prevention perspective, policymakers have raised the MLA of smoking and drinking alcohol from 18 to 21 and still considering extending the age limit to even 25, since the tobacco markets and product promotions have increasingly targeted young adults.¹⁰³ By raising the MLA of accessing tobacco and alcohol products to age 21 or 25, policymakers not only expect a substantial reduction in smoking and illegal drinking prevalence, but also intend to prevent adolescents and young adults from engaging in delinquent behaviors.¹⁰⁴

¹⁰³ RICHARD J. BONNIE, KATHLEEN STRATTON & LESLIE Y. KWAN, PUBLIC HEALTH IMPLICATIONS OF RAISING THE MINIMUM AGE OF LEGAL ACCESS TO TOBACCO PRODUCTS (2015); Pamela M. Ling & Stanton A. Glantz, *Why and How the Tobacco Industry Sells Cigarettes to Young Adults: Evidence From Industry Documents*, 92 AMERICAN JOURNAL OF PUBLIC HEALTH 908–916 (2002).

¹⁰⁴ Bonnie et al., *supra* note 103.

The logic of policymakers to translate evidence of adolescence brain immaturity into public policy is clear. Because their brains are not mature until 25, adolescents and young adults may lack of the ability to accurately perceive and estimate the cost and benefits of certain behaviors and foresee the consequences.¹⁰⁵ Furthermore, some regions of the brain that are critical to substance dependence are still developing for adolescents and young adults, thereby increasing an adolescent's vulnerability to substance use through the negative impacts on brain developments.¹⁰⁶ In the long run, exposure to substance during adolescence may increase the probability of a further delayed or dysfunctional cognitive development and a greater sensitivity to substance reward signals.¹⁰⁷ In the short term, any individual under the influence of substances tends to act irrationally, impulsively, or aggressively. Let

¹⁰⁵ Steinberg, *supra* note 9.

¹⁰⁶ Bonnie et al., *supra* note 103.

¹⁰⁷ Danielle S. Counotte et al., *Development Of The Motivational System During Adolescence, And Its Sensitivity To Disruption By Nicotine*, 1 DEVELOPMENTAL COGNITIVE NEUROSCIENCE 430–443 (2011).

alone adolescents and young adults whose brain reward systems are highly active and cognitive control systems are underdeveloped. Among 18- to 24-year-olds, 39% of binge drinkers admit to criminal or delinquent behaviors and 60% to disorderly behaviors.¹⁰⁸ Both situations can increase an adolescent's future probability of engaging in delinquent behaviors and having substance use disorders.

B. Concerns about Raising the MLA Policy

The above logic does make sense, but only to a certain degree. It is undeniable that children, adolescents, and young adults should not be exposed to any substance. But the key debate is which age limit should we choose, or should we continue to raise the MLA of drinking and smoking from 21 up to 25 years old? Should we keep fueling up the debate? At least three concerns need to be considered.

¹⁰⁸ Jasper Gerard, *Should We Raise The Age Of Legal Drinking?*
14 PUBLIC POLICY RESEARCH 31–35 (2007).

First, the legal age cutoff is arbitrary.¹⁰⁹ There may not be a noticeable difference between 21-year-old and 22-year-old individuals in terms of both brain developments and behavioral patterns. If policymakers raise the MLA up to 25 by only considering brain development research, then what about people aged 26 years old and people who go through longer protraction of brain development or have significant brain dysfunctions? Hence, the current age limit is fairly decent and robust, and that continuing to increase the MLA may not bring seemingly huge benefits. On the contrary, it may bring up the issue related to ageism and anti-ageism in the justice system. The potential harm and debate about the merits of criminalizing adolescent substance use also receive a greater recognition.¹¹⁰ The problem now is not about raising the age or not, but it is about whether raising the MLA will achieve its potential benefits and substantially reduce

¹⁰⁹ Elizabeth Cauffman, Sachiko Donley & April Thomas, *Raising the Age*, 16 CRIMINOLOGY & PUBLIC POLICY 73–81 (2017).

¹¹⁰ Mark Wolfson & Mary Hourigan, *Unintended Consequences And Professional Ethics: Criminalization Of Alcohol And Tobacco Use By Youth And Young Adults*, 92 ADDICTION 1159–1164 (1997).

adolescent substance use problems, thus leading to a decline in juvenile delinquency. But the evidence of the causal impact of changing such public policy on adolescent risk behaviors are inconclusive.¹¹¹

Second, raising the MLA may have unintended consequences.¹¹² Analyses from the National Youth Tobacco Survey (NYTS) and the Monitoring the Future (MTF) survey have shown that three most common methods for adolescents to get cigarettes are: (a) someone offered it, (b) they asked someone else to give or buy it, and (c) they bought it by themselves.¹¹³ In theory, since adolescents and young adults who are legal before the new policy now become illegal users, the demand for an illegal

¹¹¹ See generally Jason M. Fletcher, *Estimating Causal Effects Of Alcohol Access And Use On A Broad Set Of Risky Behaviors: Regression Discontinuity Evidence*, 37 CONTEMPORARY ECONOMIC POLICY 427–448 (2019); Ralph W Hingson et al., *Impact Of Legislation Raising The Legal Drinking Age In Massachusetts from 18 to 20*, 73 AMERICAN JOURNAL OF PUBLIC HEALTH 163–170 (1983); Shari Kessel Schneider et al., *Community Reductions In Youth Smoking After Raising The Minimum Tobacco Sales Age to 21*, 25 TOBACCO CONTROL 355–359 (2016).

¹¹² See generally John Dinardo & Thomas Lemieux, *Alcohol, Marijuana, and American Youth: The Unintended Effects of Government Regulation*, 20 JOURNAL OF HEALTH ECONOMICS 991–1010 (1992); Lanza-Kaduce & Richards, *supra* note 13; Ringold, *supra* note 13.

¹¹³ Bonnie et al., *supra* note 103.

substance should be tempered by increasing their perceived risk of being arrested and punished for buying or using them.¹¹⁴ However, adolescents who are eager to use substances will always attempt to do so regardless of the legal age constraint.

No matter how the MLA policy changes, a subgroup of high-risk adolescents who should have been targeted by policy will not be affected. In addition, a boomerang effect in response to the MLA policy exists.¹¹⁵ Boomerang effect lies in the theory of psychological reactance and is roughly defined as the state of being aroused in opposition to perceived threats to a personal choice.¹¹⁶ In other words, this policy may result in an opposite rather than the intended effects on adolescents' substance use behaviors. Adolescents who do not normally use illegal substances may try to break this rule because they would think drinking demonstrates independence and individual freedom, thus reacting against school-based educational programs,

¹¹⁴ *Id.*

¹¹⁵ Ringold, *supra* note 13.

¹¹⁶ *Id.*

warnings signs, and alcohol or smoking policies.¹¹⁷ Unfortunately, these mandatory MLA policies may cause resentment and increase reactance.¹¹⁸ For adolescent sensation-seekers, they may think breaking rules with the possibility of not getting arrested is cool and gives them the adrenaline or dopamine thrill. In either case, as adolescents age and consider the policy as too repressive, they may experience an increasing level of psychological reactance, thus making the MLA policy less effective or even counterproductive.¹¹⁹

Third, presumably, a group of adolescents can deliberately think through and have plans for the consequences of their behaviors. They will engage in underage substance use not because they act recklessly or irresponsibly, but because the policy rules them as illegal. Counterintuitively, increasing the MLA policy may lead to an increase in illegal

¹¹⁷ *Id.*

¹¹⁸ Jennifer B. Unger et al., *Attitudes Toward Anti-Tobacco Policy Among California Youth: Associations With Smoking Status, Psychosocial Variables And Advocacy Actions*, 14 HEALTH EDUCATION RESEARCH 751–763 (1999).

¹¹⁹ *Id.*; see also Ringold, *supra* note 13.

substance use and juvenile delinquency.¹²⁰ There are unintended negative consequences of the MLA of alcohol laws.¹²¹ Underaged drinkers may engage in alternative forms of crime to obtain alcohol and the arbitrary age limit may make them argue that the law is unfair, thus making the policy less effective.¹²² After analyzing a large sample of students from 43 states over the years 1980–1989, researchers have revealed that raising the MLA of alcohol drinking even leads to a slight increase of marijuana consumption.¹²³

Overall, the impacts of raising the MLA policy on substance use and delinquency prevention are mixed and have not reached its intended preventative effects. Relevance of brain research on immaturity and these age-related public policies is warranted. However, the degree of its implication in *changing* current MLA policies may be limited with few justifications due to at least three concerns

¹²⁰ Dinardo & Lemieux, *supra* note 112.

¹²¹ Lanza-Kaduce & Richards, *supra* note 13.

¹²² *Id.*

¹²³ Dinardo & Lemieux, *supra* note 112.

aforementioned. Moreover, raising the MLA of substance use from 21 to 25 may obtain a similar unproductive effect as raising the MLA from 18 to 21. Therefore, current legal age cutoff is reasonable. There is no need to repeat the history and fuel up the debate again. Policies like these should be settled with what it is now because little merit will be produced if we keep arguing back and forth.

C. Brain Development and Raising the Age for Adult Referral

Adolescent brain development research has its potential to inform how to determine an adolescent's culpability, how to set a proper punishment, and how to treat young offenders fairly in the legal system, with the aim of reducing delinquency and enhancing public safety yet not disrupting their future opportunities. However, researchers and policymakers should also acknowledge its limited legal relevance and precise implications in the legal system. Public policy should not rely too much on the rhetoric gloss of brain science because it

is neither advanced enough to explain criminal responsibility among individuals nor ready to make a huge contribution to policy reforms.¹²⁴

Farrington and colleagues have directly proposed that the legislation should increase the minimum age for referral of adolescents to adult court up to 21, and preferably 24, based on the fact that their brain structures and functions are immature and similar to those of juveniles rather than adults.¹²⁵ Adolescents aged from 16 to 24 should be processed in juvenile courts rather than adult courts.¹²⁶ Furthermore, they have pointed out urgent needs to set up special correctional facilities, get a maturity discount for sentencing, provide risk assessments, and implement community programs to reduce future recidivism.¹²⁷ The logic of this call for reforming the referral policy regarding a juvenile's criminal responsibility and

¹²⁴ SALLY L. SATEL & SCOTT O. LILIENFELD, *BRAINWASHED: THE SEDUCTIVE APPEAL OF MINDLESS NEUROSCIENCE* (2013).

¹²⁵ David P. Farrington, Rolf Loeber & James C. Howell, *Young Adult Offenders: The Need For More Effective Legislative Options And Justice Processing*, 11 *CRIMINOLOGY & PUBLIC POLICY* 729–750 (2012).

¹²⁶ *Id.*

¹²⁷ *Id.*

culpability is straightforward and parallel to raising the MLA of substance use policy. Adolescents and young adults engage in various forms of delinquency partially because they are in a special brain developmental stage which predisposes them for impulsivity, aggressiveness, sensation-seeking behaviors, and high reward sensitivity.¹²⁸

D. Concerns about Raising the Age of Referral

If all adolescents/young adults are less culpable because of their developing brains, then should policymakers equally consider reforming the policy for elderly adults because of a steady shrinkage of brain volume over the age of 35? Should every offender receive individualized sentencing and treatment because everyone's brain development is slightly different? Although there is an association between the unique nature of adolescent brain development and their impulsive behaviors, brain immaturity is only one aspect that can have an impact

¹²⁸ Casey et al., *supra* note 8; Dayan et al., *supra* note 89; Steinberg, *supra* note 9.

on juvenile delinquency.¹²⁹ Brain development evidence does not mean that adolescents lack culpability or criminal responsibility; it only shows that adolescents are rehabilitable and their brains are technically more malleable.¹³⁰

Moreover, with several alternative considerations, simply raising the age for adult referral may not be as effective as it is expected to be.¹³¹ First, according to the age-crime curve¹³² and developmental theory, not all young offenders follow the same offending onset and desistence.¹³³ A Pittsburgh Youth Study has discovered that 52% to 57% of juvenile delinquents actually continue to

¹²⁹ Michael Rocque, Brandon C. Welsh & Adrian Raine, *Policy Implications of Biosocial Criminology: Crime Prevention and Offender Rehabilitation*, 40 JOURNAL OF CRIMINAL JUSTICE 306–312 (2012).

¹³⁰ Lyons, *supra* note 15.

¹³¹ Gibson & Krohn, *supra* note 15.

¹³² The age-crime curve: the prevalence of offending tends to increase from late childhood, peak in the teenage years (from 15 to 19) and then decline in the early 20s. This bell-shaped age trend, called the age-crime curve, is universal in Western populations.

¹³³ Terrie E. Moffitt, *Adolescence-Limited And Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 PSYCHOLOGICAL REVIEW 674–701 (1993); Gibson & Krohn, *supra* note 15.

offend up to age 25.¹³⁴ Individual age-crime trajectory varies significantly and not all persistence patterns are identical.¹³⁵ Although adolescent brain development shows a relatively consistent pattern at the aggregated or normative level, individual differences in such developmental trajectories still exist. For example, some offenders have chronic offending careers, whereas others may be late bloomers who only start frequent offending after adolescence or young adulthood.¹³⁶ The late blooming is not a recent phenomenon and the risk factors associated with late-blooming trajectories are also different.¹³⁷ It is possible that some brain regions of late bloomers, such as PFC and limbic system, are delayed and function ineffectively, thus resulting in a late onset of impulsivity, sensation-seeking, and delinquency. Because of different brain development

¹³⁴ DAVID P. FARRINGTON & ROLF LOEBER, FROM JUVENILE DELINQUENCY TO ADULT CRIME: CRIMINAL CAREERS, JUSTICE POLICY, AND PREVENTION (2012).

¹³⁵ Alex R Piquero, J David Hawkins & Lila Kazemian, *Criminal Career Patterns*, in FROM JUVENILE DELINQUENCY TO ADULT CRIME: CRIMINAL CAREERS, JUSTICE POLICY AND PREVENTION 14–46 (2012).

¹³⁶ Gibson & Krohn, *supra* note 15.

¹³⁷ *Id.*

trajectories among individuals, how to justify that raising the minimum age of juvenile courts will reduce juvenile delinquency may be vague.

Second, research on the juvenile offender's personality traits (impulsivity, sensation-seeking, and reward sensitivity) have provided inconclusive results about the absolute and relative stability of cognitive control.¹³⁸ Cognitive control systems are malleable and responsive to social interactions.¹³⁹ Reshuffling the “good” and the “bad” is possible.¹⁴⁰ The development of cognitive control requires dynamic interaction between social and biological factors, rather than relying solely on neuroscience.¹⁴¹ Although the debate on raising the minimum age of adult referral draws much attention from researchers and policymakers due to a compelling and robust evidence of adolescent brain immaturity and

¹³⁸ *Id.*

¹³⁹ Callie H. Burt, Ronald L. Simons & Leslie G. Simons, *A Longitudinal Test Of The Effects Of Parenting And The Stability Of Self-Control: Negative Evidence For The General Theory Of Crime*, 44 *CRIMINOLOGY* 353–396 (2006).

¹⁴⁰ *Id.*

¹⁴¹ Kevin M. Beaver & John Paul Wright, *Biosocial Development and Delinquent Involvement*, 3 *YOUTH VIOLENCE AND JUVENILE JUSTICE* 168–192 (2005).

developmental trajectory, this policy recommendation is questionable and indecisive because no methodologically rigorous study has evaluated its effectiveness and necessity, in terms of juvenile delinquency rates, recidivism, overall psychological health, and potential negative outcomes.¹⁴² At present, no empirical evidence has yet shown which policy or reform works best for adolescents and young adults.

As early as 2000, the Institute of Medicine and the National Research Council published a report entitled *From Neurons to Neighborhoods: The Science of Early Childhood Development*.¹⁴³ It proposed two critical agendas:

The first is focused on the future and asks: How can society use knowledge about early childhood development to maximize the development of the nation's human capital and ensure the ongoing vitality of its democratic

¹⁴² Gibson & Krohn, *supra* note 15.

¹⁴³ Jack P. Shonkoff & Deborah A. Phillips, FROM NEURONS TO NEIGHBORHOODS: THE SCIENCE OF EARLY CHILDHOOD DEVELOPMENT (2000). Jack P. Shonkoff & Pat Levitt, *Neuroscience and the Future of Early Childhood Policy: Moving from Why to What and How*, 67 NEURON 689–691 (2010).

institutions? The second is focused on the present and asks: How can the nation use knowledge to nurture, protect, and ensure the health and well-being of all young children as an important objective in its own right, regardless of whether measurable returns can be documented in the future? The first agenda speaks to society's economic, political, and social interests. The second speaks to its ethical and moral values.

These two agendas should always be kept in mind for researchers who intend to use brain development evidence to inform public and legal policy.¹⁴⁴ It is indisputable that the intention of raising the age for adult referral is to create a rehabilitating and restorative juvenile justice system. Yet, this is just as Stephen Morse has warned, “be careful of what you wish for” (from a personal communication in 2016). Take juvenile offenders in Texas as an example. If all 17-year-olds in Texas (about 26,000 in 2014) were referred into the juvenile rather than the adult justice system, it would

¹⁴⁴ *Id.*

crash the juvenile justice system, contradicting with the goal of depopulating the juvenile facilities.¹⁴⁵

E. Summary

Sometimes, a newly proposed legal policy solely based on neuroscience or biological theory may be conceptually misunderstood or based on non-empirical evidence.¹⁴⁶ Since public policy and prevention programs should be evidence-based rather than hypothetical, researchers and policymakers should avoid “brain overclaim syndrome” (BOS)¹⁴⁷ or over advocate for biological basis of juvenile delinquency.¹⁴⁸ Brain science can

¹⁴⁵ Lyons, *supra* note 15.

¹⁴⁶ Stephen J. Morse, *Criminal Law And Common Sense: An Essay On The Perils And Promise Of Neuroscience*, 99 MARQ. LAW REVIEW 39–72 (2015).

¹⁴⁷ Brain over-claim syndrome: a condition identified by Stephen Morse (2006). To some extent, it is a simple truism that the brain is involved with all things that comprise our human existence. Therefore, understanding the brain will help people to understand the human condition more fully. However, scientists are aware that neuroscientific findings may have social, psychological, legal, or ethical implications. But those evidences remain far from being decisive on larger social problems, including crimes.

¹⁴⁸ Jamie M. Gajos, Abigail A. Fagan & Kevin M. Beaver, *Use of Genetically Informed Evidence-Based Prevention Science to Understand and Prevent Crime and Related Behavioral Disorders*,

benefit policy making processes when they are relevant and necessary, but public policy reforms should not be based on adolescent brain research alone.¹⁴⁹ The contribution of brain research to legal policy and practice is not because it shows the normative differences between juveniles' and adults' brains and behaviors, but because it provides for the sources of such differences.¹⁵⁰ Simply raising the age of adult referral in juvenile court may not function as effectively as it is supposed to be with the whole justice system. The justification and relevance of using adolescent brain development evidence to inform such policy changes is still limited and under the question. Taken together, a radical reform in age-related public policy, such as raising the age for adult referral and raising the MLA of substance use, may be unlikely to occur in the foreseeable future. A continued debate on this issue may be futile.

15 CRIMINOLOGY & PUBLIC POLICY 683–701 (2016); Morse, *supra* note 146.

¹⁴⁹ Steinberg, *supra* note 9.

¹⁵⁰ Steinberg, *supra* note 12.

V. ETHICAL CONCERNS

Advances in brain research have certain implications in the justice system and practice, as well as raise new ethical issues. These issues arise because brain development evidence increasingly applies to understand a wide range of adolescents' behaviors, but the methodological, political, cultural, and social contexts of its applications and limitations are not well discussed. Significant attention to ethical concerns about brain science can be traced back to 2002.¹⁵¹ An interdisciplinary research area, called Neuroethics, has emerged with the goal of examining “what is right and wrong, good and bad about the treatment of, perfection of, or unwelcome invasion of and worrisome manipulation of the human brain.”¹⁵² Neuroethics discusses ethical issues about what we can do with the brain development evidence along with neurotechnology, and how to draw

¹⁵¹ Adina Roskies, NEUROETHICS STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2016), <https://plato.stanford.edu/entries/neuroethics/>.

¹⁵² STEVEN J MARCUS, NEUROETHICS: MAPPING THE FIELD (2002).

inferences from what we have known about it.¹⁵³ It is impossible to fully compass all the neuroethics topics; this review focuses only on ethical challenges related to the interconnection between brain development and the juvenile justice system.

A. Determination of Juvenile Culpability

When the justice system uses brain development research as evidence to redefine legal maturity age, explain juvenile delinquency, and reform public policy, neuroethics inevitably applies.¹⁵⁴ One major application of brain science is to determine a juvenile's mental state, culpability, and criminal responsibility. Some experts believe that adolescents' lack of emotional and cognitive capabilities to plan, foresee, and regulate their behaviors can help the law to determine, or

¹⁵³ Adina Roskies, *Neuroethics For The New Millenium*, 35 NEURON 21–23 (2002); MARTHA J FARAH, *NEUROETHICS: AN INTRODUCTION WITH READINGS* (2010).

¹⁵⁴ STEPHEN J. MORSE & ADINA L. ROSKIES, *A PRIMER ON CRIMINAL LAW AND NEUROSCIENCE: A CONTRIBUTION OF THE LAW AND NEUROSCIENCE PROJECT* (2013).

specifically mitigate, their culpability.¹⁵⁵ Along with this view, adolescents should not hold full criminal responsibility, even though their behaviors meet preliminary criteria for the crime charged.¹⁵⁶ Indeed, a landmark Supreme Court case, *Roper v. Simmons*, has overturned the death penalty for juvenile offenders.¹⁵⁷ However, the ruling itself does not solely rely on evidence of adolescent brain immaturity cited in the *amicus* brief.¹⁵⁸

Some researchers have overemphasized adolescents' immature brain structures and functions in explaining juvenile delinquency and overgeneralized these findings into the legal domain.¹⁵⁹ They tend to ignore other life experience differences and social structural factors.¹⁶⁰ Law holds a normative or folk psychological assumption

¹⁵⁵ Morse, *supra* note 146.

¹⁵⁶ *Id.*

¹⁵⁷ *Roper v. Simmons*, 543 U.S. 551 (2005).

¹⁵⁸ Roskies, *supra* note 151.

¹⁵⁹ Suparna Choudhury & Sheehan Moore, *Locating Risk in the Adolescent Brain: Ethical Challenges in the Use of Biomarkers for Adolescent Health and Social Policy*, 18 AMA JOURNAL OF ETHICS 1199–1206 (2016).

¹⁶⁰ Daniel Romer, *Adolescent Risk Taking, Impulsivity, And Brain Development: Implications For Prevention*, 52 DEVELOPMENTAL PSYCHOBIOLOGY 263–276 (2010).

of people and behaviors.¹⁶¹ Researchers and policymakers should be cautious in making decisions about individuals based on group data and need to take specific social contexts into consideration in understanding adolescent behaviors.¹⁶² For example, adolescents' desires of sensation-seeking and sensitivity to rewards are possibly adaptive to particular social environments.¹⁶³ Brain development and plasticity is an experience-dependent process that can only be understood in social context.¹⁶⁴ Developmental brain scientists have also described the brain as socio-culturally situated.¹⁶⁵ What we want to know is in which ways the evidence of adolescent brain immaturity, along with a consideration of social factors in the legal context, should be relevant for assessing criminal

¹⁶¹ Morse, *supra* note 14.

¹⁶² Johnson et al., *supra* note 3; Steinberg, *supra* note 9.

¹⁶³ Susan M Sawyer et al., *Adolescence: A Foundation For Future Health*, 379 THE LANCET 1630–1640 (2012).

¹⁶⁴ Jess Nithianantharajah & Anthony J. Hannan, *Enriched Environments, Experience-Dependent Plasticity And Disorders Of The Nervous System*, 7 NATURE REVIEWS NEUROSCIENCE 697–709 (2006).

¹⁶⁵ Choudhury & Moore, *supra* note 159.

responsibility and determining adolescent culpability.¹⁶⁶

Besides, there is a weak correlation between neuropsychological tests or brain scans of executive functions and actual real behaviors.¹⁶⁷ A gap exists in conclusions about the neurocognitive maturation in small, lab-based samples and the national statistics on adolescent risky or delinquent behaviors in a particular country.¹⁶⁸ Assessing real-world cognitive control and maturity among adolescents using brain science is far from certainty and accuracy, given natural individual differences in brain structures, functions, and plasticity especially during development.¹⁶⁹ Therefore, to what extent brain science can link to and make inferences about adolescent delinquent behaviors, as well as help determine juvenile culpability, warrants debate.

¹⁶⁶ *Id.*; see also Jesper Ryberg, *Punishing Adolescents—On Immaturity and Diminished Responsibility*, 7 *NEUROETHICS* 327–336 (2014).

¹⁶⁷ Russell A. Barkley & Kevin R. Murphy, *Impairment in Occupational Functioning and Adult ADHD: The Predictive Utility of Executive Function (EF) Ratings Versus EF Tests*, 25 *ARCHIVES OF CLINICAL NEUROPSYCHOLOGY* 157–173 (2010).

¹⁶⁸ Sawyer et al., *supra* note 163.

¹⁶⁹ Morse, *supra* note 146.

After all, an attribution of legal responsibility can be a moral and ethical question.¹⁷⁰

B. Identification of “At Risk” Adolescents

Another ethical issue comes from the use of brain evidence or neurobiological markers to identify certain impulsive characters or adolescents who are at real developmental risk.¹⁷¹ The recognition of brain immaturity raises the question of how to identify who is simply immature or impulsive, who has an underlying mental health problem, and who is purely bad. In other words, we cannot distinguish and be certain of whether an adolescent’s delinquent behavior is because of the developing brain or not.

Brain scientists have been aware of the ethical risk of identifying specific biomarkers or labeling certain adolescents or young adults as “at high risk.”¹⁷² Such a label may not only cause stigmatization by associating certain adolescents

¹⁷⁰ Stephen J. Morse, *Immaturity and Irresponsibility*, 88 THE JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY 15–67 (1997).

¹⁷¹ Choudhury & Moore, *supra* note 159.

¹⁷² *Id.*

with brain development problems with impulsivity and delinquent behaviors, but also ignore the influence of the broader social environment.¹⁷³ This labeling effect may lead to determinism, such as eugenic movements, and interfere with potential delinquency prevention and/or intervention.¹⁷⁴ The social stigma can disproportionately impact the more vulnerable population, such as adolescents who suffer from family breakdowns, learning difficulties, and disadvantaged neighborhoods.¹⁷⁵

C. Neuro-prediction for Future Dangerousness

A third line of concern is related to the neuro-prediction for adolescent future risky or delinquent

¹⁷³ Iliina Singh & Nikolas Rose, *Biomarkers in psychiatry*, 460 NATURE 202–207 (2009).

¹⁷⁴ *Id.*; see also Colleen M Berryessa & Cho K. Mildred, *Ethical, Legal, Social, And Policy Implications Of Behavioral Genetics*, 14 ANNUAL REVIEW OF GENOMICS AND HUMAN GENETICS 515–534 (2013).

¹⁷⁵ Choudhury & Moore, *supra* note 159; Stephen P. Hinshaw & Dante Cicchetti, *Stigma And Mental Disorder: Conceptions Of Illness, Public Attitudes, Personal Disclosure, And Social Policy*, 12 DEVELOPMENT AND PSYCHOPATHOLOGY 555–598 (2000).

behaviors.¹⁷⁶ When using neuroimages to predict future activities, researchers refer to a statistical probability of an occurrence of a behavior.¹⁷⁷ Such a prediction neither means that a predicted activity will definitely happen nor does it mean a person's future is determined.¹⁷⁸ However, researchers sometimes make this mistake or lack of clarifications when discussing their findings.¹⁷⁹ Such a mistake may lead to a misuse and misunderstanding of the neuro-prediction in a broader social context.

Aharoni and colleagues have found that error-related brain activity while performing a behavioral inhibitory task has predictive value for recidivism within four years of release, after controlling for other risk factors.¹⁸⁰ They suggest a potential neurocognitive biomarker for persistent antisocial

¹⁷⁶ Morse, *supra* note 146; Thomas Nadelhoffer et al., *Neuroprediction, Violence, and the Law: Setting the Stage*, 5 *NEUROETHICS* 67–99 (2012).

¹⁷⁷ Roskies, *supra* note 151.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ Eyal M. Aharoni et al., *Neuroprediction of Future Rearrest*, 110 *PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES* 6223–6228 (2013).

behaviors.¹⁸¹ However, the key question is how to justify that a particular prediction is correct according to which type of standard.¹⁸² At least we need to consider both the accuracy of the prediction itself and the base rate of inevitable prediction errors, because all methods have the problem of false positives and false negatives.¹⁸³ The major concern seems to come from the prediction part of neuro-prediction, rather than the neuro-element.¹⁸⁴ Even though neuro-prediction techniques can improve and produce more accurate and reliable results, overreliance on it for legal decision-making and post-punishment detection is problematic, crowding out the proportionality of punishment principle in the criminal justice system, especially in violence cases and/or among adolescents.¹⁸⁵ Neuro-prediction may not raise any new ethical concerns other than what traditional prediction methods have already done.¹⁸⁶

¹⁸¹ *Id.*

¹⁸² Morse, *supra* note 146.

¹⁸³ *Id.*

¹⁸⁴ Nadelhoffer, et al., *supra* note 176.

¹⁸⁵ *Id.*

¹⁸⁶ Morse, *supra* note 146.

People who refuse to apply neuro-prediction for moral reasons tend to be concerned about any prediction method in the legal system, not just because of brain science.¹⁸⁷

Moreover, obtaining adequate data, such as a person's genetic information and brain images, to ensure and increase prediction accuracy may put threats to one's privacy and autonomy.¹⁸⁸ The justification for such intrusion is a normative and debatable issue.¹⁸⁹ Who should be tested and whether this technique can be used without an adolescent's cooperation? Should parents have the right to get their children tested or should public officials have the ability to do so if adolescents show serious behavioral problems? How should the state or people respond if it has discovered an adolescent with the highest risk? Is it justifiable for the state to forcibly treat at-risk adolescents in order to prevent their future delinquency that hypothetically would have

¹⁸⁷ Nadelhoffer, et al., *supra* note 176.

¹⁸⁸ *Id.*; Nita A Farahany, *Searching secrets*, 160 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 1239–1308 (2012);

¹⁸⁹ Morse, *supra* note 146.

done without treatments or interventions? Should it serve as a tool for reducing potential harms for society?

In an extreme situation, could law enforcement agents use predictive information to detain or arrest adolescents who have not yet committed a crime? Furthermore, should predictive data be admissible to determine sentence or parole decisions? Would that mean we could punish adolescents for crimes that they have not committed? When neuro-prediction is applied to the legal system prematurely, it can lead to difficult ethical and serious policy problems.¹⁹⁰ At the current stage, neuro-prediction is not sufficiently developed to impact public policy.¹⁹¹ Hence, given the validity and reliability of problems relying on brain development data to make legal decisions, using neuro-prediction for adolescent future, dangerousness in both guilt/innocence phase and sentencing phase for legal argumentation and

¹⁹⁰ Roskies, *supra* note 151.

¹⁹¹ Morse, *supra* note 146.

prosecution can result in unintended consequences and ethical challenges.¹⁹²

VI. CONCLUSION

This Article tells an objective and cautionary tale. Developmental brain science has overwhelmingly evidenced the structural and functional immaturity of adolescent brains.¹⁹³ Such brain immaturity manifests in adolescent risky, impulsive, and delinquent behaviors.¹⁹⁴ Brain development evidence has not only changed our traditional definition of legal age for adulthood or maturity, but also facilitated our understanding of adolescent behavioral patterns and behavioral problems. However, public policy is debating to keep up with growing interest in brain science.¹⁹⁵ Many policy recommendations rush to rely exclusively on biological explanations for adolescent behaviors. Policymakers and researchers need to consider the

¹⁹² *Id.*; Farahany, *supra* note 188; Nadelhoffer et al., *supra* note 176.

¹⁹³ Steinberg, *supra* note 9.

¹⁹⁴ *Id.*

¹⁹⁵ Johnson et al., *supra* note 3.

social context of brain development, as well as unintended consequences from policy reform. An ignorant and rash application of brain development evidence in the juvenile justice system can raise serious ethical issues that will jeopardize human rights and social values.¹⁹⁶

The value of adolescent brain science to juvenile justice is not because it creates something new, but because it promotes our understanding of normative behaviors and explains the folk psychological concepts cited in the legal field.¹⁹⁷ The major contribution of brain science does not come from finding biological bases for adolescent immaturity and delinquency, but from highlighting the impact of the legal and social environments created for them.¹⁹⁸ Brain development evidence should not be used as an independent source to change or recommit to traditional juvenile justice values; it merely

¹⁹⁶ Roskies, *supra* note 151.

¹⁹⁷ Morse, *supra* note 146.

¹⁹⁸ *Id.*

reinforces the knowledge we have already had in the justice system and practice.¹⁹⁹

Acknowledging the complex relationships between the brain, behavior, and social environment of juvenile delinquency can lead to better policy implications.²⁰⁰ However, as policy scholar Robert Blank commented, “we have little evidence that there is an anticipatory policy. Most policies tend to be reactive.”²⁰¹ Brain development research does not mean that adolescents lack culpability; it only shows that adolescents are rehabilitatable and their brains are technically more malleable.²⁰² Therefore, instead of reactively reforming policies and waiting for about 40% to 60% of juvenile offenders to desist offending naturally, it is better to proactively translate adolescent brain science into juvenile

¹⁹⁹ Katherine Hunt Federle & Paul Skendelas, *Thinking Like a Child: Legal Implications of Recent Developments in Brain Research for Juvenile Offenders*, LAW, MIND AND BRAIN 199–214 (2017).

²⁰⁰ Johnson et al., *supra* note 3.

²⁰¹ Robert H. Blank, *Policy Implications of the New Neuroscience*, 16 CAMBRIDGE QUARTERLY OF HEALTHCARE ETHICS 169–180 (2007).

²⁰² Lyons, *supra* note 15; Steinberg, *supra* note 2.

justice policies and practices.²⁰³ By identifying biological and social environmental risk factors, brain science can provide important insights into delinquency prevention and rehabilitation programs. Such collaborative, multidisciplinary efforts should be beneficial and promising.

²⁰³ David P. Farrington, *Key Results from the First Forty Years of the Cambridge Study in Delinquent Development*, TAKING STOCK OF DELINQUENCY LONGITUDINAL RESEARCH IN THE SOCIAL AND BEHAVIORAL SCIENCES: AN INTERDISCIPLINARY SERIES 137–183 (2003).

INTERNATIONAL PROTECTION OF MINORITIES RIGHTS AND ISLAMIC LAW: A COMPARATIVE STUDY

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I. INTRODUCTION

The essence of democracy is majority rule, the making of binding decisions by a vote of more than one-half of all persons who participate in an election. However, constitutional democracy in our time requires majority rule with minority rights. Thomas Jefferson, third President of the United States, expressed this concept of democracy in 1801 in his First Inaugural Address. He said, “All . . . will bear in mind this sacred principle, that though the will of

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the majority is in all cases to prevail, that will to be rightful must be reasonable; that the minority possess their equal rights, which equal law must protect and to violate would be oppression.”¹

In every genuine democracy today, majority rule is both endorsed and limited by the supreme law of the constitution, which protects the rights of individuals. The concept of majority rule and respect for minority rights is demonstrated in several Constitutions of world such as American and Indian constitutions. Oppression by majority over the minority is barred by articles of the respective constitution. Today mostly, democracy is a way of government of the people which is ruled by the people. Democracies understand the importance of protecting the rights, cultural identities, social practices, and religious practices of all individuals². In order for the people’s will to govern, a system of

¹ Thomas Jefferson, *The Papers of Jefferson*, 17 February to 30 April 1801, Volume 33, 148 (2006).

² UN Human Rights Committee, General Comment No. 23: The Rights of Minorities (Art. 27), ICCPR.

majority rule with respect to minority rights has been put into place.

“Minorities” and its inseparable accompaniment “minority rights” are the most complex notions around the world, and despite all theoretical assertions, have so far escaped any distinct definition that may be applicable universally. The concept of “minorityism” reflects a phenomenon of uncertainty and inferiority³ which a particular section of society may face because of a variety of reasons, and, therefore, the measures, legal or otherwise initiated by the state to eliminate this complex is generally termed as “minority rights.”⁴

In the contemporary world which is characterized as a global village, “minority rights” which are the direct outcome of multiculturalism are

³ Some scholars argue that although the use of the term “inferior” is meant to indicate that numerical minority position of the group is required, a neutral term with no undesirable connotations would have been suitable. See generally, Kristin Henrard, *Devising an Adequate System of Minority Protection*, (2000) 33; G. Gilbert, *The Legal Protection Accorded to Minority Groups in Europe*, 23 NETHERLANDS YEAR BOOK INT’L L. 73 (1992).

⁴ *Ibid.*

on the political agenda of almost all the states.⁵ It has been necessitated because the fastest ever means of transport and communication have brought into the national boundaries of other states new ethnic, religious and linguistic groups - each of them struggling to preserve its identity, and seeking the protection from the state concerned for this purpose. To cope with this problem, and to accord the required guarantees to such groups, almost every government of the world has taken certain affirmative measures, which in brief are termed as “minority rights,” and the whole social structure which emerges from this pluralistic ethos is known as “minorityism.”⁶

Today, issues related to the rights of persons belonging to minorities may be found in nearly every human rights instrument and forum. The United Nations and other intergovernmental organizations recognize that minority rights are essential to protect those who wish to preserve and develop values and

⁵ Malcom N. Shaw, *The Definition of Minorities in International Law*, THE PROTECTION OF MINORITIES & HUMAN RIGHTS (1992), at 25.

⁶ Philip Vuciri Ramaga, *Relativity of the Minority Concept*, 14 Human Rights Q. 117 (1992).

practices which they share with other members of their community. They also recognize that members of minorities make significant contributions to the richness and diversity of society, and that States which take appropriate measures to recognize and promote minority rights are more likely to remain tolerant and stable.

The concepts of “minority” and “majority” are relatively recent in international law, although distinctions among communities have obviously existed throughout history. Some political systems did grant special community rights to their minorities, although this was not generally based on any recognition of minority “rights” per se.⁷ The Ottoman Empire, for example, allowed a degree of cultural and religious autonomy to non-Muslim religious communities, such as Orthodox Christians, Armenians, Jews and others under millet system. It was an independent court of law pertaining to “personal law” under which a confessional

⁷ Jennifer Jackson Preece, *National Minorities and the European Nation-states System* (1998).

community (a group abiding by the laws of Muslim Sharia, Christian Canon law, or Jewish Halakha) was allowed to rule itself under its own laws.⁸ The French and American revolutions in the late eighteenth century proclaimed the free exercise of religion as a fundamental right, although neither directly addressed the broader issue of minority protection. In the United States, freedom of religion is a constitutionally protected right provided in the religion clauses of the First Amendment. Freedom of religion is also closely associated with separation of church and state, a concept advocated by Colonial founders such as Dr. John Clarke, Roger Williams, William Penn and later Founding Fathers such as James Madison and Thomas Jefferson.⁹ The 1815 Congress of Vienna, which dismantled the Napoleonic Empire, recognized minority rights to some extent, as did the 1878 Treaty of Berlin, which

⁸ Bruce Masters, *CHRISTIANS AND JEWS IN THE OTTOMAN ARAB WORLD: THE ROOTS OF SECTARIANISM* (2001), at 61.

⁹ Mark Zimmerman, *Symbol of Enduring Freedom*, COLUMBIA MAGAZINE 19 (2010).

recognized special rights for the religious community of Mount Athos.¹⁰

The issue of the rights and duties of minorities in Islam is one of crucial importance and value for all Muslims, if only to make sure that no one attributes to them anything in this regard that is unworthy of the authentic texts and the established principles. This also has been a matter of concern for diverse international circles. Beyond all, it has pertinence for those to whom the actual status of “minority” currently applies.

All countries around the world include persons belonging to national or ethnic, religious and linguistic minorities, which enriches the diversity of their societies.¹¹ Despite the diverse conditions of minorities, what is common among minorities, in many cases, is that they face multiple forms of discrimination resulting in marginalization and exclusion. To achieve an effective participation of

¹⁰ Dr. Andrea Benzo & Professor Silvio Ferrari (Editors) BETWEEN CULTURAL DIVERSITY AND COMMON HERITAGE: LEGAL AND RELIGIOUS (2014).

¹¹ UN Human Rights Committee, General Comment No. 23: The Rights of Minorities (Art. 27), ICCPR

minorities and to end exclusion, there should be an acceptance of diversity through the promotion and implementation of international human rights standards.

When the Prophet migrated from Mecca to Medina owing to persecution in Mecca at the hands of Meccan tribal leaders, he found Medina's society a pluralistic society. There were Jews, pagans and Muslims and also Jews and pagans were divided into several tribes, each tribe having its own customs and traditions. The Prophet drew up a covenant with these tribes guaranteeing them full freedom of their faith and also creating a common community in the city of Medina with an obligation to defend it, if attacked from outside.¹²

The issue of minority rights today is at the core of the notion of civic rights, and the objective in this paper, is to demonstrate, as we possibly can, that Islam did institutionalize the civic rights for minorities, and that there is no room in Islam for anyone to question these rights (of minorities) or to

¹² A. A. Maududi, HUMAN RIGHTS IN ISLAM (1997) 236.

use religion to obstruct any of these rights, inasmuch as civic rights (in Islam) are governed by the laws of the land, applicable to all, without discrimination.

II. HISTORICAL DEVELOPMENT OF INTERNATIONAL PROTECTION OF MINORITIES

Though the oldest roots of minority protection can be traced to the seventeenth century reforms regarding protection of religious minorities, but explicitly can be traced from Westphalia Treaty (1648).¹³ Even the treaty of Oliva in 1660 in favor of the Roman Catholics in Livonia, ceded by Sweden and Poland also tried to protect minorities. The millet system of the Ottoman Empire, for example, allowed a degree of cultural and religious autonomy to non-Muslim religious communities, such as Orthodox Christians, Armenians, Jews and others.¹⁴ The Ottoman Empire followed the tradition of the millet system, and, beginning with Sultan Mehmet Fatih

¹³ Compare for example Treaty of Westphalia, which in 1648 granted religious right to the Protestant German population.

¹⁴ Nazila Ghanea, *Are Religious Minorities Really Minorities?*, 1 OXFORD J. L. & RELIGION 57 (2012).

(the Conqueror),¹⁵ improved its institutional structure by explicitly stating that rights of non-Muslim communities be addressed to them in the royal decrees. These decrees were called Ahdname, and because they were accompanied by the Sultan's pledge, they had the force of an international contract.¹⁶

Greek Orthodox Christians were not established as the first millet after the conquest of Constantinople by Sultan Mehmet (1453), as is commonly assumed in the literature. Rather, they had the same communal rights all along under the Seljuqs and the Ottomans prior to the conquest of Constantinople in 1453.¹⁷ The Orthodox patriarch had been granted the same rights as the leaders of other communities that had previously come under Islamic rule. The patriarch was allowed to apply Orthodox law in secular and

¹⁵ S. J. Shaw, *HISTORY OF THE OTTOMAN EMPIRE AND MODERN TURKEY* (1977).

¹⁶ K. El Fadl, *Islamic Law and Muslim Minorities: The Juristic Discourse on Muslim Minorities from the Second/Eighth to the Eleventh/Seventeenth Centuries*, 1 *ISLAMIC L. & SOC.* 141 (1994).

¹⁷ Halil İnalcık & Donald Quataert (Editors), *AN ECONOMIC AND SOCIAL HISTORY OF THE OTTOMAN EMPIRE: 1600-1914* (1997).

religious matters.¹⁸ What Sultan Mehmet, who after the fall of Constantinople considered himself the Eastern Roman Emperor, did was to grant a charter to the patriarch of the Orthodox Church, Genady II. As the policy of religious pluralism and multiculturalism was consolidated by the millet system, it allowed the Jews to form their own community and to establish independent religious, educational, and legal institutions in Istanbul.¹⁹ Historians commonly note that the freedom that was granted to the minorities within the Ottoman territories attracted large numbers of displaced Jewish communities that were among the victims of persecution in Spain, Poland, Austria, and Bohemia.²⁰ While in Russia, Rumania, and most of the Balkan states, Jewish communities suffered from constant persecution (pogroms, anti-Jewish laws, and other vexations), Jews established on Turkish

¹⁸ Recep Senturk, *Towards an Open Science: Learning from the Ottoman Humanities*; NEW MILLENNIUM PERSPECTIVES ON THE HUMANITIES, Judi Upton-Ward (Editor), 55 (2002).

¹⁹S. J. Shaw, *JEWS OF THE OTTOMAN EMPIRE AND THE TURKISH REPUBLIC* (1991).

²⁰ Braude & Lewis, *CHRISTIANS AND JEWS IN THE OTTOMAN EMPIRE: THE FUNCTIONING OF A PLURAL SOCIETY* (2013).

territory enjoyed an altogether remarkable atmosphere of tolerance and justice.²¹

The French and American revolutions in the late eighteenth century proclaimed the free exercise of religion as a fundamental right, although neither directly addressed the broader issue of minority protection. On the contrary “the contemporary minority issues with which we have familiarity are largely rooted in the nineteenth century.”²² The three great congresses of the nineteenth century, Vienna (1814-15), Paris (1856), and Berlin (1878), included minority protection provisions in treaties establishing rights and security of populations that were to be transferred to a foreign sovereignty.²³ However, more rational approach can be seen for the first time in the history of international law that steps

²¹ P. Dumont, *Jewish Communities in Turkey during the Last Decades of the Nineteenth Century in the Light of the Archives of the Alliance Israelite Universelle*, CHRISTIANS AND JEWS IN THE OTTOMAN EMPIRE 209 (2013).

²² Jay A. Sigler, MINORITY RIGHTS. A COMPARATIVE ANALYSIS 68 (1983).

²³ Patrick Thornbery, ‘*Historical Background: International Law Moves from Protection of Particular Groups to Norms of a Universal Character*’, INTERNATIONAL LAW AND THE RIGHTS OF MINORITIES 37 (1991).

were taken for minority protection and their rights were methodically defined in the Treaty of Versailles, after the World War I.²⁴

The international protection of minorities originates from the Paris Peace Conference, was held in 1919, giving the birth of League of Nations.²⁵ Although the pact of the League of Nations contained no provisions regarding human rights, it incorporated two relating systems of mandates and of minorities.²⁶ The League's failure to establish an effective minorities system reflected the economic, social, and political problems of the inter-war period and contributed to the fall of Woodrow Wilson's vision²⁷ of 1919 of security system and disarmament, that resulted with the Second World War. The idea of human rights protection emerged stronger after

²⁴ Carole Fink, *The League of Nations and the Minority Question*, 157 WORLD AFFAIRS 197 (1995).

²⁵ Margaret MacMillan, *PARIS 1919: SIX MONTHS THAT CHANGED THE WORLD* (2003).

²⁶ Thomas Buergenthal, INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL (2009).

²⁷ Thomas J. Knock, *TO END ALL WARS: WOODROW WILSON AND THE QUEST FOR A NEW WORLD ORDER* (1995).

Second World War's disaster²⁸ for peoples that would be considered minorities from today's perspective. At that time, those peoples did not enjoy any rights.²⁹

Most international legal-political concerns during the nineteenth century, however, were directed towards justifying the unification of linguistic "nations" based on the principle of self-determination, rather than the protection of minority groups as such.³⁰ As the lure of nationalism grew, people who did not share the ethnic, linguistic or religious identity of the majority within their country were increasingly under threat.³¹ The consolidation of States along linguistic lines, expansion of trade and increasing need for literate populations who could work successfully in the context of the industrial revolution placed pressures on smaller or less powerful communities to conform to dominant

²⁸ John S. Gibson, *DICTIONARY OF INTERNATIONAL HUMAN RIGHTS LAW* (1996).

²⁹ Louis Henkin, *THE AGE OF RIGHTS* (1990).

³⁰ Jörg Fisch, *A HISTORY OF THE SELF-DETERMINATION OF PEOPLES: THE DOMESTICATION OF AN ILLUSION* (2015), at 118.

³¹ Timothy Baycroft, *NATIONALISM IN EUROPE 1789–1945* (1998), at 104.

linguistic and cultural norms. By the time of the outbreak of the First World War in 1914, national or minority concerns were at the forefront of international politics, at least in Europe.³²

Today “minorityism” is a global phenomenon, though its time significance and concomitant elements differ from country to country, the issue has been under the constant consideration of the United Nations. It explains why many conventions have been passed and declarations made for the “Prevention of Discrimination and Protection of Minorities.” At the United Nations level the term “minority” has been defined as a "group numerically inferior to the rest of the population of the State, in a non-dominant position, whose members - being nationals of the State - possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language."³³

³² *Ibid.*

³³ Gaetano Pentassuglia, *MINORITIES IN INTERNATIONAL LAW* (2002).

III. DEFINING THE TERM “MINORITIES”

The United Nations Minorities Declaration in its Article 1³⁴ and Article 2³⁵ refer to minorities as based on national or ethnic, cultural, religious and linguistic identity, and provides that States should protect their existence, adopted by consensus in 1992.³⁶ There is no internationally agreed definition as to which groups constitute minorities. It is often stressed that the existence of a minority is a question of fact and that any definition must include both objective factors (such as the existence of a shared ethnicity, language or religion) and subjective factors (including that individuals must identify themselves as members of a minority).

Despite many references to “minorities” in international legal instruments, there is no

³⁴ Article 1. States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity.

³⁵ Article 2, States shall adopt appropriate legislative and other measures to achieve those ends.

³⁶ United Nations Human Rights, Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities Adopted by General Assembly resolution 47/135 of 18 December 1992.

universally agreed, legally binding definition of the term “minority.”³⁷ This is primarily because of a feeling that the concept of “minority” is inherently vague and imprecise and that no proposed definition would ever be able to provide for the innumerable minority groups that could possibly exist.³⁸ Moreover, there are many states that prefer the definition to be too restrictive so that large trenches of their population do not fall within the definition. The diverse contexts of different groups claiming minority status also makes it difficult to formulate a solution of universal application.³⁹ Consequently, international law has found it difficult to provide any firm guidelines in relation to defining the concept.⁴⁰ Both states and the potential minorities themselves obstruct the process of defining the

³⁷ Francesco Capotorti, *STUDY ON THE RIGHTS OF PERSONS BELONGING TO ETHNIC, RELIGIOUS AND LINGUISTIC MINORITIES* (1991), at 5.

³⁸ Javaid Rehman, *The Weaknesses in the International Protection of Minority Rights* (2000), at 14.

³⁹ Philip Vuciri Ramaga, “*Relativity of the Minority Concept*,” 14 *Human Rights Q.* 112 (1992).

⁴⁰ Javaid Rehman, *supra* at 14-15.

scope of the term.⁴¹ Nevertheless, the efforts made so far at various forums and by various international lawyers offer good insights as to the factors to be taken into consideration in developing a definition of the term “minority.”⁴²

The most widely acknowledged definition is the one formulated by Capotorti,⁴³ a special Rapporteur of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities in 1977. According to him a minority is:

A group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members—being nationals of the State—possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their

⁴¹ Rhona K. M. Smith, “*The Fate of Minorities – Sixty Years On*,” 1 WEB J. CURRENT LEGAL ISSUES (2009).

⁴² Philip Vuciri Ramaga, “*Relativity of the Minority Concept*,” 14 Human Rights Q. 104 (1991).

⁴³ Jelena Pejic, “*Minority Rights in International Law*,” 19 Human Rights Q. 671 (1997).

culture, traditions, religion or language.⁴⁴

For the purpose of his study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities, he defined, with the application of Article 27 of ICCPR in mind, a minority group as a group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members being nationals of the state possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, maintain a sense of solidarity, directed towards preserving their culture, traditions, religion or language.⁴⁵

In 1985, the Sub-Commission submitted to the Commission on Human Rights a text on the definition of “minority” prepared by Jules Deschenes. The definition was, however, not

⁴⁴ E/CN.4/Sub.2/384/Rev.1, para. 568.

⁴⁵ Francesco Capotorti, STUDY ON THE RIGHTS OF PERSONS BELONGING TO ETHNIC, RELIGIOUS AND LINGUISTIC MINORITIES (1991), at 98.

accepted by the Commission. According to this definition, minority is a group of citizens of a state, consisting of a numerical minority and in a non-dominant position in that state, endowed with ethnic, religious, or linguistic characteristics which differ from those of the majority of the population, having a sense of solidarity with one another, motivated, if not implicitly, by a collective will to survive and whose aim is to achieve equality with the majority in fact and in law.⁴⁶

Although there is some measure of agreement regarding essential elements of the definitions proposed by Capitorti and Deschenes, some of the elements are criticized for being vague, misleading and inadequate for the diversified minority situations. Some countries considered the definitions as irrelevant, while others saw it as non-

⁴⁶ Jules Deschenes, "Proposal concerning a definition of the term minority," UN Doc. E/CN.4/Sub.2/1985/31/Corr.1 para.181 (1985).

contributive to the debate concerning the definition of the term “minority.”⁴⁷

The Charter of the United Nations makes no mention of minority rights per se, but it does include several provisions on human rights, including Article 1 (3), which identifies as one of the purposes of the United Nations the achievement of international cooperation “in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.” In 1948, the General Assembly adopted the Universal Declaration of Human Rights, which articulated the content of human rights in much greater detail and remains one of the most important international human rights documents: its anti-discrimination provisions and other articles are of central importance also for persons belonging to minorities. While the General Assembly was unable to agree on any formulation in the Declaration concerning minority rights per se, it did note that the

⁴⁷ Steven Wheatley, *DEMOCRACY, MINORITIES AND INTERNATIONAL LAW* (2005) 20.

United Nations “cannot remain indifferent to the fate of minorities.” It added, in the same resolution that proclaimed the Universal Declaration, that it was “difficult to adopt a uniform solution for this complex and delicate question [of minorities], which has special aspects in each State in which it arises.”⁴⁸

Adopted by consensus in 1992, the United Nations Minorities Declaration in its article 1 refers to minorities as based on national or ethnic, cultural, religious and linguistic identity, and provides that States should protect their existence. There is no internationally agreed definition as to which groups constitute minorities. It is often stressed that the existence of a minority is a question of fact and that any definition must include both objective factors (such as the existence of a shared ethnicity, language or religion) and subjective factors (including that individuals must identify themselves as members of a minority). The 1992 declaration seeks to protect—cultural, religious, and linguistic affiliations,

⁴⁸ Resolution 217 C(III).

political participation, and freedom of association—are the same as those underlying Article 27. Universal in significance, they are constituent features of human identity shared by members of majorities and minorities alike.⁴⁹

The difficulty in arriving at a widely acceptable definition lies in the variety of situations in which minorities live. Some live together in well-defined areas, separated from the dominant part of the population.⁵⁰ Others are scattered throughout the country. Some minorities have a strong sense of collective identity and recorded history; others retain only a fragmented notion of their common heritage.

The term minority as used in the United Nations human rights system usually refers to national or ethnic, religious and linguistic minorities, pursuant to the United Nations Minorities Declaration. All

⁴⁹ Other UN instruments that extend minority rights protection include the Convention on the Prevention and Punishment of the Crime of Genocide, Jan. 12, 1951, 78 U.N.T.S. 277; UNESCO Convention Against Discrimination in Education, Dec. 14, 1960, 429 U.N.T.S. 93; Convention on the Rights of the Child, 20 Nov. 1989, 1577 U.N.T.S. 43. *See also*, The Vienna Declaration and Programme of Action, U.N. Doc. A/CONF.157/23 (Jul. 12, 1993).

⁵⁰ From the Editors: *Minority as a Global Concept and Political Problem.* Ab Imperio 2019, 4, 9 (2019).

States have one or more minority groups within their national territories, characterized by their own national, ethnic, linguistic or religious identity, which differs from that of the majority population.⁵¹

According to a definition offered in 1977 by Francesco Capotorti, Special Rapporteur of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, a minority is: A group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members - being nationals of the State - possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.⁵²

While the nationality criterion included in the above definition has often been challenged, the requirement to be in a non-dominant position remains important. In most instances a minority

⁵¹ I.A. Laponce, *THE PROTECTION OF MINORITIES*(1960), at 44.

⁵² E/CN.4/Sub.2/384/Rev.1, para. 568.

group will be a numerical minority, but in others a numerical majority may also find itself in a minority-like or non-dominant position, such as Blacks under the apartheid regime in South Africa. In some situations, a group which constitutes a majority in a State as a whole may be in a non-dominant position within a particular region of the State in question.

In addition, it has been argued that the use of subjective criteria, such as the will on the part of the members of the groups in question to preserve their own characteristics and the wish of the individuals concerned to be considered part of that group, combined with certain specific objective requirements, such as those listed in the Capotorti definition, should be taken into account. It is now commonly accepted that recognition of minority status is not solely for the State to decide, but should be based on both objective and subjective criteria.

The question often arises as to whether, for example, persons with disabilities, persons belonging to certain political groups or persons with a particular sexual orientation or identity (lesbian,

gay, bisexual, transgender or intersexual persons) constitute minorities. While the United Nations Minorities Declaration is devoted to national, ethnic, religious and linguistic minorities, it is also important to combat multiple discrimination and to address situations where a person belonging to a national or ethnic, religious and linguistic minority is also discriminated against on other grounds such as gender, disability or sexual orientation. Similarly, it is important to keep in mind that, in many countries, minorities are often found to be among the most marginalized groups in society and severely affected by, for example, pandemic diseases, such as HIV/AIDS, and in general have limited access to health services.⁵³

IV. MINORITIES RIGHTS UNDER INTERNATIONAL LAW

The first significant attempt to identify internationally recognized minority rights was

⁵³ Minority Rights: International Standards and Guidance for Implementation (HR/PUB/10/3).

through a number of “minority treaties” adopted under the auspices of the League of Nations. With the creation of the United Nations (1945), attention initially shifted to universal human rights and decolonization. However, the United Nations has gradually developed a number of norms, procedures and mechanisms concerned with minority issues.

Today, issues related to the rights of persons belonging to minorities may be found in nearly every human rights instrument. The United Nations recognize that minority rights are essential to protect those who wish to preserve and develop values and practices which they share with other members of their community and had been champion for the cause of minorities rights since its inception, 1945. United Nations provides protection of the rights of minorities under Article 27 of the International Covenant on Civil and Political Rights (ICCPR),⁵⁴ and under Article 30 of the Convention of the Child. In addition, the United Nations Declaration on the

⁵⁴ UN Human Rights Committee, General Comment No. 23: The Rights of Minorities (Art. 27), CCPR/C/21/Rev.1/Add.5, (1994).

Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities is the document which sets principle standards and provide guidance to countries to take legislative and other necessary measures to ensure the rights of persons belonging to minorities.⁵⁵ Instruments adopted by the Conference on Security and Co-operation in Europe and the Council of Europe, on the other hand, refer only to “national” minorities. The Minorities Declaration has the broadest scope, encompassing persons belonging to “national or ethnic, religious and linguistic minorities;” it also refers to the protection of “cultural” identity.⁵⁶

The UN Declaration on Minorities, as the first exclusively devoted to the subject, is perhaps the single most important UN instrument on minority rights; but it is neither the beginning nor the end of UN efforts to promote and protect minority rights. Such as the Convention against Genocide; the

⁵⁵ K. Henrard, *Devising an Adequate System of Minority Protection: Individual Human Rights, Minority Rights and the Right to Self-determination* (2000) 48.

⁵⁶ Ernest Gellner, *NATIONS AND NATIONALISM* (1983).

International Convention on the Elimination of All Forms of Racial Discrimination; UNESCO's Convention Against Discrimination in Education; the Convention on the Rights of the Child; the UNESCO Declaration on Race and Racial Prejudice; the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religious Belief; the Universal Declaration of Human Rights (Article 26); the International Convention on Economic, Social and Cultural Rights (Article 13); and the Declarations and Programmes of Action adopted in 1978 and 1983 by the two World Conferences to Combat Racism and Racial Discrimination.⁵⁷

Article 13 the International Covenant on Economic, Social and Cultural Rights (ICESCR) provides the right of everyone to education, stating in some of its paragraphs that states should made possible for parents or legal guardians to choose for their children schools, other than those established

⁵⁷ Carole Fink, *The League of Nations and the Minority Question*, 157 WORLD AFFAIRS (1995).

by the public authorities, which conform to such minimum educational standards. States are also expected to ensure the religious and moral education of their children in conformity with their own convictions. The Limburg principles on the implementation of ICESCR⁵⁸ endeavor to eliminate all kind of discrimination and adopt special measures that allow disadvantaged groups access to the enjoyment of the economic, social and cultural rights.⁵⁹

The first Optional Protocol to the ICCPR⁶⁰ allows individuals to submit complaints to the Human Rights Committee. The Human Rights Committee, an expert body, was established to monitor the implementation of the ICCPR and the Protocols to the Covenant in the territory of States parties. One part of its activities is the assessment of the reports,⁶¹ which States parties must submit every

⁵⁸ Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights.

⁵⁹ Asbjorn Eide, Katarina Krause, & Allan Rosas (Editors), *ECONOMIC, SOCIAL AND CULTURAL RIGHTS* (1995).

⁶⁰ Adopted by the General Assembly on 16 December 1966 and entered into force on 23 March 1976. 0

⁶¹ Article 40 of the Covenant on Civil and Political Rights.

five years on the legislative and implementation measures they have adopted regarding the rights recognized in the Covenant and on the progress made in the enjoyment of those rights. The other scope of Human Rights Committee competences is individual procedure mechanism, designed for individuals who claim that their rights and freedoms have been violated by the State who is the party to the Optional protocol.⁶² The International Convention on the Elimination of All Forms of Racial Discrimination has protective closes extending to minorities.⁶³ Under the scope of the Article 14 the Committee on the Elimination of Racial Discrimination (CERD),⁶⁴ that was the first body by the United Nations created to monitor and review States' actions taken in fulfillment of their obligations under a specific

⁶² Great part of the minority rights related cases decided by the Human Rights Committee are related to rights of indigenous peoples. *See, Lubicon Lake Band (Bernard Ominayak) v. Canada* (No 167/1984) (CCPR/C/38/D/167/1984), *Lovelace v. Canada* (No.24/1977), *Mikmaq v. Canada* (No.78/1980), 2 Selected Decisions 23, *Kitok v. Sweden* (No. 197/1985), 1988 Report of the Human Rights Committee, GAOR 43rd Session, *Cadoret v. France* (Nos 221/1987 and 323/1988). *Ibid* at 219.

⁶³ *Ibid* at 219.

⁶⁴ Adopted and opened for signature and ratification on 21 December 1965, entry into force 4 January 1969.

human rights agreement.⁶⁵ The Convention establishes three procedures to make it possible for CERD to review the legal, judicial, administrative and other steps taken by individual States to fulfill their obligations to combat racial discrimination. Firstly, all States which ratify or accede to the Convention must submit periodic reports to CERD. Secondly, the Convention provides for State-to-State complaints. Thirdly, the Convention makes possible for an individual or a group of persons who claim to be victims of racial discrimination to lodge a complaint with CERD against their State.

The Convention on the Prevention and Punishment of the Crime of Genocide⁶⁶ also extends its protection to minority groups, defining the genocide in the Article 2 as an act committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, such as: killing

⁶⁵ Human Rights Committee (which has responsibilities under the International Covenant on Civil and Political Rights), the Committee on the Elimination of Discrimination against Women, the Committee against Torture, the Committee on Economic, Social and Cultural Rights, and the Committee on the Rights of the Child.

⁶⁶ Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277, entered into force on January 12, 1951.

members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life, calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; forcibly transferring children of the group to another group.

The 1992 United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities is generally seen as the consequence of events occurred after the fall of communism. It is the fundamental instrument that guides the activities of the United Nations in this field today. The Declaration contains a list of rights in favor of persons belonging to ethnic, national, religious or linguistic minority, and obligates State parties “to protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and encourage conditions for the promotion of that

identity.”⁶⁷ The weak point of Declaration is lack of precise states’ obligations. However, it is not a legally binding document, but simply a political declaration, it represents one of the first international documents that attempted to promote protection of minority rights.⁶⁸

Special measures for minorities, even for limited duration, remain a controversial issue and are often misunderstood as an exception to the “equal opportunities” and tilting the “level playing fields” concepts.⁶⁹ Well-informed commentators have pointed out that where group rights of the majority are provided for by the state, the equivalent (not identical) group rights should also be provided for minorities. “Minorities are members of a state; they contribute to its finances and should benefit from provisions for their language, religion, association and culture. This concept can be explored through

⁶⁷ Article 1 of the Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities.

⁶⁸ Florence Benoit-Rohmer, *THE MINORITY QUESTION IN EUROPE* (1996).

⁶⁹ Asbjorn Eide, Katarina Krause, & Allan Rosas (Editors), *ECONOMIC, SOCIAL AND CULTURAL RIGHTS* (1995).

“pluralism in togetherness” or “pluralism by territorial sub-division”⁷⁰ as explained by Asbjorn Eide.⁷¹

V. MINORITIES (DHIMMAH/ DHIMMI⁷²) IN ISLAM

There is no such difference between Muslims and non-Muslims as far as human rights are concerned. The same is true between citizens of an Islamic state and others because human rights are not granted on the basis of citizenship. These basic rights include the right to life, property, freedom of religion, freedom of expression, family, and honor. These rights are granted to all human beings by virtue of their being human.

The fact that non-Muslim minorities are conventionally called dhimmis is a historical⁷³ term

⁷⁰ *Ibid.* Asbjorn Eide.

⁷¹ Chairman of UN Working Group on the Rights of Minorities and Norwegian human rights scholar with base in Law and Social Science Research.

⁷² Plural of “dhimma.”

⁷³ Juan Eduardo Campo (Editor), "dhimmi," *ENCYCLOPEDIA OF ISLAM* (2010), at 195. Dhimmis are non-Muslims who live within Islamdom and have a regulated and protected status, and allowed to retain his or her original faith.

referring to non-Muslims living in an Islamic state with legal protection, it means nothing other than reiterating and affirming with a written contract that non-Muslims are equal with Muslims in enjoying the right to personhood. It indicates that non-Muslim minorities also have the right to legal personhood and that they acknowledge their accountability. It may be seen as a declaration of the equality in that aspect between Muslims and non-Muslims. Other non-Muslims, without a treaty with Muslim authority, have to officially acknowledge and register that they accept their accountability and liability before the law for their actions.⁷⁴

Dhimmah is based on verse 9:29 of the Quran and finds precedent in the conquest of Mecca. Caliph Umar's pact with non-Muslims, granting them life and property protection, constitutes the detailed provisions of the institution/state. It is the state's obligation under sharia to protect the minorities life, property, and freedom of religion. in exchange they

⁷⁴ H. Patrick Glenn, *LEGAL TRADITIONS OF THE WORLD* (2007), at 219.

have to pay the jizya tax, which complemented the zakat, or obligatory alms, paid by the Muslim subjects.⁷⁵ Under this status, minorities enjoyed exemption from military service, freedom of religion, freedom to practice their religious duties, and the right to renovate, although not to erect, new houses of worship.⁷⁶

The following citation from the prominent Hanafi jurist Sarakhsi (d. 1090) succinctly elucidates the issue of personhood:

Upon creating human beings, God graciously bestowed upon them intelligence and the capability to carry responsibilities and rights (dhimmah personhood). This was to make them ready for duties and rights determined by God. Then He granted them the right to inviolability, freedom, and property to let them continue their lives so that they can perform the duties also. Then these rights to carry responsibility/ duties and enjoy rights, freedom, and property exist with a human being when he is born. The insane / child and the sane / adult are the same concerning these rights. This is how the

⁷⁵ W. Hallaq SHARI'A: THEORY, PRACTICE, TRANSFORMATIONS (2009).

⁷⁶ H. Patrick Glenn, *supra* 219-21.

proper personhood is given to him when he is born for God to charge him with the rights and duties when he is born. In this regard, the insane/child and sane/adult are equal.⁷⁷

According to Senturk, “non-Muslims are already granted all the rights they may possibly have by virtue of their humanity, and thus signing a treaty with Muslims is not going to bring them new rights. However, the act of dhimmah serves as a confirmation of those rights and duties by both parties.”⁷⁸ According to Senturk, “Dhimmah” is also commonly understood as ‘protection,’ ‘treaty’ (‘ahd), and ‘peace’ (sulh, rather truce), because it is a treaty that puts non-Muslims under the protection of Muslims. Thus, ‘This is in his dhimmah’ means that a person is accountable to the law or is under its protection. This accountability may be based on a written contract or a general law.⁷⁹

⁷⁷ S. Abul Ala Maududi, *ISLAMIC LAW AND CONSTITUTION* (1997) 296.

⁷⁸ Recep Senturk, Adamiyyah, & Is-mah, *The Contested Relationship between Humanity and Human Rights in Classical Islamic Law*, *Turkish J. Islamic Stu.*, no 8 (2002).

⁷⁹ *Ibid* Recep Senturk (2002).

Islamic jurisprudence stipulates that dhimmah is what makes a person responsible for the consequences of his actions; because he has personhood, others can hold him liable for his deeds and demand that he fulfill his duties - which are their rights. Yet it is unanimously accepted that 'one's dhimmah is originally clear of charges' (al-Asl fi al-dhimmah al-bara'ah) unless a charge is proven beyond doubt by evidence. This principle is interpreted as 'one is innocent unless proven otherwise.'⁸⁰

VI. DIVERGENT VIEWS REGARDING DHIMMAH

The more conservative Islamic thinkers reject any thought of changing the institution of *dhimmah*.⁸¹ Their views range from denying the principle of equality to religions other than Islam,

⁸⁰ Wael B. Hallaq, *A history of Islamic Legal Theories: An Introduction To Sunni Usul Al-Fiqh* (1997)

⁸¹ Mashood A. Baderin, Recep Sentur *Sociology of Rights: "I Am Therefore I Have Rights": Human Rights in Islam between Universalistic and Communalistic Perspectives Muslim World*, 2 J. HUMAN RIGHTS (2004). See also, Omar Bakri, *ESSENTIAL FIQH* (1996).

through blocking certain positions of influence in the state to non-Muslims, to reiterating their rights and Islam's traditional liberal attitude according to the *sunna*, especially by comparison to European historical record. Some even go as far as to offer "Islamic citizenship" to non-Muslims.⁸²

Others claim that the distinction between Muslim and non-Muslim is one of political administration, not of human rights, according *dhimma* to all religionists (Quran 17:70, 2:62, 5:69, 22:17, 5:48). The debate over *dhimma* includes political issues: Some of the minorities are accused of having abused it internally, and the West has been accused of having created and exacerbated the entire problem of "minorities."

Not all Islamic jurists in the classical period agreed with these views. The competing communalist discourse, represented by Muhammad ibn Idris al-Shafii (d. 820), Malik Ibn Anas (d. 795), and Ahmad ibn Hanbal (d. 855), maintains that having *dhimma* (personhood) is a status that only

⁸² Intisar A. Rabb, 'REASONABLE DOUBT' IN ISLAMIC LAW (2014).

Muslims can enjoy. Non-Muslims achieve that status by virtue of the contract they make with the Muslim authority or Ruler.⁸³

From this perspective, *dhimmah* is a gained right and privilege; it is also the basis of other rights to be gained by virtue of signing a treaty with the Muslim authority. Enjoying legal personhood requires fulfilling the conditions of the treaty. Otherwise, it will be lost. One of the conditions of keeping legal personhood is to pay the special poll-tax, *jizya*, to the state.⁸⁴ Jurists adopt divergent views on why minorities should be granted rights. Is it because of their humanity, or because of their citizenship?

There are contradicting and evolving views advocated by jurists from the classical and modern periods. The cleavage between universalist and communalist jurists can be observed in all major legal traditions, including Islamic law. The universalist group believes that human beings, be they from the majority or the minority, are entitled to

⁸³ Wael Hallaq, *supra* at 80.

⁸⁴ Rauf I.F.A., *Shariah and the Objectives of Islamic Law*, DEFINING ISLAMIC STATEHOOD (2015).

rights by virtue of their humanity. In contrast, the communalist group is concerned only with the rights of the citizens of their state, usually called a nation, or with the members of religious or ethnic communities.

VII. THE MINORITY RIGHTS IN ISLAM

In Islam, the first document that protects the rights of minorities is known as “the Madinah Constitution” or “the Madinah Pact,” which we will talk about it later in this paper. But before that, it should be pointed out that the Arabian Peninsula has known, before the emergence of Islam, a charter related to human rights, which is called “Hilf al-Fudul,”⁸⁵ which translates as “the league of the virtuous,” this charter which dates back to the year 590 AD, was approved and praised by the Prophet

⁸⁵ This was a seventh century alliance created by the prophet Muhammad and various Meccans, to establish justice for all through collective action, even for those who had no powerful connection. Because of Prophet’s role in its formation, the alliance plays a significant role in Islamic ethics.

Muhammad, peace be upon him.⁸⁶ It was narrated that the Prophet Mohamed peace be upon him said: “I was with my cousins in Abdullah bin Juda’s home when this oath was affirmed. That oath is more pleasant to me than owning red- haired camels. And if I am summoned to it during the Islamic era, I will accept it.” Also,⁸⁷ “the Pact of Umar” which was held by the second Caliph Omar Ibn Khattab may Allah be pleased with him with the people of Elae in Jerusalem (Eastern Jerusalem), in which he granted them security for their churches and properties when Muslims opened the city in 638 AD.⁸⁸ The Siege of Jerusalem was part of a military conflict which took place in the year 636-637/38 AD between the Byzantine Empire and the Rashidun Caliphate. It began when the Calipha’s army, under the command of Abu Ubaidah, besieged Jerusalem beginning in

⁸⁶ Muhammad Hamidullah, *THE FIRST WRITTEN CONSTITUTION IN THE WORLD: AN IMPORTANT DOCUMENT OF THE TIME OF THE HOLY PROPHET* (1975).

⁸⁷ Wael B. Hallaq, *SHARI’A: THEORY, PRACTICE, TRANSFORMATIONS* (2009).

⁸⁸ Bernard Lewis, *THE ARABS IN HISTORY* (2002). Also see Amikam Elad, *MEDIEVAL JERUSALEM AND ISLAMIC WORSHIP: HOLY PLACES, CEREMONIES, PILGRIMAGE* (1999).

November 636 AD. After six months, the Patriarch Sophronius agreed to surrender, on condition that he submit only to the Caliph. In 637 AD or 638 AD, Caliph Umar traveled to Jerusalem in person to receive the submission of the city.⁸⁹

Indeed, we can always link rights to duties, because ‘right’ and ‘duty’ always go hand in hand and are interdependent. The right is all what is granted to the individual or the community or the two together, decided by law/Sharia in order to achieve an interest or to prevent a harm, while the duty is all what men are responsible for in this context.⁹⁰ Definitely, it is needed to present elements that may serve as a reference for the international drive towards evolving a fundamental document relevant to the issue of the rights of minorities, as a common framework that may be referred to, especially by those who are not so clear about the issue, a

⁸⁹ David Nicolle, *Yarmuk 636 A.D.: The Muslim Conquest of Syria* (1994). Also see, Edward Gibbon, *The History of the Decline and Fall of the Roman Empire*, Vol. 6 (1862).

⁹⁰ K. El Fadl, *Islamic Law and Muslim Minorities: The Juristic Discourse on Muslim Minorities from the Second/Eighth to the Eleventh/Seventeenth Centuries*, 1 Islamic L. & Soc. 145 (1994).

document that would benefit Muslims, minority-members, institutions, and such other concerned parties.⁹¹ A minority is a social community representing a minor group within a particular demographic setting. A minority's status usually transcribes into a curtailment of rights, whether those that are meant to be shared equally with the majority or those that are specific to that minority. A minority status may refer, as we all know, to a racial, ethnic, religious or cultural affiliation.⁹² Our focus here is on the religious minority mostly.

VIII. AL MADINAH PACT

The Madinah Pact is considered as the first civil constitution evolved under Islam as established by the Prophet (PBUH) in the first year of the Hejira (Emigration to Madinah)/623⁹³ AC, we find the

⁹¹ Fernando R. Teson, *International Human Rights and Cultural Relativism*, in *The Philosophy of Human Rights: Readings in Context Paragon Issues in Philosophy* Patrick Hayden (Editor) 379 (2001).

⁹² *Ibid.* Fernando R. Teson.

⁹³ Yetkin Yildirim, *The Medina Charter: A Historical Case of Conflict Resolution, Islam and Christian-Muslim Relations*, 20 ISLAM & CHRISTIAN-MUSLIM RELATIONS 450 (2009).

reference to the people of “Dhimmah,”⁹⁴ a term frequently used in pre-Islamic times to refer to neighbors and to the notion of neighborhood which involved a principal of mutual guardianship observed among Arab tribes in times of peace and war. The Prophet (PBUH) refashioned this pre-Islamic tribal paradigm into a religious duty by labeling it as “Allah’s ordained Guardianship.”⁹⁵ In fact, under item fifteen of the said Madinah Pact, “Allah’s ordained Guardianship” is a right shared among all Muslims who are thus duty-bound to offer exclusive support (guardianship) to each other.⁹⁶

A pact, or covenant in such a context is also known as “Dhimmah,” that is a contract of safe-conduct and guardianship. Suffice it that Islam has had the credit of introducing this notion, thus

⁹⁴ K. A. Armstrong, HISTORY OF GOD: THE 4000 YEAR QUEST OF JUDAISM, CHRISTIANITY AND ISLAM (1993). “As the armies of conquest encountered communities of Jews, Christians, and Zoroastrians, the model of Prophet Muhammad’s accommodating behavior extended the original notion to incorporate all these recipients of God’s revelation as Ahl al-Dhimmah, or Dhimmi, protected peoples.” A. A. Knopf.

⁹⁵ Wael B. Hallaq (2009), *supra* at 87.

⁹⁶ Mohamed Berween, *Al-Wathiqah: The First Islamic State Constitution*, 23 J. MUSLIM M. AFFAIRS 117 (2003).

institutionalizing the Islamic State's relation with the minorities, as a relation of protection and ensured safety on a basis of mutual responsibility, whereby whoever is granted "safety" is granted protection for his life, his religion, his livelihood and his culture.⁹⁷ And, in no way does this bear any notion of disdain or ascendancy over the other as alleged by scores of ill-intentioned Western studies that took up the subject of Dhimmah and People of Dhimmah (protected people, under Allah's witness). Indeed, the term has been used by Muslim scholars to mean a "covenant," and by some orthodoxy as indicating a "mandatory" nature.⁹⁸

A covenant-partner is someone who may have been at war with Muslims and then those to conclude peace with them reaching an agreement with them on the grounds of mutually accepted terms to be observed by both parties.⁹⁹ It is a common

⁹⁷ Saïd Amir Arjomand, *The Constitution of Medina: A Socio-legal Interpretation of Muhammad's Acts of Foundation of the "Umma,"* 41 INT'L J. M. EAST STUD. 555 (2009).

⁹⁸ Wael Hallaq, *A History Of Islamic Legal Theories* (1997).

⁹⁹ Muhittin Ataman, *Islamic Perspective on Ethnicity and Nationalism: Diversity or Uniformity?* 23 J. MUSLIM M. AFFAIRS 89 (2003).

knowledge that honoring an agreement is an obligation under Islamic Shariah. Allah Almighty says “Honor your pledge – Indeed you are answerable for your pledge”(Quran AYAH al-Isra` 17:34). “Come not near the wealth of the orphan save with that which is better till he come to strength; and keep the covenant. Lo! of the covenant it will be asked.” (Quran AYAH al-Isra` 17:34)¹⁰⁰

In the pact that was signed by the Prophet (PBUH) with the Christians of Najran,¹⁰¹ we find the terms “Dhimma” and “Jiwar” (Ensured safety and protection) carrying the meaning of a protection that goes hand in hand with the freedom enunciated in the agreement.¹⁰²

¹⁰⁰ Pickthal Translation . *Quran AYAH al-Isra` 17:34* (Translation- Come not near the wealth of the orphan save with that which is better till he come to strength; and keep the covenant. Lo! of the covenant it will be asked.)

¹⁰¹ Sir Muhammad Zafrulla Muhammad Khan, SEAL OF THE PROPHETS (1980). In the tenth year of the Hijrah, a delegation of fourteen Christian Chiefs from Najran; among them Abdul Masih of Bani Kinda, their chief, and Abdul Harith, bishop of Bani Harith, came to Medina to make a treaty with the prophet Muhammad, and were permitted by him to pray in his mosque, which they did turning towards the east.

¹⁰² Yetkin Yildirim, *The Medina Charter: A Historical Case of Conflict Resolution*, 20 ISLAM & CHRISTIAN–MUSLIM RELATIONS 440 (2009).

As for the Al-Quds Covenant which was concluded by Caliph Omar with the people of Al-Quds after its conquest, it uses the term “Allah’s covenant” instead of talking about protection rights and “Guaranteed freewill,”¹⁰³ indicating that these two words are synonymous, bearing the same meaning.¹⁰⁴ Many earlier scholars have indeed explored the foundations of the Islamic approach in dealing with minorities, reasoning by deduction, on the basis of the Holy Book and the Sunnah (Prophet’s Tradition), to fathom the matter and the prescribed duties of either party.¹⁰⁵ At this regard, these scholars emphasized that Islam is founded on three general principles in the light of which one can appreciate the great mass of rights introduced by this religion, including the very aspects of concern to us here:

First: Removing all the considerations that underlie the different types of segregation such as

¹⁰³ Syed Ameer Ali, *A CRITICAL EXAMINATION OF THE LIFE AND TEACHINGS OF MOHAMMED* (1873).

¹⁰⁴ W. Hallaq, *Considerations on the Function and Character of Sunni Legal Theory*, 104 *J. AMERICAN O. SOC.* 679 (1984).

¹⁰⁵ Bat Ye’or, *The Dhimmi: Jews and Christians Under Islam* 36 (1985); see Milka Levy-Rubin, *NON-MUSLIMS IN THE EARLY ISLAMIC EMPIRE: FROM SURRENDER TO COEXISTENCE* (2011).

differences in ethnicity, gender, color or culture. Allah, glorified and exalted be He, created all humans from one single unit and made them then into communities and tribes¹⁰⁶ so that they may connect and reach out to each other on the basis of solidarity, mercy and justice. He established fraternity and equality among them in terms of livelihood, community - building, and benefiting from the resources made available to them to perpetrate life, as a general honor graciously imparted by God Almighty on his creation. Indeed, within the fold of the Islamic State since its early days, multiple races and diverse people lived and merged together in the Islamic environment free from any segregation. In the very first generation of disciples we already find, for instance, Salman Al-Farsi, (the Persian ,death 32

¹⁰⁶ Quran chapter 49 (*sūrat l-ḥujurāt*) (49:13) English Translation Yusuf Ali: O mankind! We created you from a single (pair) of a male and a female, and made you into nations and tribes, that ye may know each other (not that ye may despise (each other)). Verily the most honoured of you in the sight of Allah is (he who is) the most righteous of you. And Allah has full knowledge and is well acquainted (with all things).

AH/652 or 653 AD)¹⁰⁷ Bilal Al-Habashi, (the Ethiopian) Sohaib Al-Rumi, (the Frank)¹⁰⁸ and so many others.¹⁰⁹

Second: Protecting the fundamental matters for Muslims and non-Muslims alike; that is protecting people's life, religion, intellect, property and honor, in an all-embracing manner to ensure the continuity and integrity of life and its basic components. The issue of minority rights is left open as to the problems relating to sharing neighborhoods in the case of there being many religions living together.¹¹⁰

Third: Refraining from exerting any coercion, thus acknowledging the principle of religious freedom, as illustrated in God's injunction "No compulsion in religion."¹¹¹ Islam indeed gave individuals and communities all types of freedom as

¹⁰⁷ He was raised as a Zoroastrian, then attracted to Christianity, and then converted to Islam after meeting Prophet Muhammad in the city of Yathrib, which later became Medina.

¹⁰⁸ Suhayb the Roman or Suhayb al-Rumi (born c. 587), also known as Suhayb ibn, was a former slave in the Byzantine Empire who went on to become a companion of Prophet Muhammad and member of the early Muslim community.

¹⁰⁹ Akbar Shah Najeebabadi, *HISTORY OF ISLAM* (2001).

¹¹⁰ Bernard Lewis, *THE ARABS IN HISTORY* (1993).

¹¹¹ Verse (ayah) 256 of *Al-Baqara of Quran*, The verse explain the phrase that "there is no compulsion in religion."

long as they do not encroach on religious fundamentals or on the rights of others, including the right to choose one's religion¹¹² and perform freely one's religious rites and worshipping practices, as well as one's social mores, ceremonies, festivities and holidays, for non-Muslims living in the land of Islam.¹¹³

A very important human right is given in Clause 25 of Al Madina Pact, where freedom was guaranteed for each community to practice its own religion. The implication of this clause is that each individual was also free to choose his or her religion, in line with the clear teachings of the Quran.¹¹⁴ These generic and holistic principles that were introduced by Islam, and other such fundamentals of concern to

¹¹² Translation Yusuf Ali, *Quran 2:256* (Let there be no compulsion in religion: Truth stands out clear from Error: whoever rejects evil and believes in Allah hath grasped the most trustworthy hand-hold, that never breaks. And Allah heareth and knoweth all things.) See also, Jacques Berque, *LE CORAN: ESSAI DE TRADUCTION*, éditions Albin Michel (1995), at 63.

¹¹³ Mustansir Mir, *UNDERSTANDING THE ISLAMIC SCRIPTURE*, 54 (2008).

¹¹⁴ "There shall be no compulsion in religion: the right way is now distinguished from the wrong way." (2:256) Note that this statement of complete religious freedom comes immediately after the grandest statement of God's power to be found in any scripture. It is indeed significant!

us here, form the key platform which Islam established for interactions among Muslims and between them on the one hand and other communities and peoples that have not embraced Islam. These are the fundamentals, and whatever diversions a researcher may find across the history of Muslims, were only the result of misinterpretation or cases of erring applications that may have taken place in certain stages in its history.¹¹⁵

IX. APPLICATIONS OF THE ISLAMIC PACT/AL -MADINAH PACT

The Al Madinah Pact includes 47 articles (52 articles in some other calculations), of which the first 23 articles set the rights and duties of Muslims in Madinah, while the remaining articles set the rights and duties of the Jews.¹¹⁶ Al Madinah Pact was written immediately after the migration of the Prophet Muhammad peace be upon him to

¹¹⁵ Wael B.Hallaq, SHARI'A: THEORY, PRACTICE, TRANSFORMATIONS (2009).

¹¹⁶ R. B. Serjeant, *Sunnah Jāmi'ah, Pacts with the Yathrib Jews, and the Tahrim of Yathrib: Analysis and Translation of the Documents Comprised in the Called "Constitution of Medina"*(1978).

Madinah.¹¹⁷ Indeed, this pact is considered to be the first civil constitution in history, and historians and Orientalists throughout history have spoken about it. This constitution was designed primarily to regulate the relations among all sects and groups in Al Madinah, principally the immigrants from Makkah (Al Muhajirin) and the local Muslims (Al Anssar), and Jewish tribes and others.¹¹⁸ Many have considered this pact to be one of the prides and glories of Islamic civilization, mainly of its political and humanitarian glories and landmarks.¹¹⁹

The main principles of the Al Madinah pact can be summed up as follows:

- First: The Islamic nation is over the Tribe.
- Secondly: Social solidarity between the factions of the people.
- Third: Deter treacherous of covenants.
- Fourth: Respect for the protection pledge granted by a Muslim.

¹¹⁷ Yetkin Yildirim, *Peace and Conflict Resolution in the Medina Charter*, 18 PEACE REV. 109 (2006).

¹¹⁸ Sh. Muhammad Ashraf, *THE FIRST WRITTEN CONSTITUTION IN THE WORLD* (1968), Frederic G. Kenyon (Translator), *THE AVALON PROJECT* 9 (1996).

¹¹⁹ R. B. Serjeant, *The Constitution of Medina*, 8 ISLAMIC Q. 3 (1964).

- Fifth: protection of dhimmis and non-Muslim minorities.
- Sixth: Ensure Social Security and Blood Money.
- Seventh: The governance reference is Islamic law
- Eighth: Freedom of conscience and worship is guaranteed to all factions of the people.
- Ninth: Financial support for the defense of the State is everyone's responsibility.
- Tenth: Financial independence of every fraction of the people.
- Eleventh: Obligation of common defense against any aggression.
- Twelfth: Advise and mutual righteousness between Muslims and the People of the Book.
- Thirteenth: Freedom of each faction to have alliances that do not harm the state.
- Fourteenth: Obligation to defend the oppressed.
- Fifteenth: Right to security for every citizen.

The requisites of international law in the field of minority rights:

Many international charters speak about rights of minorities, specifically article 27 the International

Covenant on Civil and Political Rights,¹²⁰ and article 30 of the Convention of the Child,¹²¹ and the UN Declaration of 1992 on Minorities Rights,¹²² main minorities rights can be summarized as follow:

- The right to protection against partisanship, segregation or social violence
- The right to equal protection irrespective of one's ethnic or racial origins
- The right for minorities to preserve their culture, their religion and their language.
- The right to benefit from the positive measures adopted by the State to encourage racial integration and promote minority rights.
- The right to seek asylum to flee from persecution based on their race, religion, ethnicity, social affiliation or political opinion.
- The right to appeal legal rulings and to resort to justice.

¹²⁰ International Covenant on Civil and Political Rights, December 16th (1966).

¹²¹ Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November (1989), entry into force 2 September (1990), in accordance with article 49.

¹²² It was adopted by the General Assembly resolution 47/135 of 18 December 1992.

Let us take up these rights one by one, and note along the way the fundamentals therein which tie them to the treatment advocated in Islamic Shari'ah.

A. The Right of Minorities to Protection against Partisanship, Segregation and Racial Violence

Here is an article on general protection rooted in people's commonality in humanity above all. If we refer to the Holy Scripture, we find, Allah's declaration:

“And we have certainly honored the children of Adam and carried them on the land and sea, and provided for them of the good things and preferred them over much of what We have created, with (definite) preference”¹²³ (Quran, Al Isra: 17:70). So this verse of Quran says that respect and honour all human beings irrespective of their religion, colour, race, sex, language, status, property, birth, profession/job and so on.

¹²³ Abdullah Yusuf Ali Trans. *Quran, Al Isra: 17:70*.

God has indeed created all humanity from one single unit and made them into communities and tribes for them to exchange graces and reach out to each other on the basis of solidarity, compassion and justice. God made them into fraternal communities with equal rights to livelihood, to growth and to tapping into the resources made available to them for the perpetuation of life, with no distinction between races, black or white, Muslim or non- Muslim.¹²⁴

This is an inclusive honor bestowed on man by God Almighty, and is apt in its essence to command fair and indiscriminate treatment between the Muslim majority and the non-Muslim minority wherever that may be.¹²⁵

As for individual honoring, it is based on Iman (firm belief in God) and Islam (Submission to God), proceeding from God's saying:

¹²⁴ Mahmoud Ayoub, *Dhimmah in Qur'an and Hadith*, MUSLIMS & OTHERS IN EARLY ISLAMIC SOC'Y Robert Hoyland (Editor) 25 (2004). (Originally published in Lawrence I. Conrad (Editor), THE FORMATION OF THE CLASSICAL ISLAMIC WORLD 18 (2004)).

¹²⁵ Sayed Khatab & Gary D. Bouma, DEMOCRACY IN ISLAM (2007).

“...Indeed, the most noble of you in the sight of Allah is the most righteous of you.”

(Quran, Al Moujadala (9))

or based on knowledge and perception deduced from Allah’s saying”

“... Allah will Raise those who have believed among you and those who were given knowledge, by degrees. And Allah is Acquainted with what you do.”

(Quran, Al Hujurat: 13)

This individual honoring does not clash with the idea of equality at the general level which God Almighty has bestowed on all the masses of people, all descendants of Adam. It is rather a special favor and privilege accorded to the righteous believer and the learned Muslim. As for those who do not belong to the community of Islam, they are still looked upon with God’s encompassing grace and honor accorded to all humans and with full rights under the Islamic

Shariah whose key hallmark is indeed justice, equity and compassion.¹²⁶

Hence, the notion of mutual respect among humans, irrespective of their ethnicity or beliefs, is founded on the spirit of mutuality as advocated in the Quran and as dictated by the requisites of coexistence and communal living, amounting to recognition of the value of the other and of his rights. It is also built on the concept of freewill which God has instilled in man as an innate feature, enjoyed by all in their inter-relations, on an equal footing in their conduct, their labor, their coexistence, their intellectual appreciation, their freedom expression and argumentation.¹²⁷

In the Madinah Pact it is stated that “A neighbor is (to be treated) like, the self, (as long as) he is neither an aggressor nor a trespasser.”¹²⁸ Also, Islam

¹²⁶ Vincent J. Cornell, *RELIGIOUS ORTHODOXY AND RELIGIOUS RIGHTS IN MEDIEVAL ISLAM: A REALITY CHECK ON THE ROAD TO RELIGIOUS TOLERATION*; Michael Igrave (Editor), *JUSTICE & RIGHTS: CHRISTIAN AND MUSLIM PERSPECTIVES* (2009), at 53.

¹²⁷ Allinda Black & June Hopkins (Editors), *Covenant on Civil and Political Rights*, *THE ELEANOR ROOSEVELT PAPERS* (2003).

¹²⁸ R. B. Serjeant, *Sunnah Jāmi'ah, Pacts with the Yathrib Jews, and the Tahrīm of Yathrib: Analysis and Translation of the Documents*

has ensured minorities against any aggression of whatever character. In his book “*Al Furook*” Al Qourafi says:

“If someone is under a Dhimma (Protected status) pact in our land and some enemies come seeking him, we are duty bound to rise to his defense¹²⁹ with every available weapon, even laying our lives in the protection of he who is under such a pact of dhimmahood (protection)”.

B. The Right to Equal Protection Irrespective of Ethnic or Racial Origins

Here we find that Islamic Shari’ah founded its interaction with non-Muslim minorities living in an Islamic State, on the principle of justice and equality, Allah, Exalted be He, says, “O you who have believed, be persistently standing firm for Allah, witnesses in justice, and do not let the hatred of a

Comprised in the So-called “Constitution of Medina,” 41 BULL. SCH. ORIENTAL & AFRICAN STUD. 1 (1978).

¹²⁹ Provisions of the Dhimmi, Ibn AlQayim Al-Jawziya Report of the 9th Regular Session of the OIC Independent Permanent Human Rights Commission Mohammed Raissouni, *Rights of Minorities in Islam*, IPHRC Member OIC (2013).

people prevent you from being just. Be just; that is nearer to righteousness. And your Allah; indeed, Allah is acquainted with what you do” (Quran, Al Maida: 8).

In this, one finds a clear reference to the need to spread justice and apply its principles to all irrespective of differences in ethnicity or culture, and a clear directive not to be swayed away from justice by any feelings of hatred, offense, disagreements or by the misconduct of some individuals, since justice is posited as a divine injunction that must be honored and enforced. In his book “Koranic Tafsir” (Quranic Interpretations), *Ibn Kathir* states, regarding the above verse that it is meant to establish justice in dealing with the non-believers, and that it applies quite obviously to Muslims as well.¹³⁰

Regarding the idea of banishing injustice to a (peace) covenant – partner (Dhimmi), the Hadith is

¹³⁰ Tafsir Ibn Kathir, *Exegesis of the Grand Holy Qur'an* (4 volumes) by Abu-l-Fidaa' 'Imaadu-d-Deen Isma'eel Ibn 'Umar Ibn Kathir Al-Quraishi Ash-Shafi'i Al-Ash'ari Al-Busrawee Ad-Dimashqi. The unabridged translation was done by Dr. Muhammad Mahdee Ash-Shareef and published by Daaru-l-Kutub 'Ilmiyah, Beirut, Lebanon (2006).

clear, insisting on the right of the said partner to undiminished rights and to full equality with Muslims¹³¹. Also, the Shari'ah law has guaranteed for this group the honoring of every commitment taken with them. Indeed, a Muslim is enjoined to abide by his commitment with others as long as the said commitment does not cause any harm to Muslims – *Ibn Qaiem* (1292–1350)¹³² says: “It was the practice for the Prophet (PBUH) that if any of his enemies entered in a commitment with one of his disciples, provided no harm is entailed for Muslims, he would put his signature to it.”¹³³ Also it is further stated in the Madinah Pact that a person is not to be held accountable for a wrong committed by a covenant-partner of his, but that reaching out to

¹³¹ Sunan Abī Dāwūd 3052, Safwan ibn Sulaym reported: The Prophet, peace and blessings be upon him, said, “Whoever wrongs a person protected by a covenant, violates his rights, burdens him with more work than he is able to do, or takes something from him without his consent, I will be his prosecutor on the Day of Resurrection.” Sahih (authentic) according to Al-Albani.

¹³² Ibn Qayyim al-Jawziyya was an important medieval Islamic jurisconsult, theologian, and spiritual writer. Belonging to the Hanbali school of orthodox Sunni jurisprudence.

¹³³ Muhhamed Al Ghazâli, *FIQH-US-SEERAH: UNDERSTANDING THE LIFE OF PROPHET MUHAMMAD* (2015), at 117.

ensure justice for a wronged person is a duty for all, irrespective of the wronged person's religion.¹³⁴

C. The Right for Minorities to Preserve their Culture, Religion and Language

Here we find that Islamic Shari'ah has guaranteed the right for non-Muslim communities to practice their religious creed and rites, according them religious freedom, proceeding from God Almighty's injunction (No coercion in matters of faith).¹³⁵ This was well epitomized in the message addressed by the Prophet (PBUH) to the People of the Book of the Yemen in which he invited them to Islam in these words: "Whoever chooses to join Islam amongst the Jews or the Christians becomes a member of the Muslim Community of Believers, enjoying equal rights and equal duties, and whoever chooses to stand by his Jewishness or Christianity must not be tempted (away from their beliefs)."¹³⁶ In the Madinah Pact, it is stated that Jews are entitled to

¹³⁴ *Ibid.* Muhhamed Al Ghazâli (2015).

¹³⁵ Verse (ayah) 256 of Al-Baqara of Quran.

¹³⁶ Bernard Lewis, THE JEWS OF ISLAM (1984).

their faith and Muslims to theirs. Likewise, the Najran Pact includes a provision for non-interference in the Christians' religious affairs, as an inviolable right for each and for their dependents.¹³⁷

D. The Right to the Benefit of Positive Measures Taken by the State to Encourage Racial Harmony and Promote Human Rights

When we refer back to Islamic literature we find that it has guaranteed for non-Muslims the right to mutual cooperation and mutual righteous treatment.¹³⁸ This is well illustrated in the prescribed duties to cover the needs of the relatives, to honor one's debts to honor your guest, to forgive even when capable of meeting punishment, to be affable to the incoming, and to provide for the defenseless, ensuring proper livelihood for non-Muslims in the land of Islam, as they form an integral part of its citizenship and as the state is responsible for the

¹³⁷ William Montgomery Watt, *MUHAMMAD: PROPHET AND STATESMAN* (1961).

¹³⁸ K. A. Armstrong, *HISTORY OF GOD: THE 4000 YEAR QUEST OF JUDAISM, CHRISTIANITY AND ISLAM* (1993).

wellbeing of all is citizens.¹³⁹ According to Prophet Mohamed (PBUH) “Each one of you is a steward and each is responsible for (the safety and wellbeing of) those under his stewardship Indeed an Imam (local religious leader) is a steward accountable for the wellbeing of his dependents, the husband is a steward in his family accountable for its wellbeing, etc.”¹⁴⁰

Islam also commands compassion for the weak and the vulnerable among the people of the Book who are affable to (refraining from aggressing) Islam. It also instructs that a share of the Zakat levied from by Muslims be allocated to the People of the Book, as established in the Quran: “The alms are only for the poor and the needy, and for those employed in connection therewith, and for those whose hearts are to be reconciled, and for the freeing of slaves, and for those in debt, and for the cause of Allah and for the wayfarer” (Quran 9:60, Surah Tawbah).¹⁴¹

¹³⁹ Michael Penn, *ENVISIONING ISLAM: SYRIAC CHRISTIANS AND THE EARLY MUSLIM WORLD* (2017).

¹⁴⁰ Abdur Rahman Al-Sheha, *Human Rights in Islam and Common Misconceptions*. Riyadh revised ed. 65. (2012).

¹⁴¹ Abdullah Yusuf Ali, *Quran Translation 9:60* (Alms are only for the poor and the needy, and the officials (appointed) over them, and

By getting married to slaves regardless of their social hardship, Islam encouraged Muslims to value people on other basis than their social class, and henceforth; find a balance between the differences established by the ethnic-tribal system at that time.¹⁴²

Even more admirable than all the above, is the right for the non-Muslim community for proper coverage of their needs from the Islamic State's treasury (Beitulumel) in the case of incapacity, old age or destitution.¹⁴³ This is well established in what Abu Ubeid reported (in his book "Financial Assets") on the authority of Ibn Al Musseib, that "The Prophet (PBUH) offered a 'Sadaqa' (Charity) to a Jewish household, a 'standing' (perpetual) Sadaqa that was offered to them regularly even after his death. Also, in the Madina Pact, it is stated that "The Jews of Beni Awf are to be treated by Muslims as they treat themselves" Protection (when given) in the Name of

those whose hearts are made to incline (to truth) and the (ransoming of) captives and those in debts and in the way of Allah and the wayfarer; an ordinance from Allah; and Allah is knowing, Wise.)

¹⁴² S. Abul Ala Maududi, ISLAMIC L. & CONST. (1997), at 296.

¹⁴³ *Supra* Lewis (1984) at 151.

Allah will be common.¹⁴⁴ The weakest among Believers may give protection (In the Name of Allah) and it will be binding on all Believers.¹⁴⁵

In the Dhimmahood Contract established by Khaled Ibn Al-Waleed for the benefit of the people of Al Hayra in Iraq, who were Christians, one finds the following: (I have taken it upon myself that whoever among them is incapacitated because of old age or ill health, and whoever is stricken by poverty¹⁴⁶ after ease and becomes the receiver of charity from the people of his own faith, shall be exempted from the payment of Jezya (tax) as well as shall enjoy life-coverage from Beitulmel (the Islamic State treasury) for himself as well as for his dependents).¹⁴⁷

¹⁴⁴ Abul Hasan M. Sadeq, *Poverty Alleviation: An Islamic Perspective*, 13 HUMANOMICS 110 (1997).

¹⁴⁵ Clause 14 Madina Charter, Khilafah al-'Alam al-Islami, Full Text of the Madina Charter. [30 November 2007].

¹⁴⁶ Michael Morony, *Religious Communities in Late Sasanian and Early Muslim Iraq*, MUSLIMS & OTHERS IN EARLY ISLAMIC SOC'Y, (Robert Hoyland (Editor)) (2004).

¹⁴⁷ Shadi Hamid, *An Islamic Alternative? Equality, Redistributive Justice, and the Welfare State in the Caliphate of Umar*, 13 RENAISSANCE.

E. The Right to Asylum for Fear of Persecution on Account of One's Race, Religion, Ethnicity, Social Affiliation or Political opinion

Here, Islamic Shari'ah guarantees the right to neighborly succor and to protection: "And if any one of the polytheists seeks your protection, then grant him protection that he may hear the word of Allah. Then deliver him to his place of Safety. That is because they are a people who do not know" (Quran, Al Tawba: 6).

Allah, Mighty and Sublime Be He, tells His Messenger: "And if one of the polytheists seeks your protection" (that is your succor), then do respond to this call for help. Offer them the opportunity to listen to the word of God (that is the Quran of which you may read for him, introducing him to the faith) as a duty on your part, after which you must help him reach a safe place."¹⁴⁸ In other words, after you rescue him and offer him some insights of the word of God, if he still declines your offer to embrace Islam and

¹⁴⁸ S. Abul Ala Mawdudi, THE RIGHTS OF NON-MUSLIMS IN ISLAMIC STATE (1982), at 282.

is not inclined to accept what you.¹⁴⁹ have read out to him from the word of God, then it is still your duty to help him reach a safe place, where he would feel safe from you and from those under your command, until he reunites with his own homeland and people among the unbelievers.¹⁵⁰ This is a command that applies not only to that past era. It is applicable at all times and in all places.

F. The Right to Appeal Before the Court:

Here, Islamic Shari'ah has guaranteed for all non-Muslims living within its borders the right to resort to court under their own law, while still offering them the free option to resort to either their own law or that of Islam.¹⁵¹ *Mohammad Ibn Al Qacem Al Shibani* (749– 805¹⁵²) said: “(If two adversaries among the Dhimma – partners choose on the basis of a common agreement between them, to

¹⁴⁹ *Ibid.*

¹⁵⁰ A. Gauher (Editor), *Islamic Law - Its Ideals and Principles*, CHALLENGE OF ISLAM (1980), at 269.

¹⁵¹ Abdulaziz Abdulhussein Sachedina, *THE ISLAMIC ROOTS OF DEMOCRATIC PLURALISM* (2001), at 31.

¹⁵² The father of Muslim international law.

resort to a Muslim judge, the latter may only take up their case after the approval of their priests, failing which, he must refrain. And the same applies in case the priests' approval does not have the consent of both adversaries.”¹⁵³

X. DUTIES TOWARDS NON-MUSLIM / DHIMMIS

In parallel to this, Islam having imparted upon this social category so many rights which honor and dignify them in the land of Muslims, it also required of them. Certain duties which they had to honor on their side, so that society at large may enjoy collective security, symbiosis and peace. These duties include the following:

A. Abiding by the General Terms of Islamic Law

As a matter of fact, there is a need for all non-Muslims living within the fold of the Islamic society

¹⁵³ Sadia Tabassum, *Combatants, Not Bandits: The Status of Rebels in Islamic Law*, 93 I. R. RED CROSS. 121 (2011).

to abide by the same Islamic provisions applicable to Muslims. As long as they have chosen to live within the fold of the Muslim society, it becomes a duty for them to abide by its laws without prejudice to their own creeds and religious freedom. Indeed, under Islam, they are not required to abide by any of the worshiping rites of Muslims, nor are they required to cede any of their civilian or social particulars permitted to them by their religion, even if prohibited by Islam, as in the cases of marriage and divorce and all that has to do with their food and drink.¹⁵⁴ They are also free to practice their religious rites and not to renounce what is permissible under their religion. However, they have (in all collective civil matters) to accept and abide by the law of the state where they are living, under the umbrella of its ruler.¹⁵⁵

B. Be Considerate of the Feelings of Muslims

Non-Muslims living in a Muslim State need also to be considerate of the feelings of Muslims and be

¹⁵⁴ A. A. Maududi, *HUMAN RIGHTS IN ISLAM* (1997), at 236 -37.

¹⁵⁵ *Ibid.* A. A. Maududi at 238-39.

respectful of the dignity of the state under whose umbrella they are living, by being respectful of the Islamic religion and its sanctuaries and refraining from any manifestations likely to offend the feelings of Muslims.

C. Paying Financial Dues

Another requirement for non-Muslims living in a Muslim state is to settle all the required fiscal duties and contributions, in which they are in fact equal to Muslims, in terms of taxes levied on all types of assets, commerce, agriculture and trading. On the level of constitutional rights, however, the Islamic school allows diversity and accepts differences between Muslims and non-Muslims. These differences manifest themselves in the debates about interreligious marriage, inheritance, and giving testimony against a suspect from another religion. In addition, non-Muslims are not required to join the army or serve the state; these may be seen as advantages or restrictions. Yet there is one clear restriction: a non-Muslim cannot be the leader of a

Muslim state. Non-Muslims can occupy any position other than the top leadership.¹⁵⁶

A poll tax (jizya) was levied; in addition, dhimmis (or ahlu-dh- dhimmah, protected people) were prohibited from criticizing the Quran, expressing disrespect to the Prophet or to Islam, conducting missionary activity, or having sexual relations with or marrying Muslim women.¹⁵⁷ From this perspective, dhimmah is a gained right and privilege; it is also the basis of other rights to be gained by virtue of signing a treaty with the Muslim authority. Enjoying legal personhood requires fulfilling the conditions of the treaty. Otherwise, it will be lost. One of the conditions of keeping legal personhood is to pay the special poll-tax, jizya, to the state.¹⁵⁸

¹⁵⁶ A.S. Tritton, *THE CALIPHS AND THEIR NON-MUSLIM SUBJECTS* (1970), at 8.

¹⁵⁷ Michael Morony, *Religious Communities in Late Sasanian and Early Muslim Iraq*, *MUSLIMS AND OTHERS IN EARLY ISLAMIC SOCIETY* (2004).

¹⁵⁸ Muhammad Abdel-Haleem, *The Jizya Verse (Q. 9:29): Tax Enforcement on Non-Muslims in the First Muslim State*, 14 *J. QURANIC STUD.* 72 (2012).

What is Jizyah?

From the perspective of the Islamic school, the jizyah is the fee for dhimmah (protection),¹⁵⁹ which entitles one to inviolability ('ismah), and residence in the Muslim state (sukna). But universalist jurists argue otherwise. For them, dhimmah and 'ismah are not subject to monetary exchange; they are inalienable universal rights that are granted at birth. From this perspective, as Muslims are required to pay zakat and other annual charities and taxes, non-Muslims are also required to pay taxes in the form of jizya. For the Hanafi school, jizya is acceptable from all non-Muslims, including the People of the Book and non-Arab pagans, the only exceptions being Arab pagans and polytheists. For the Shafi'i school, jizya is acceptable only from the People of the Book and Zoroastrians and not from the followers of other

¹⁵⁹ The jizya tax is based on the following verse from the Quran:
Fight those who believe not in Allah
nor the Last Day nor hold that forbidden which hath been forbidden
by Allah and His Messenger,
nor acknowledge the religion of Truth, (even if they are) of the
People of the Book, until they pay the Jizya with willing submission,
and feel themselves subdued (Al-Tawbah 9:29).

religions because the Ouran and hadith did not list them among those who are allowed to make peace with Muslims and pay jizya.¹⁶⁰

D. To Refrain from Causing Prejudice to Religious Sanctities

Anyone living within the fold of the Islamic state enjoys full freedom to practice their own religious rites and are entitled to all the manifestations of their rituals, subject however to steering away from any public manifestations offending Muslims or prejudicing their religion or their Prophet.¹⁶¹

Thus Islam has defined the foundations of peaceful coexistence between Muslims and non-Muslim minorities living within the territories of Islam. It offered thus a template for modalities of dialogue and interplay between Muslims and the followers of other religions, in favor of building a

¹⁶⁰ Qur'an, Al-Tawbah 9:29. Bukhari, *Sahih, Kitab al-Jizya* (297/6); Malik, *al-Muwatta, Jizyat Ahl al-Kitab* (121/1). It is narrated that the Prophet Muhammad took jizya from the Zoroastrians of Bahrain; Umar took it from the Zoroastrians of Iran.

¹⁶¹ Mohammed Raissouni, *Rights of Minorities in Islam*, IPHRC Member OIC.

well-integrated society enjoying peace, security, equality and mutuality, it being known that this has been the subject of a wide spectrum of texts (in the Quran and Hadith) that may be referred on the matter, all of which converge around what we have expounded in terms of the inviolability of the rights of religious minorities in the land of Islam.¹⁶²

E. Axiomatic Principles of Law: Basic Rights in Islam

Irrespective of the above noted discussion about justification of rights in Islamic Law, which grants six basic rights to individuals, whether they are Muslims or non-Muslims. An individual is presumed to be part of a millet organization. However, individuals have rights that are granted to them universally and equally regardless of their religion, race, gender, and culture.

¹⁶² K. El Fadl, *Islamic Law and Muslim Minorities: The Juristic Discourse on Muslim Minorities from the Second/Eighth to the Eleventh/Seventeenth Centuries*, 1 *Islamic L. & Soc.* (1994), at 141-187.

These rights are not subject to debate. Therefore, they are termed "axiomatic principles of law" (al-daruriyyat alshar'iyya). They are also known as "the objectives of law" (maqasid al-shari'ah).

These rights are as follows

- 1) the right to the inviolability of life ('ismah al-nafs or 'ismah aldam);
- 2) the right to the inviolability of property ('ismah al-mal);
- 3) the right to the inviolability of religion ('ismah al-din);
- 4) the right to the inviolability of freedom of expression ('ismah al-'aql);
- 5) the right to the inviolability of family ('ismah al-nasl); and
- 6) the right to the inviolability of honor ('ismah al-'ird).

Because these rights are universally granted, minorities also enjoy them. Accordingly, the life, property, religion, mind, family, and honor of all individuals are inviolable, regardless of their inherent, inherited, and acquired qualities such as race, religion, gender, culture, and education. Minorities are allowed to fully practice their cannon law provided that they do not contradict these six

axiomatic principles of Islamic law. In that case they are prevented from practicing those rules that explicitly violate these basic rights. Consequently, Muslim rulers prohibited the practice of *sati* in India.¹⁶³ Similarly, they prohibited the practice of marriage with siblings among some Zoroastrians in Iran.¹⁶⁴

XI. CONCLUSION

Minority rights are fundamental rights derived from the ground rules of international human rights law. These rules dictated the development of protective measures for the rights of these minorities, to ensure that all races and ethnicities that exist in a country, enjoy all the rights enjoyed by the rest of society components, as well as to ensure their participation in development of countries they are in, and to participate in public life, and to protected own

¹⁶³ Sri Ram Sharma, *The Religious Policy of the Mughal Emperor* (1972), at 42-44.

¹⁶⁴ Patricia Crone, *MEDIEVAL ISLAMIC POLITICAL THOUGHT* (2005), at 307.

identities from any damage or harm that may inflict these minorities.

The Islamic world has its own features and uniqueness. It should, however, be kept in mind that the Islamic world is also not a homogenized one. One comes across fundamental differences in Islamic countries from Algeria to Indonesia though all of them follow religion of Islam. Commonality of religion does not necessarily mean commonality of social or political traditions.¹⁶⁵ While these countries have Islam as majorities religion, they do allow all their citizens, including the non-Muslims, equal political and social rights¹⁶⁶. The Islamic tenets, do not disapprove of composite or pluralistic way of life. The Covenant of Medina (called *Mithaq al-Madinah*) clearly approves of pluralistic set up, religious pluralism and composite nationalism.¹⁶⁷

¹⁶⁵ A. Gauher (Editor), *Islamic Law - Its Ideals and Principles*, THE CHALLENGE OF ISLAM (1980), at 269.

¹⁶⁶ Mohamed Suffian Hashim, AN INTRODUCTION TO THE CONSTITUTION OF MALAYSIA (1976). See, Shad Saleem Faruqi, DOCUMENT OF DESTINY- THE CONSTITUTION OF THE FEDERATION OF MALAYSIA (2008), at 341.

¹⁶⁷ Abdulaziz Abdulhussein Sachedina, THE ISLAMIC ROOTS OF DEMOCRATIC PLURALISM (2001), at 30-31.

The Prophet clearly set an example himself that people of different faith and traditions can live together in peace and harmony creating a common bond and respecting a common obligation towards the city/country Medina.¹⁶⁸

The Islamic emphasis on law would then lead us to inquire about how classical Islamic Sharia protected the rights of minorities under Muslim rule or whether men and women were given the same rights in the medieval or late medieval period.¹⁶⁹ But Europe, for instance, as late as the seventeenth century, was plunged in fratricidal wars of religion, hardly a model of “religious freedom.”¹⁷⁰ In the many centuries before that, as well, European states, starting with the Holy Roman Empire, were famous for discriminating against and at times massacring

¹⁶⁸ Anver Emon, *Reflections on the “Constitution of Medina”: An Essay on Methodology and Ideology in Islamic Legal History*, 1 UCLA J. Islamic & Near Eastern L. no. 103 (2001).

¹⁶⁹ Vincent J. Cornell, *Religious Orthodoxy and Religious Rights in Medieval Islam: A Reality Check on the Road to Religious Toleration* (2009), 53.

¹⁷⁰ Thirty Years’ War, History, <http://www.history.com/topics/thirty-years-war> (accessed on Nov. 2019).

those whose beliefs did not match those of the ruling elites, and the Jews in particular.¹⁷¹

The concept of civil society which respects autonomy of a citizen and his/her religious, cultural and political rights does not, in any way, contradictory to the Qur'anic injunctions. The above analysis has shown that Islam has no clash with the minority rights. The Qur'an clearly states that all children of Adam have been honoured.¹⁷² This of course includes right to live with dignity and to promote one's own religious, cultural and linguistic or ethnic interests. In sum, the rights of minorities in Islam have been guaranteed to ensure a full and comprehensive treatment, within the scope of maintaining all concerned covenants and conventions.

¹⁷¹ Mark R. Cohen, *UNDER CRESCENT AND CROSS: THE JEWS IN THE MIDDLE AGES* (2008).

(a comparative study of Jews in the medieval period under European Christendom and under Muslim rule, showing that the Jews were much better off in Muslim lands).

¹⁷² Abdullah Yusuf Ali, *The Holy Quran*, trs Surah Al-Isra 17:70.