Migration of constitutional ideas and religious freedom
By Aldir Guedes Soriano

Abstract: This paper examines the constitutional migration of the liberal concept of religious freedom from the United States across the western world and the current change of its early meaning through the anti-liberal influence in Brazil and Argentina, and likewise the migration of Sharia law towards the west. Liberalism was set up in the United States through the Declaration of Independence of 1776. On account of it, the principle of liberal democracy holds the free exercise of religion and the non-establishment of any church or religion, consecrated in the First Amendment of the American Constitution. The liberal point of view of religious freedom – which was born in the United States – has evidently traveled to different parts of the world, including Japan, Europe and Latin America as well. The United States also exported liberal democracy to Europe and Latin America as well. The liberal conception of religious freedom is clear in the German and Brazilian Constitutions, for instance. However, there is a risen possibility of constitutional migration of Sharia law (Islamic law) to western countries. Nowadays, there is an important controversy in the United States and also in Europe about the application of Sharia law in domestic courts. The problem is: Do Islamic laws have a place in American, German or Brazilian courts? The problem is the same for all western nations. This paper shows that the migration of Sharia law throughout judicial decisions is unconstitutional, because Sharia law is, of course, a religious law and the First Amendment of the American Constitution doesn’t allow the establishment of religion. It doesn’t violate Muslims’ religious freedom. Christian or Hinduism doctrines can’t be legitimate by law as well. Furthermore, Sharia law is in conflict against the western legal system; it includes laws and federal constitutions. If Sharia law is according to western legal system, then its application in domestic courts is not really necessary. This paper concludes that the application of Sharia law in western domestic courts violates the legal system and the culture of the non-Muslim nations. It would be a perversion of the Founding Fathers legacy to western civilization and also a violation of the universality of the human rights principle. Migration of Sharia law across the west would bring a negative impact on human rights, thus changing the meaning of the liberal viewpoint of religious freedom.

1. Introduction

The migration of constitutional ideas is a very new topic on constitutional law. Moreover, according to Sujit Choudhry, the “migration of constitutional ideas across
legal systems is rapidly emerging as one of the central features of contemporary constitutional practice.” Probably, it is also an innovative constitutional perspective to study and to understand the current challenges on the right of religious freedom around the world.

The first question about this topic could be how does a constitutional idea may travel among different countries and cultures? The book *The Migration of Constitutional Ideas*, edited by Sujit Choudhry, talks about different ways of the migration of legal ideas between different nations. Based on this and also whereas American experience, I propose a classification of the possibilities of constitutional migration.

After the Declaration of Independence of 1776, the United States started to export liberal democracy across the world. Probably, that was a kind of the migration of constitutional idea phenomenon. Thus, this paper examines some aspects of the constitutional migration of the liberal concept of religious freedom from the United States to Brazil and Argentine. These are very interesting examples of a migration of constitutional idea, because it was not performed by imposition of the American imperialism. I call this kind of migration as *spontaneous assimilation*.

Constitutionalization of the international law is another way of the migration of constitutional ideas. By the way, concerning international law there is a well knows conflict between universality of human rights and cultural relativism. The controversy with regard to the universality of the human rights that were proclaimed in the 1948 Universal Declaration of Human Rights was also present in the debates about the article 18 of the International Covenant on Civil and Political Rights of 1966 and in the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief of 1981. Even today, in spite of the consensus achieved at the 1993 Vienna Conference, the idea of cultural relativism continues to be invoked as a justification for discrimination and even for the persecution of religious minorities through government institutions. Thus, cultural relativism in relation to the universality of human rights nevertheless constitutes the greatest challenge to international law in the 21st century.

Cultural background of the majority of muslims countries does not permit the complete assimilation of universality of human rights or even full democracy. These countries are refractory to the equal religious freedom and women rights, for instance. On the other hand, supremacist muslims, as we shall see, are interested to export their theocratic legal system. Furthermore, muslims intend to live in western countries, Europe and the United States, under Sharia Law. The problem is should western countries accommodate its legal system according to Islamic claim?

Whereas the rouge increasing of muslims immigrants to Europe and the United State in the last decades, the topic about the possibility of migration of Islamic Law should be part of most urgent academic debate. Then, these paper exams the constitutionality of migration of Islamic law to west and a potential risk for de identity of western culture and values.

2. Kinds of migration of constitutional ideas
It is reasonable to admit a kind of migration of constitutional idea through colonial imposition. The Brazilian colonial and imperial order legal order were under the aegis of the Ordinances of kingdom of Portugal (“Ordenações Filipinas”), for instance. As we shall see, Brazil assimilated the American legal model, included federalism and separation between the Church and the State, after the Proclamation of Independence in 1889. There was a spontaneous assimilation of the American liberal ideas.

- Direct or immediate: Throughout colonial imposition.
- Direct or immediate: Throughout spontaneous assimilation (imitation).
- Direct or immediate: Throughout Constitutionalization of international law.
- Indirect or mediate: Throughout Jurisdiction – Application of foreign law or foreign jurisprudence.

Another well-known way of migration would be through the constitutionalization of the International Law. After World War II, the Brazilian Constitution of 1988 has incorporated the International Law of Human Rights. The last but not least possibility of migration of ideas between two different legal systems is via Jurisdiction, in which a national Judge or Judicial Court makes its decision by borrowing it from a foreign Jurisdiction or Law.

3. The risen of liberal democracy in America and its foundations

The American liberal democracy is a Judeo-Christian legacy. Christian moral thought was crucial to the development of the American legal system and to the consolidation of religious freedom in America, and through her, to the rest of western world. Christianity, according to Benjamin F. Morris, was important to the establishment of the American democratic institution.

According To Benjamin F. Morris:

“Christianity is the principal and all-pervading element, the deepest and most solid foundation, of all our civil institutions. It is the religion of the people - the national religion, but we have neither an established church nor an established religion. An established church implies a connection between church and state, and the possession of civil and political as well as of ecclesiastical and spiritual power by the former.” (...) “The founders of the Christian republic of North America adopted the symbol of civil and religious liberty as the great idea and end of all their civil institutions.”

The Virginia Declaration of Rights of 1776 was the first liberal document to establish the idea of the universality of natural or innate rights. The same idea was later reproduced in the Declaration of Independence of the United States of 1776, in the French Declaration of the Rights of Man and of the Citizen of 1789, and even in the Universal Declaration of Human Rights of 1948. Indeed, Article 1 of the Universal Declaration of Human Rights of 1948 proclaims: “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”
Further, according to Michael McConnell, the provision of religious freedom in the Virginia Declaration of 1776 is recognized as the precursor to the First Amendment of the American Constitution. It is interesting to note the concept of religion as a duty of obedience to divine precepts in the Virginia Declaration:

That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practise Christian forbearance, love, and charity towards each other.

The United States’ Declaration of Independence reflects political liberalism, as well as the Judeo-Christian legacy. The main writer of this declaration, Thomas Jefferson, was a daily Bible reader and he considered Jesus’s teachings to embody the most sublime morals of mankind. This most important document presents the idea that “all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.” Thus, the rights are not concessions from the king, the government, or the state. On the contrary, this document establishes that “to secure these rights, governments are instituted among men.” Therefore, the foremost purpose of the democratic and liberal state is to protect the human person and her unalienable rights. In the words of Jacques Maritain, the state is “an instrument in the service of man.” In contrast, it would be a political perversion to place man at the service of this instrument, the state. Ultimately, the state can neither revoke nor restrict human rights at its own pleasure because it was not the author of those rights. Rights are innate, whether from the rational point of view (natural rights) or a metaphysical or religious point of view.

The First Amendment of the American Constitution contains two interrelated pillars or crucial principles of liberal democracy: the free exercise of religion (Free-Exercise Clause) and the non-establishment of religion by the state (non-Establishment Clause). The metaphor of the wall of separation was canonized by two important U.S. Supreme Court decisions written by Justice Hugo L. Black in *Everson v. Board of Education* and *McCollum v. Board of Education*. From these cases prevailed the understanding that neither the states nor the federal government may establish a church. According to Justice Black, the wall should be “kept high and impenetrable.”

Today, constitutions around the world typically contain a catalogue of fundamental rights (the dogmatic part) that guarantees to citizens the greatest possible freedom with minimum necessary restrictions that are still in consonance with liberal democracy.

The American liberal-democratic model was imitated by European Union and international organizations such as NATO and the United Nations, but there is remarkable shift in name of illiberalism, anti-Americanism and also anti-Semitism.

4. Constitutional migration of the liberal concept of religious freedom from the United States to Brazil and Argentine
Liberalism was set up in the United States throughout the Declaration of Independence of 1776. After the advent the First Amendment of American Constitution, the main principle of liberal democracy holds free exercise of religion and the nonestablishment of any church or religion.

Liberal point of view of the religious freedom – that was born in the United States – has evidently traveled to different parts of the world including Japan, Europe and Latin America as well. It happened by the influence of the liberal thought. After the World War II, Japan disrupted the alliance between religion and State Shinto. The United States also exported liberal democracy to Europe and Latin American as well. The liberal conception of religious freedom is clear in German and Brazilian Constitution, for instance.

Ruy Barbosa introduced liberal democracy in Brazil. Juan Bautista Alberdi did the same thing in Argentine. Both jurists had been greatly influenced by the liberalism of the American Founding Fathers.

Brazil had an established church before the Proclamation of the Republic in 1889. Liberalism disrupted the association between Catholic Church and State. It is important to remember that in 1600, a large group of Jews was banished from Brazil. Today, according to Pew Research Center, Brazil “has lowest government restriction on religion among 25 largest countries”. So, the republican liberal democracy increased the tolerance and also the level of religious freedom in Brazil.

The means and mechanisms whereby a new concept of religious freedom was established in Brazil and Argentine were by dint of the democratic American influence. Concerning the mechanisms responsible for similar interpretations, primarily in the United States and then in Brazil and Argentine, I argue that the historical process is the chief one.

Brazil and Argentine have assimilated the American concept of religious freedom and the principle of separation between the State and the Church. Michel Rosenfeld and András Sajó, in their article, talked about the spreading of liberal constitutionalism in the second half of the twentieth century. It is very important, however, to recognize a strong liberal wave of spreading of liberal constitutionalism, which, in the second half of the 19th century, reached Latin America. The Constitutional migration of the liberal concept of religious freedom from United States to Brazil and Argentine was a long historical process of assimilation or adoption of the American institutions and values.

Brazil and Argentine were colonies of Portugal and Spain, not from the United States. In the colonial time both countries were shaped according to the metropolis and under the influence of the Catholic Church. Instead, Dinesh D’Souza supports that “America’s influence was greater because its institutions and values were adopted rather than imposed.” The United States did not impose its values by imperialist force.

In the Imperial period, Brazil had an established Church: Catholic. No doubt that the liberal ideas have contributed to the disruption of the alliance between Brazilian State and Catholic Church. Therefore in the beginning of Brazilian Republic, in 1889, a new conception of religious freedom was forged according to the liberal ideas and the
principle of separation between the State and the Church. Before the separation between
the State and the Church, the religious freedom was framed according to the illiberal or
theocratic conception called *libertas ecclesiae*. It meant liberty within the borders of the
official church (Catholic). The new conception improves religious freedom for all
religions.

The process of the migration of the liberal concept of religious freedom to
Argentina was very similar. The dialog between the Church and the State in Argentine
has been always more closed than in Brazil, however. In Argentine, the Catholic Church
is probably an important actor for a turning back to the old illiberal conception of
religious freedom. Currently, according to the Abstract there is an important
controversy in Argentine about bills mandating dominical rest for everyone. Those bills
are clearly unconstitutional and contrary to liberal concept of religious freedom.

Undoubtedly, the North American ideas influenced the prevalent concepts of
religious freedom and the relations between the religion and the state. It is an amazing
fact. In fact, Argentine and Brazilian constitution-drafters, Ruy Barbosa and Juan
Bautista Alberdi, had intensively studied and debated ideas about religion-state relations
of North American thinkers and politicians.

In the Brazilian case, for instance, American influence is a very well-known
historic fact. In short, I would like to highlight that the first step was the republican
revolution that overthrew the imperial government by decree in conjunction with the
Brazilian Army. Among civil republicans the radical Jacobins influenced part of them
and they would like to murder the Brazilian emperor Dom Pedro II. The majority of
them were liberal republicans, who admired American values. The desire of the
Revolutionary Army stemmed from the positivist ideas expounded by Augusto Comte.
The Freemasonry participated of the movement advocating the separation between the
Church and the State. After de disruption of the Brazilian monarchy and its banishment,
an interim government created a commission of five jurists to draft the republican
constitution. The interim government did not approve the constitution draft. The
government summoned Ruy Barbosa to review the draft. Thus, in 1890-1891, Ruy
Barbosa reviewed the draft of the Constitution by himself, according to his liberal
American values. Barbosa had the spirit of American Revolution in 1776. The
documents such as The Federalist, The Declaration of independence of Unlisted State
and the American Constitution were adopted as models for the early Brazilian republic.

The liberal ideas were not attractive to the Catholic Church. There was a sort of
struggle between the liberal ideas and the conception of the Church concerning the
religious liberty (*libertas ecclesiae*) which was much more restrictive. The Protestant
Church was not so influential in the last phase of imperial period. Its influence was very
small.

The revolutionary Constituent power was the instrument of the change, whereby
liberal values were adopted by the new juridical republican order. The original
Constituent power is unlimited. Perhaps, it is possible to identify civil republican, army
men and freemasons as actors or channels of the migration of the liberal values from
United States to Brazil in de second half of 19th century. However, the jurist Ruy
Barbosa was no doubt the principal actor of the assimilation of American liberal
political ideas and values.
3. Migration of the Sharia Law to Western Countries

The application of foreign law in domestic courts, state or federal is theoretically possible since it does not violate public order, at least according to Brazilian law. On the other hand, to be applied the foreign law must be in accordance with the Constitution. Furthermore, the foreign law must be also in accordance to international law of human rights. If the judiciary applied a foreign law or even a foreign jurisprudence, it should be called migration of constitutional idea.

If is very relevant to promote an academic debate about the migration of the Sharia Law to western countries, because both in Europe an United State, is increasing muslims which want to live according to Sharia Law. I argue that this debate is absolutely unavoidable whereas the existence of very favorable condition for the migration of Islamic ideas to the west world.

Existence of favorable conditions to the migration of the Sharia Law to western countries

It is easy to identify seven favorable conditions to the migration of the Sharia Law in western countries:

1) Existence of Islamic doctrine favorable to exportation of Sharia Law;
2) Existence of activist groups demanding Sharia Law in western Countries;
3) Virulent Secularism (anti-Judeo-Christian secularism) in western countries;
4) Large spread doctrine of multiculturalism in western countries;
5) Depreciation of western culture in western countries and Continuing and progressive loss of cultural identity of the western countries.
6) Existence of a risen anti-Americanism and also anti-Semitism.
7) Existence of a risen ideology of the rule of leveler egalitarianism against rule of law.

Scholars from different orientation like Bat Ye’or, Robert Spencer and Sayyid Qutb very well document the will of the establishment of the Sharia Law in western countries. Moreover, muslims have been demanding Sharia Law in western countries such as the United States and the United Kingdom for instance. Thus, nowadays, there is an important controversy in the United States and Europe about the application of the Sharia law in domestic courts. The problem is: Do Islamic laws have a place in American, German or Brazilian (western) courts? The problem is the same for all western nations.
According to the study “Shariah Law and American Courts: An Assessment of State Appellate Court Cases” from Center for Security Policy of May 20, 2011 there is a clear Islamic doctrine favorable and openly intent to impose the Sharia law even in the western world:

“Shariah is distinctly different from other religious laws, like Jewish law and Catholic Canon, and distinctly different from other secular foreign laws. This distinction rests in the fundamental Shariah doctrine that Islamic law must rule supreme in any jurisdiction where Muslims reside. In the case where Muslims are few, they are permitted to comply as minimally necessary with the secular “law of the land,” but according to authoritative and still quite ex-tant Shariah law, Muslim adherents to this legal doctrine may not accept secular or local laws as superior to or even equal to Shariah’s dictates. This creates an explicit doctrine to introduce Shariah law and replace U.S. legal systems with Shariah for the local Muslim population.”

The Sharia law is linked to Jihad. The Jihad’s main propose is to establish the Sharia law around the world. Jihad means struggle. To Sayyid Qutb, the “struggle to establish the sovereignty of God on earth is calling Jihad.”

In fact, the study from Center for Security Policy, quoted above, shows 50 cases concerning claiming for application of the Sharia Law in United State. “This study analyzes and discusses a total of 50 cases from 23 different states: 6 cases were found in New Jersey; 5 in California; 4 each in Florida, Massachusetts and Washington; 3 each in Maryland, Texas and Virginia; 2 each in Iowa, Louisiana and Nebraska; and 1 each in Arizona, Arkansas, Delaware, Illinois, Indiana, Maine, Michigan, Minnesota, Missouri, New Hampshire, Ohio and South Carolina.”

American lawmakers have been worried about this issue and started to make bills restricting the application of foreign laws. According to Pew Research Center:

“Between 2010 and 2012, lawmakers in at least 32 states introduced bills to restrict the circumstances in which state courts can consider foreign or religious laws in their decisions. During this period, six states – Arizona, Kansas, Louisiana, Oklahoma, South Dakota and Tennessee – enacted such bills into law. The Oklahoma law, which explicitly banned judicial consideration of Islamic law (or sharia), was struck down in 2010 when a federal district court ruled that the law infringed upon Muslims’ constitutional rights. The 10th U.S. Circuit Court of Appeals upheld the district court’s decision on the Oklahoma law in January 2012. The other five states still have their restrictions on judicial consideration of foreign or religious law on the books.”

According to Alexandre del Valle, Union of Muslim Organizations of UK and Ireland was one of the first organizations to advocate the application of Sharia law in Europe. In 1979, such organization arranged a colloquium in Birmingham with the theme “Recognition of sharia’s family law by the British authorities.” Today, Britain has 85 sharia courts, according to the Gatestone Institute.

The western civilization today is secular. Secularism is a consequence of the separation between the Church and the State. But, the problem is that this secularism
became hostile to the Christianity and to the Judeo-Christian legacy of liberal democracy. Today, there is a kind of virulent, atheistic and anti-Judeo-Christian secularism. The principle of separation and also the concept of secular state were totally perverted.

There is a confusing and perverted misconception that the secular state is atheistic and then it should be hostile to the Judeo-Christian values. I will give you an example. The Spanish philosopher Francisco Santamaría reports in his book, Religion Under Suspicion, that a Christian couple in England was not allowed to adopt a child because their beliefs would influence the sexual behavior of the child against homosexuality. They were barred from adoption by the judge because they had a traditional Christian moral code.

To live as Christian in the western countries is becoming every day more difficult. Sometimes, to live as a Christian outside the west is almost impossible. As Marshall observed, of the twenty nations considered “not free,” twelve are Muslim-majority countries (Iran, Iraq, Maldives, Saudi Arabia, Sudan, Turkmenistan, Uzbekistan, Afghanistan, Bangladesh, Mauritania, Pakistan, and Palestine). Of these twenty countries, it may also be inferred that five of them have anti-democratic or communist tendencies (China, North Korea, Cuba, Vietnam, and China-Tibet) and have systematically restricted the freedom of religion and the freedom of speech. Thus, democratic and Christian states of the Western world offer better conditions for the exercise of religion-related public liberties. On the other hand, non-democratic states are notorious for serious freedom of belief violations and persecutions.

Table 1 – Who are the twelve countries considered “not free”, according to Marshall.

<table>
<thead>
<tr>
<th>20 Countries considered “not free”, high level of religious persecution.</th>
<th>12 are Muslim-majority countries.</th>
<th>Iran, Iraq, Maldives, Saudi Arabia, Sudan, Turkmenistan, Uzbekistan, Afghanistan, Bangladesh, Mauritania, Pakistan, and Palestine.</th>
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</thead>
<tbody>
<tr>
<td>5 countries have anti-democratic tendencies, in other words, are communist.</td>
<td>China, North Korea, Cuba, Vietnam, and China-Tibet.</td>
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</tbody>
</table>

According to Brian J. Grim and Roger Finke, “religious persecution is not only more prevalent among Muslim-majority countries, but is also generally occurs at more severe levels. Sixty-two percent of Muslim-majority countries have a moderate to high level of persecution … the contrast between Muslim-majority an Christian-majority countries is even more pronounced at the highest levels of persecution, where more than one thousand persons are reported to have been abused or displaced because of religion.”

A large spread doctrine of multiculturalism in west contributes to the weakness of western culture. This doctrine imposes the idea that the State is obliged to protect and recognize all cultures as equal and to help minorities against the intrusion by the majorities cultures. It is a hard duty imposed to western countries. So the
multiculturalism is also an ideology against western culture and values. It is a kind of trap or *Trojan Horse*. Unfortunately, the European Union has been changed the early project and adopt a new one according to the cultural universality and neutrality of values. This new project is open to the future, but forgotten to the past: the Judeo-Christian cultural legacy. Then, the level of hostility against western culture inside the western countries is almost surreal.

In a first time an atheistic conception of secular state was adopted in the western world. Today, it is been changing, probably, for adoption of a new foundation. After years of multicultural and secular propaganda, whereby western state should keep religious and cultural neutrality, intellectuals stated to introduce the Eurabia ideology. Jürgen Habermas says that the substitution of the identity by the globalization is a necessity and admits the end of Nation-State.

The perversion of the concept of secular state contributed to the depreciation of western culture and to the continuing and progressive loss of cultural identity. The people forgot their cultural roots. In others words, the foundation of western culture – Judeo-Christian legacy of human rights, equality and liberty for all – was forgotten.

It is important to consider the existence of a risen anti-Americanism and also anti-Semitism, both are absolutely unfair and contribute the assimilation of foreign cultures and values such as Islam. This risen and large spread filling against the United States and Israel undermine the western culture and democracy. Israel is the last democracy in Middle East.

Finally, it is also important to notice that the hegemonic leftist ideology of the west is very similar to the Islamic revolutionary of the *rule of leveler egalitarianism*. That is the reason why the western left wing is so interested to promote Islam in west.

**Unconstitutionality of the migration of Sharia Law to western countries**

The problem is that there are several conflicts between Sharia Law and liberal Western legal system and values. The most part of the Sharia law is incompatible to western legal system.

Thus, the migration of the Sharia law throughout judicial decisions is unconstitutional, because Sharia law is, of course, a religious law and the First Amendment of the American Constitution, for instance, doesn’t allow the establishment of the religion. It doesn’t violate muslims’ religious freedom. Christian or Hinduism doctrines can’t be legitimate by law as well. Furthermore, Sharia law is in conflict against the western legal system, it’s includes laws and federal constitution. If Sharia law is according to western legal system, then its application in domestic courts is not so necessary.

Sharia law discriminates women, condemns changes of religion or belief calling it crime of apostasy and violates freedom of speech with anti-blasphemy laws. In sum, it criminalizes civil liberties. According to David G. Littman, the 1990 “Cairo Declaration of Human Rights in Islam” and 1981 “Universal Islamic Declaration” clearly states that human rights should be subject to Islamic law. Even today, in spite of the consensus about the universality of human rights, the idea of cultural relativism continues to be used as a justification for discrimination and even for the persecution of religious
minorities. Should Sharia law be applied only to Muslims? If so, discrimination against women should be permitted among Muslims living in Western countries in the name of relativism cultural or multiculturalism?

Table 2 – Comparison between the liberal western legal system and the Sharia Law

<table>
<thead>
<tr>
<th>Liberal Western legal system and values</th>
<th>Sharia Law</th>
</tr>
</thead>
<tbody>
<tr>
<td>Separation between the State and the religion.</td>
<td>Fusion between the State and the religion.</td>
</tr>
<tr>
<td>Democracy.</td>
<td>Totalitarian theocracy.</td>
</tr>
<tr>
<td>Secular State.</td>
<td>Theocratic State.</td>
</tr>
<tr>
<td>Universality of human rights.</td>
<td>Cultural Relativism. Supremacy of Sharia Law in face of the human rights</td>
</tr>
<tr>
<td>Tolerance is a virtue.</td>
<td>Intolerance is a virtue for the supremacist and for Muslim brotherhood.</td>
</tr>
<tr>
<td>Equal rights between men and women.</td>
<td>Discrimination against women.</td>
</tr>
</tbody>
</table>
| Religious freedom for all, even for Muslims. | - Social and government hostility against religious minority and atheists.  
- Persecution of religious minority and atheists.  
- Religious freedom restriction even for Muslims. |
| Freedom of speech. | - Criminalization of liberty of speech.  
- In Muslims country; punishment by Blasphemy law. In non-Muslims; country  
– Auto-censorship. |
| Autonomy of the individual conscience. | Autonomy of the collective consensus. |
| Rule of law. Equality according to the law. | Rule of leveler egalitarianism. |

Despite of all the evidences of the unconstitutionality of the migration of the Sharia law to the Western countries, one could argue on the contrary. Local rules that ban the application of Sharia law in the United States have had its constitutionality questioned by Muslims organizations.

The risk of application of Sharia law cannot be avoid just with argument of unconstitutionality. Part for Sharia Law can be considered according to the Constitution (American, Brazilian or German), even though its application is not so convenient because this precedent would be a treat to the western legal system. According to Sayyid Qutb, “Islam is a complete system. One cannot enforce a part of Islamic Law and neglect another for then it would not be Islam.” The application of constitutional part can path the way for the application of unconstitutional one.

Someone could claim that there are different interpretations of the Sharia law, and the most moderate one should be applied in western jurisdictions. About this topic is relevant to ponder the following observations concerning to Sharia written by Brian J. Grim and Roger Finke:
“Although many Muslims have come to accept a distinction between civil and religious law, and in Muslim-majority countries such as Turkey Sharia currently has no civil jurisdiction, tensions between Islamic law and the religious freedom of UN resolutions typically center on two key areas: apostasy (renunciation of faith) and blasphemy (defamation of God or that which is sacred). There are multiple schools of thought in Islamic law, but all treat apostasy and blasphemy as serious offenses, with some interpretations of Islamic law penalizing both with death – especially in cases in which treason to community of Muslims is evident. And, although Kamali and many other Islamic scholars have argued for included, raising the standards of evidence, and sharply reducing penalties, these offences remain serious concerns in all branches of Sharia law. Regarding apostasy, the assumption of Sharia law remains: once individuals embrace Islam, they are Muslim for life.”

In other words, Islam permits only conversions from others religions to Islam. They don’t admit conversion from Islam to any other religions. So, applying Sharia law in a western country, the eventual conversion of a Muslim to Christianity would be forbidden. Moreover, the conversion of a Christian to Islam would not able to be undone. Thus, Sharia law is not compatible with article 18 of the Universal Declaration of Human Rights. According to the Article 18 of the UN Declaration of Human Rights:

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

The application of the Sharia law in western domestic courts would violate the legal system and the culture from the non-Muslim nations. It would be a perversion of the Founding Fathers of America legacy and a violation of universality of the human rights principle. Migration of Sharia law would bring a negative impact on human rights.

Can the metaphor of migration of constitution ideas be used as argument or even as an instrument to apply the Sharia law in western countries?

Perhaps the metaphor of migration of constitution ideas can be used to spread Sharia law among western countries, despite the incompatibility or unconstitutionality of such law. The book edited by Sujit Choudhry didn’t face this relevant topic, but some of its arguments could be used to promote the migration of Islamic law to the west. I argue that the developing to explain and justify the migration of constitutional ideas as proposed by Sujit and his contributors could build the gateway for spreading of Sharia law in west.

The book’s contributors, in my opinion, don’t invalidate the Scalia’s argument against the migration of constitutional ideas in general, which, in short, American law should not conform to law of the rest of the world. The justice Antony Scalia also agrees that “the Court must rely on “[t]he standards of decency of American society – not the standards of decency of other countries that don’t have our background, that don’t have our culture, that don’t have our moral views.” Moreover, opponents of the
migration of constitutional ideas agree that it “facilitates the erosion of US [or any other western countries] sovereignty by forces of globalization” and it is also a kind of judicial activism. According to Sujit, “The use of foreign law was described by Republican legislators as an ‘alarming new trend’, a ‘disturbing line of precedents’ which ‘undermines our democracy’ and is ‘quietly undermining the sovereignty of our nation’.” The fear of “foreign interference in our [American] government” argued by Representative Ryun is called as “truly paranoiac fear”.

**Brief Critique to the dialogical method of migration**

Neil Walker’s propose of the “ecumenical concept” of the “dialogical interpretation in constitutional adjudication” that sounds like a kind of artificial rational to justify the very constitutional borrowing or the same legal transplant from one culture to another, but in a new dressing. Just in case of judicial application of Sharia law controversy, someone could claim that it is only a new form of dialog between cultures or civilizations, and it is pretty good for the pacific coexistence of them.

The dialogical method sounds like just a tentative to invalidate Scalia’s challenge concerning the dichotomy between binding and non-binding uses of comparative material. However, the problem was not solving because still either the foreign law or jurisprudence is binding or it is non-binding. So, if the foreign law or jurisprudence is binding, “the Court is acting as an agent of foreign authorities.” Moreover, just in case if the comparative material is the Sharia law, what the authority is? Is it muslin brotherhood?

**Brief Critique to the convergence in migration**

The contributor Jeff Goldsworthy’ critique on migration of constitutional ideas lies in two questions: “Whether convergence toward a common constitutional model is a good thing, and whether judicial interpretation should serve as a vehicle for convergence.”

I argue, however, that the convergence toward a liberal democratic model would be a good thing perhaps, but this ideal is very hard to be reached on the reality, whereas the dialog between such deeply different civilization as western culture and the Islamic one. At this point I ask whether democracy is possible within a theocratic country. Just in case, it is much easier to perform the convergence toward Islamic model than the convergence toward liberal democratic model. The migration of American liberal democratic model to muslin countries is completely unthinkable for the majority of the Islamic government, jurisprudence and scholars. By the way, John R. Bradley says that instead to promoting democracy, the Arab Spring movement opened an opportunity for radicals to establish theocratic government models.

On the second Jeff”s question, I argue that judicial interpretation should not serve as a vehicle for convergence, because it would violate the sovereignty of the people, whereby their will should dint by parliament or legislative power. Moreover, it would assault the national sovereignty. The constitutional *iter* to change the laws is the legislative process. A short cut on the track of this path – ruled by the Constitution - would pave the way for the judicial activism again and again.
In short, the application of Sharia law is absolutely unconditional and undermines not only the democratic principle of Rule of Law but the entire western legal system and culture as well. The migration of constitutional ideas can be used as a new form of judicial jihad. It can be understood as a new form of judicial atavism.

Conclusion

The migration of constitutional ideas is a good thing. For instance, it was responsible for spreading of the liberal concept of religious freedom and the principle of separation between the State and the religion between western countries mainly. But even good things can be used to do evil deeds. The migration of unconstitutional ideas toward the theocratic laws like Sharia law should be avoided.

Just in case to applying Sharia law, Scalia’s argument against the migration of constitutional ideas cannot be rejected in name of the neither dialogical method of migration, convergence in migration nor the multiculturalism.

Cultural relativism and also multiculturalism are troublesome obstacles to the adoption of the universality of the human rights by communist and theocratically controlled countries. Those regimes cannot assimilate the occidental standard of democracy and human rights. Also troubling is the declining level of democracy and individual liberties in the Western countries. Thus, the focus should be to improve the inner problem, that is, inside the Western countries banning laws on the contrary to western principles and values. Maybe, the cause of such decline rests on the disdain of the principles of liberal democracy and Western values.

In short, Sharia law is unconstitutional according to any constitution of the west. A large range of application of Sharia law in western countries would be almost a surreal case of cultural suicide of the west. Moreover, it would cause, in the future, a negative impact on human rights and undermine all democratic, secular and liberal principles and values such as the sovereignty of the State, the Rule of Law, the Checks and Balances, and the Separation of the State and the Religion.

Bibliography


