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THE UNIVERSITY OF NOTTINGHAM  
SCHOOL OF LAW

MODERN MUSLIM STATES BETWEEN ISLAMIC LAW AND  
INTERNATIONAL HUMAN RIGHTS LAW

By

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## Abstract

This thesis examines the important question of whether or not Islamic law and international human rights are compatible and whether Muslim States can comply with international human rights law while they still adhere to Islamic law. The traditional arguments on the subject are examined and responded to from both international human rights and Islamic legal perspectives. The thesis formulates a synthesis between two extremes and argues that although there are some differences of scope and application, that does not create a general state of dissonance between Islamic law and international human rights law. It is argued that the differences would be easier to address if the concept of human rights were positively established from within the themes of Islamic law rather than imposing it as a concept alien to Islamic law. To avoid a simplistic generalisation of the arguments, each Article of the international bill of rights (ICCPR and ICESCR) and some relevant articles of the Convention on the Elimination of all Forms of Discrimination against Women are analysed in the light of Islamic law. The thesis theoretically engages international human rights law in dialogue with Islamic law and then evaluates the human rights policy of modern Muslim States within the scope of that dialogue. The State Practice of six Muslim States is examined as case studies to establish the arguments of the thesis. The thesis concludes, *inter alia*, that it is possible to harmonise the differences between Islamic law and international human rights law through the adoption of the margin of appreciation doctrine by international human rights treaty bodies and the utilisation of the Islamic law doctrines of *maqâsid al-sharî'ah* (overall objective of *Sharî'ah*) and *maslahah* (welfare) by Muslim States in their interpretation and application of Islamic law respectively. It is asserted that Islamic law can serve as an important vehicle for the enforcement of international human rights law in the Muslim world and recommendations are advanced to that effect in the conclusion.

## Affirmation

This thesis, submitted for the Degree of Doctor of Philosophy, is my own work and has not been submitted previously for any other Degree elsewhere.

*Dedicated to the memory of*

HAOLAT 'LAITAN.

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## Glossary

*Adâlah*: Justice.

*Âdât*: Custom.

*Âhâd*: Solitary *Hadîth* transmitted through a single chain of individuals.

*Amr bi al-ma'rûf wa nahy an al-munkar*: The Islamic public order principle of commanding virtues and prohibiting vices.

*Asîr*: Prisoner.

*Bay'ah*: Pledge of allegiance.

*Bayt al-mâl*: State treasury.

*al-Birr*: Goodness, Righteousness.

*Darûrah*: Necessity.

*Darûriyyât*: Indispensable benefits or rights – comprising of: Life, Family, Property, Intellect and Religion.

*Dhimmî*: Non-Muslim citizen of the Islamic State.

*Diyah*: Blood-Money - Compensation for murder of injuries.

*Faskh*: Judicial annulment of marriage.

*Fatwâ*: Legal or religious opinion by a qualified Islamic jurisconsult.

*Fiqh*: Islamic Jurisprudence.

*Habs*: Imprisonment.

*Habs Ihtiyâtî*: Preventive detention pending investigation of a crime.

*Hidânah*: Child custody and care.

*Hadîth*: Saying; Traditions of the Prophet Muhammad.

*Hâjiyyât*: Necessary benefits or rights; – Comes next in line to *Darûriyyât*.

*Hâkim*: Law Giver.

*Haqq*: Right.

*Haqq al-'afw 'an al-'uqûbah*: Right of clemency from punishment; Amnesty.

*Haqq Allah al-khâlis*: Special right of God

*al-Huqûq al-Fitriyyah*: Natural right; Fundamental right.

*Hibah*: Gift.

*Hirâbah*: Highway robbery; Brigandage.

*Hisbah*: Public order.

*Hudûd*: Limits; The fixed punishments for certain crimes under Islamic law.

*Hukm*: Legal ruling; Injunction; Decision.

*Huqûq*: Rights.

*Huqûq Adamiyyîn*: Rights of humans; Private rights; Human rights.

*Huqûq al-Ibâd*: Rights of servants (of God) *i.e.* Rights of humans; Private rights; Human rights.

*Huqûq al-Insân*: Rights of human beings; Human Rights.

*Huqûq Allah*: Rights of God; Public Rights.

*Hurriyyah*: Freedom; Liberty.

*Ibâd*: Servants (of God).

*Ibâdât*: Acts of worship.

*Ihsân*: Benevolence; Goodness

*Ijmâ'*: Islamic legal consensus.

*Ijtihâd*: Juridical reasoning of a qualified Islamic legist.

*Insâniyyah*: Humanity; Humaneness; Civility.

*Isnâd*: Chain of narrators of *Hadîth*.

*Istihsân*: Juristic preference.

*Istishâb*: Legal presumption of continuity of a state until contrary is proved.

*Istislâh*: Welfare; Benefit.

*Jâhiliyyah*: Ignorance.

*Kafâlah*: Guardianship.

*Karâmah*: Honour; Human Dignity.

*Khilâfah*: Representation; Rule by representation.

*Khiyâr al-Bulûg*: Option of puberty.

*Khiyâr al-Talâq*: Option of divorce.

*Khul'*: Divestiture; Discharge of marriage initiated by the wife.

*Madhhab*: School of thought.

*Ma'rûf*: Virtue.

*Mahkûm alayh*: Subject of the Law.

*Mahkûm fih*: Object of the Law.

*Mahr*: Dowry; Marriage endowment (in cash or service) paid by the husband to the wife.

*Mahram*: Unmarriageable male relation of a Muslim woman.

*Maqâsid al-Sharî'ah*: Overall Objective of the *Sharî'ah*; Object and purpose of the *Sharî'ah*.

*Mas'ûliyyah*: Responsibility.

*Maslahah*: Welfare; Benefit.

*Maslahah Mursalah*: Public Interest.

*Maslahah Wahmiyyah*: Dubious welfare; non-genuine welfare.

*Mazâlim*: Complaints tribunal; Court of grievances.

*Mu'âmalât*: Social intercourse: Inter-human relations.

*Mubâra'ah*: Dissolution of marriage by mutual/bilateral agreement of the couple.

*Mufî*: Islamic jurisconsult.

*Muhtasib*: Public order officer.

*Muhtasibûn*: Public order officers.

*Mujtahidûn*: Islamic legists competent enough to formulate independent legal or theological opinion based on the sources and methods of Islamic law (Singular: *Mujtahid*).

*Murâfa'ah*: Defence; appeal; legal proceedings.

*Musâwâh*: Equality.

*Musta'min*: Safe alien: Non-national of the Islamic State who enjoys safe conduct in it.

*Mutaw'ah*: Religious Volunteers

*Naqd al-Hâkim*: Governmental criticism: governmental censorship.

*Nasîhah*: Admonition; Advice.

*Naskh*: Abrogation.

*Qadâ'*: Judgement.

*Qadhf*: Slanderous accusation (of adultery or fornication).

*Qâdi*: Judge.

*Qâdi al-Qudât*: Chief Justice.

*Qisâs*: Retaliation.

*Qawâmûn*: Guardians; Protectors; Defenders.

*Qiyâs*: Legal analogy.

*Rajm*: Punishment by stoning.

*Riddah*: Apostasy.

*Sabb Allah aw Sabb al-Rasûl*: Reviling God or reviling The Prophet; Blasphemy.

*Sadaqât*: Charity; Voluntary Alms.

*Sâhib al-Mazâlim*: Complaints officer; Ombudsman.

*Sariqah*: Theft as defined under Islamic law.

*Sharb al-Khamr*: Wine-drinking.

*Sharî'ah*: The Right Path; Qur'an and *Sunnah*. Source of Islamic Law.

*Shûrâ*: Consultation.

*Siyâsah Shar'iyah*: Legitimate governmental policy based on the *Sharî'ah*.

*Sunnah*: Practice; The Practices of Prophet Muhammad.

*Ta'âwun*: Co-operation.

*al-Tâbi'ûn*: The early Muslims who met the era of the Prophet's Companions but not that of the Prophet himself.

*Tadrîj*: Islamic legal principle of gradualism.

*Tafwîd al-Talâq*: Delegated repudiation of marriage.

*Ta'liq al-Talâq*: Suspended repudiation of divorce.

*Ta'zîr*: Discretionary punishment under Islamic law.

*Tahsînîyât*: Improvement benefits or rights; - Comes next in line to *Hâjîyyât*.

*Takhayyur*: Eclectic choice (Movement between the schools of Islamic jurisprudence).

*Taqlîd*: Conformism; Blind following of a juristic view.

*Taqnîn*: Codification.

*Tashrî'*: Legislation.

*'Ulamâ'*: Traditional Islamic scholars.

*Ummah*: Community (Nation).

*'Urf*: Custom; Usage; Practice.

*Zakât*: Annual obligatory alms (tax) payable by Muslims in favour of the indigent.

*Zinâ*: Adultery/Fornication.



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# CHAPTER 1

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## Introduction

### INTRODUCTORY REMARKS

International human rights is the most popular theme today that cuts across every aspect of modern international law and influences almost every aspect of modern international relations. It is an important objective that permeates all the other purposes of the United Nations (UN).<sup>1</sup> Almost every regional inter-governmental organisation today also acknowledges the idea of human rights. The protection of human rights has thus become a powerful tool of internationalism that pierces the “sacred” veil of State sovereignty for the sake of human dignity. The universality of human rights has also been regularly reiterated since the adoption of the Universal Declaration of Human Rights (UDHR) in 1948.<sup>2</sup>

Despite its popularity and universal acceptance however, opinions still differ considerably about the conceptual interpretation and scope of human rights. As observed by Weston, “(t)o say that there is widespread acceptance of the principle of human rights on the domestic and international plane is not to say that there is complete agreement about the nature of such rights or their substantive scope”.<sup>3</sup> This has generated the paradox of universalism and cultural relativism in international human rights discourse.<sup>4</sup> The conceptual differences are neither meaningless nor trivial but emanate from the complexity and diversity

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<sup>1</sup> See Article 1 of the UN Charter on the Purpose and Principles of the UN. 1 UNTS, p.xvi. The UN Secretary General also reiterated in his Statement to the 55<sup>th</sup> Session of the Commission on Human Rights in 1999 that human rights is “at the heart of every aspect of our work and every article of our Charter” (i.e. the United Nations Charter). See UN Doc. SG/SM/99/91 of 7 April 1999. Par. 3.

<sup>2</sup> Adopted by UN General Assembly Resolution 217A(III) of 10 December 1948. Both the Proclamation of Tehran [UN Doc. A/CON.32/41 at 31(1968)] after the 1<sup>st</sup> World Conference on Human Rights in Tehran in 1968 and the Vienna Declaration after the 2<sup>nd</sup> World Conference on Human Rights in Vienna in 1993 [UN Doc A/CONF.157/23 of 12 July 1993] also reiterated the universality of human rights.

<sup>3</sup> Weston, B., “Human Rights” in *New Encyclopaedia Britannica*, 15<sup>th</sup> Ed. , Vol. 20, p.713 at 714. See also Steiner, H.J., and Alston, P., *International Human Rights in Context, Law, Politics and Morals* (2<sup>nd</sup> Ed. 2000) p.324 at 326.

<sup>4</sup> Thus it is argued herein that “universality of” human rights differs from “universalism in” human rights. See Chapter 2, pp. 15-18 below. See also e.g. Donnelly, J., *Universal Human Rights in Theory and Practice* (1989) (defends a universal conception of human rights, but argues also that the concept of human rights is purely Western and foreign to non-western cultures.); Milne, A.J.M., *Human Rights and Human Diversity* (1986) (proposes that human rights are not the same everywhere and argues that the concept of human rights must not presuppose Western values and institutions); Mutua, M., “The Ideology of Human Rights”, (1996) 36 *Virginia Journal of International Law*, pp. 589-657 (argues that even though the concept of human rights is not unique to European societies the philosophy of contemporary human rights is essentially European). See n.3 thereof for list of literature on discussion of different philosophical perspectives of human rights. See also Renteln, A.D., *International Human Rights: Universalism versus Relativism* (1990) p.10 and literature cited there on the conceptual differences about human rights.

of human society and civilisation. Some scholars do argue that we need not address the conceptual differences anymore but rather focus on the problems of guaranteeing human rights and preventing their continued violations universally.<sup>5</sup> That argument ignores the fact that the conceptual differences have major consequences on the practical universal observance of human rights. The drafters of the UDHR had correctly identified that “a *common understanding* of these rights and freedoms is of the greatest importance for the(ir) full realization”.<sup>6</sup> This demands a continued attempt at harmonising the different concepts, to achieve, despite the complexity and diversity of human society, a common universal understanding that ensures the full guarantee of human rights to every human being everywhere. The present research is a contribution to that end focusing on the realisation of international human rights within the context of the application of Islamic law in Muslim States.

#### DEFINING THE PROBLEM AND METHOD OF ANALYSIS

Islam is one of the major civilisations of the world and is claimed to be the fastest growing religion in the world today.<sup>7</sup> Many Member States of the UN are Muslim States that apply Islamic Law either fully or partly as domestic law. Also, Islamic law influences, one way or another, the way of life of more than one billion Muslims globally.<sup>8</sup> While Muslim States participate in the international human rights objective of the UN, it will be observed that they enter declarations and reservations on grounds of the *Shari'ah* or Islamic law when they ratify international human rights treaties.<sup>9</sup> Also in their periodic reports to UN human rights treaty and Charter bodies many Muslim States do refer to *Shari'ah* or Islamic law in their arguments.<sup>10</sup> There is however a general view, especially in the West, that Islamic law is incompatible with the ideals of international human rights, and thus human rights are not realisable within the dispensation of Islamic law. At the same time, there is also some pessimism in the Muslim world about the disposition of the current international human rights objective of the UN. Due to the fact, *inter alia*, that human rights are best protected by

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<sup>5</sup> See e.g. Bobbio, N., *The Age of Rights*, (1996) pp.12-13.

<sup>6</sup> Emphasis added. See the 7<sup>th</sup> Preambular paragraph of the UDHR.

<sup>7</sup> See e.g. Freamon, B.K., “Slavery, Freedom, and the Doctrine of Consensus in Islamic Jurisprudence”, (1998) 11 *Harvard Human Rights Journal*, p.1 n.2 for list of citations on the fast growth of Islam and importance of Islamic law in the world today.

<sup>8</sup> *ibid.*, n.5.

<sup>9</sup> See e.g. United Nations, *Multilateral Treaties Deposited with the Secretary General, Status as at 31/12/1999, Vol.1, Part 1, Chapters I to XI*.

<sup>10</sup> See e.g. Sudan's 2<sup>nd</sup> Periodic Report on the ICCPR - UN Doc CCPR/C/75/Add.2 of 13/03/97 and Saudi Arabia's Initial Report on the Child Convention – UN Doc. CRC/C/61/Add.2 of 29/3/2000.

States within their different cultures and domestic laws, the relevance of Islamic law to the effective application of international human rights law in the Muslim world cannot be over-emphasised. As Muslim States possess the sovereign right of applying Islamic law within their jurisdictions, the question of whether international human rights can be effectively guaranteed within the application of Islamic law remains very important in the international human rights discourse.

Previous research on this subject has mostly emphasised the classical doctrines of Islamic law and an exclusionist interpretation of international human rights law. This has obscured many commonalities that do exist between Islamic law and international human rights law and has continued to strengthen the theory of incompatibility between them. The incompatibility theory puts international human rights law at a sort of crossroads in Muslim States that apply Islamic law. Apart from much very general literature on this important subject, the more prominent works are An-Naim's *Towards an Islamic Reformation*<sup>11</sup>, Mayer's *Islam and Human Rights*<sup>12</sup> and Monshipouri's *Islamism, Secularism, and Human*

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<sup>11</sup> An-Na'im, A.A., *Towards an Islamic Reformation, Civil Liberties, Human Rights, and International Law*, (1990). Other works of An-Na'im on this subject include: "The Position of Islamic States Regarding the Universal Declaration of Human Rights" in Baehr, P., et. al., (eds.) *Innovation and Inspiration: Fifty Years of the Universal Declaration of Human Rights* (1999) pp.177-192; "Human Rights in the Muslim World: Socio-Political Conditions and Scriptural Imperatives" (1990) 3 *Harvard Human Rights Journal*, pp.13-52; "Toward an Islamic Hermeneutics for Human Rights" in An-Na'im, A.A., et. al., (eds.) *Human Rights and Religious Values: An Uneasy Relationship?* (1995) pp. 229-242; "Islamic Law and Human Rights Today" (1996) *Interights Bulletin*, No.1, 3; "Problems of Universal Cultural Legitimacy for Human Rights" in An-Na'im, A.A., and Deng, F.M., (eds.) *Human Rights in Africa: Cross-Cultural Perspectives* (1999) pp.331-367; "Towards a Cross-Cultural Approach to Defining International Standards of Human Rights: The Meaning of Cruel, Inhuman or Degrading Treatment or Punishment" in An-Na'im, A.A. (ed.) *Human Rights in Cross-Cultural Perspectives* (1992) pp.19-43; "Universality of Human Rights: An Islamic Perspective" in Ando, N., (ed.) *Japan and International Law: Past, Present and Future* (1999) pp.311-325. Professor An-Na'im's work subjected traditional Islamic law to the jurisprudence of international human rights, disregarding any Islamic jurisprudential justifications. His main proposition is for an Islamic law reformation "from within" to conform with international human rights principles through a reversed process of "naskh" (i.e. abrogation of certain verses of the Qur'an by others), whereby the application of some Medinan revelations of the Qur'an would be abandoned in favour of other Meccan revelations. Some writers on the subject have however questioned the practicality of that proposition. See e.g. Sachedina, A., "Review of Abdullahi Ahmed An-Na'im, Toward an Islamic Reformation: Civil Liberties, Human Rights and International Law" (1993) 25 *International Journal of Middle East Studies*, p.155-157; and Manzoor, P., "Human Rights: Secular Transcendence or Cultural Imperialism?" (1994) 15 *Muslim World Book Review*, No.1, p.3 at 8.

<sup>12</sup> Mayer, A.E., *Islam and Human Rights, Tradition and Politics* (3<sup>rd</sup> Ed. 1999). Other works of Mayer on this subject include: "Universal versus Islamic Human Rights: A Clash of Cultures or a Clash with a Construct?" (1994) 15 *Michigan Journal of International Law*, p. 306-404; "Islam and the State" (1991) 12 *Cardozo Law Review*, p.1015-1056; "Current Muslim Thinking on Human Rights" in An-Na'im, A.A., and Deng, F.M., (eds.) *Human Rights in Africa: Cross-Cultural Perspectives* (1999) pp.131. The main thesis of Professor Mayer's work is that modern Islamic human rights schemes are dubious, in the sense that they borrow their substance from international human rights but use Islamic law to limit human rights applications. She relied mostly on traditional interpretations of the *Shari'ah* and the practice in some Muslim countries based on those traditional interpretations, disregarding other legally valid alternative interpretations of the *Shari'ah* in that regard. Although she referred to the fact that "Islamic heritage offers many philosophical concepts, humanistic values, and moral principles that are well adapted for use in constructing human rights principles", she did not elaborate on those alternatives. One reviewer has thus observed that: "As to the crucial task of comprehensively elaborating a methodologically sound and truly contemporary Islamic human rights teaching based on the premodern Islamic heritage, she has been wise to leave this to Muslim believers and to the internal doctrinal debate among them". See Troll, C.W., "Book Review of Islam and Human Rights: Traditions and Politics By Ann Elizabeth Mayer" (1992) 3 *Islam and Christian-Muslim Relations*, No.1, p.131 at 133.

*Rights in the Middle East*.<sup>13</sup> While these works address some of the problems identified in this research, their approaches differ significantly from the one adopted in the present thesis. Their approach has been generally monological, and reflects what Watson has described as the presumption that the current interpretations of international human rights law are or must be valid, with everything else being adjusted to maintain that assumption.<sup>14</sup> The argument often is that when Muslim States ratify international human rights treaties they are bound by the international law rule that a State Party to a treaty “may not invoke the provisions of its internal law as justification for its failure to perform a treaty”.<sup>15</sup> In practice however, Muslim States do not generally plead the *Shari’ah* or Islamic law as justification for “failure to perform” their international human rights obligations. They often argue not against the letter of the law but against some interpretations of international human rights law which, they claim, does not take Islamic values into consideration.

This thesis thus aims to fill an important lacuna in the international human rights discourse by proposing a synthesis between two extremes and providing an alternative perspective to the relationship between Islamic law and international human rights law. Using arguments from both Islamic jurisprudence and international human rights practice, the aim is to challenge the argument that the observance of international human rights law is impossible within an Islamic legal dispensation. The thesis will theoretically engage international human rights practice in dialogue with Islamic jurisprudence and then evaluate the human rights policy of modern Muslim States within the scope of that dialogue. The importance of this dialogical approach was observed by the General Rapporteur, Mrs. Mary Robinson, in the conclusions adopted at the end of the inter-regional meeting organised by the Council of Europe in advance of the World Conference on Human Rights at Strasbourg in 1993, that:

“We must go back to listening. More thought and effort must be given to enriching the human rights discourse by explicit reference to other non-Western religions and

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<sup>13</sup> Monshipouri, M., *Islamism, Secularism, and Human Rights in the Middle East*, (1998). Other works of Monshipouri on this subject include: “Islamic Thinking and the Internationalization of Human Rights” (1994) 84 *The Muslim World*, No.2-3, pp.217-239; “The Muslim World Half a Century after the Universal Declaration of Human Rights: Progress and Obstacles” (1998) 16 *Netherlands Quarterly of Human Rights*, No.3., pp.287-314; Monshipouri, M., and Kukla, C.G., “Islam, Democracy, and Human Rights: The Continuing Debate in the West,” (1994) 3 *Middle East Policy*, No.2, pp.22-39. The central theme of Professor Monshipouri’s work is that “fusing secular and Islamic principles can effectively promote human dignity”. See Monshipouri, M., *Islamism, Secularism, and Human Rights in the Middle East*, *supra*, p.25. One reviewer has however observed that while “he judges specific rules of Islamic law against conceptual values of secularism for compatibility (he) does not articulate the parallel essential values of Islam, let alone place specific secularist human rights norms against them for judgment.” See Quraishi, A., “Book Review of Islamism, Secularism, and Human Rights in the Middle East By Mahmood Monshipouri” (2000) 22 *Human Rights Quarterly*, p.625 at 628.

<sup>14</sup> Watson, J.S., *Theory & Reality in the International Protection of Human Rights* (1999) p.15.

<sup>15</sup> Art. 27 Vienna Convention on the Law of Treaties (1969). See also e.g. Mayer, E.A., (1999) *supra*, note 12 above pp. 10-12.

cultural traditions. By tracing the linkages between constitutional values on the one hand and the concepts, ideas and institutions which are central to Islam or the Hindu-Buddhist tradition or other traditions, the base of support for fundamental rights can be expanded and the claim to universality vindicated. The Western World has no monopoly or patent on basic human rights. We must embrace cultural diversity but not at the expense of universal minimum standards".<sup>16</sup>

The hypothesis herein is that although there are some differences of scope between Islamic law and international human rights law, that does not create a general antithesis between the two. The differences can be meaningfully discussed and the noble ideals of international human rights realised in the Muslim world if the concept of international human rights can be convincingly established from within the themes of Islamic law rather than expressing it as a concept alien to Islamic law. This is premised on the fact that the positive means to promote any concept within a particular culture is through evidential support from within its legitimising principles. Also, since morality and substantive justice are important principles applicable to the philosophy of both Islamic law and international human rights law, the principle of justification need be accommodated in proposing practical harmonisation of the conceptual differences between Islamic law and international human rights law. Thus the jurisprudential arguments of Islamic jurists on differing issues will be analysed vis-à-vis the interpretations of modern international human rights law. Applying the justificatory principle the thesis argues for paradigm shifts from traditional hard-line interpretations of classical Islamic law and also from exclusionist interpretations of international human rights law. The Islamic legal doctrine of *maslahah* (welfare)<sup>17</sup> and the European human rights "margin of appreciation"<sup>18</sup> doctrine are explored in establishing the arguments in this thesis.

### STRUCTURE OF THE THESIS

The thesis is composed of 9 Chapters and divided into three parts. Chapter 1 is the introduction. Part One, consisting of Chapters 2 to 5, addresses the conceptual issues. In Chapter 2 the nature and evolution of international human rights law is examined while

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<sup>16</sup> See Council of Europe Doc. CE/CMDH (93) 16, of 30 January 1993, at p.3. See also Robinson, M., "Human Rights at the Dawn of the 21<sup>st</sup> Century" (1993) 15 *Human Rights Quarterly*, 629 at 632.

<sup>17</sup> Kamali has observed that the Islamic law doctrine of "*maslahah*" can strike a balance between public expectations of government and its meaningful identification with Islam. See Kamali, M.H., "Have We Neglected the Shari'ah Doctrine of Maslahah?" (1988) 27 *Islamic Studies*, p.287 at 288.

<sup>18</sup> According to Macdonald, the "margin of appreciation" is more of a principle of justification under the European human rights regime. See Macdonald, R. St. J., "The Margin of Appreciation" in Macdonald, R. St. J., *et al.*, (eds.) *The European System for the Protection of Human Rights* (1993) p.83 at 123.

Chapter 3 analyses the nature and evolution of Islamic law. This establishes a general framework of reference for the thesis in respect of both international human rights and Islamic law. The approach adopted in those two chapters is different from the traditional “end of history” approach usually followed, especially in the analysis of Islamic law. The possible and continued evolution of both International human rights law and Islamic law in directions that promote their harmonious co-existence in Muslim States to ensure the protection of individuals against the misuse of the apparatus of State is highlighted. Chapter 4 examines human rights in the context of Islamic law and researches into the sources, the jurisprudence and the legal theories of Islamic law to discover whether the theory and practice of human rights can be established from within Islamic law. In doing that, the research goes beyond mere theoretical postulations to examine necessary legal practicalities leading to identification of the commonalities and the conceptual differences between the two legal dispensations. Chapter 5 then examines and traverses the conceptual differences identified and also discusses the justificatory principle as a necessary synthesis between international human rights law and Islamic law.

Part Two, consisting of Chapters 6 and 7, is a comparative legal analysis of the International Bill of Rights. The International Covenant on Civil and Political Rights (ICCPR)<sup>19</sup> and the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>20</sup> are examined in the light of Islamic law in Chapters 6 and 7 respectively. The practices of the Human Rights Committee and the Committee on Economic, Social and Cultural Rights are respectively analysed in respect of the rights guaranteed under each of the two Covenants. Due to the topicality of the question of women’s rights in the international human rights/Islamic law debate, necessary Articles of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)<sup>21</sup> are also referred to in the examination of women’s rights under the two Covenants. The juristic views of the different schools of Islamic jurisprudence are then examined on each aspect of the rights guaranteed under the two Covenants. The Islamic juristic justifications in respect of Islamic views are analysed vis-à-vis the liberal principles of international human rights law as interpreted by the Committees and *vice versa*. On grounds of the justificatory principle earlier established, a thesis of inclusive interpretation is advanced to facilitate every legitimate shift from a static traditional Islamic jurisprudence and from an exclusionist interpretation of international human rights law.

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<sup>19</sup> Adopted by General Assembly Resolution 2200A(XXI) of 16 December 1966; 999 UNTS 171.

<sup>20</sup> Adopted by General Assembly Resolution 2200A(XXI) of 16 December 1966. 993 UNTS, p.3.

Part Three is the case studies, where in Chapter 8, the international human rights policy and practices of selected Muslim States are examined within their different phases of Islamic law application.

For the purposes of Chapter 8 it is necessary to define the notion of the modern Muslim State in this thesis. The Muslim world is today divided into separate sovereign nation-states.<sup>22</sup> A few of these States have been specifically declared as Islamic Republics, some others indicate in their Constitutions that Islam is the religion of the State, while most are only identifiable as Muslim States on the basis of their predominant Muslim population and the allegiance of the people to Islam. A different single criterion adopted in this research for defining the modern Muslim States is membership of the Organisation of Islamic Conference (OIC). That all the 56 Member States of the OIC are identifiable as Muslim States is supported by the first charter-objective of the Organisation, which is “to promote Islamic solidarity among member States”.<sup>23</sup> The States exist as independent sovereign States but are theoretically linked by their Islamic heritage, traditions and solidarity. For prudence, the Muslim States are in this research divided into four main categories in their application of Islamic law, and six States have been selected for case studies in Chapter 8. The main focus is on legislation, State policies and judicial interpretations in the selected countries as general case studies of how modern Muslim States have responded to international human rights within their different phases of applying Islamic law as State law.

Finally, the findings and recommendations of the research are presented in Chapter 9 as the concluding chapter of the thesis.

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<sup>21</sup> Adopted by General Assembly Resolution 34/180 of 18 December 1979; 1249 UNTS 13.

<sup>22</sup> For analysis of the evolution of the Muslim world into modern nation states *See e.g.* Baderin. M.A., “The Evolution of Islamic Law of Nations and the Modern International Order: Universal Peace through Mutuality and Co-operation” (2000) 17 *The American Journal of Islamic Social Sciences*, No.2. pp. 57-80. *See also* Nasr, S.V.R., “European Colonialism and the Emergence of Modern Muslim States” in Esposito, J.L., *The Oxford History of Islam* (1999) pp.549-599; Khadduri, M., *The Islamic Law of Nations: Shaybani’s Siyar*, (1966) pp.19-20; and al-Ghunaimi, M.T., *The Muslim Conception of International Law and the Western Approach*, (1968) pp.38-54.

<sup>23</sup> *See* Art. II (A) (1) Charter of the OIC. The OIC as at February 2001 had 56 Member and 4 Observer States. The Members States are: Afghanistan, Republic of Albania, Algeria, Azerbaijan, Bahrain, Bangladesh, Republic of Benin, Brunei, Burkina Faso, Republic of Cameroon, Chad, Islamic Republic of Comoros, Djibouti, Egypt, Gabon, Gambia, Guinea, Guinea-Bissau, Guyana, Indonesia, Islamic Republic of Iran, Iraq, Jordan, Kazakhstan, Kuwait, Kyrgyzstan, Lebanon, Libya, Malaysia, Islamic Republic of Maldives, Mali, Islamic Republic of Mauritania, Morocco, Mozambique, Niger, Nigeria, Oman, Islamic Republic of Pakistan, Palestine, Qatar, Kingdom of Saudi Arabia, Senegal, Sierra Leone, Somalia, Sudan, Surinam, Syria, Tajikistan, Togo, Tunisia, Turkey, Turkmenistan, Uganda, United Arab Emirates, Uzbekistan, and Yemen. The Observer States are: Republic of Bosnia and Herzegovina, Central African Republic, Côte d’Ivoire, and Thailand. *See* the OIC Website at: <http://www.oic-un.org/about/members.htm> [12/2/2001].



PART ONE:

**Conceptual Issues**

## CHAPTER 2

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### The Nature and Evolution of International Human Rights Law

It is essential to begin by establishing a general framework of reference in respect of international human rights law for this thesis. We will not delve into the complex philosophical arguments associated with the concept of human rights,<sup>1</sup> but will focus on the development of the international protection of human rights and the basis and legality of international human rights law. The question of universalism and cultural relativism will also be revisited as part of the background for latter arguments in the thesis.

#### WHAT ARE HUMAN RIGHTS?

Human rights are the rights of humans. They are the rights of all human beings in full equality. We are entitled to them simply because we are human beings. They derive from the “inherent dignity of the human person”<sup>2</sup> and have been defined as “those claims made by men, for themselves or on behalf of other men, supported by some theory which concentrates on the humanity of man, on man as a human being, a member of mankind...”<sup>3</sup>. These claims relate to standards of life, which every person has a right to expect from society as a human being. In the words of Umozurike:

“Human rights are thus claims, which are invariably supported by ethics and which should be supported by law, made on society, especially on its official managers, by individuals or groups on the basis of their humanity. They apply regardless of race, colour, sex or other distinction and may not be withdrawn or denied by governments, people or individuals.”<sup>4</sup>

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<sup>1</sup> For detailed philosophical and critical analysis of the theory of human rights See e.g. Winston, M.E., (ed.) *The Philosophy of Human Rights* (1989); Shestack, J.J., “The Jurisprudence of Human Rights”, in Meron, T., (ed.) *Human Rights in International Law: Legal and Policy Issues*, Vol.1, (1984) pp.69-113; Nino, C.S., *The Ethics of Human Rights* (1991); Rosenbaum, A., (ed.) *The Philosophy of Human Rights, International Perspectives* (1980); and Douzinas, C., *The End of Human Rights* (2000).

<sup>2</sup> See e.g. The 2<sup>nd</sup> Preambular paragraph of both the International Covenant on Economic, Social and Cultural Rights (ICESCR), 993 UNTS 3. and the International Covenant on Civil and Political Rights (ICCPR), 999 UNTS 171. See also 1<sup>st</sup> Preambular paragraph of the Universal Declaration of Human Rights (1948).

<sup>3</sup> Dowrick, F.E., (ed.) *Human Rights: Problems, Perspectives and Texts* (1979) p.8.

<sup>4</sup> Umozurike, U.O., *The African Charter on Human and Peoples’ Rights* (1997) p.5.

Scholars have advanced different views concerning the origins of the human rights idea. While some authors assert that “human rights are as old as people are”, others hold that human rights should be listed as “new business”.<sup>5</sup> A better perspective than considering the idea of human rights either as old or new business, is to conceive it as an evolutionary phenomenon that has matured over time through the different stages of human civilisation and enlightenment. Lauren has thus observed that:

“The historical evolution of visions of international human rights that continues to this day started centuries ago with efforts attempting to address these difficult and universal questions. It began as soon as men and women abandoned nomadic existence and settled in organized societies, long before anyone had ever heard of the more recent expression “human rights,” or before nation-states negotiated specific international treaties.”<sup>6</sup>

### THE EMERGENCE OF THE INTERNATIONAL HUMAN RIGHTS REGIME<sup>7</sup>

Although the historical origins of human rights dates back into ancient times and often linked with the idea of natural rights, the First and Second World Wars, and the periods between them played the antecedent roles for the emergence of the international human rights regime.<sup>8</sup> The opprobrious and savage treatment of individuals and groups during the period, and the use of the apparatus of the State to deal unwholesomely with human beings created international concerns for the protection of human beings. Concern for the protection of minority groups in Central and Eastern Europe after the First World War was the first attempt for an international human rights regime. Two human rights notions emerged in the process, i.e. the notion of individual rights and that of collective rights. The first was for the protection of the rights of individuals and the second for the protection of minorities.<sup>9</sup> Attempts at including human rights provisions in the Covenant of the League of Nations, that was to be created, was however unsuccessful. What emerged were separate minority protection treaties and State declarations guaranteeing the protection of the rights of minorities. The League of Nations however performed a supervisory role over the

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<sup>5</sup> See e.g. Cleveland, H., “Introduction: the Chain Reaction of Human Rights”, in Henkin, A.H., (ed.) *Human Dignity: The Internationalization of Human Rights* (1979) p.ix.

<sup>6</sup> Lauren, P.G., *The Evolution of International Human Rights, Visions Seen* (1998) p.5. See also generally Ishay, M.R., (ed.) *The Human Rights Reader: Major Political Essays, Speeches and Documents from the Bible to the Present* (1997).

<sup>7</sup> See e.g. Sohn, L.B., “The New International Law: Protection of the Rights of Individuals Rather than States” (1982) 32 *American University Law Journal*, 1-64.

<sup>8</sup> See e.g. Weston, B., “Human Rights” in *New Encyclopaedia Britannica*, 15<sup>th</sup> Ed., Vol. 20, p.713; Douzinas, C., *The End of Human Rights* (2000); Szabo, I., “Historical Foundations of Human Rights and Subsequent Developments” in Vasak, K., (ed.) *The International Dimensions of Human Rights* (1982) Vol.1, pp.11.; Cassese, A., *Human Rights in a Changing World* (1990) pp.1-23.

obligations created, which were considered of international concern.<sup>10</sup>

Private endeavours continued both within and outside the League of Nations for the realisation of an international human rights regime. In 1929 the Institute of International Law, a private body of distinguished authorities on international law in Europe, the Americas and Asia, adopted the Declaration of the Rights of Man<sup>11</sup>, in which it considered it the duty of every State to recognise, *inter alia*, the equal rights of every individual to life, liberty and property. The Institute also considered that every State had a duty to accord to everyone within its territory the full and entire protection of these rights without distinction as to nationality, sex, race, language or religion. Although the Declaration was not a binding document, it contributed to the popularisation of the idea of international human rights in the years immediately after its adoption. The Declaration also set a pace for a new relationship between the individual and the State under international law. Marshall Brown, an editor of the American Journal of International Law in 1930 reflected the Declaration's significance in the then emerging international order as follows:

“This declaration...states in bold and unequivocal terms the rights of human beings, “without distinction of nationality, sex, race, language and religion,” to the equal right to life, liberty and property, together with all the subsidiary rights essential to the enjoyment of these fundamental rights. It aims not merely to assure to individuals their *international* rights, but it aims also to impose on all nations a standard of conduct towards all men, *including their own nationals*. It thus repudiates the classic doctrine that states alone are subjects of international law. Such a revolutionary document, while open to criticism in terminology and to the objection that it has not juridical value, cannot fail, however, to exert an influence on the evolution of international law. It marks a new era which is more concerned with the interests and rights of sovereign individuals than with the rights of sovereign states.”<sup>12</sup>

The fascist atrocities during the Second World War further aroused the asperity of humanity and moved the world community to call for formal international measures aimed at ensuring the protection of human rights and achievement of world peace and security. The Allies determined even before the end of the war that an international commitment to the protection of human rights should be a part of the post Second World War settlement. Thus, in the preamble of the Charter of the United Nations Organisation which emerged after the

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<sup>9</sup> See Szabo, I., (1982) *ibid*, p.21.

<sup>10</sup> See e.g. Article 12 of The Polish Minorities Treaty (1920). See also Cassese, A., (1990) *supra*, note 8 above, pp.17-21; Weston, B., *supra*, note 8 above, p., 717; and Ezejiolor, G., *Protection of Human Rights Under Law* (1964) pp.38-50.

<sup>11</sup> See (1941) 35 *American Journal of International Law* pp.662-665.

<sup>12</sup> See (1930) 24 *American Journal of International Law* p.127.

war,<sup>13</sup> the Member States declared their determination "... to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small...". They also made it clear in Article 1(3) that one of the purposes of the UN was "(t)o achieve international co-operation in... promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion...".

The UN Member States also pledged themselves under Article 56 of the Charter "to take joint and separate action in co-operation with the Organisation for the achievement of the purpose stated in Article 55", which include "universal respect for, and observation of, human and fundamental freedoms for all without distinction as to race, sex, language, or religion." Although the Charter contains no provisions as to the contents of human rights, it signalled the dawn of the international human rights regime. It provided for the establishment of an Economic and Social Council (ECOSOC) whose functions included making "recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all."<sup>14</sup> Henkin has succinctly described the development as follows:

"The UN charter ushered in a new international law of human rights. The new law buried the old dogma that the individual is not a "subject" of international politics and law and that a government's behaviour toward its own nationals is a matter of domestic, not international concern... It gave the individual a part in international politics and rights in international law, independently of his government. It also gave the individual protectors other than his government, indeed protectors and remedies against his government".<sup>15</sup>

The UDHR was the first UN document adopted containing a list of internationally recognised human rights.<sup>16</sup> It was adopted as a simple resolution of the General Assembly of the UN in 1948.<sup>17</sup> The rights in the UDHR were stated in very general terms and some of its principles are considered to have become part of international customary law because they

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<sup>13</sup> The UN Charter was adopted on June 26 1945 and is regarded as "the constitution of the organized world community after World War II" and is binding between all the Member States of the UN. See Ermacora, Nowak and Tretter (eds.) *International Human Rights: Documents and Introductory Notes* (1993) p.3.

<sup>14</sup> See Chapter 10 of the UN Charter.

<sup>15</sup> See Henkin, L., (ed.) *The International Bill of Rights: The Covenant on Civil and Political Rights*. (1981) p.6.

<sup>16</sup> The rights covered by the UDHR are Life, Liberty and Security of Person (*Art.3*), Recognition as a person (*Art.6*), Equality before the law (*Art.7*), Effective legal remedies (*Art.8*), Due process of law (*Art.9, 10 & 11*), Freedom of Movement (*Art.13*), Asylum (*Art.14*), Nationality (*Art.15*), Marriage and Family (*Art.16*), Property (*Art.17*), Freedom of Thought, Conscience and Religion (*Art.18*), Freedom of Opinion and Expression (*Art.19*), Peaceful Assembly and Association (*Art.20*), Participation in Government (*Art.21*), Social Security (*Art.22*), Work and Equal Pay for Equal Work (*Art.23*), Rest and Leisure (*Art.24*), Adequate Standard of Living (*Art.25*), Education (*Art.26*), Cultural Life (*Art. 27*), Prohibition of Slavery or Servitude (*Art.4*), Prohibition of Torture or Cruel, Inhuman or Degrading Treatment (*Art. 5*), Prohibition of Arbitrary Interference with Privacy (*Art.12*).

lead to rights accepted by States generally.<sup>18</sup> The UDHR has served as framework for not only subsequent international human rights treaties but also many national and regional human rights documents.<sup>19</sup>

In 1966, the International Covenant on Civil and Political Rights (ICCPR)<sup>20</sup> and the International Covenant on Economic, Social, Cultural Rights (ICESCR)<sup>21</sup> were adopted, and both entered into force in 1976. The two Covenants together with the UDHR constitute the International Bill of Rights. The rights guaranteed under the two Covenants cover nearly all the basic values cherished by every civilised human society.<sup>22</sup> Apart from the international bill of rights, the UN has also adopted other ancillary international treaties and declarations on the rights of women, children, refugees, stateless persons, diplomatic agents, minorities, e.t.c. There are also specific international human rights treaties for the protection of the human person against atrocities such as genocide, racial discrimination, apartheid, slavery, forced labour, torture, e.t.c.<sup>23</sup>

Regional organisations such as the Council of Europe, the Organisation of American States, the Organisation of African Unity, and the League of Arab States have also adopted different regional human rights treaties in recognition of the noble ideals of international human rights. The basic regional human rights treaties are the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950),<sup>24</sup> The European Social Charter (1961),<sup>25</sup> The American Convention on Human Rights (1969),<sup>26</sup> The African Charter on Human and People's Rights (1981)<sup>27</sup> and the Arab Charter of Human Rights (1994)<sup>28</sup>. Of relevance to this thesis is also the Cairo Declaration on Human Rights in Islam adopted by the Organisation of Islamic Conference in 1990.<sup>29</sup>

All the above international treaties and declarations on human rights confirm, as rightly observed by Henkin, the acceptance of the human rights idea by "virtually all states and

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<sup>17</sup> 10 December 1948, GAOR, 3<sup>rd</sup> Sess., Res.217A.

<sup>18</sup> See Lillich, R.B., "The Growing Importance of Customary International Human Rights Law" (1995-96) 25 *Georgia Journal of International and Comparative Law*, Nos. 1 & 2, 1-30.

<sup>19</sup> See Hannum, H., "The Status of the Universal Declaration of Human Rights in National and International Law" (1995-96) 25 *Georgia Journal of International and Comparative Law*, Nos. 1 & 2, 287-396.

<sup>20</sup> 999 UNTS 171.

<sup>21</sup> 993 UNTS 3.

<sup>22</sup> See Chen, L., *An Introduction to Contemporary International Law*, (1989) pp.209-211.

<sup>23</sup> See UN Human Rights Treaty Website at: <http://www.unhchr.ch/html/intlinst.htm> [10/2/2001].

<sup>24</sup> Adopted on 4 November 1950. E.T.S. No.005.

<sup>25</sup> Adopted on 18 October, 1961. E.T.S. No.035.

<sup>26</sup> Adopted on 22 November 1969. O.A.S.T.S. No.36 at 1.

<sup>27</sup> Adopted on 27 June 1981. OAU Doc.CAB/LEG/67/3 rev. 5; (1982) 21 I.L.M. 58.

<sup>28</sup> Adopted 15 September 1994. Reprinted in (1997) 18 *Human Rights Law Journal*, 151. See Rishmawi, M., "The Arab Charter on Human Rights: A Comment" (1996) 10 *Interights Bulletin*, No.1, 8-10 for an overview of the Arab Charter.

<sup>29</sup> Adopted on 5 August 1990. The Declaration was submitted by the OIC to the UN prior to the 2<sup>nd</sup> World Conference on Human Rights in Vienna. See UN Doc. A/CONF.157/PC/62/Add.18 (1993).

societies” of the contemporary world “regardless of historical, cultural, ideological, economic or other differences”.<sup>30</sup>

### CATEGORISATION OF HUMAN RIGHTS

Human rights are today classified either by subject, object or generation. Thus, we talk of civil and political rights distinct from economic, social and cultural rights, and of individual rights separate from collective or group rights. We also talk of first generation, second generation, and third generation rights. The civil and political rights are often referred to as the first generation rights.<sup>31</sup> They are the traditional rights relating to the liberty and justice that individuals are entitled to expect from the State. They are the favourites of Western States, some of whom consider them as the only true human rights.<sup>32</sup> The ICCPR contains the list of the internationally recognised civil and political rights. Apart from the right of self-determination, the civil and political rights are mostly individual rights, which every individual may demand of the State. In the past, these rights were sought through the channel of civil disobedience and revolution. Today, international human rights law provides the individual with legal channels for the demand and guarantee of these rights.<sup>33</sup>

Economic, Social and Cultural rights are the so-called second generation rights. They are mostly rights which States have to take positive action to promote. They may be called the sustenance or enjoyment rights, and are strongly advanced by socialist and developing nations.<sup>34</sup> The ICESCR contains a list of internationally recognised economic, social and cultural rights. Despite their inevitability for the sustenance of human dignity, the economic, social and cultural rights are often considered as “utopian aspirations”, non-legal and non-justiciable.<sup>35</sup> Shue however argues strongly that there is a basic or fundamental human right to subsistence which the economic, social and cultural rights fulfil. He contends that justice and international law requires the rich nations to share their abundant resources with the millions of human beings who are chronically malnourished all over the world.<sup>36</sup> Human rights would certainly be meaningless in a world where one part of humanity is in abundance

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<sup>30</sup> See Henkin, L., (1981) *supra*, note 15 above, p.1.

<sup>31</sup> See e.g. Harris, D.J., *Cases and Materials on International Law* (5<sup>th</sup> Ed. 1998) p.625; Weston, B., *supra*, note 8 above. p.715; and Sohn, L.B., (1982) *supra*, note 7 above, p.32.

<sup>32</sup> See e.g. U.S. position in UN Doc. A/40/C3/36, p.5 (1985) that economic, social and cultural rights were “societal goals” rather than human rights.

<sup>33</sup> See e.g. Optional Protocol 1 to the ICCPR; 999 UNTS 171.

<sup>34</sup> See Harris, D.J., (1998) *supra*, note 31 above; Weston, B. *supra* at note 31 above; and Sohn, L.B., (1982) *supra*, note 31 above.

<sup>35</sup> See e.g. Cranston, M., *What Are Human Rights* (1973) p.9-17.

<sup>36</sup> See generally, Shue, H., *Basic Rights: Subsistence, Affluence and US Foreign Policy* (2<sup>nd</sup> Ed., 1996).

but yet feels no obligation for another part of it in abject poverty. The notion of generations of human rights can thus be misleading if not well addressed. For instance, it had for a long time blurred attention from the important role of the economic, social and cultural rights in the enhancement of human dignity. Many scholars therefore reject this notion of generations.<sup>37</sup> While the civil and political rights might have been pursued more vigorously in international law for political and ideological reasons, this does not mean that the economic, social and cultural rights are less important.<sup>38</sup>

Supplementary to the so-called first and second generation of rights mentioned above is also the notion of a third generation of human rights. These are collective rights, not individual rights. They are described as solidarity rights based on solidarity between men. According to its major proponent, Karel Vasak, the third generation human rights are born of the obvious brotherhood of men and their indispensable solidarity.<sup>39</sup> The right to development, right to peace, and right to a healthy and balanced environment are prominent on the list of the proposed third generation of human rights. This group of human rights also expresses aspirations for co-operation between developed affluent nations on one hand and developing poor nations of the world on the other, for the benefit of humanity. With the exception of treaties on environmental protection, which are reflective of the right to a healthy and balanced environment, there is no UN international treaty yet on the third generation of human rights.<sup>40</sup>

Although the categorisation of human rights may serve the useful purpose of easy identification of particular rights, there is the need to emphasise the treatment of human rights as a totality. The UN General Assembly has thus stressed the fact that all human rights are indivisible and interdependent.<sup>41</sup> This will prevent a rigid compartmentalisation of human rights and ensure a wholesome realisation of the ideals of international human rights law.

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<sup>37</sup> See e.g. Eide, A., and Rosas, A., "Economic, Social and Cultural Rights; A Universal Challenge", in Eide, A., *et al* (eds.) *Economic, Social and Cultural Rights: A Textbook*. (1995) p.27.

<sup>38</sup> See Van Hoof, G.J.H., "The Legal Nature of Economic, Social and Cultural Rights: A Rebuttal of Some Traditional Views", in Alston, P., and Tomasevski, K., (eds.) *The Right to Food*. (1984) pp.97-110 (argues that it is wrong to construe a strict dichotomy of the two groups of rights, and suggests a more integrated approach that covers both sets of rights.).

<sup>39</sup> See Vasak, K., "For the Third Generation of Human Rights: "The Rights of Solidarity", *Inaugural Lecture to the 10<sup>th</sup> Study Session of the International Institute of Human Rights, Strasbourg, 2-27 July, 1979*.

<sup>40</sup> The UN General Assembly has however adopted the *Declaration on the Right to Development* at its 97<sup>th</sup> plenary meeting on 4<sup>th</sup> December 1986, and recognised in its preamble that "development is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom." The right to development also continues to be a subject of discussion within the activities of the UN Commission for Human Rights. See e.g. The UN Secretary General's Report on Right to Development to the 55<sup>th</sup> Session of the UN General Assembly – UN Doc. A/55/283 of 8 August 2000.

<sup>41</sup> See e.g. GA Res. 32/130 of 16 December 1977, and also Paragraph 5 of the Declaration of the World Conference on Human Rights, Vienna 1993, UN Doc. A/CONF.157/23.



## UNIVERSALISM IN INTERNATIONAL HUMAN RIGHTS LAW

The question of universalism in international human rights law has been very intensely debated.<sup>42</sup> It is noted however that the “universality of” human rights has often generally been confused with “universalism in” human rights within the international human rights discourse. Although the two concepts are inter-related, each refers to a different aspect of the universalisation of human rights. An appreciation of the distinction between the two concepts is very important for a realistic approach to the question of universalism in international human rights law.

“Universality of” human rights refers to the universal quality or global acceptance of the human rights idea as elaborated above, while “Universalism in” human rights relates to the interpretation and application of the human rights idea.<sup>43</sup> The universality of human rights has been achieved over the years since the adoption of the UDHR in 1948, and is evidenced by the fact that there is no State today that will unequivocally accept that it is a violator of human rights. Today, all nations and societies do generally acknowledge the human rights idea, thereby establishing its universality. However, universalism in human rights has not been so achieved. Universalism connotes the existence of a common universal value consensus for the interpretation and application of international human rights law. The current lack of such universal consensus is evidenced by the fact that universalism continues to be a subject of debate within the international human rights objective of the UN.<sup>44</sup> Universalism is often confronted by the cultural relativist argument at every opportunity in the international human rights discourse. For example during the Vienna Conference on Human Rights, representatives of some African, Asian, and Muslim States challenged the present concept of universalism in international human rights as being west-centric and insensitive to non-western cultures. Prior to the conference, a group of Asian States had adopted the Bangkok (Governmental) Declaration recognising the contribution that can be made by Asian countries to the international human rights regime through their diverse but rich cultures and traditions.<sup>45</sup> An NGO coalition from the Asia Pacific region had also

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<sup>42</sup> See e.g. Symposium on “Universalism and Cultural Relativism: Perspectives on the Human Rights Debate” (1997) *Human Rights at Harvard*, April 5, 1997, pp.9-38. See also Steiner, H.J., and Alston, P., *International Human Rights in Context, Law Politics Morals* (2<sup>nd</sup> Ed., 2000) p.366.

<sup>43</sup> Linguistically the suffix “-ity” denotes the quality, condition or degree of a phenomenon while the suffix “-ism” denotes its system, principle, result or practice. See e.g. Pearsall, J., and Trumble, B., (eds) *The Oxford English Reference Dictionary* (Oxford: Oxford University Press, 2<sup>nd</sup> Ed., 1996) p.746 and p.749.

<sup>44</sup> See e.g. Yash, Ghai, “Human Rights and Governance: The Asia Debate” (1994) 15 *Australian Yearbook of International Law* 11. See also generally Renteln, A.D., *International Human Rights: Universalism Versus Relativism* (1990); Bauer, J.R., and Bell, D.A., (eds.) *The East Asian Challenge for Human Rights* (1999); and also Smith, J., (ed.) *Human Rights: Chinese and Dutch Perspectives* (1996).

<sup>45</sup> See “Report of the Regional Meeting for Asia of the World Conference on Human Rights” (Bangkok, March 29 - April 2,

adopted the Bangkok NGO Declaration on Human Rights promoting the emergence of “a new understanding of universalism encompassing the richness and wisdom of Asia Pacific cultures.”<sup>46</sup> Muslim States that apply Islamic law also often advance similar arguments in respect of Islamic law.<sup>47</sup>

When the UDHR was adopted by the UN General Assembly in 1948 it was very clear from the outset that the human rights it guaranteed were intended to be universal. Apart from it being titled a “Universal Declaration”, the General Assembly proclaimed it as “a common standard of achievement for all peoples and all nations”. The need to promote respect for the rights through national and international measures, and to secure their universal and effective recognition and observance were also identified in the Declaration.<sup>48</sup> The UN was then constituted of only 58 Member States.<sup>49</sup> Although none of the Member States opposed the human rights idea nor its universalisation, 8 of them (Byelorussian SSR, Czechoslovakia, Poland, Saudi Arabia, South Africa, USSR, Ukrainian SSR, and Yugoslavia) abstained from voting for the adoption of the Declaration due principally to interpretational differences on some of its provisions.<sup>50</sup> While the number of abstaining States may have seemed insignificant, it was no doubt a signal of the possible interpretational divergence ahead of the then emerging universal human rights initiative. Renteln has observed notably in this respect that all the eighteen drafts considered for the UDHR “came from the democratic West and that all but two were in English”.<sup>51</sup> She concluded thus that “(t)he fact that there were no dissenting votes should not be taken to mean that complete value consensus had been achieved.”<sup>52</sup>

One of the earliest indications of the need for a universal value consensus and thus a multi-cultural approach to the then emerging international human rights initiative was given in 1947 by the American Anthropological Association in its memorandum submitted to the UN Commission on Human Rights charged with the drafting of the UDHR. The Association

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1993), UN Doc. A/Conf.157/ASRM/8, Preambular Paragraph 2.

<sup>46</sup> See 1<sup>st</sup> Paragraph under *Challenges* in the Bangkok NGO Declaration on Human Rights. Reproduced in (1993) 14 *Human Rights Law Journal*, p.352.

<sup>47</sup> See Case Studies in Chapter 8 below.

<sup>48</sup> See Paragraph 8 of the Preamble of the UDHR.

<sup>49</sup> Afghanistan, Argentina, Australia, Belgium, Bolivia, Brazil, Belarus, Canada, Chile, China, Colombia, Costa Rica, Cuba, Czechoslovakia, Denmark, Dominican Republic, Ecuador, Egypt, El Salvador, Ethiopia, France, Greece, Guatemala, Haiti, Honduras, Iceland, India, Iran, Iraq, Lebanon, Liberia, Luxembourg, Mexico, Myanmar, Netherlands, New Zealand, Nicaragua, Norway, Pakistan, Panama, Paraguay, Peru, Philippines, Poland, Russian Federation, Saudi Arabia, South Africa, Sweden, Syrian Arab Republic, Thailand, Turkey, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, Venezuela, Yemen, Yugoslavia.

<sup>50</sup> On Saudi Arabian reasons see Chapter 8 p. 262 below.

<sup>51</sup> Renteln, A.D., (1990) *supra*, note 44 above, p. 30; See also Tolley, H., *The UN Commission on Human Rights*, (1987) p.20.

<sup>52</sup> Renteln, A.D., *ibid.*

had stated, *inter alia*, that:

“Because of the great numbers of societies that are in intimate contact in the modern world, and because of the diversity of their ways of life, the primary task confronting those who would draw up a Declaration on the Rights of Man is thus, in essence, to resolve the following problem: How can the proposed Declaration be *applicable* to all human beings, and not be a statement of rights conceived only in terms of the values prevalent in the countries of Western Europe and America?... the problem is complicated by the fact that the Declaration must be of *world-wide applicability*. It must embrace and recognize the validity of many different ways of life. It will not be convincing to the Indonesian, the African, the Indian, the Chinese, if it lies on the same plane as like documents of an earlier period. The rights of Man in the Twentieth Century cannot be circumscribed by the standards of any single culture, or be dictated by the aspirations of any single people. Such a document will lead to frustration, not realization of the personalities of vast numbers of human beings.”<sup>53</sup>  
(emphasis added)

The above observation was calling attention to universalism in human rights because it referred specifically to the “world-wide (i.e. universal) applicability” of the Declaration. The UN Commission seemed however to have concentrated more on the universality of human rights at that early stage and not necessarily on the means of identifying a universal value for achieving the rights guaranteed by the Declaration - i.e. universalism in human rights. It is in the context of universalism (not universality) that many publicist, in retrospect, contend that were the UDHR to be re-adopted, it would perhaps be impossible to reach the same unanimity in today’s fragmented world of more than 180 culture-conscious Member States of the UN.<sup>54</sup>

It is discernible however that emphasising universalism by the UN Commission at that early stage in 1947 could have stalled the whole universal human rights initiative. Rather, the UDHR was drafted in very general terms to secure the support of all the States despite their different cultures. The seventh preambular paragraph of the Declaration however stated that “a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge.” But since the Declaration contained no ultimate interpretative organ, the interpretation of the rights declared was more or less left to the individual States, each interpreting the values within its cultural context. The controversy on universalism in human rights did not fully arise until human rights had established itself as a powerful catalyst in international relations championed strongly by Western nations, and Western scholarship consequently projecting human rights as a strictly western concept subject to

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<sup>53</sup> See American Anthropological Association, “Statement on Human Rights”, (1947) 49 *American Anthropologist*, pp. 539-543.

<sup>54</sup> See e.g. An-Na’im, A.A., “Universality of Human Rights: An Islamic Perspective” in Ando, N., (ed.) *Japan and*

complete west-oriented interpretations. This was met by counter arguments advocating a culturally relative interpretation of international human rights norms. Thus began the contending theories of universalism versus cultural relativism within the universal human rights objective of the UN, which has resulted in a sort of paradox.

### THE PARADOX OF UNIVERSALISM AND CULTURAL RELATIVISM

The theory of universalism is that human rights are the same (or must be the same) everywhere both in substance and application. Advocates of strict universalism assert that international human rights are exclusively universal. This theory is mostly advocated by western nations and scholars who present universalism in human rights through a strict western perspective. They reject any claims of cultural relativism and consider it as an unacceptable theory advocated to rationalise human rights violations. Western scholars who argue that human rights were developed from western culture also argue that western norms should always be the universal normative model for international human rights law.<sup>55</sup> Advocates of this exclusive concept of universalism usually seek support for their argument in the language of international human rights instruments, which normally states that “every human being”, “everyone” or “all persons” are entitled to human rights. While it is trite that the language of international human rights instruments generally support the theory of universalism, present State practice hardly supports any suggestion that in adopting or ratifying international human rights instruments, non-western State Parties were indicating an acceptance of a strict and exclusive western perspective or interpretation of international human rights norms.<sup>56</sup> One may observe in this regard that Art. 31(2) of the ICCPR, for instance, provided that in electing members of the Human Rights Committee “consideration shall be given to equitable geographical distribution of membership and to the *representation of the different forms of civilization and of the principal legal systems*” of the State Parties. (emphasis added). It is arguable that this recognises the need for an inclusive and multi-civilisational approach in the interpretation of the Covenant.<sup>57</sup> The theory of cultural relativism is thus advocated mostly by non-western nations and scholars who contend that

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*International Law: Past, Present and Future* (1999) p.311 at 318-319.

<sup>55</sup> See e.g. D’Amato, A.A., *Collected Papers, International Law Studies* (1997) Vol.2, pp.139-40; and Mayer, E.A., “Current Muslim Thinking on Human Rights” in An-Naim, A.A., and Deng, F.M., (eds.) *Human Rights in Africa, Cultural Perspectives* (1990) p.131 at 147-8.

<sup>56</sup> e.g. See Case Studies of Muslim States in Chapter 8 below.

<sup>57</sup> The same provision can be found in Art 8 of the International Convention on the Elimination of All Forms of Racial Discrimination (1965) on the election of the members of CERD. Also Article 9 of the Statute of the International Court of Justice (1945) provides for “the representation of the main forms of civilization and of the principal legal systems of the

human rights are not exclusively rooted in western culture, but are inherent in human nature and based on morality. Thus human rights, they claim, can not be interpreted without regard to the cultural differences of peoples. Advocates of cultural relativism assert that “rights and rules about morality are encoded in and thus depend on cultural contexts.”<sup>58</sup> The theory emanates from the philosophy of the need to recognise the values set up by every society to guide its own life, the dignity inherent in every culture, and the need for tolerance of conventions though they may differ from one’s own.<sup>59</sup> Cultural relativism is thus conditioned by a combination of historical, political, economic, social, cultural and religious factors and not restricted only to indigenous cultural or traditional differences of people.

A critical evaluation of both theories reveals that, on the one hand, the theory of cultural relativism is prone to abuse and may be used to rationalise human rights violations by different regimes. It admits of pluralistic inputs, which, if not properly managed, can debase the efficacy of human rights. On the other hand, the current values projected for the interpretation of international human rights law by advocates of strict universalism have been criticised as purely western and not really universal.<sup>60</sup> The present theory of universalism is itself thus criticised as being culturally relative to western values.<sup>61</sup> That is the paradox, whereby the controversy between universalism and cultural relativism actually portrays a situation of cultural relativisms.

To most of the former colonies, western values are essentially being used as the universal repugnancy test for the interpretation of international human rights law in the same way Western laws and customs were used in colonial periods to eliminate local laws.<sup>62</sup> The question has thus often been raised as to whether the theory of strict universalism in human rights is not another “form of neocolonialism serving to strengthen the dominance of the West.”<sup>63</sup> The ideals of universalism in international human rights law need therefore to be advanced in a manner that escapes charges of cultural imperialism within non-western societies. Universalism in international human rights law demands the evolution or identification of a universal consensus in the interpretation of human rights principles. This

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world” in the election of its judges.

<sup>58</sup> See Steiner, H.J. and Alston, P., *International Human Rights in Context, Law Politics Morals* (2<sup>nd</sup> Ed., 2000) p.366.

<sup>59</sup> See Herskovits, M., *Man and His Works* (1950) p.76.

<sup>60</sup> See e.g. Mutua, M., “The Ideology of Human Rights”, (1996) 36 *Virginia Journal of International Law*, p. 586 at 592-593.

<sup>61</sup> *ibid.*

<sup>62</sup> See generally e.g. Obilade, O.A., *The Nigerian Legal System* (1979) and Park, A.E.W., *The Sources of Nigerian Law* (1963) for an analyses of the application of the Repugnancy principle in the Nigerian Legal System. See also Allot, A.N., *New Essays in African Law* (1970).

<sup>63</sup> See Higgins, R., “The Continuing Universality of the Universal Declaration” in Baehr, P., et al. (eds.) *Innovation and Inspiration: Fifty Years of the Universal Declaration of Human Rights* (1999) p.17 at 19.

calls for a multicultural or cross-cultural approach to the interpretation and application of the international human rights principles in a manner that will not reduce its efficacy but lead to the realisation of an inclusive theory of universalism. The American Anthropological Association had argued in its earlier quoted comment to the Human Rights Commission that international human rights should "...not be circumscribed by the standards of any single culture, or be dictated by the aspirations of any single people."<sup>64</sup> An-Na'im has also reiterated that: "Any concept of human rights that is to be universally accepted and globally enforced demands equal respect and mutual comprehension between rival cultures".<sup>65</sup> That argument continues to be advanced today mostly by non-western nations. There is thus a need for an objective evaluation of what every civilisation can contribute to universalism in international human rights law. Presumptions of cultural inferiority must be avoided and justifications on cultural differences must be examined and critically evaluated within the parameters of human dignity with a view of evolving an inclusive universalism in international human rights law.

Whatever definition or understanding we ascribe to human rights, the bottom line is the protection of human dignity. There is perhaps no civilisation or philosophy in today's world that would not subscribe to that notion. Thus it may only be difficult, but not impossible to evolve a universally acceptable conception in that respect. There is need for sincere and justificatory cross-cultural evaluations of human dignity with a view of evolving an international moral value which no repressive regime may find easy to circumvent in the business of State governance.

#### **RELEVANCE OF ISLAMIC LAW TO UNIVERSALISM IN INTERNATIONAL HUMAN RIGHTS LAW**

The relevance of Islamic law in the quest for an inclusive universalism that will ensure the full realisation of international human rights in the Muslim world is, in view of the number of Muslim States in the international legal order, quite obvious. This has often been practically demonstrated by references to Islamic law in the arguments and reports of Muslim States to UN charter and human rights treaty committees. The general relevance of Islamic law in international law is also demonstrated by the existence of a "Committee on Islamic Law and International Law" amongst the international committees of the International Law Association (ILA). Notably, the Committee for instance proposed in its report after the ILA

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<sup>64</sup> See American Anthropological Association, (1947) *supra*, note 53 above.

London Conference in July 2000, “to contribute to the advancement of International Law on asylum and refugees by incorporating some aspect of Islamic Law on asylum in International Law”.<sup>66</sup> Mayer has however observed that there is a general indifference to the Islamic tradition within learned international human rights literature and that “(q)uestions of Islamic law are only occasionally mentioned in scholarly writing on international human rights – for the sake of comparison with international norms or to illustrate the problems of introducing international norms in areas of the developing world.”<sup>67</sup> Thus while Islamic law is recognised as a factor relevant to the introduction of international norms in Muslim areas of the developing world, legal scholarship on the subject has not been persuasive enough to achieve effective harmonisation of the differences in scope between Islamic law and international human rights law.

It is noteworthy however that the ILA adopted Resolution No. 6/2000 after the London Conference observing that “...aspects of Islamic Law are protective of human rights” and requested its Committee on Islamic Law and International Law “to continue its work on the contribution of Islamic Law to the development of International law by undertaking further studies, with a view of reporting on that work to the 70<sup>th</sup> conference to be held in New Delhi in 2002”.<sup>68</sup>

More than just establishing a religious and legal order, Islam is an institution of legitimacy in many States of the Muslim world. Many regimes in the Muslim world today seek their legitimacy through portraying an adherence to Islamic law and traditions. Any attempt to enforce international or universal norms within Muslim societies in oblivion of established Islamic law and traditions thus creates tension and reactions against the secular nature of the international regime no matter how humane or lofty such international norms may be. For example the Representative of Islamic Republic of Iran, Said Raja’i-Khorasani at the 65th meeting of the Third Committee during the 39th Session of the UN General Assembly on 7th December, 1984 had argued in defence of alleged violation of human rights by his country that the new political order in Iran was

“in full accord and harmony with the deepest moral and religious convictions of the people and therefore most representative of the traditional, cultural, moral and religious beliefs of Iranian society. It recognised no authority... apart from Islamic law... (therefore) conventions, declarations and resolutions or decisions of international organisations, which were contrary to Islam, had no validity in the

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<sup>65</sup> See An-Na’im, A.A., “What Do We Mean By Universal?” (1994) *Index on Censorship*, September / October, 120.

<sup>66</sup> See the ILA Internet Website at <http://www.ila-hq.org/> [11/12/ 2000].

<sup>67</sup> See Mayer, A. E., *Islam and Human Rights, Traditions and Politics*, (3<sup>rd</sup> Ed., 1999) p. 41.

<sup>68</sup> See note 66 above.

Islamic Republic of Iran.”<sup>69</sup>

Conversely, accommodation of Islamic law is also often seen in international human rights circles as accommodating a constraint on freedoms, liberties and human rights generally. The assumption is that it is impossible to realise human rights within an Islamic legal dispensation. For example when one of the States in the Federal Republic of Nigeria recently passed a Bill into law for the full application of Islamic law within its jurisdiction<sup>70</sup> many human rights groups both within and outside the country expressed fears that the application of Islamic law would adversely constrain fundamental human rights and freedoms within the jurisdiction of the State.<sup>71</sup> Similar fears were expressed by human rights groups in 1998 when the government of Pakistan proposed a constitutional amendment bill to its parliament seeking to make the Qur'an and *Sunnah* the supreme law of Pakistan.<sup>72</sup> Such apprehension is believed to have also contributed to the abortion of the democratisation process in Algeria in 1992 through a military take over, when it appeared that the Islamic Salvation Front (FIS) would emerge victorious in the overall elections. According to Bassam Tibi: “If the FIS were to come to power, the first measure it would have taken would have been to abolish the constitution and declare *nizam al-islami* (Islamic system of government based on the *shari'a*)”.<sup>73</sup>

While the political and legal philosophy of Islam may differ in certain respects from that of the secular international order, it does not necessarily mean a complete discord with the international human rights regime. Removing the traditional barriers of distrust and apathy would reveal that diversity is not synonymous to incompatibility. Mayer has observed that:

“The Islamic heritage offers many philosophical concepts, humanistic values, and moral principles that are well adapted for use in constructing human rights principles. Such values and principles abound even in the premodern Islamic intellectual heritage”<sup>74</sup>

Judge Weeramantry formerly of the International Court of Justice also observed in his

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<sup>69</sup> UN General Assembly, 39th Sess., Third Committee, 65th Mtg, 7 December, 1984, A/C.3/39/SR.65.

<sup>70</sup> See Shari'a Court of Appeal Law of Zamfara State of the Federal Republic of Nigeria; Zamfara State of Nigeria Law No.6 of 8<sup>th</sup> October, 1999.

<sup>71</sup> Similar fears were raised in 1979 and 1989 during the debates on provisions for a Shari'ah Court of Appeal in the Nigerian Constitution. See generally Basri, G., *Nigeria and Shari'ah: Aspirations and Apprehensions*, (1994).

<sup>72</sup> Constitution (15<sup>th</sup> Amendment) Act, 1998. The Bill was passed by the National Assembly on 9 October 1998. But the Senate had not voted on it before it was suspended by the Musharraf regime that took power in October 1999. However, there is an Enforcement of Shari'ah Act of 1991 already in force, Article 3 (1) of which provides that; “The Shari'ah, that is to say the Injunctions of Islam as laid down in the Holy Qur'an and Sunnah, shall be the supreme law of Pakistan.”

<sup>73</sup> Tibi, B., “Islamic Law/Shari'a and Human Rights: International Law and International Relations”, in Lindholm, T., and Vogt, K., (eds.) *Islamic Law Reform and Human Rights: Challenges and Rejoinders*, (1993) p.75 at 76.

<sup>74</sup> See Mayer, A.E., (1999) *supra*, note 67 above, p.43.



penetrative work titled *Justice Without Frontiers, Furthering Human Rights*, that although Locke, the founding father of Western human rights, never attended most of his lectures as a student at Oxford, “he assiduously attended only the lectures of Professor Pococke, the professor of Arabic studies”. According to the learned judge: “Those studies may well have referred to Arabic political theory including the idea of rights that no ruler could take away, subjection of the ruler to the law, and the notion of conditional rulership”. He concluded that: “When Locke proclaimed his theory of inalienable rights and conditional rulership, this was new to the West, but could he not have had some glimmerings of this from his Arabic studies?”<sup>75</sup>

The wide gap that still exists between the theory and reality of the universal protection of human rights<sup>76</sup> indicates that universalism in international human rights law is not yet a *fait accompli*. The evolution of international human rights has therefore not reached the end of its history yet. With the cognisance that international human rights law is aimed at the enhancement of human dignity and the promotion of the well being of humanity, it is submitted that Islamic law rather than contradicting it, should be able to contribute to the realisation of its ideals and also to the achievement of its universal observation, especially in the Muslim world. What is required as observed by one writer, is an expatiation “from within by a Muslim intellectual who can engage in dialogue with the traditionally educated scholars of Islamic jurisprudence”,<sup>77</sup> in a comparative manner with international human rights law.

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<sup>75</sup> See Weeramantry, C.G., *Justice Without Frontiers: Furthering Human Rights* (1997) Vol.1, pp.139-140.

<sup>76</sup> See generally, Watson, J.S., *Theory & Reality in the International Protection of Human Rights* (1999) for a critical analysis of this.

<sup>77</sup> See Sachedina, A., “Review of Abdullahi Ahmed An-Na’im, *Toward and Islamic Reformation: Civil Liberties, Human Rights and International Law*” (1993) 25 *International Journal of Middle East Studies*, p.155-157.

## CHAPTER 3

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### The Nature and Evolution of Islamic Law

This chapter examines the nature and evolution of Islamic law to serve as background for the later arguments of this thesis in respect of Islamic law. A distinction is made between the sources and the methods of the law and the overall objective of Islamic law is also examined at the end.

Traditionally, Islamic law is not *stricto sensu* monolithic. Its jurisprudence accommodates a pluralistic interpretation of its sources, which does produce differences in juristic opinions that can be quite significant in a comparative legal analysis. Afshari has argued that “(w)hen reference is made to “Islamic law”, a host of diverse positions...comes into the picture”.<sup>1</sup> The complexity of Islamic law does not however make it indeterminable. The differences of the jurists and schools of Islamic jurisprudence represent “different manifestations of the same divine will” and are considered as “a diversity within unity”.<sup>2</sup> It depicts recognition of the inescapable pluralism that exists within human society. Islam, as observed by Breiner, “refuses the temptation to find unity only in uniformity, even in matters of law”.<sup>3</sup> The appreciation of differences, Breiner further observed, is an “important principle of Islamic law, one quite different from the assumptions of Roman law inherited throughout most of Europe”.<sup>4</sup> There is in fact an Islamic jurisprudential maxim that says: “The blessing of the (Muslim) community lies in the jurists’ differences of opinion”.<sup>5</sup> Law is ultimately the product of its sources and methods, and Islamic law is not an exception to that fact. It is

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<sup>1</sup> Afshari, R., “An Essay on Islamic Cultural Relativism in the Discourse of Human Rights”, (1994) 16 *Human Rights Quarterly*, p.235 at 271; See also Lawyers Committee on Human Rights, *Islam and Justice* (1997) p.18 where another law Professor had expressed that when people talk about *Sharî’ah* or Islamic law he really does not know what is meant.

<sup>2</sup> See Kamali, H.M., *Principles of Islamic Jurisprudence*, (1991) p.169.

<sup>3</sup> Breiner, B. “A Christian View of Human Rights in Islam” in Breiner, B. (ed.) *Two Papers on Sharî’ah* (1992) p.3.

<sup>4</sup> *ibid.*

<sup>5</sup> The maxim says: “*Rahmah al-Ummah fi Ikhtilâf al-A’immah*”. This indicates that the jurists’ differences of opinion in the interpretation of legal sources on certain matters offer a broad and equally legal scope from which the community may choose the most compassionate and beneficial interpretation for themselves. It was on the basis of this that the Islamic legal principle of “*takhayyur*” (eclectic choice) was evolved, which allows for unification or movement within the different schools of jurisprudence. A 15<sup>th</sup> Century Islamic jurist, Abû Abdullah al-Dimashqî, wrote a jurisprudential book titled “*Rahmah al-Ummah fi Ikhtilâf al-A’immah*” in which he listed the legal consensus and dissension of the classical Islamic jurists. Republished by Dâr al-Kutub al-Ilmiyyah, Beirut, Lebanon (1995).

important therefore to distinguish between *Sharī'ah* as the source from which the law is derived and *Fiqh* as the method by which the law is derived and applied.<sup>6</sup>

### THE NATURE OF ISLAMIC LAW<sup>7</sup>

There is a general traditional misconception about Islamic law being wholly divine and immutable. This arises from the usual non-distinction between the sources and interpretation of Islamic law. Distinguishing between *Sharī'ah* and *Fiqh* is very significant for a proper understanding of Islamic law. Although either of the terms is often referred to as Islamic law, they are not technically synonymous. Literally *Sharī'ah* means “path to be followed” or “right path”<sup>8</sup> while *Fiqh* means “understanding.”<sup>9</sup> The former refers more to the sources while the latter refers more to the methods of Islamic law. In the strict legal sense *Sharī'ah* refers to the corpus of the revealed law as contained in the Qur'an and in the authentic Traditions (*Sunnah*) of the Prophet Muhammad (PBUH).<sup>10</sup> It differs in this sense from *Fiqh* because it (*Sharī'ah*) refers here to the primary sources of the law, which is textually immutable. *Fiqh* on the other hand refers to methods of the law, i.e. the understanding derived from the *Sharī'ah*, which may change according to time and circumstances.<sup>11</sup> The significance of this distinction with respect to the arguments of this thesis are:

- (i) *Sharī'ah* as a source of Islamic law is divine in nature and thus immutable, while *Fiqh*, as the understanding, interpretation and application of the *Sharī'ah*, is a human product that may change according to time and circumstances; and
- (ii) *Sharī'ah* broadly covers the moral, legal, social, and spiritual aspects of the Muslims' life, while *Fiqh* mostly covers the legal or juridical aspect of the *Sharī'ah* as distinguished from the moral.<sup>12</sup>

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<sup>6</sup> See e.g. Kamali, M.H., “Law and Society: The Interplay of Revelation and Reason in the Shariah” in Esposito, J.L., *The Oxford History of Islam* (1999) p.107.

<sup>7</sup> See generally e.g. Kamali, M.H., *Principles of Islamic Jurisprudence*, (1991); Hallaq, W.B., *A History of Islamic Legal Theories*, (1997); Qadri, A.A., *Islamic Jurisprudence in the Modern World* (1986); Ramadan, S., *Islamic Law: Its Scope and Equity*, (1970); Philips, A. A. B., *The Evolution of Fiqh* (1988) for English language expositions on the nature of Islamic law.

<sup>8</sup> See e.g. Doi, A.R., *Shari'ah: The Islamic Law* (1984) p.2.

<sup>9</sup> In Q45:18 the word *Sharī'ah* is used as “straight path” or “right way” – “Then We put you on a right way (*Sharī'ah*) of the affairs, so follow it ...” and the Prophet Muhammad used *Fiqh* in one of his sayings to mean “understanding”- “To whomsoever God wishes good, He gives the understanding (*fiqh*) of the faith”. *Fiqh* is also used in the Qur'an to mean understanding. See e.g. Q 9:87. See also Qadri, A.A., (1986) *supra*, note 7 above, p.15-17.

<sup>10</sup> The abbreviation PBUH which means ‘Peace be Upon Him’, will not be repeated in writing after this first occurrence but shall be implied as repeated after every occurrence of the Prophet's name hereinafter.

<sup>11</sup> See e.g. Ramadan, S., (1970) *supra*, note 7 above, p. 36 and Philips A. A. B., (1988) *supra*, note 7 above, pp.1-4.

<sup>12</sup> Note however as pointed out by Professor Kamali that “There is often...a relationship between strict compliance to a legal duty and the Islamic concept of moral excellence”. See Kamali, M.H., *Freedom of Expression in Islam*, (Revised Ed. 1997) p. 27; and Kamali, M.H., (1999) *supra*, note 6 above, p.107 at109.

Islamic law thus consists of two component parts: (i) immutable divine revelation termed *Sharî'ah* and (ii) human interpretation of the *Sharî'ah* termed *Fiqh*. 'Abd al 'Atî has correctly observed that "confusion arises when the term *sharî'ah* is used uncritically to designate not only the divine law in its pure principal form, but also its human subsidiary sciences including *fiqh*".<sup>13</sup> We will now examine the characteristics of these two component parts of Islamic law.

## SOURCES OF ISLAMIC LAW<sup>14</sup>

### *Sharî'ah*

The Qur'an and the *Sunnah* are the formal sources of Islamic law. They contain the corpus of the revealed law. The Qur'an is the principal source and is believed by Muslims to be the exact words of God revealed to Prophet Muhammad over a period of approximately 23 years for the guidance of humanity.<sup>15</sup> It is not strictly a legal or constitutional code. It more specifically addresses itself as a book of guidance<sup>16</sup>. Out of its approximately 6666 verses, which cover both the spiritual and temporal aspects of life, Muslim jurists estimate between 350 to 500 verses as containing legal elements,<sup>17</sup> and according to Coulson: "No more than approximately eighty verses deal with legal topics in the strict sense of the term".<sup>18</sup> This conceivably anticipates the application of some juridical principles to extend the few strictly legal verses to cover the dynamic and expansive nature of human life. Those verses that may be viewed largely as moral rules also constitute basis for every Islamic legal principle.<sup>19</sup>

The words of the Qur'an are, to Muslims, immutable and from it "springs the very conception of legality"<sup>20</sup> in Islam. The Qur'an forms the foundation or the basic norm of Islamic law, the *grundnorm*, as Kelsen will call it in his pure theory of law, or the "ultimate

<sup>13</sup> 'Abd al Atî, H., *The Family Structure in Islam* (1977) p.14.

<sup>14</sup> The approach adopted here deviates from the traditional classification of the Qur'an, *Sunnah*, *Ijmâ'* and *Qiyâs* as main sources of Islamic law, a classification which Ramadan has rightly observed, "is by no means a decisive or authoritative one". See Ramadan (1970) *supra*, note 7 above, p.33. The approach here distinguishes the sources of the law (i.e. Qur'an and *Sunnah*) from the methods of the law (i.e. *Ijmâ'*, *Qiyâs*, *Ijtihâd*, e.t.c) to avoid the confusion of the traditional misconception of the whole of Islamic law as being divine and immutable.

<sup>15</sup> See e.g. Q26:192 which says: "Verily this is a Revelation from the Lord of the Worlds" and Q45:2 which says: "The revelation of The Book is from God, The Exalted in Power, Full of Wisdom".

<sup>16</sup> See e.g. Q2:2 which says: "This is the Book; In it is guidance sure, without doubt, to those who fear God".

<sup>17</sup> See Kamali, M.H. (1991) *supra*, note 7 above p.19-20 and p.41 n.19.

<sup>18</sup> Coulson, N.J., *A History of Islamic Law* (1964) p.12.

<sup>19</sup> Although law and morals are not fully merged in Islamic law, they are also not strictly separated as understood in the theory of positivism in Western legal philosophy. See Kamali, M.H., (1997) *supra*, note 12 above, p. 27.

<sup>20</sup> See Ramadan, S., (1970) *supra*, note 7 above, pp.42-43.

rule of recognition” in Hart’s concept of law.<sup>21</sup> This explains, as observed by Mayer, why “many works on the topic of Islam and human rights are burdened with long quotations from” especially the Qur’an.<sup>22</sup> While legal texts are very significant in every legal system, their interpretation is what actually constitutes law at every point in time. The text of the Qur’an is divine, but its application has been through human interpretation since revelation. The Prophet Muhammad being the receiver of its revelation, was obviously in the best position to interpret the Qur’an during his lifetime, and he did so in his dual role as a Prophet and a judge. His elucidation of some verses of the Qur’an formed the initial basis of what came to be known as his *Sunnah* or Traditions.

The *Sunnah* as a source of law consists of the Prophet’s lifetime sayings, deeds and tacit approvals on different issues, both spiritual and temporal. The *Sunnah* developed from the need for elucidation, by the Prophet, of some Qur’anic verses, supply of details to some general provisions of the Qur’an and instructions on some other aspects of life not expressly covered by Qur’anic texts. Thus Imâm al-Shâfi‘î, the eponym of the *Shâfi‘î* school of Islamic jurisprudence<sup>23</sup> had stated that:

“the *Sunnah* of the Prophet is of three types: first is the *Sunnah* which prescribes the like of what God has revealed in His Book; next is the *Sunnah* which explains the general principles of the Qur’an and clarifies the will of God; and last is the *Sunnah* where the Messenger of God has ruled on matters on which nothing can be found in the Book of God.”<sup>24</sup>

The role of the *Sunnah* as a source of law is supported in the Qur’an itself.<sup>25</sup> The Qur’an and the *Sunnah* thus formed the only sources of law from the Prophet’s lifetime. Ramadan has therefore observed that “the structure of Islamic Law - the *Sharî‘ah* - was completed during the lifetime of the Prophet, in the Qur’an and the *Sunnah*.”<sup>26</sup> An illustrative evidence of the Qur’an and *Sunnah* being sources of Islamic law from the time of the Prophet Muhammad is the well known Tradition in which the Prophet was reported to have asked one of his companions named Mu’âdh ibn. Jabal, when he deployed the latter as a judge to Yemen, as to what would be his source of law in deciding cases. Mu’âdh replied: “I will

<sup>21</sup> See Kelsen, H., *Pure Theory of Law* (1967) and Hart, H.L.A., *The Concept of Law*, (2<sup>nd</sup> Ed. 1994). As illustrated by Nyazee, the basic Islamic attitude to law is: “I am ready to obey such and such law as it has been communicated to me by a qualified jurist. I follow the opinion of the jurist as it is in conformity with the sources of Islamic law. I obey a law based on the sources as they are the sources revealed to Muhammad. I obey Muhammad for he is a Messenger of (God) and I believe in (God).” See Nyazee, I.A. K., *Theories of Islamic Law* (n.d.) 38.

<sup>22</sup> See Mayer, A.E., “Current Muslim Thinking on Human Rights” in An-Na’im, A.A. and Deng, F.M., (eds.) *Human Rights In Africa: Cultural Perspectives* (1990), p.133 at 134-135.

<sup>23</sup> The development of the Schools of Islamic Jurisprudence are explained below. See p.29 below.

<sup>24</sup> Shâfi‘î, M., *al-Risâlah* (1983) pp.52-53 English translation cited in Kamali, H.M., (1991) *supra*, note 7 above, p.63.

<sup>25</sup> See e.g. Q3:31 and Q33:21.

judge with what is in the book of God (Qur'an)". The Prophet then asked "And if you do not find a clue in the book of God?", Mu'adh answered: "Then with the *Sunnah* of the Messenger of God". The Prophet asked again: "And if you do not find a clue in that?", Mu'adh replied: "I will exercise my own legal reasoning."<sup>27</sup> The Prophet was reported as being perfectly satisfied with these answers by Mu'adh, which signified an approval by the Prophet. The general rule on the application of the Qur'an and *Sunnah* as main sources of Islamic law is that in case of any irresolvable conflict between a verse of the Qur'an and a reported *Sunnah*, the former prevails, because of its indubitable authenticity in Islamic law.<sup>28</sup>

While Muslims believe generally that the *Sunnah* also has elements of divine inspiration, they appreciate that not every reported *Sunnah* is authentic. The political differences between the fourth Caliph, Ali and Mu'awiyah in the middle of the first century of Islam, which led to the emergence of factions among the Muslims, led to the emergence of fabricated statements and distorted interpretations attributed to the Prophet.<sup>29</sup> A conscientious and critical technique of authenticating the *Sunnah* was thus developed which eventually culminated in the emergence of the six recognised and authentic books of *Sunnah* of the *Sunnî* school in the third century of Islam.<sup>30</sup> In applying a *Sunnah* the two main questions that need be answered are whether the *Sunnah* is authentic and if so whether it is obligatory. The first question is basically a question of fact that is usually considered on the basis of the evidence adduced to support it in accordance with laid down criteria for the verification of Prophetic Traditions. The second question is a question of law depending, *inter alia*, on the context and language of the Tradition.

## METHODS OF ISLAMIC LAW

### *Fiqh*

The passage of time and the expansion of Islam after the demise of the Prophet brought many new cases that were not directly covered by the Qur'anic texts or the Prophetic

<sup>26</sup> Ramadan, S., (1970) *supra*, note 7 above, p. 36.

<sup>27</sup> See e.g. Abû Dâwûd, *Sunan Abû Dâwûd*, Trans. A. Hasan, (1984), Vol. III, p.1019, Hadîth No.3585. Mu'adh is reported in this Tradition to have used the words "*ajtahidu râ'iy*" meaning "*I will exert my own reasoning*". The noun "*ijtihâd*" meaning exertion was later adopted to indicate "legal reasoning" as a legal method of Islamic law.

<sup>28</sup> See Kamali, M.H., (1991) *supra*, note 7 above, p.59.

<sup>29</sup> *ibid.* pp.65-68.

<sup>30</sup> The six authentic *Sunni* books of the collections of the Prophets Traditions are those by al-Bukhâri (d.870AD), Muslim (d.875AD), Abû Dâwûd (d.888AD), al-Tirmidhî (d. 892AD), al-Nasâ'î (d.915AD) and Ibn Mâjah (d.886AD). Muslims are divided into the two main groups of *Sunnî* and *Shî'ah*. The *Sunnî* are the majority while the *Shî'ah* constitute about 10% of the world Muslim population. The *Shî'ah* group developed from a schism among the Muslims during the Caliphate of Ali. The *Shî'ah* also have their own different collections of the Prophet's Traditions apart from the six *Sunni* books mentioned above.

Traditions. On the authority, *inter alia*, of the Tradition of Mu'adh ibn. Jabal quoted above, the concept of *ijtihâd* (legal reasoning) was developed as a method of Islamic law and from it emerged the legal methods of *Ijmâ'* (juristic consensus) and *Qiyâs* (legal analogy) as well as legal doctrines such as *Istihân* (juristic preference), *Istislâh* or *Maslahah* (public interest or welfare), *'Urf* (Custom), *Darûrah* (Necessity) e.t.c., through which the formal sources could be extended to cover new developments of life. These methods, which are usually considered as secondary sources of Islamic law, were products of human reasoning, an indication of the recognition of human reasoning in the Islamic legal process from the earliest period of Islam. The methods were applied to new cases not expressly covered by Qur'anic texts or the *Sunnah*, and also facilitated the adequate interpretation and application of the sources to suit the different circumstances of human life. Thus while the revealed sources of Islamic law (i.e. *Sharî'ah*) was completed with the demise of the Prophet, the evolved methods of Islamic law were to be the vehicle by which the jurists would transport the *Sharî'ah* into the future. In the words of Qadri, "the jurists are emphatic in saying that though God has given us a revelation He also gave us brains to understand it; and He did not intend to be understood without careful and prolonged study."<sup>31</sup> The careful and prolonged study helps to prevent misapplication of the methods.

With the expansion of Islam and its establishment within different cultures outside Arabia, about 500 schools of legal reasoning developed in the early years but most of them disappeared and others merged by the beginning of the third century of Islam. Four *Sunnî*<sup>32</sup> schools of jurisprudence survived up to the present times. They are the *Hanafi* School (prevails in Turkey, Syria, Lebanon, Jordan, India, Pakistan, Afghanistan, Iraq, and Libya), the *Mâlikî* School (prevails in North Africa, West Africa and Kuwait), the *Shâfi'î* School (prevails in Southern Egypt, Southern Arabia, East Africa, Indonesia and Malaysia) and the *Hanbalî* School (prevails in Saudi Arabia and Qatar). Other schools of jurisprudence also emerged from within the *Shî'ah*. The major ones being the *Ithnâ 'Asharî* (prevails in Iran and Southern Iraq), the *Zaydî* (followed in Yemen), the *Ismâ'îlî* (followed in India) and the *Ibâdî* (followed in Oman and parts of North Africa).<sup>33</sup>

All the schools of Islamic jurisprudence generally recognise the Qur'an and *Sunnah* as

<sup>31</sup> Qadri, A.A., (1986) *supra*, note 7 above, p.199.

<sup>32</sup> See note 30 above.

<sup>33</sup> See e.g. Makdisi, G., *The Rise of Colleges: Institutions of Learning in Islam and the West* (1981) p.2; and Kamali, M.H. (1999) *supra*, note 6 above. pp.112-114. Note also that there were other schools of rational theology that were not strictly jurisprudential schools, but their arguments and views sometimes influenced and were reflected in the jurisprudence of the jurists. Some of the schools of rational theology were the *Ash'arî*, *Mu'tazilah* and *Mâturîdî* schools which will be referred to below. See Chapter 4, pp. 44-46s below.

the primary sources of Islamic law. The differences of opinion on particular matters result from their different interpretations of some Qur'anic verses and Prophetic Traditions. The different views of jurists on certain matters reflected their sensitivity to the different cultures of the different provinces within which the different schools flourished.<sup>34</sup> To control the divergence of interpretations of the sources, the jurisprudence of these schools on both the aspects of worship (*ibâdât*) and inter-human relations (*mu'âmalât*) compiled in form of legal treatises became the material sources of Islamic law. By the tenth century it was thought that the established schools of jurisprudence had fully exhausted all the possible questions of law and that the necessary material sources of Islamic law was fully formed. The utilisation of the doctrine of independent legal reasoning (*ijtihâd*) consequently diminished and this led, by the thirteenth century, to what was termed as "closing the gate of legal reasoning (*ijtihâd*) and opening that of legal conformism (*taqlîd*)". Islamic law thus became restricted largely to the application of the legal findings of the jurists as recorded in the treatises of the established schools of jurisprudence dating back to the 10<sup>th</sup> Century.<sup>35</sup> Muslims thus became restricted to conform to or follow the rulings of any one of the schools of jurisprudence but not generally allowed to exercise independent legal reasoning on any matter. This brought a halt to the dynamism that had been injected into Islamic law from its inception, and that, in the words of Iqbal, "reduced the Law of Islam practically to a state of immobility".<sup>36</sup> Although many contemporary scholars have challenged the notion of the closing of the gate of *ijtihâd*,<sup>37</sup> the legal conformism (*taqlîd*) of following the rulings of the jurists of the very early period of Islam continues to this day. The jurisprudence (*fiqh*) of the established schools found in their treatises dating from the 10<sup>th</sup> Century are today held as the corpus of Islamic law and erroneously portrayed as the immutable *Sharî'ah*. In respect to that Ramadan has rightly observed that:

"the invariable basic rules of Islamic Law are only those prescribed in the *Sharî'ah* (Qur'an and *Sunnah*), which are few and limited. Whereas all juridical works during more than thirteen centuries are very rich and indispensable, they must always be subordinated to the *Sharî'ah* and open to reconsideration..."<sup>38</sup>

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<sup>34</sup>See generally Daura, A., "A Brief Account of the Development of the Four Sunni Schools of Law and Some Recent Developments" (1968) 2 *Journal of Islamic and Comparative Law*, 1.

<sup>35</sup> See e.g. Kamali, M.H. "Law and Society" *supra*, note 6 above, at p.114-115.

<sup>36</sup>Iqbal, M., *The Reconstruction of Religious Thought in Islam* (1951) p.148.

<sup>37</sup> See e.g. Hallaq, W., "Was the Gate of Ijtihâd Closed?" in Hallaq, W., (ed.) *Law and Legal Theory in Classical and Medieval Islam* (1995) pp.3-41.

<sup>38</sup> Ramadan, S., (1970) *supra*, note 7 above, p.36.



## SPIRITUAL AND TEMPORAL ASPECTS OF ISLAMIC LAW

As already observed above, the provisions of the *Sharî'ah* broadly covers all aspect of human life. But through the methods of Islamic law the jurists have categorised Islamic law into two broad spheres. The first sphere embodies spiritual laws regulating religious observance and acts of worship. This is generally referred to as *ibâdât* and concerns the direct relationship between an individual and God. The second sphere embodies temporal laws regulating inter-human relations and the temporal affairs of this world. This is generally referred to as *mu'âmalât* and generally promotes the realisation of the common good (*ma'rûf*) of humanity. While the jurisprudence on the spiritual aspects is considered to be fully settled and unchanging, the same is not true of the temporal aspects. It is in the sphere of temporal laws that the arrest in the dynamism of Islamic jurisprudence is greatly felt. The traditional jurisprudence (*fiqh*) of the established schools on many aspects of inter-human relations have been overtaken by the dynamic nature of human life and thus created a wide *lacuna* in Islamic legal and political judgement.

The need to rejuvenate the methods of Islamic law to generate a more encompassing and realistic jurisprudence to meet contemporary challenges became evident from the nineteenth century with the intimate interaction between the East and the West. That urge continues today. The advancements and developments of modern life have affected inter-human relations in many ways which Islamic law needs to address from contemporary perspectives. The emergence of international human rights law is one such development. Due to the erroneous impression that the traditional opinions of the established schools of Islamic jurisprudence were immutable, Muslims were hesitant in formally accepting the need for a re-appraisal in the methods of Islamic law. Islamic legal scholarship aiming at a formal, adequate and cohesive re-appraisal of the methodology of Islamic law in the light of contemporary challenges has been going on since the last century with general contributions from many Muslim thinkers and intellectuals.<sup>39</sup> Nevertheless, the stagnation of the thirteenth century continues to eclipse the great legacy of the earliest Islamic jurists that developed Islamic law into a most dynamic legal system from which even the West was a borrower in the middle ages.<sup>40</sup>

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<sup>39</sup> See Kamali, M.H., "Law and Society" *supra*, note 6 above, at p.116-118.

<sup>40</sup> See e.g. Makdisi, G., (1981) *supra*, note 33 above, pp. 290-91.

## THE SCOPE AND PURPOSE OF ISLAMIC LAW

Today, Islamic law continues to be formally applied in most parts of the Muslim world as we had it interpreted by the classical *Sunnî* schools of Islamic jurisprudence with regards to the *Sunnî* Muslims and the classical *Shî'ah* schools with regards to *Shî'ah* Muslims. A static and immoderate application of those traditional interpretations of the *Sharî'ah* can however constrain the scope of Islamic law for present times. Research shows that the earliest Islamic jurists had utilised the methods of Islamic law within the scope of the *Sharî'ah* in an evolutionary and constructive manner that prevented any unwarranted circumscription upon human living during their times. Such evolutionary and constructive application is more relevant today than before. Cognisance of the object and purpose of the *Sharî'ah* (*maqâsid al-sharî'ah*), which has been identified as promotion of welfare and prevention of harm (*maslahah*),<sup>41</sup> also ensures realisation of the proper and benevolent scope of Islamic law.

In his analysis of the scope and equity of Islamic law, Ramadan has identified six important characteristics of Islamic law deductible from a thorough study of the Qur'an, the *Sunnah* and the works of some classical Islamic jurists. They are as follows:

1. The formal sources of Islamic law, i.e. Qur'an and *Sunnah* "are basically inclined towards establishing general rules without indulging in much detail". This makes room for a wider application of the legal sources through the legal methods for the best benefit of humanity.
2. Qur'anic "texts were directly meant to deal with actual events (and) Presupposition was basically excluded from" the legislative philosophy of Islamic law. This characteristic, Ramadan observes, is a method of realism which "is apt to minimize the definite limitations imposed on human dealings", which in essence makes things easier for humanity.
3. "As a rule, everything that is not prohibited is permissible." In explaining this rule Ramadan rightly observed that: "Islamic Law was not meant to paralyze people so that they might not move unless allowed to. Man on the contrary, is repeatedly called upon by the Qur'an to consider the whole universe as a Divine grace meant for him, and to exhaust all his means of wisdom and energy to get the best out of it."
4. "Even in the field of prohibition, the Qur'an sometimes used a method which could gradually meet a growing readiness in the society where the revealed enjoinders were to be implemented." This is the so-called principle of gradualism (*tadrîj*) by which legislation was gradually upgraded in view of societal circumstances. Thus social circumstances are not overlooked in the development of the law.

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<sup>41</sup> See e.g. al-Shâtibî, A.I., *al-Muwâfaqât* (Arabic) (1997), Vol. 2; and Masud, M.K., *Shatibi's Philosophy of Islamic law* (1995) p.151.

5. "All that the Qur'an and the Sunnah have prohibited becomes permissible whenever a pressing necessity arises". This is based on the doctrine of necessity (*darûrah*) by which all Islamic jurists generally agree that "necessity renders the prohibited permissible".
6. "The door is wide-open to the adoption of anything of utility, of whatever origin, so long as it does not go against the texts of the Qur'an and the Sunnah".<sup>42</sup>

Apart from the many Qur'anic verses and Prophetic Traditions cited in support of the above characteristics of Islamic law, the following Qur'anic verse succinctly summarises the benevolent nature of Islamic law.

"...For he commands them what is just and forbids them what is evil; he allows them as lawful what is good and prohibits them from what is bad. He releases them from their heavy burdens and from the yokes that are upon them".<sup>43</sup>

Thus the overall objective and purpose of the Sharî'ah, which must always be kept in mind in both its interpretation and application, is the promotion of welfare and prevention of harm.

#### **PROMOTION OF WELFARE AND PREVENTION OF HARM (*MASLAHAH*)**

Among the many doctrines and principles established by the founding jurists for an intelligible application of Islamic law, *maslahah* is considered as the most viable means of bringing the ideals of Islam closer to realisation for all time. Kamali has observed that:

"The doctrine of *maslahah* is broad enough to encompass within its fold a variety of objectives, both idealist and pragmatic, to nurture the standards of good government, and to help develop the much needed public confidence in the authority of statutory legislation in Muslim societies. The doctrine of *maslahah* can strike balance between the highly idealistic levels of expectation from the government on the part of the public and the efforts of the latter to identify more meaningfully with Islam".<sup>44</sup>

The doctrine was originally introduced by Imâm Mâlik, the eponym of the *Mâlikî* school of Islamic jurisprudence, and later developed by jurists such as al-Gazâlî and al-Tûfî of the *Shâfi'î* and *Hanbalî* schools respectively. The fourteenth century Malikî jurist, Abû Ishâq al-Shâtibî further developed the concept as a "basis of rationality and extendibility of Islamic law to changing circumstances (and also) as a fundamental principle for the universality and

<sup>42</sup> See Ramadan, S., (1970) *supra*, note 7 above, pp.64-73. See also al-Shâtibî, A.I., (1997) *ibid.*; and Ibn al-Qayyim, *I'lâm al-Muwaqqi'în 'An Rabb al-'Alamîn* (Arabic (1996) Vol.1 pp.71-72.

<sup>43</sup> Q7:157.

certainty of Islamic law”.<sup>45</sup> It is an expedient doctrine of Islamic law acknowledged today by Islamic legalists as containing “the seeds of the future of the *Shari‘ah* and its viability as a living force in society.”<sup>46</sup> Against the background of the nature and evolution of Islamic law established above, the doctrine of *maslahah* is thus advocated in this thesis as a veritable Islamic legal principle for the realisation of international human rights within the dispensation of Islamic law.<sup>47</sup> We will rely on the doctrine within the ample scope of the *Shari‘ah* in deriving legal benefits and averting hardship to the human person, as endorsed by the Quranic verse that: “He (God) has not imposed any hardships upon you (humans) in religion”.<sup>48</sup>

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<sup>44</sup> Kamali, M.H., “Have We Neglected the Shari‘ah-Law Doctrine of Maslahah?” (1988) 27 *Islamic Studies*, No.4, p.287-288.

<sup>45</sup> See Masud, M.K., (1995) *supra*, note 41 above, p. viii.

<sup>46</sup> Kamali, M.H., (1988) *supra*, note 44 above, at p.288.

<sup>47</sup> For further elaboration on the principle of Maslahah See e.g. Kamali. M.H., (1991) *supra*, note 7 above pp. 267-282; and al-Shâtibî, A.I., (1997 ) *supra*, note 41 above; Masud, M.K., (1995) *supra*, note 41 above, pp.127-164.

<sup>48</sup> Q22:78.

## CHAPTER 4

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### The Idea of Human Rights within Islamic Law

Against the background established in the last two chapters, this chapter will, in pursuance of the first proposition of this thesis, examine whether the concept of human rights can be established from within the themes of Islamic law. The chapter will examine and respond to traditional arguments on the subject and research into the sources, methods and jurisprudence of Islamic law to identify the concept of human rights in relation to the concept under international human rights law.

#### BREAKING TRADITIONAL BARRIERS

Traditionally, a number of difficulties confront the discourse of international human rights from an Islamic legal perspective. On one hand is the domineering influence of the Western perspective of human rights, which creates a tendency of always using Western values as a yardstick in every human rights discourse. It is often argued that human rights principles are “principles that were developed in Western culture”, thus Western norms should always be the universal normative model for the content of international human rights.<sup>1</sup> There however continues to be opposing arguments against that assertion.<sup>2</sup> While it is true that the impetus for the formulation of international human rights standards originated from the West, the same cannot be said of the whole concept of human rights, which is perceivable within different human civilisations.<sup>3</sup> Related to that is the negative image of Islam in the West. Often, some of the punishments prescribed in Islamic law and the political *cum* human rights situation in many parts of the Muslim world today are, *inter alia*, cited by Western analysts as evidence of Islamic brutality and lack of provision or respect for human

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<sup>1</sup> See e.g. Mayer, A.E., “Current Muslim Thinking on Human Rights” in An-Na’im, A.A. and Deng, F.M., (eds.) *Human Rights In Africa, Cultural Perspectives* (1990) p.131 at 147-8.

<sup>2</sup> See e.g. Said, M.E., “Islam and Human Rights” (1997) *Rowaq Arabi*, January ed. p.11 at 13; Manglapus, R., “Human Rights are not a Western Discovery” (1978) 4 *Worldview*, pp.4-6; and Kushalani, Y., “Human Rights in Asia and Africa” (1983) 4 *Human Rights Law Journal*, No.4, p.404.

<sup>3</sup> See e.g. Kushalani, Y., (1983) *ibid.*; and Smith, J., (ed.) *Human Rights: Chinese and Dutch Perspectives* (1996) for discussions on different perceptions of the concept of human rights.

rights in Islamic law.<sup>4</sup> This has created what has been termed “Islamophobia”<sup>5</sup> in the West, which adversely affects the view about human rights in Islam generally. In the academic realm there is also what Strawson calls the “orientalist *problematique*” by which “Islamic law is represented within Anglo-American scholarship as an essentially defective legal system”<sup>6</sup>, especially with regards to international law.<sup>7</sup>

On the other hand, is the obstacle of static hard-line interpretations of the *Shari‘ah* and non-relative application of traditional Islamic jurisprudence on some aspects of inter-human relations. Islamic law or *Shari‘ah* are both sometimes vaguely advanced by some Muslim countries as excuse for their poor human rights records without any elaboration on the precise position of Islamic law on the matter.

Due to the above difficulties, the concept of human rights under Islamic law has often been discussed from either a reproachful or a defensive angle, depending on the leanings of the discussant. Piscatori has frowned at the defensive approach of most Muslim writers in the international human rights discourse.<sup>8</sup> We need to determine however, whether the defensiveness is merely an apology in the face of genuine challenges posed by international human rights to Islamic law, or are genuine defences against criticisms of Islamic law for human rights situations in Muslim countries not necessarily justifiable even under the *Shari‘ah*. On one hand, it is undeniable that Western initiatives and modern challenges, which include the international human rights regime, have forced contemporary Muslim thinkers and intellectuals to strongly propose a review of some traditional Islamic jurisprudential views, especially in the area of international law and relations.<sup>9</sup> On the other hand, there have also been general erroneous reproaches against Islamic law for the

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<sup>4</sup> See Bannerman, P., *Islam in Perspective, A Guide to Islamic Society, Politics and Law*. (1988) p.25. See also Robertson, B.A., “Islam and Europe: An Enigma or a Myth?” (1994) 48 *Middle East Journal*, No.2, pp.288-307.

<sup>5</sup> See e.g. Tash, A.Q., “Islamophobia in the West” (1996) *Washington Report on Middle East Affairs*, November/December ed. p.28; and “Islamophobia” in *BULLETIN, University of Sussex Newsletter*, 7th November, 1997, 16. Available Online: [http://www.sussex.ac.uk/press\\_office/bulletin/07nov97/item12.html](http://www.sussex.ac.uk/press_office/bulletin/07nov97/item12.html) [12/03/2001].

<sup>6</sup> See generally Strawson, J., “Encountering Islamic Law”, *University of East London Law Department Research Publications Series*, No.1., p.1.

<sup>7</sup> Strawson for instance refers to Schacht’s very well known work, *Introduction to Islamic Law*, which omits the discussion of Islamic international law because of what the learned professor described as “its essentially theoretical and fictitious character and the intimate connection of the relevant institutions with the history of Islamic states...” (See Schacht, J., *Introduction to Islamic Law* (1964) p.112). It is difficult to imagine how international law can stand without an “intimate connection of the relevant institutions” of the State. As to the excuse of “its essentially theoretical and fictitious character”, this was in 1964 when, even in western discourses, public international law had its own cynics as to whether it was really law or not, but this never ostracised public international law from the law books. Such approaches to Islamic law were some of the barriers, *inter alia*, which shut out Islamic law from contemporary international law discourses. See also generally Said, E. W., *Orientalism, Western Conceptions of the Orient* (1978).

<sup>8</sup> See Piscatori, J.P., “Human Rights in Islamic Political Culture” in Thompson, K, (ed.) *The Moral Imperatives of Human Rights: A World Survey* (1980) p. 139 at 152-162; See also Manzoor, P., “Humanity Rights as Human Duties” *Inquiry*, July 1987, p.34 at 37-38.

<sup>9</sup> See e.g. AbuSulayman, A.A., *Towards an Islamic Theory of International Relations: New Directions for Islamic Methodology and Thought* (1993).

sometimes appalling attitudes or actions of some governments in Muslim countries that are not justifiable under the *Shari'ah*. At the end of a Seminar on Human Rights in Islam held in Kuwait in 1980, jointly organised by the International Commission of Jurists, the University of Kuwait and the Union of Arab Lawyers, the conclusion, *inter alia*, was that:

“It is unfair to judge Islamic law (Shari'a) by the political systems which prevailed in various periods of Islamic history. It ought to be judged by the general principles which are derived from its sources... Regrettably enough, contemporary Islamic practices cannot be said to conform in many aspects with the true principles of Islam. Further, it is wrong to abuse Islam by seeking to justify certain political systems in the face of obvious contradictions between those systems and Islamic law.”<sup>10</sup>

While the theoretic arguments concerning the conceptual foundations of human rights may be difficult to settle, the indisputable fact is that international human rights is today not a prerogative of a single nation. It is a universal affair that concerns the dignity and well being of every human being. However, as earlier analysed in Chapter two, there is yet to emerge what we may call a “universal universalism” in international human rights.<sup>11</sup> What exists now has been described as “provincialism masquerading as universalism”.<sup>12</sup> While the flagrant abuse of human rights in Muslim States under the pretext of cultural differences is unacceptable, the role and influence of the Muslim world in achieving a peaceful co-existence within the international community does permit Muslim States to question a universalism “within which Islamic law (generally) has no normative value and enjoys little prestige”.<sup>13</sup> An exception to the general non-consideration of Islamic law principles and values in the development of international human rights law is found only in the Convention on the Rights of the Child (CRC) adopted in 1989. Article 20(3) of the CRC makes a specific reference to the principle of “*kafalah* of Islamic law”. Apart from Somalia and Palestine, all Muslim States have ratified the CRC.<sup>14</sup> Since human rights are best achieved through the domestic law of States, recognition of relevant Islamic law principles in that regard will enhance the realisation of international human rights objectives in Muslim States that apply Islamic law fully or partly as State law.

As will be shown, there is need for the Muslim world to also acknowledge change as a necessary ingredient in law. The adaptability of the *Shari'ah* must be positively utilised to

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<sup>10</sup> See International Commission of Jurists, *Human Rights in Islam: Report of a Seminar held in Kuwait in December 1980* (1982) p.7.

<sup>11</sup> See p. 15 above.

<sup>12</sup> See Strawson, J., *supra*, note 6 above, p.2 and also Mutua, M., “The Ideology of Human Rights” (1996) *Virginia Journal of International Law*, p. 589, at 592-3.

<sup>13</sup> See Mayer, A.E., *Islam and Human Rights, Tradition and Politics*, (3<sup>rd</sup> Ed. 1999) p.41.

<sup>14</sup> The CRC as at 1 March 2001 has 191 ratifications. See UN Human Rights Treaty Website at:

enhance human rights in the Muslim world.<sup>15</sup> While Muslims must be true to their heritage, the ideals of international human rights can shed new light on their interpretation of the *Shari'ah*, their international relations and self-awareness within legal limits of Islamic law.

### ISLAMIC RESPONSES IN THE INTERNATIONAL HUMAN RIGHTS DISCOURSE

Halliday has identified at least four classes of Islamic responses to the international human rights debate. The first is that Islam is compatible with international human rights. The second is that human rights can only be fully realised under Islamic law. The third is that the international human rights objective is an imperialist agenda that must be rejected, and the fourth is that Islam is incompatible with international human rights.<sup>16</sup> There is a fifth noteworthy response not mentioned by Halliday, which is that the international human rights objective has a hidden anti-religious agenda.<sup>17</sup> Viewed critically, most of these responses are Muslim reactions to what is often described as the double standards of countries at the helm of international human rights promotion. The responses reflect the entrapment of human rights between international politics and humanitarianism rather than actual disagreements on the concept of human rights in Islamic law. We will now evaluate these responses within the perimeters of Islamic law.

The view that Islam is compatible with human rights is the most sustainable within the principles of Islamic law. This is not merely by vaguely or apologetically reading the western notion of human rights into Islamic principles. The sources and methods of Islamic law contain common principles of good government and human welfare that resonate with modern international human rights ideals. Respect for justice, protection of human life and dignity, are central principles inherent in the *Shari'ah* which no differences of opinion can exclude. They are the overall purpose of the *Shari'ah*, as will be shown below, to which the Qur'an refers that:

“God commands justice, the doing of good, and liberality to kith and kin, and He forbids all shameful deeds, and injustice and rebellion: He instructs you, that you may receive admonition”.<sup>18</sup>

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<http://www.unhchr.ch/html/menu3/b/k2crc.htm> [1/3/2001].

<sup>15</sup> See Yamani, A.Z., “The Eternal Shari'a” (1979) 12 *New York University Journal of International Law and Politics*, p.205.

<sup>16</sup> Halliday, F., “Relativism and Universalism in Human Rights: The Case of the Islamic Middle East” in Beetham, D., (ed.) *Politics and Human Rights* (1995) p.152 at 154-55.

<sup>17</sup> See e.g. Mortimer, E., “Islam and Human Rights” *Index on Censorship*, October, 1983, No.12, p.5 (quoted the late leader of Islamic Republic of Iran, Imam Ayatollah Khomeini observe that: “What they call human rights is nothing but a collection of corrupt rules worked out by Zionists to destroy all true religions”).



The view that human rights can only be fully realised under Islamic law is exclusionist and will be culpable of the same egoism of the criticised exclusive Western perspective to human rights. Islam is not egocentric with respect to temporal matters but rather encourages co-operation (*ta'âwun*) for the attainment of the common good of humanity.<sup>19</sup> Islam encourages interaction and sharing of perception. A Tradition of the Prophet Muhammad advised Muslims to seek knowledge as far as in China, (a non-Muslim country) and in another Tradition he stated that wisdom is the lost property of a Muslim and is most entitled to it wherever it may be found. All these point towards the recognition by Islam of possible alternative and permissible routes to the betterment of humanity in temporal matters. AbuSulayman thus observed that: “(t)he Islamic call for social justice, human equality (equity), and submission to the divine will and directions of the Creator requires the deepest and sharpest sense of responsibility, as well as the *total absence of human arrogance and egoism, both in internal and external communication.*”<sup>20</sup>

The view that the international human rights regime is an imperialist agenda is not peculiar to the Islamic discourse on human rights. It is common in the human rights discourses of all developing nations.<sup>21</sup> This results from the fear of neo-colonialism, and is a psychological effect of the past colonial experience of most developing nations under Western imperialism. That fear is sometimes strengthened by the Western nations' insistence on defining human rights only in the western perspective without consideration for the contribution and understanding of other cultures.

If we understand international human rights strictly as a universal humanitarian objective for the protection of individuals against the misuse of State authority and for the enhancement of human dignity, then the view that Islam is incompatible with it is very unsustainable. That is because the protection and enhancement of the dignity of human beings has always been a principle of Islamic political and legal theory. While there may be some areas of conceptual differences between Islamic law and international human rights law, this does not make them incompatible. It is sometimes also argued that human beings have no rights in Islamic law but only to submit to God's commands.<sup>22</sup> This is also misleading. While it is true that human beings are to submit to God's commands, this does not mean that they have no inherent rights under Islamic law. The principle of legality is a

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<sup>18</sup> Q 16:90.

<sup>19</sup> See e.g. Q 5:5 “...Co-operate with one another in good deeds and piety but not in sin and enmity”.

<sup>20</sup> AbuSulayman, A.A., (1993) *supra*, note 9 above, p. 54. (emphasis added).

<sup>21</sup> See e.g. Mutua, M.W., (1996) *supra*, note 12 above, pp. 589-657.

<sup>22</sup> See e.g. Imam Khomeyni's view in that regard in Rajaei, E., *Islamic Values and Worldview: Khomeyni on Man, the State and International Politics* (1983) pp.42-45.

fundamental principle of Islamic law whereby all actions are permitted except those clearly prohibited by the *Sharī'ah*.<sup>23</sup> That means human beings have inherent rights to everything except for things specifically prohibited. To say that humans have no rights but only obligations to God expresses a principle of illegality, which makes life very restrictive and difficult. That will be inconsistent with the overall objective of the *Sharī'ah*, which is the promotion of human well being as will be analysed later.

Most Muslim proponents of the incompatibility view are really not opposed to the concept of human rights *per se*. Their position only reflects a disappointment with, and protest against Western hegemony and thus against any ideology considered as championed by Western nations. They often refer to “double standards” of the West and the general disparity in reactions to human rights abuses under “Islamic” and “non-Islamic” regimes as evidence of lack of sincerity in the international human rights regime.<sup>24</sup> For instance one Egyptian writer has been quoted as denouncing the UDHR in the following words:

“I must admit that I am not a supporter of the *Universal Declaration of Human Rights* that the United Nations Organisation issued on December 10, 1948. Our history of civilisation has taught us to be wary of big and noble words as the reality of our history has taught us how big words can be transformed into atrocious crimes. We cannot forget that the initiators of the *Declaration of Human Rights* and the plain French citizens are the same people who shortly afterwards, and before the ink of the *Declaration* had dried up, organised a campaign and sent their forces under the leadership of their favourite general, Napoleon, to Egypt. We must not forget either that the United Nations Organisation issued the *Universal Declaration of Human Rights* in the same year that it recognised the Zionist state that usurped Palestine and robbed its people of every right stipulated in the *Declaration*, including the right of life.”<sup>25</sup>

Huntington has also drawn attention to this protestation by pointing out that:

“Non-westerners...do not hesitate to point to the gaps between Western principle and Western action. Hypocrisy, double standards, and “but nots” are the price of universalist pretensions. Democracy is promoted but not if it brings Islamic fundamentalists to power; nonproliferation is preached for Iran and Iraq but not for Israel; ... human rights are an issue with China but not with Saudi Arabia;... Double standards in practice are the unavoidable price of universal standards of principle.”<sup>26</sup>

Finally, the view that the international human rights objective harbours a hidden anti-religious agenda also results from some suspicion among Muslims that, having separated the

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<sup>23</sup> See Chapter 3, p. 32 above.

<sup>24</sup> In nearly all human rights communiqué or resolutions adopted at every Islamic conference, the question of Palestine always comes up as an issue of double standards in international relations and law.

<sup>25</sup> See Sayf al-Dawla, I., “Islam and Human Rights: Controversy and Agreement” (1988) 9 *Minbar al-Hiwar* pp.33-39, cited in R. al-Sayyid, “Contemporary Muslim Thought and Human Rights”, (1995) 21 *Islamochristiana*, p.27 at 28.

Church from the State in the Western world, the West intends the same for the Muslim world and through the “crusade” of international human rights wants to discredit the Islamic faith with a new international ideology of humanism in its effort to totally remove religiosity from the world order. This, as it may seem, is not an opinion canvassed only by governments in Muslim States but even by some ordinary individual Muslims whom human rights are intended to protect. This indicates the need for continuous education and practical demonstration of sincerity and genuine commitment to the humanitarian ideals of international human rights. Bielefeldt has stressed in this regard that human rights “do not pretend to serve as a transhistoric yardstick, for measuring cultures and religions generally (and) ... are not, and should not be presented as, an international ‘civil religion’” but be presented as shedding “new light on the self-perception of cultural and religious communities because, the principle of human dignity, which has roots in many cultures, serve as the foundation for human rights.”<sup>27</sup>

### IS THERE A THEORY OF RIGHTS IN ISLAMIC LAW?

A common view in the discourse of rights in general and human rights in particular is that Islamic law is only a system of duties that does not recognise the idea of rights.<sup>28</sup> Kamali has described this view as a “persistent misunderstanding of Islamic law” on the subject of rights.<sup>29</sup> Although Islamic law emphasises the concept of duty, this does not seem to subsume or annihilate the concept of rights within the system. The existence of rights in Islamic law can be established logically, semantically and through its legal sources and methods respectively.

Logically, the fact that Islamic law provides for legal remedies is a *prima facie* indicator of its recognition of the concept of rights. This is because legal remedies can be available only in a system that recognises not only the concept of duties but also the concept of rights and claims. Semantically too, Islamic law has a term for rights. The Arabic word for “right” is “*haqq*” and its plural is “*huqûq*”.<sup>30</sup> Literally, “*haqq*” means established fact, truth, justice, right, claim or reality. It also connotes duty when used with the Arabic

<sup>26</sup> Huntington, S.P., *The Clash of Civilizations and the Remaking of World Order*, (1996), p.184.

<sup>27</sup> See Bielefeldt, H., “Muslim Voices in the Human Rights Debate” (1995) 17 *Human Rights Quarterly*, 587 at 616.

<sup>28</sup> See e.g. Siegman, H., “The State and the Individual in Sunni Islam,” (1964) 54 *The Muslim World*, p.14 at 23; Donnelly, J., *Universal Human Rights In Theory and Practice* (1989) p.51.

<sup>29</sup> See Kamali, M.H., “Fundamental Rights of the Individual: An Analysis of Haqq (Rights) in Islamic Law” (1993) 10 *American Journal of Islamic Social Sciences*, No.3, p.340 at 341. The article is a detailed and scholarly analysis of rights in Islamic law from which the present researcher has benefited extensively.

<sup>30</sup> Arabic is the language of the primary sources of Islamic law. It is also the common language of the Middle East and

genitive “*alâ*” (upon).<sup>31</sup> In that sense it is constructed either as “right upon” or “right against” (*haqq ‘alâ*) to connote duty. Its juridical usage has followed its literal meaning since the earliest period of Islam and it has been used quite extensively in both the primary sources of Islamic law and the works of the earliest Islamic jurists. The sixteenth century *Hanafi* school jurist, Ibn Nujaym is perhaps the first to give a legal definition of the term “*haqq*”. He defined it as “*mâ yastahiqquhû al-insân*” meaning “that to which a person is entitled”.<sup>32</sup> Contemporary Islamic jurists even define “*haqq*” in broader terms.<sup>33</sup> While Yusuf Musa defined “*haqq*” as “an identifiable benefit” (*maslahah thâbitah*) conceded by the Legislator to the individual or to the community or to both”<sup>34</sup>, Shalabî defined it as “every benefit (*kull maslahah*) conformable to the *Sharî’ah*”<sup>35</sup>.

Nearly all the Islamic jurists tend to define right (*haqq*) with reference to “*maslahah*”.<sup>36</sup> This refers to the ultimate goal of rights. In Islamic law, a right is not an end in itself. It is a means to an end, and that end is what the jurists have identified as “*maslahah*”. This term, which literally means welfare, benefit or interest, is mostly used to express the Islamic legal doctrine of public interest or public welfare when qualified as “*maslahah mursalah*”.<sup>37</sup> Although “*maslahah*” as a legal doctrine is generally conceived as collective or communal welfare, the ultimate goal of rights in Islamic law is also *maslahah* in which sense it extends to the benefit of individuals to ensure individual well being. The jurists’ definitions of *haqq* (right) support this submission. For instance Yusuf Musa’s definition of right as *maslahah*, does not restrict the term to the concept of community but also mentions the individual. Shalabî’s definition also mentions “every benefit” (*kull maslahah*), which will include that of the individual. Furthermore, the ultimate objective of rights does not actually end with the individual *per se*. The well being of the individual will consequently ensure the well being of the community and ultimately the realisation of public welfare and *vice versa*. This makes the doctrine of *maslahah* very relevant in the concept of human rights under Islamic law.

Turning to the sources of Islamic law, one observes that in the Qur’an “*haqq*” is mostly used to connote “truth”, “certainty”, “justice” or “right”. A specific use of the word to

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North African countries, and is spoken by many non-Arab Muslims world-wide.

<sup>31</sup> See e.g. Cowan, J.M. (ed.) *The Hans Wehr Dictionary of Modern Written Arabic* (1960) p.192 and under “Hakk” in Bearman, P.J., (ed.), *The Encyclopaedia of Islam, Glossary and Index of Technical Terms to Volumes I-VIII* (1997) p.107.

<sup>32</sup> Ibn Nujaym, Z., *al-Bahr al-Râiq: Sharh Kanz Al-Daqâ’iq* (Arabic) (1311AH) cited in Tamûm, M., *al-Haqq fi al-Sharî’ah al-Islâmiyyah*, (Arabic) (1398AH/1978CE) p. 33. See also Kamali, M.H., (1993) *supra*, note 29 above, p. 343.

<sup>33</sup> See Tamûm, M., *ibid.*, pp.36-37. See also al-Zuhayli, W., *al-Fiqh al-Islâmî Wa Adillatuh* (Arabic) (4<sup>th</sup> Ed. 1997), Vol.4, pp.2837ff.

<sup>34</sup> See Musa, M. Y., *al-Fiqh al-Islamiyy* (Arabic) (1954) p.211.

<sup>35</sup> See Shalabi, M.M., *al-Madkhal Li al-Fiqh al-Islâmiyy*, (Arabic) (n.d) p.238.

<sup>36</sup> See e.g. Tamûm, M., (1398AH/1978CE), *supra.*, note 32 above, pp.36-37.

<sup>37</sup> See e.g. Hallaq, W.B., *A History of Islamic Legal Theories* (1997) pp.112-113; Kamali, H.M., *Principles of Islamic Jurisprudence* (1991) p.267; and Masud, M.K., *Shatibi’s Philosophy of Islamic Law* (1995) pp.127-164.

connote “right” as opposed to “duty” occurs in Qur’an 51: 19 – “And in their wealth is a right (*haqq*) for the needy and the outcast”. We also find in the *Sunnah*, many sayings of the Prophet Muhammad where “*haqq*” is used in the above context. An example of his use of the term “*haqq*” to connote right, as opposed to duty, is in respect of Qur’anic heirs, where he is reported to have said: “God has given every legal heir his/her right (in the inheritance) so there shall be no (additional) bequest for a legal heir”.<sup>38</sup> Although “*haqq*” is used sometimes in the Qur’an to connote duty (right against), its use to connote right (as opposed to duty) is more common.<sup>39</sup> Due to its significance in Islamic law, it is nearly impossible not to find the use of the word “*haqq*” in most classical and contemporary Islamic juristic works. It is observed that the jurists have also mostly used “*haqq*” to connote right as opposed to duty in their legal scholarship. From the very early period of Islamic jurisprudence one finds discourses on the nature of rights by Islamic jurists on questions such as whether rights were absolute and whether the exercise of rights could give rise to liability. While Abu Hanîfah and al-Shâfi’î, the eponyms of the *Hanafî* and *Shâfi’î* schools of Islamic jurisprudence respectively, held that the exercise of rights was absolute, Mâlik, the eponym of the *Mâlîkî* school and other jurists held the view that rights were not absolute, and should thus not be exercised to cause injury to others.<sup>40</sup> The later view prevails in the modern theory of rights. It becomes evident from the above that the concept of rights is not alien to Islamic law as is often portrayed.

Rights are however very interwoven with duties under Islamic law. The two are seldom treated in isolation from each other. This indicates the appreciation of the correlating nature of the two concepts. In Islamic jurisprudence, rights and duties are not independent legal concepts. They both evolve from the Islamic legal norm called “*hukm*” (legal ruling) which is normally conveyed in form of either a sanction, command or prohibition aimed at regulating human conduct.<sup>41</sup> Rights and duties are therefore, mediums through which the law functions. Thus the law will often place a duty on one party which conversely confers a right on another through the same injunction. Many verses of the Qur’an vividly demonstrate this approach.

<sup>38</sup> Reported by Abû Dâwûd. See e.g. Fazlul Karim, A.M., *Al-Hadis: An English Translation and Commentary of Mishkat-ul-Masabih with Arabic Text* (1994) Vol.2, pp. 324-325. Hadith No. 34.

<sup>39</sup> A Concordance of the Qur’an shows a total of 247 entries of the word “*haqq*” out of which 15 entries are used in the context of “*right*” (Q3: 21, Q3: 112, Q3: 181, Q4: 155, Q5: 116, Q6: 151, Q11: 79, Q17: 26, Q17: 33, Q22: 40, Q25: 68, Q40: 75, Q41: 15, Q46: 20, Q70: 24) while only three entries (Q2: 180, Q2: 236, Q2: 241) are used in the context of “*duty*”. See Kassis, H. E., (ed.) *A Concordance of the Qur’an* (1983) pp.537-542. Note however that there are other Qur’anic terminologies for “*duty*” apart from the word “*haqq*”. This analysis is not to say that rights are more recognised than duties in the Qur’an but to show that the idea of “rights” as opposed to “duty” exists in Islamic law, and that the term “*haqq*” is mostly used to connote “right” rather than “duty”.

<sup>40</sup> See Khadduri, M., and Liesbesny, H.J., (ed.) *Law in the Middle East* (1955) Vol. I, pp.186-187.

<sup>41</sup> See Kamali, M.H., (1993) *supra*, note 29 above, pp. 341 and 347-350.

Islamic legal theory recognises three essential elements in this process. First, there must be the Lawgiver (*hâkim*), then the object of the law (*mahkûm fih*) and lastly the subject of the law (*mahkûm alayh*).<sup>42</sup> Every rule regulating human conduct in Islamic law must conform to that principle. We shall now analyse the three elements in relation to human rights.

God is considered generally as the original Lawgiver through His revelation which is the major source of Islamic law. The role of human beings in the legal process is only to interpret, expand and apply the law. In Islamic human rights, God is thus considered to be the source of rights and duties.<sup>43</sup> Human rights must therefore conform to His commands as conveyed in revelation, the conclusive of which, according to Islamic belief, is the Qur'an. This raises questions concerning the relation between law, revelation and reason. Does the human intellect have any role at all in the determination of what is good or evil and what is right or wrong? Three views were advanced by the classical Islamic theologians on this question.<sup>44</sup>

First is the view that human intellect can not be relied upon as a source of law and that revelation is the only criterion of right or wrong, good or evil. This is the view advanced by the *Ash'arî* theological school. They argue that human reason is liable to error, and that perceptions differ in respect of what is right or wrong, good or evil. Thus what may be evaluated as right by the reasoning of one person may be evaluated as wrong by the reasoning of another. They also point to the inevitable subjectivity of human reasoning and conclude that revelation alone is the authentic source of law, rights and duties.<sup>45</sup>

Second is the view of the *Mu'tazilah* that human intellect can identify right or wrong and good or evil by reference to the overall benefit or harm that is derivable from a particular action. They emphasise reason and thus assert that whatever human reason identifies as right is also right in the sight of God, and *vice versa*. They argue that reason and revelation must always correspond, that it is impossible for God to command what is intrinsically wrong or prohibit what is intrinsically right. Their position therefore is that the probity of revelation should be subjected to its compatibility with human reason. This view manifests an utilitarian approach whereby rights are evaluated on the basis of the benefits they entail. It also exhibits some traits of the natural law school. Al-Ghazâli argued that this approach is too relative, because the standards of right and wrong vary with environment and from person to person.

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<sup>42</sup> See e.g. Qadri, A.A., *Islamic Jurisprudence in the Modern World*, (1986) p.18; Kamali, M.H., (1991), *supra*, note 37 above, pp. 342-349; and Hasan, A., *Principles of Islamic Jurisprudence* (1993) pp.230-387.

<sup>43</sup> See e.g. Maududi, A.A., *Human Rights in Islam*, (1993) p.15; and Uthmân, M.F., *Huqûq al-Insân Bayn al-Sharî'ah al-Islâmiyyah Wa al-Fikr al-Qanûni al-Garbiyy* (Arabic) (1402AH/1982CE) p.16.

<sup>44</sup> See Kamali, M.H., (1991) *supra*, note 37 above, pp.343-345.

<sup>45</sup> *ibid.*, p.343.

The law of God can thus not be subjected to such a relativistic approach.<sup>46</sup> The *Mu'tazilah* were generally considered as pure rationalists whose theology faced a lot of opposition. Their utilitarian approach to law was however to be utilised later by Islamic jurists to a large extent in the methods of Islamic law. Islamic legal scholars therefore acknowledge that their contribution to Islamic legal thought "cannot be denied by an impartial observer."<sup>47</sup>

The third is the *Mâturîdî* view. While agreeing that right and wrong can be discerned through human intellect, this school holds that human reason must be evaluated on the basis of divine revelation. They argue that the law of God may not always necessarily correspond to human reasoning because human intellect is liable to error.<sup>48</sup> Since the law must be interpreted and also continue to grow and adapt itself to new situations of life, reliance on human reason becomes inevitable. But this must always be subjected to the evaluation of divine revelation. This view attempts to harmonise the two previous ones and has been adopted by the *Hanafî* school. It is the most practical view on the relationship between law, revelation and reason. Although the *Ash'arî* view is the traditional Sunni majority view, the adoption of methods of Islamic law such as *qiyâs* (legal analogy) and *ijmâ'* (legal consensus) clearly demonstrate the impossibility of a literal application of that view. While the *Ash'arî* view rejects reason as an independent source of law it can not mean to exclude reason totally as a necessary tool for expanding the scope of revealed sources. In practice, almost all Islamic jurists tend to follow the *Mâturîdî* approach when they expand the law to cover new areas not expressly covered by either the *Qur'ân* or the *Sunnah*. The inevitability of this was actually confirmed by Abû al-Hassan al-Ash'ari (the eponym of the *Ash'arî* theological school) himself, but only cautioned that in dealing with new cases, matters relating to reason should be distinguished from those relating to the divine, "without confounding the rational with the traditional, or the traditional with the rational".<sup>49</sup> Sayyid Qutb thus maintained that full recourse to reason by modern Muslims was essential to fulfil the demands of revelation. He observed that both the *Mu'tazilah* and *Ash'arî* views failed to estimate the value and position of reason correctly. The former overestimated reason by placing it over revelation while the later underestimated its significance and lost sight of its important role in realising the demands of divine revelation. He thus advocated a middle path that aims at creating a correct relationship between reason and revelation to ensure human happiness and felicity.<sup>50</sup>

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<sup>46</sup> *ibid.*, p.344; See also Al-Ghazâlî, A.M., *al-Mustasfâ Min Ilm al-Usûl*, Vol. I (Arabic) (1356AH) pp. 36 and 136.

<sup>47</sup> Qadri, A.A., (1986) *supra*, note 42 above, p.156 referring to Abû Zaharah's work on Imâm Abû Hanîfah.

<sup>48</sup> See e.g. Khallâf, A.W., *Ilm Usûl al-Fiqh*, (Arabic) (1398AH/1978CE) p.99.

<sup>49</sup> See McCarthy, R., *The Theology of al-Ash'ari* (1953) p.131.

<sup>50</sup> See Qutb, S., *Fî Zilâl al-Qur'an* (Arabic) (1974) Vol. II, p.806 and Abu Rabi', I.M., in his review of Monsalli, A.S., "Radical Islamic Fundamentalism: the Ideological and Political Discourse of Sayyid Qutb" (1994) 1 *Al-Mizan*, Issue 1,

Al-Ghunaimi has also pointed out that “Islam recognises for reason a considerable domain, particularly in the realm of what Muslim jurists term as *mu‘âmalat*.”<sup>51</sup> The answers by Mu‘adh bn Jabal to the Prophet’s questions as to his sources of law, when he was deployed as a judge to Yemen confirms this approach.<sup>52</sup> It established the doctrine of *ijtihâd* (legal reasoning) without which the law will remain static and not be able to meet the demands, functions and new developments of life. Under Islamic law, the will of God and His command can therefore be known “either directly through divine revelation, or indirectly by means of inference, deduction and *ijtihâd*” (legal reasoning).<sup>53</sup>

Now turning to the objects of Islamic law (*mahkûm fih*) with regards to human rights, these are both rights and duties through which human conduct is regulated, and the subjects of the law (*mahkûm alayh*) are human beings to whom the law is addressed. While human beings are entitled to the rights granted under the law, they are also under an obligation to fulfil their duties within the law.

In line with general principles of Islamic law, rights are further subjected, as objects of law, to three conditionalities. Firstly, the right must be identifiable. It must not be nebulous or ambiguous to the extent that it can not be legally determined. Secondly, the right must be executable. It must be accomplishable within human capacity. No right may be demanded that is not within the power of whom there is either the positive or negative obligation to its fulfilment. Thirdly, the right must be lawful within the *Sharî‘ah* and not prohibited by it.<sup>54</sup> In the light of the above principles, Breiner had observed notably that the Islamic legal theory reveals “a highly developed awareness of ...rights and obligations, a combination of which enabled Islam to formulate a system which would seek to safeguard the rights of individuals to an extent which was not common in the legal thinking of many cultures and civilisations.”<sup>55</sup>

One observes however, that the founding jurists of Islamic law mostly addressed issues of personal and private rights. Apart from a few but monumental legal works in specialised areas of law, such as al-Shaybânî’s works on International law,<sup>56</sup> the early Islamic jurists did not bother to separate their treatment of legal issues specifically into tight compartments.

p.133 at 135.

<sup>51</sup> Al-Ghunaimi, M.T., *The Muslim Conception of International Law and the Western Approach* (1968) p.101 and n. 4 thereof.

<sup>52</sup> See Chapter 3, pp. 27-28 above.

<sup>53</sup> See Kamali, M.H., (1991), *supra*, note 37 above, p.342 especially pp.366-391 for a detailed analysis on the doctrine of *ijtihâd* as “the most important source of Islamic law next to the Qur’an and the Sunnah”. See also generally al ‘Alwânî, T.J., *Ijtihad*, (1993).

<sup>54</sup> See e.g. Kamali, M.H., (1993) *supra*, note 29 above, pp.344-345.

<sup>55</sup> Breiner, B., “A Christian View of Human Rights in Islam”, in *Two Papers on Shari‘ah* (1992) p.1 at 3.

<sup>56</sup> al-Shaybânî, M.H., *al-Jâmi‘ al-Kabîr, Kitâb al-Siyar and Kitâb al-Asl*.



Human rights was thus not treated in their works as a separate subject of public law, but addressed within the general framework of rights and duties of both individuals and the State.

### HUMAN RIGHTS WITHIN ISLAMIC LEGAL THOUGHT

The common Arabic term used today to express human rights in Islamic legal writings and discourse is “*huqûq al-insân*”. The term is a construct derived from two words - “*huqûq*”(rights)-plural of “*haqq*” (right), and “*insân*” (human being). The term “*huqûq al-insân*” is of recent coinage and it neither appears in the primary sources of Islamic law nor in the writings of the founding jurists of Islamic law. The term “*huquq Adamiyyîn*” which also means “rights of humans”<sup>57</sup> is however found, used at least, as early as the eleventh century by al-Mâwardi in his famous work titled “*The Principles of Government*”, wherein he discussed the duty of the ruling authority to protect and ensure certain rights of individuals.<sup>58</sup>

Conceptually, many scholars have observed that the idea of human rights is not alien to Islamic law. Breiner has noted that “(I)slam developed the concept of human rights early in its legal tradition.”<sup>59</sup> Ostorog had also stated earlier before him that:

“Considered from the point of view of its logical structure, the system (Islamic law) is one of rare perfection, and to this day it commands the admiration of the student. ... If the contents of that logical fabric are examined, some theories command not only admiration but surprise. Those Eastern thinkers of the ninth century laid down, on the basis of theology, the *principle of the Rights of Man*, in those very terms, comprehending the rights of individual liberty, and of inviolability of person and property, ...elaborated a Law of War of which the humane, chivalrous prescriptions would have put to the blush certain belligerents in the Great War; expounded a doctrine of toleration of non-Muslim creeds so liberal that our West had to wait a thousand years before seeing equivalent principles adopted.”<sup>60</sup> (emphasis added)

Briffault has also been quoted in similar vein as follows:

“The ideals of freedom for all human beings, of human brotherhood, of the equality of all men before the law, of democratic Government by consultation and universal suffrage, the ideals that inspired the French Revolution and the Declaration of Rights, that guided the framing of the American Constitution and inflamed the struggle for independence in the Latin American countries were not inventions of the West. They find their ultimate inspiration and source in the Holy Quran. They are the quintessence of what the intelligentsia of Mediaeval Europe acquired from Islam

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<sup>57</sup> Literally “rights of Adam’s offsprings”. In Islamic terminology human beings are generically addressed as “Adam’s offsprings” being descendants of the first human being Adam.

<sup>58</sup> See al-Mâwardi A, *Al-Ahkâm al-Sultânîyyah* (Arabic) (1386AH/1966CE) 2<sup>nd</sup> Ed. pp.243-258. See also the English Translation, Yate, A., Trans. *The Laws of Islamic Governance* (1996) pp.337-362 at 341.

<sup>59</sup> See Breiner, B., (1992) *supra*, note 55 above, p. 3.

<sup>60</sup> Ostorog, C.L., *The Angora Reform* (1927) pp. 30-31, cited in Fyzee, A.A.A., *Outlines of Muhammadan Law* (1964) 3<sup>rd</sup> Ed., pp.51-52.

over a period of centuries through the various channels of Muslim Spain, Sicily, the Crusader; and of the ideals propagated by the various societies that developed in Europe in the wake of the Crusades in imitation of the brotherhood associations of Islam”<sup>61</sup>

Islam’s first contact was with a very chaotic society in the seventh century, which it described as an environment of ignorance (*jâhiliyyah*). The reformative stance of Islam and its ultimate objective of bringing humanity from the darkness of ignorance into the light of enlightenment, directed its philosophy, from inception, towards the liberation of humanity on the basis of its holy book and examples of its Prophet.<sup>62</sup> Thus, major moral principles that serve as basic postulates for the concept of human rights, such as human dignity (*karâmah*)<sup>63</sup>, freedom (*hurriyyah*)<sup>64</sup>, humanity (*insâniyyah*)<sup>65</sup>, equality (*musâwah*)<sup>66</sup>, beneficence (*ihsân*)<sup>67</sup>, responsibility (*mas’ûliyyah*)<sup>68</sup>, co-operation (*ta’âwun*)<sup>69</sup> and justice (*adâlah*)<sup>70</sup> evolved, and were embodied in the general doctrines of Islamic theology, law and governance.<sup>71</sup>

The early jurists had carefully categorised the rights that evolve from Islamic law in relation to human conduct into “*huqûq Allah*” (rights of God) and “*huqûq al-ibâd*” or *huqûq Adamiyyîn*<sup>72</sup> (rights of humans). As indicated earlier, rights are not an end in themselves they are means for the well being of human beings. Thus, even though there is a notion of “rights of God” in Islamic law, such rights are not for the welfare of God *per se*. He is not in need of welfare. They are means only to the welfare or benefit of human beings. While they may be designated *de jure* as “rights of God” they are *de facto* “rights of humans” - human rights. There are “rights of God” in both the acts of worship and in inter-human relations. The first “right of God” is His right to be worshipped by every human being. The correlative duty to that “right of God” is that human beings shall worship no other being except God. That is the nucleus of every human conduct in Islam. It is an exclusive right of God (*haqq Allah al-khâlis*). The immediate rights that emanate from this is the guarantee of the individual’s liberty and dignity. Every person is liberated from subjugation to fellow beings, making human beings equally dignified. Thus, in the words of Rab’a ibn Amar to the Persian

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<sup>61</sup> Quoted in Bari, M.E., “Human Rights in Islam with Special Reference to Women’s Rights” (1994) 5 *Dhaka University Series*, Part-F, No.1, p.1 at 12.

<sup>62</sup> See e.g. Q 14:1 “A Book which We revealed unto you in order that you lead mankind out of the depths of darkness into light.....”.

<sup>63</sup> See e.g. Q17:70.

<sup>64</sup> See e.g. Q 5:89.

<sup>65</sup> See e.g. Q46:15.

<sup>66</sup> See e.g. Q 4:1.

<sup>67</sup> See e.g. Q 2:195.

<sup>68</sup> See e.g. Q 7:6-7.

<sup>69</sup> See e.g. Q 5:2.

<sup>70</sup> See e.g. Q 5:8.

<sup>71</sup> There are also numerous Traditions of the Prophet Muhammad that emphasise each of these and other similar values.

Emperor at the dawn of Islam, the mission of Islam was “to liberate humanity from the worship of humans to the worship of God, from oppression into freedom and from the injustice of (other) faiths into the justice of Islam.”<sup>73</sup>

The notion of “rights of God” plays an important role in inter-human relations by placing correlative duties upon human beings, which ensure that certain fundamental human rights are protected both in private individual interactions and in interactions between individuals and the State. For example there exists a “right of God” in the maintenance of justice in all human interactions as enjoined in the Qur’an as follows:

“God commands you to render back trusts to those to whom they are due, and when you judge between people that you judge with justice...”<sup>74</sup>.

This injunction is binding on the whole of humanity, individually and collectively. In it is a “right of God” that justice be maintained, and because the institutions of justice are State organs, there is a positive duty, particularly upon the State to maintain and administer justice. From this emanates the right to justice for every human being. Where this duty is not fulfilled, any person whose right to justice is thereby violated is entitled to claim redress even against the State. An example may be cited of an incident that occurred during the reign of Umar ibn al-Khatâb, the second Caliph of the early Islamic State in Medina. While Umar was Caliph of the State, he once declared that no man should pay more than 400 *dirhams* as dowry to any woman. A lady protested saying that this was an injustice against women, because the Qur’an permitted that a woman may be given a whole treasure (*kintâr*) as dowry,<sup>75</sup> thus the Caliph could not deny women of that right. The Caliph agreed that the woman was right. He thus went back to the pulpit and declared: “I had earlier prohibited you from giving more than 400 *dirhams* as dowry. Whoever wishes may give as much property as he likes”.<sup>76</sup> This illustrates the recognition, under Islamic law, of the right of individuals to challenge State legislation that infringe on their ascertained legal rights. Mahmood has thus pointed out that “Man’s right to protest against tyranny and injustice is given by Islam to all human beings – be it the state, the ruler or an individual howsoever highly placed who is guilty of such tyranny or injustice.”<sup>77</sup>

The “rights of God” are, therefore, so called because they emanate from duties that God

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<sup>72</sup> See e.g. al-Mawardi, *supra*, note 58 above.

<sup>73</sup> See Uthmân, M. F., (1402AH/1982CE) *supra*, note 43 above, p.7.

<sup>74</sup> Q 4:58.

<sup>75</sup> See Q 4:20.

<sup>76</sup> See e.g., Doi, A.R., *Shari'ah: The Islamic Law* (1984). p.164). See also Chapter 7 of al-Mâwardi, A., Trans. Yate, A., (1996) *supra*, note 58 above, pp.116-143 for further examples of Judicial Redress.

has placed, through His law, upon every individual as well as upon the State, and from which the whole community of the human race derives not only substantive rights but also protection against their violation. They are, in reality, more of a ruling (of God) than a right (of God).<sup>78</sup> In other words, they are public rights to which every individual is entitled for the mere fact of being human.<sup>79</sup> They are different from the private rights of individuals in that the duties that ensure them are placed in the State. The State has a duty to enforce them.<sup>80</sup> The “rights of humans”, on the other hand, are the individual rights or private rights which an individual has an option to or not to claim.

The *Mâlikî* jurists divided the “rights of humans” into three categories.<sup>81</sup> These may be classified as special, general and private rights. The special rights are the rights of individuals vis-à-vis God. They emanate from the fulfilment of the duty to worship Him. Thus the Prophet Muhammad asked Mu’âdh on one occasion whether he knew the right of God upon human beings and the right of human beings upon God. Mu’âdh answered, “God and His Apostle know best.” The Prophet Muhammad then said, “God’s right upon His servants is that they should worship Him alone and ascribe no partners to Him.” and “The right of the servants upon God, for doing that, is that He should not punish them.”<sup>82</sup> This right is not a general right. It is a “special” right in the sense that, according to Islamic belief, it is granted only to those who fulfil the duty of worshipping God.

The general rights are the rights that ensure the well being of every human being within the State. They are inherent in human nature and come into being without any further evidence other than the fact of being created as a human being by God. Some Muslim scholars sometimes describe them as “*al-huqûq al-fitriyyah*” that is “natural rights”, because they arise without any special or legal undertaking other than the natural fact of being human.<sup>83</sup> The private rights are the rights between individuals such as contractual rights.

Human rights can thus emanate in Islamic law either from the “rights of God” or the “rights of humans” or a combination of both. This does not practically allocate specific rights to God and others to human beings, but rather follows a religio-legal approach of

<sup>77</sup> Mahmood, T., “The Islamic Law on Human Rights” (1984) 4 *Islamic and Comparative Law Quarterly*, p.32 at 40.

<sup>78</sup> See Kamali, M.H., (1993) *supra*, note 29 above, p.348.

<sup>79</sup> See e.g. Ibn Malik, I.A., *Sharh al-Manâr al-Anwâr* (Arabic) (1308AH) p.886; and Uthmân, M.F., (1982CE) *supra*, note 43 above, p.29.

<sup>80</sup> See Kamali, M.H., (1993) *supra*, 29 above, p. 350.

<sup>81</sup> See e.g. Tamûm, M., *supra*, note 32 above, pp.61-62.

<sup>82</sup> Reported by al-Bukhari, See e.g. Khan, M.M., (Trans.) *Sahih al-Bukhari – Arabic-English Ed.* (1997) Vol.4, p. 80, Hadith No. 2856. See also al-Shâtibi, A.I., *al-Muwâfaqât* (Arabic) (1997), Vol.2 p.538ff.

<sup>83</sup> See e.g. Ibn Nujaym, *supra*, note 32 above.; Kamali, M.H., (1993) *supra*, note 29 above, pp.346-347; Abû Sinnah, A.F., “Nazariyyah al-Haqq” in ‘Uwaydah, M.T., *al-Fiqh al-Islâmî Asâs al-Tashrî* (1391AH). The Prophet Muhammad said in one Tradition that: “every child is born in a pristine natural state of Islam....” .

ensuring a non-compromise of the rights that every person is entitled to enjoy as a human being. Thus the rights categorised as “rights of God” cannot be waived. They are mandatory by the *Sharī’ah*. They are public rights which the State has either a positive or negative obligation to ensure their fulfilment. Their being attached to God may be seen as a sort of built-in element to ensure the full enjoyment, by human beings, of the inherent rights conferred on them by God, from Whose sanctions, according to Islamic beliefs, none can escape, for the violation of those rights, which in essence will amount to not fulfilling an obligation to God. There is thus the view that every right has an element of “right of God” in order to ensure its fulfilment.<sup>84</sup> In the opinion of al-Qarāfi, a *Mālikī* jurist of the thirteenth century, the whole of the *Sharī’ah* is the “right of God” which must be fulfilled because all rights and obligations are derived from His command.<sup>85</sup> And thus since the State must govern within the provisions of the *Sharī’ah*, the rights of individuals become guaranteed. It is in that context that Brohi has observed as follows:

“The perspective of Islam on (human rights) is theocentric - God-conscious. ... the strategy of Islam is to emphasize the supreme importance of our respect for human rights and fundamental freedom as an aspect of the quality of religious consciousness that it claims to foster in the heart, mind and soul of its followers. The perspective is “theocentric” through and through... Man acknowledges the rights of his fellow men because this is a duty imposed on him by the religious law to obey God and the Prophet and those who are constituted as authority to conduct the affairs of state. In every thing that a believer does his primary nexus is with his Maker, and it is through Him that he acknowledges his relationship with the rest of his fellowmen as even with the rest of creation.”<sup>86</sup>

The theocentric element operates as a factor for the achievement of the well being of humans and the enjoyment of their human rights under Islamic law and not as an obstruction to it. This would however depend greatly upon (and envisages) compliance with the *Sharī’ah* by both the rulers and the ruled. The pertinent question here is: What happens where the ruling authority decides to govern contrary to the provisions of the *Sharī’ah* and denies the guarantee of human rights and welfare? Will such ruling authority be left accountable to God only, perhaps in the hereafter? This concerns the issue of accountability of government and the right of the people to criticise or challenge the abuse of power by rulers. We will examine that later below under the section on the State and the enforcement of human rights in Islamic law.<sup>87</sup>

<sup>84</sup> See e.g. Tamûm, M., *supra*, note 32 above, p.80.

<sup>85</sup> See Al-Qarāfi, S., *Kitāb al-Furūq* (Arabic)(1346AH) Vol.1 p.104.

<sup>86</sup> Brohi, A.K., “Islam and Human Rights” in Gauher, A., (ed.) *The Challenge of Islam* (1980) pp.179-181.

<sup>87</sup> See page 63 below.

## HUMAN DIGNITY AS BASIS FOR HUMAN RIGHTS IN ISLAMIC LAW

As earlier analysed in Chapter 2, human dignity is the principal normative concept underlying the idea of human rights.<sup>88</sup> It finds acceptance in both religious and secular thought and is thus an important common ground factor in the international human rights discourse. Islam strongly acknowledges the dignity of human beings and Islamic legal theory promotes its preservation and enhancement. The Qur'an emphasises in very clear terms that God created humans "in the best of moulds"<sup>89</sup>, honoured them and also conferred special favours on them.<sup>90</sup> The very narration of the creation of Adam, his designation as the vicegerent of God on earth and his elevation even above the angels, indicate the worth of the human being in Islamic teachings.<sup>91</sup> The human being is considered as the "king" of the cosmos and God has granted him the intellect and all other faculties that enable him to maintain that esteemed position. Human dignity, according to Islamic teachings, is God-granted and is inherent in all human beings from conception to death. It cannot be taken away by any individual or institution.<sup>92</sup> That is why some rights attach even to the unborn child as well as the dead in Islamic law.<sup>93</sup> For example, the unborn child has, *inter alia*, a right to life and a right to legitimacy<sup>94</sup> while the dead has a right not to be mutilated and to be buried decently and quickly.<sup>95</sup> Islamic law thus prohibits the violation of human dignity both in life and in death.

An important aspect of human dignity in Islam is, as earlier stated, freedom from worship of any other being except God. This does not only reflect a theocentric characteristic, but also illustrates that if Man is considered as the "king" of the cosmos and the most dignified of all creatures, then it becomes most undignified of him to subdue himself to any other creature. Not to any other non-human creature because he is more dignified than it and not even to any other human being because they are equal. Man is only expected to deal in a righteous manner with his fellow humans and all other creatures, but not

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<sup>88</sup> See p. 8 above.

<sup>89</sup> See Q 95:4.

<sup>90</sup> See Q 17:70.

<sup>91</sup> See Q 2:30-35.

<sup>92</sup> See e.g. 4<sup>th</sup> and 5<sup>th</sup> preambular paragraphs of the Universal Islamic Declaration of Human Rights adopted by the Islamic Council of Europe on 19<sup>th</sup> September 1981.

<sup>93</sup> c.f. Mayer, A.E., (1999) *supra*, note 13 above, pp.60-61 (argues that "It is hard to see how conventional "right" can be involved, since the beneficiaries are ... dead..(and) helpless to vindicate the "right" that is being afforded them). See also Belliotti, R., "Do Dead Human Beings Have Rights?" (1979) 60 *Personalist*, pp.201-210.

<sup>94</sup> Abortion is generally prohibited under Islamic law except for a few recognised valid reasons such as when the life of the mother is endangered. See e.g. Omran, A. R., *Family Planning in the Legacy of Islam* (1992) pp. 8-9.

<sup>95</sup> See e.g. Maududi, A.A., (1993) *supra*, note 43 above, pp.37-38. See also Art. 4 of the OIC Cairo Declaration on Human Rights in Islam, which provides that: "Every human being is entitled to the inviolability and protection of his good name and honour *during his lifetime and after his death*. The State and society shall protect his remains and burial place." (emphasis added).

to subdue himself to them. He subjugates himself only in worship to his Creator. Such a person accumulates both the general rights as a human being and the special rights for fulfilling the duty of worshipping God.<sup>96</sup> That is because Islam recognises that the inherent dignity conferred upon human beings by God can be further enhanced by each person through God-consciousness and good deeds. This is evidenced in the Qur'anic statement that: "...Verily the most honoured of you in sight of God is the one who is most God-conscious and righteous".<sup>97</sup>

Islam also recognises that every human being is born free, thus no one may be coerced nor shall life be unnecessarily regimented in any way to deprive the legitimate liberty of human beings.<sup>98</sup> There are thus repeated prohibitions against persecution, aggression and violations of the inherent human dignity in both the Qur'an and *Sunnah*. At the same time every person is encouraged to develop himself and seek perfection through piety and righteousness in order to enhance the inherent dignity. The question of slavery under Islamic law becomes relevant here. Slavery was widely practised in Arabia as well as other parts of the world before the advent of Islam in the seventh century. Despite the heinous nature of the institution it was a big source of labour and income in both the East and West. Slaves were treated in most inhuman and undignified fashion. No philosophy that promoted the concept of human dignity could have reasonably been insensitive to the plight of slaves in those periods. Thus in the spirit of reformation, both the Qur'an and *Sunnah* greatly encouraged and recommended the manumission and humane treatment of slaves.<sup>99</sup> The Prophet and his companions also set many examples in the liberation of slaves.<sup>100</sup> Although there is no direct injunction on its abolition, the *Shari'ah* also contains no provisions that authorises or supports slavery. There is consensus among Islamic jurists that freeing slaves is a recommended act, indeed it is the first of the options prescribed in the Qur'an as expiation for certain sins.<sup>101</sup> While some scholars view that those steps pointed towards abolition, and slavery should therefore be considered as abolished today under Islamic law<sup>102</sup>, others submit the contrary. For instance, while Tabandeh acknowledged those humane steps taken by Islam towards slaves, he still argued that "should the legal condition for the enslavement of anyone

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<sup>96</sup> See page 50 above.

<sup>97</sup> See Q49:13.

<sup>98</sup> The second Caliph, Umar is reported to have summoned one of his governors whose son assaulted a subject. Umar reproached the governor saying: "Do you want to enslave people when their mothers have given birth to them as free individuals?" See e.g. Uthman, M.F., (1402AH/1982CE) *supra*, note 32 above p.8.

<sup>99</sup> See e.g. Q 2:177, Q9:60, Q 4:92, Q 24:33, Q 90:13, Q 58:3.

<sup>100</sup> See e.g. Maududi, (1993) *supra*, note 43 above, p. 20.

<sup>101</sup> See e.g. Q4:92 and Q58:3.

<sup>102</sup> See e.g. Malekian, F., *The Concept of Islamic International Criminal Law: A Comparative Study* (1994) pp.83-89; and al-Zuhayli, W., (1997) *supra*, note 33 above, Vol.3, pp.2019-20.

be proven... Islam would be bound to recognise such slavery as legal, even though recommending the freeing of the person...".<sup>103</sup> An-Na'im has argued against that opinion, but also made reference to the continual existence of rules on slavery in the traditional books of Islamic jurisprudence and asserted that this is a fundamental human rights issue for Muslims until slavery is abolished in Islamic law.<sup>104</sup>

It is clear to see however that the rules in the traditional books of Islamic jurisprudence do not sanction or advocate slavery, they are mostly in respect of manumission and other ameliorating rules in the treatment of slaves. Those rules regulating the affairs of slaves found in traditional Islamic jurisprudence must thus be viewed inter-temporally. The problem of slavery could not have been solved radically in isolation of the prevailing social circumstances of that period. While Islam had, on one hand, endured the practice due to social factors of that period, it simultaneously promoted its gradual abolition on the other. Today most Muslim countries have ratified international instruments abolishing slavery or slavery-like practices, and no Muslim country will formally admit the practice of slavery. There is thus general consensus in Muslim States today against slavery. This can be adopted into a legal consensus (*ijmâ'*) on its abolition in Islamic law. *Ijmâ'* (legal consensus) constitutes a strong source of law in the absence of a direct text of the Qur'an or the *Sunnah* on any issue. It is appreciated that traditionally, *ijmâ'* was restricted to the consensus of the legists (*mujtahidûn*), meaning traditional Islamic theologians.<sup>105</sup> That view is considered too restrictive for contemporary needs, because contemporary international legal and policy-making involve complex techniques and considerations beyond such restrictive consensus.<sup>106</sup> There can be no higher consensus on the abolition of slavery than this State practice of all Muslim States, none of which will officially sanction the practice of slavery today within its jurisdiction. This is strengthened by the fact that slavery contradicts the great emphasis laid by Islam on serving God alone as earlier addressed.<sup>107</sup> All human beings are referred to as servants or slaves (*ibâd*) of God and can thus not be the slaves of other human beings at the same time. Thus the doctrine of the overall objective of the *Sharî'ah* (*maqâsid al-Sharî'ah*)<sup>108</sup> strongly supports the consensus on the total abolition of slavery under Islamic law.<sup>109</sup>

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<sup>103</sup> Tabandeh, S., *Muslim Commentary on the Universal Declaration of Human Rights* (1970) p.27.

<sup>104</sup> An-Na'im, A.A., *Towards An Islamic Reformation*, (1990) p.172-175.

<sup>105</sup> See al-Âmidî, S.A., *al-Ihkâm fî Usûl al-Ahkâm* (Arabic) (1402AH), Vol.1., p.196 and 226, See also Kamali, M.H., (1991) *supra*, note 37 above, pp.168-194, particularly p.173.

<sup>106</sup> See AbuSulayman, A.A. (1993), *supra*, note 20 above, p.86.

<sup>107</sup> See p. 52-53 above.

<sup>108</sup> See page 62 below.

<sup>109</sup> See generally, B.K. Freamon, "Slavery, Freedom, and the Doctrine of Consensus in Islamic Jurisprudence", (1998) 11



## LANGUAGE OF RIGHTS IN ISLAMIC LAW

The *Sharî'ah* as the primary source of Islamic law provides the textual authority and legitimising force for human rights principles in Islamic law. The *Sharî'ah* text may sometimes be declarative as in the following Qur'anic verse:

“O mankind We created you from a single pair of a male and a female, and made you into nations and tribes that you may know each other. Verily the most honoured of you in the sight of God is the one who is most righteous.”<sup>110</sup>

This statement expresses the concept of equality of human beings and thus from it arises the general right of equality for all. The text can also be a positive assertion clearly indicating the existence of a right as in the Qur'anic verse: “...And women shall have rights similar to the rights against them ...”.<sup>111</sup> The language of *Sharî'ah* texts is however often an imperative injunction in form of prescription or prohibition imposing positive or negative obligations on one hand, and correlatively conferring an array of rights on the other hand. For example the Qur'an provides that: “...Take not life, which God has made sacred except by way of justice and law...”.<sup>112</sup> From this injunction there is a duty not to take life arbitrarily, and from it arises the correlative right to life for every person. Also from the Qur'anic injunction that says: “.... Enter not houses other than your own until you have asked permission...”<sup>113</sup> there is a duty not to intrude into other person's privacy, and from it arises the correlative right to privacy for every person.

The greater use of imperative injunctions in the Islamic legal sources is often argued as indicating the notion of duties and not that of rights in Islamic law.<sup>114</sup> Such argument can be justifiable only from a one-sided interpretation of the injunctions. It is easy to understand that while the injunctions impose obligations on one part they at the same time convey rights on the other part as correlates of the duties they impose. The injunctions are legal rulings that create duties and corresponding rights. Expressing rights through the language of duties may be a characteristic of Islamic law but it is not peculiar to it. One observes that even the language of international human rights instruments is not couched exclusively in terms of “right to”. The language of duties in form of imperative injunctions – “No one shall be” is

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*Harvard Human Rights Journal*, p.1; and also Hassan, R., “On Human Rights and the Qur'anic Perspective” in Swidler, A, (ed.) *Human Rights in Religious Traditions* (1982)p.51 at 58-59.

<sup>110</sup> Q 49:13.

<sup>111</sup> Q 2:228.

<sup>112</sup> Q 6:151 See also Q17:33.

<sup>113</sup> Q24:27.

<sup>114</sup> See e.g. Donnelly, J., “Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights” (1982) 76 *American Political Science Review*, No. 2, p.303 at 306.

also used in nearly all the international human rights documents. For example while the European Convention provides in its Article 8(1) that “Everyone has the right to respect for his private and family life, his home and correspondence”, the ICCPR provides for the same right in its Article 17(1) through an imperative injunction that “No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence...”. It will also be observed that nearly all the international human rights instruments express the very important and fundamental right to freedom from torture in form of an imperative injunction – “No one shall be subjected to torture...”<sup>115</sup> Expressing human rights either in the language of rights or that of duties is like presenting a coin from either of its two sides. Each of the two sides of a coin is indispensable to render it a legal tender. The same applies to human rights, because they are claim-rights, they can not exist without a correlative positive or negative duty.<sup>116</sup> It is sometimes also argued that it is the expression of human rights positively in the language of rights that renders them claimable. This is not necessarily so. The need to claim rights arises only when the rights are denied or violated. Therefore even where the rights are expressed in the language of duties a claim can still be brought in form of an action for restraint in case of violation and for performance in case of denial, provided that avenues for making such claims are available. Thus whether human rights are expressed in the language of obligations upon rulers or in the language of rights for the ruled, it is only a matter of form and not of substance. In fact no human right can be practically operative except it is first understood as an obligation. If human rights are viewed through a strict dichotomy of right and duty they cannot be sustained on the basis of rights alone. Imagining that human rights are argued monolingually with no notion of duty brought into it at all, States could then argue that since human rights are concerned only with rights and not at all with duties then there is no obligation of duty upon them to respect those rights. Human rights would certainly become empty rights in such situation.

Illustrated alternatively, if the concepts of duty and right operated separately, the fulfilment of duties will automatically guarantee rights but claiming of rights does not automatically guarantee rights. Conversely, the non-fulfilment of duties automatically denies rights but the non-claiming of rights makes no difference. This indicates the necessary correlation of rights and duties and even the importance of duties for the guarantee of rights. Understanding human rights in the context of duties “does not affect the basic premise of the human rights idea” in any way, it rather instils into it a notion of responsibility that enhances

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<sup>115</sup> See Art. 3 ECPHR; Art. 7 ICCPR; Art. 5(2) ACHR; Art. 5 ACHPR says “...torture...shall be prohibited”.

<sup>116</sup> See e.g. Jones, P., *Rights* (1994) p.14-15.

respect for the concept.<sup>117</sup> Conceptually, there is thus no practical difference between the expression “Enter not houses other than your own until you have asked permission”<sup>118</sup> and “Everyone has the right to respect for his private and family (and) his home...”<sup>119</sup>. Whatever difference may be associated with them is merely semantic and theoretic. Muslim scholars and jurists thus identify that Islamic law confers an array of rights through many imperative injunctions of the Qur’an and the *Sunnah*.<sup>120</sup>

The existence of rights is itself only one aspect of ensuring human rights, the other equally important aspect is the State, upon which is the major obligation of ensuring and protecting the rights. The State has a dual obligation in that respect. It must itself respect human rights by, for instance, not using its powers to violate the rights of any person. It also has a further obligation of ensuring the respect of human dignity amongst individuals within society. That is, it must ensure both a vertical and horizontal observation of human rights. Zaidan has thus observed rightly that the State is the most important means to facilitate the enjoyment of human rights, and it has a duty to do so under Islamic law.<sup>121</sup> The Islamic governmental policy (*siyâsah shar‘iyyah*) formulated by the early jurists thus also imposed some obligations upon the State, which ensures the promotion and protection of human rights, as shown below.<sup>122</sup>

### THE STATE AND THE ENFORCEMENT OF HUMAN RIGHTS IN ISLAMIC LAW

The scope of the *Shari‘ah* recognises the institution of State and the importance of governance. Qur’anic regulations relating to the administration of justice, the duties of ensuring public order, welfare of humanity, maintenance of law and international relations, e.t.c., cannot be implemented without the power of a State or governmental authority. Thus the maxim that: “God achieves through the authority of the State that which is not achieved through the Qur’an”.<sup>123</sup> This indicates the recognition by Islamic jurists of the importance of the authority of State in the implementation or enforcement of law. However, sovereignty in Islamic law is seen as belonging to God, so the State is established on the basis of

<sup>117</sup> See e.g. Burgers, H.J., “The Function of Human Rights as Individual and Collective Rights” in Berting, J., *et al* (eds.) *Human Rights in a Pluralistic World, Individuals and Collectivities* (1990) p.63 at 68.

<sup>118</sup> Q 24:27.

<sup>119</sup> Art. 8(1) European Convention.

<sup>120</sup> See e.g. Chaudhry, M.S., *Islam’s Charter of Fundamental Rights and Civil Liberties* (1995).

<sup>121</sup> See Zaidan, A.K., *Individual and the State in Islamic Law* (1982) p.16-17.

<sup>122</sup> See e.g. Weeramantry, C.G., *Islamic Jurisprudence : An International Perspective* (1988), p.120 and Kamali, M.H., “Siyâsah Shar‘iyyah or the Policies of Islamic Government (1989) 6 *The American Journal of Islamic Social Sciences*, No.1, 59-80.

<sup>123</sup> See e.g. Zaydân, A.K., *al-Fard wa al-Dawlah fi al-Shari‘ah al-Islâmiyyah*, (Arabic) (1970) p.12. This maxim is ascribed

representation (*khilâfah*). To prevent abuse of State authority, Islamic law defines the purpose for which the State or the institution of governance is established. The main purpose of the State under Islamic law, as defined by the early Islamic jurists, is to enforce the principles of *Sharî'ah* in a manner that ensures the well being of humanity. The individual human being is a very important aspect of it, and the fullest “enjoyment of his rights is considered to be the greatest safeguard for the survival” of the State.<sup>124</sup> The Islamic State does not exist merely to maintain law and order, or to protect its territory. Its viability depends also upon its ability to achieve social justice, promote public good and balance the relationship between individuals, society and government. Government must not become absolute and individual freedom must not threaten the interest of society nor *vice versa*. It is the duty of the State to enhance human dignity and alleviate conditions that hinder the guarantee of human rights.<sup>125</sup>

Manifestations of human rights observance in the early Islamic State are well documented in the leadership chronicles of Prophet Muhammad and the rightly guided Caliphs after him. The protection of rights as a duty of the State was reflected, for example, in the inaugural speech of the first Caliph, Abu Bakr, in which he was reported to have stated, *inter alia*,

“O Men! Here I have been assigned the job of being a ruler over you while I am not the best among you. If I do well in my job, help me. If I do wrong, redress me. ... The weak shall be strong in my eyes until I restore to them their lost rights, and the strong shall be weak in my eye until I have restored the rights of the weak from them... Obey me as long as I obey God and His Prophet. But if I disobey God’s command or His Prophet’s, then no obedience is incumbent upon you...”<sup>126</sup>

The Caliph appointed governors who ruled and performed all functions of State over their respective provinces, but they were directly responsible to the Caliph for any violations of public law or people’s rights. For example the forth Caliph, Ali ibn Abî Tâlib is recorded to have advised Malik ibn Ashtar when he appointed the later as a governor to Egypt in the following words:

“...know Malik, that I am sending you as a governor to a country which had seen many governments before,... you must be kind compassionate and love your subjects,... you must never forget that if you are a ruler over them, then the Caliph is a ruler over you and God is the Supreme Lord over the Caliph...”<sup>127</sup>

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to Uthmân, the 3rd Caliph of the early Islamic State in Medina.

<sup>124</sup> See Weeramantry, C.G., (1988) *supra*, note 122 above, p.120.

<sup>125</sup> See Said, A. A., “Precepts and Practice of Human Rights in Islam” (1979) 1 *Universal Human Rights*, No.1, pp. 68-70.

<sup>126</sup> See Haykal, M.H., *The Life of Muhammad* (1983) pp.510-511.

<sup>127</sup> See e.g. Imam Ali Ibn Abu Tâlib, *Nahjul Balagha, Peak of Eloquence*, Trans. Reza, S.A., (1984) Letter No. 53, p.534.

The Caliph could therefore receive petitions from people throughout the Islamic Empire against any governor or his officers with respect to any injustice or violation of rights.

The Islamic theory of State traditionally envisaged that the State will, due to the assumed piety of those in authority, discharge its obligation under the *Sharī'ah* and thus the individual will automatically enjoy his guaranteed rights under Islamic law without the need to claim for it. There was an assumption that rulers would always act in the best interests of both the individual and the community. The first Islamic State in Medina under the leadership of Prophet Muhammad is often cited as a model of the Islamic State in which the fulfilment of State obligations under the *Sharī'ah* guaranteed the enjoyment of human rights without the need to demand for it. Human rights were observed as part of the Islamic legal and religious ideals. Being a Prophet of God, Muhammad combined in his person all the qualities necessary to fulfil those purposes. He practicalised the ideal State envisaged by Islam in which the rights of individuals were neither denied nor violated and wherein existed no conflict between the individual and the State. Reference is also usually made to the four rightly guided Caliphs after him as having largely followed his precedents in that respect. However, later political events that followed demonstrated the need for some control on rulers to prevent misuse of State power to the detriment of human welfare. For instance al-Māwardī had noted that the period of the four Caliphs was a period when “men... willingly allowed themselves to be guided to the truth and ... desisted from wrong action by mere admonition”, but that after the Caliphate of Ali, “people would openly act unjustly towards each other and try to get the better of each other”, and also “injustice of (public) officers and the oppressive conduct of the haughty increased to such a point that only the most powerful authority and most strict of commands could restrain them”.<sup>128</sup>

Between 661CE and 850CE during the Umayyad and Abassid dynasties, many political and social developments occurred within the Islamic State that manifested a *lacuna* between ideals of the law and realities of the time. Cases of violation of the rights of individuals became frequent and the judges (*qâdis*) could also not deal effectively with claims against high and powerful officials of State. A complaints tribunal or court of grievances called the *mazâlim* was formally instituted by the Abâssid Caliphate in an effort, *inter alia*, to ensure a practical and effective protection of the rights of individuals. The *mazâlim* tribunal was

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<sup>128</sup> See e.g. al-Māwardī, A., Trans. Yate, A., (1996) *supra*, note 58 above pp. 117-118. The four Caliphs that assumed leadership of the Islamic community in order of succession after Prophet Muhammad (i.e. Abubakr, Umar, Uthmân and Ali) are referred to by *Sunni* Muslims as “the rightly guided Caliphs”. This is from the belief that being very close companions of the Prophet during his lifetime and also by their level of sincerity of faith and piety, were rightly guided by God during their respective Caliphate of the Islamic community. The Prophet had also used the phrase “the rightly guided successors after me” in one of his Sayings.

different from normal *Shari'ah* courts. The *Shari'ah* courts are normal everyday judicial courts that adjudicated on both civil and criminal matters while the *mazâlim* tribunal was a special tribunal constituted to, *inter alia*, consider complaints against public officers including the Caliph himself. Complaints were addressed through it for the attention of the Caliph who could personally look into a complaint or appoint an independent person to look into complaints against public officers. The *mazâlim* tribunal sought to safeguard the rights of individuals against the excesses of State officials. It was meant to “ensure government under the rule of law in that abuse of power by influential persons and state dignitaries did not escape the law due merely to their capacity at resisting it...(and) was first and foremost an administrative tribunal which looked into disputes between the citizen and state.”<sup>129</sup> It was usually constituted under a “Complaint’s Officer” (*sâhib al-mazâlim*) instead of a judge (*qâdi*) as in the normal *Shari'ah* courts and with a “special administrative-cum-constitutional jurisdiction” to hear petitions and enquire into complaints against officials or agents of the State.<sup>130</sup> Tyan has observed that “the mazalim procedure was applied to all torts, caused not only by an individual, a group or an administrative body to another individual, but many other diverse means, *when the victim is an individual*”<sup>131</sup>. It did not apply only to violations of “the subjective right of an individual, but instances of erroneous or faulty application of the objective rules of law, either in specific cases or in a general way, such as the bad administration of a foundation or negligence in the observance of municipal police regulations.”<sup>132</sup> Its jurisdiction was inter-provincial and any violations by governors of the provinces or their agents against individuals “were scrutinised and corrected” through it.<sup>133</sup> Although the *mazâlim* tribunal started more or less as the Caliphs’ Court, a *curia regis* of the time, it was ultimately separated from the office of the Caliph and put under the supervision of the Complaints Officer (*sâhib al-mazâlim*). It combined under its jurisdiction, the justice of the judge and the power of the sovereign.<sup>134</sup>

Kamali traced the origin of the *mazâlim* procedure to the time of Prophet Muhammad when he was reported to have appointed one Rashid Ibn Abdullah to adjudicate complaints against government officials.<sup>135</sup> It was however formally institutionalised during the Abassid

<sup>129</sup> See Kamali, M.H., “Appellate Review and Judicial Independence in Islamic Law”, in Mallat, C., *Islam and Public Law* (1993) p. 49 at 62.

<sup>130</sup> See e.g. Qadri, A.A., (1986) *supra*, note 42 above, pp.488-492 and also Coulson, N.J., *A History of Islamic Law* (1964)p. 122 and 128-129.

<sup>131</sup> See Tyan, E., “Judicial Organisation” in Khadduri, M., and Liebesny. H.J., *Law in the Middle East* (1955) p.235 at 263 (emphasis added).

<sup>132</sup> *ibid.*

<sup>133</sup> See Qadri, (1986) *supra*, note 42 above, pp.488-492.

<sup>134</sup> See Kamali, M.H., (1993) *supra*, note 129 above.

<sup>135</sup> *ibid.* See also Qadri, (1986) *supra*, note 42 above, p.488.

caliphate after which the procedure passed on to the later caliphates. It was revived in the eighteenth century as an attempt to protect people from the excesses of military officers and the police and was one of the influences that led to the first proposal in 1879 and the eventual establishment of the Egyptian Constitutional Court in 1946.<sup>136</sup> Although the *mazâlim* tribunal would be considered in Western legal perspectives as a domestic administrative tribunal or an Ombudsman, its jurisdiction covered in the light of those times, the purpose for which modern human rights tribunals are created.<sup>137</sup> The *mazâlim* procedure demonstrated the recognition of a formal complaints system under Islamic law as early as the eighth century to ensure the protection of the rights of individuals against State violation. It had powers to take binding decisions against public officers and redress any abuse of rights against individuals where proved.

Around the eleventh century the political and social developments further motivated the evolution of another “doctrine of public law which rationalised the place which the Shari’ah had in fact come to occupy in the organisation of the Islamic state.”<sup>138</sup> Governmental policy was modified through legal scholarship leading to the Islamic political doctrine called *siyâsah shar’iyyah* (legitimate governmental policy) to address the common principles of good government. The doctrine was intended to introduce some equity between ideals of law and reality of life on the principle that the overriding duty of the ruler was to protect public welfare, which in particular circumstances of time and place may prevent a strict and hard-line interpretation of the *Sharî’ah*.<sup>139</sup> The need to clearly identify the purposes of the State as a political entity thus became quite imperative. The Islamic legal scholars of the eleventh century were able to identify that the State as a political entity was instituted to fulfil six main purposes, i.e. protection of life, family, intellect, religion, property and elimination of corruption.<sup>140</sup> These are sometimes also classified as the indispensable aspects (*darûriyyât*) of public welfare, and their non-fulfilment by the State as capable of jeopardising normal social order.<sup>141</sup> The political policy of State must therefore be directed essentially to achieve those purposes.

<sup>136</sup> See Gibb, H.A.R., and Bowen, H., *Islamic Society and the West* (1957) Vol.1, Part 2, p.130 and generally Hill, E., “Majlis al-Dawla: The Administrative Courts of Egypt and Administrative Law” in Mallat, C., (ed.) (1993) *supra*, note 129 above, pp.207-228.

<sup>137</sup> Note that the term “*Mazâlim*” is a derivative of the Arabic verb “*Zalama*” meaning “treated unjustly” or “tyrannised”. The *Mazâlim* was thus a complaint arena for a person oppressed or tyrannised.

<sup>138</sup> Coulson, N.J., (1964) *supra*, note 130 above, p.129.

<sup>139</sup> See e.g. Coulson, N.J., *Conflicts and Tension in Islamic Jurisprudence* (1969) p.68.

<sup>140</sup> See e.g. Ibn Farhûn, M., *Tabsîrât al-Hukkâm* (Arabic) (1937) Vol.2, p.133. See also Coulson, N.J., “The State and the Individual in Islamic Law” (1957) 6 *International and Comparative Law Quarterly*, p.49 at 51.

<sup>141</sup> See Kamali, M.H., (1993) *supra*, note 29 above, p.362. He indicated that a minority view adds protection of dignity “*ird*” to this list of essential interests, but the majority view merge protection of dignity within the protection of life.

According to Ibn Qayyim al-Jawziyyah, a *Hanbalî* jurist of the fourteenth century, this includes all incidental measures that ensures the well-being of the people and removes harm from them even if no express authority is found for such action in the *Sharî'ah*.<sup>142</sup> This finds support in the principle of the overall objective of the *Sharî'ah* (*maqâsid al-Sharî'ah*). al-Shâtibi, another fourteenth century jurist but of the *Mâlîki* school, emphasised the need to always put into consideration the overall objective of the *Sharî'ah* in the application and interpretation of the law. This he also identified as "*maslahah*". He asserted that the overall objective of the *Sharî'ah* was to ensure welfare of human beings herenow and hereafter.<sup>143</sup> Since what constituted welfare could be so multifarious, al-Ghazâli gave a hierarchical classification of three levels. On the first level are those benefits (or rights) considered as indispensable (*darûriyyât*) which he identified as protection of life, family, property, intellect and religion as earlier mentioned. Because of their indispensability they must not only be promoted but also be protected against any threats. Some contemporary Muslim scholars equate these with fundamental rights.<sup>144</sup> On the second level are those considered as necessary benefits (*hâjiyyât*). These are supplementary to the first category and consist of those things, the neglect of which may cause hardship to life but do not lead to the collapse of society. The third level are those considered as improvement benefits (*tahsînîyyât*) and consist of those things, which improve and enhance life.<sup>145</sup> It was within the same period when the jurist al-Mâwardi first used the term "*huqûq Adamiyyîn*" (rights of humans) in his work on Islamic principles of government<sup>146</sup> that the Islamic legal theorists were also formulating these theories of categorising human welfare into indispensable, necessary and improvement benefits or rights. Although they were not using modern international human rights terminologies, they were certainly speculating human rights concepts. It must be stated however that the right of the individual to judicially challenge the State on the basis of those principles was not specifically provided for under the doctrines of traditional Islamic law. It was taken for granted that the State had a duty to fulfil them.

Although the principles of the overall objective of the *Sharî'ah* (*maqâsid al-Sharî'ah*) and that of welfare (*maslahah*) are also applicable to public interest to ensure the continued peaceful existence of the State, it will be a wrong interpretation of those principles to use

<sup>142</sup> Ibn Qayyim al-Jawziyyah, A.M., *al-Turuq al-Hukmiyyah Fî al-Siyâsah al-Shar'iyyah* (Arabic) (1961)p.16. See also Kamali, M.H., (1991) *supra*, note 37 above, p.271.

<sup>143</sup> See al-Shatibi, A.I., *al-Muwafaqât*, (1997), *supra*, note 82 above, Vol.2, pp.9 and 300.

<sup>144</sup> See Kamali, M.H., (1993) *supra*, note 29 above, p.362. See also Imârah, M., *Islâm wa Huqûq al-Insân: Darûrât Lâ Huqûq* (1989).

<sup>145</sup> See e.g. Kamali, M.H., (1991) *supra*, note 37 above, pp.271-272 and Hallaq, W., (1997), *supra*, note 37 above, pp.89-90.

<sup>146</sup> See page 47 above.



them as justification for the gross violation of the rights of individuals on the excuse of protecting the overall peaceful existence of the State. The presence of autocratic or despotic rules in Islamic history that have wrongly utilised the doctrines of *maslahah* or *siyâsah* on the excuse of public interest to deny rights of individuals is not an indication that these doctrines are meant to be so applied. The concept of public interest is actually meant for the benefit of members of the community and not for the sole and personal interest of rulers who often consider their own personal interest as the public interest. The concept of public interest or the community approach in Islamic law does not aim at rendering the individual totally defenceless.

Furthermore, it is also well established in Islamic legal theory that the fundamental principles underlying the *Shari'ah* are (i) Removal of difficulties (ii) Realisation of welfare and (iii) Realisation of universal justice,<sup>147</sup> which are all relevant postulates of human rights. The State therefore does not come into being as an end in itself but as a vehicle to ensure the well being of humanity. This perhaps explains why Islamic jurists identified as early as the eleventh century the important role of the State in the protection of human rights. They seemed quite conscious even at that early period that the well being of human beings was very much related to the issue of good governance and political justice. The political purposes of the State as identified by the jurists were elements that demanded political justice on the part of the State for the protection of the dignity of human beings. They are purposes that impose both negative and positive duties on the State and precursors to the protection of human rights. This brings us back to the issue of government accountability and the right of the people to challenge the abuse of authority and also demand redress for violation of rights raised earlier above.<sup>148</sup>

The Qur'anic verse that says: "O you believers! Obey God and obey the Apostle and the holders of authority amongst you..."<sup>149</sup> is often cited as evidence of absolutism of authority in Islamic law. So also is a Tradition of the Prophet Muhammad in which he is reported to have said "Obedience to me is obedience to God and obedience to the leader is obedience to me; Rebellion against me is rebellion against God and rebellion against the leader is rebellion against me".<sup>150</sup>

While it is true that the Islamic theory of State tended to have centred all authority in the

<sup>147</sup> See e.g. Qadri, (1986) *supra*, note 42 above, p.18 and Philips, A.A.B., *The Evolution of Fiqh*, (1996) pp.14-37.

<sup>148</sup> See page 51 above.

<sup>149</sup> Q 4:59.

<sup>150</sup> Reported by al-Bukhârî and Muslim. See e.g. Fazlul Karim, A.M., *Al-Hadis: An English Translation and Commentary of Mishkat-ul-Masabih with Arabic Text*, 3rd ed., Vol..2, (1994), pp.573-574, Hadith No.15.

Caliph on the assumption that he will act in the best interests of the people, yet the Caliph was not considered to be above the law. Siegman observed that “the early theory of the Caliphate provided for a “restrained” absolutism, for it contained both legal and moral restrictions to the ruler’s arbitrariness.” The Caliph, he continued, “was subject to the Law like any ordinary Muslim ... (h)owever, in the absence of specific procedures and institutions for the removal of an “illegal” ruler, the restraints conceived by the jurists proved worthless”.<sup>151</sup> The concluding part of that Qur’anic verse on obedience to authority actually instructs that “...and if you dispute on any affair, refer such to God and to the Apostle if you do believe in God and the Last Day; that is the best and most suitable for the final determination”.<sup>152</sup> That thus indicate that the order of obedience was by virtue of those in authority ruling according to the rules of the *Sharī’ah* itself. There is therefore no duty of obedience in violation of the *Sharī’ah*. It was the “fear and abhorrence of civil discord and *fitna* (strife)” that led the Islamic theologians and philosophers from the eleventh century onwards to adopt such views as: “Sixty years of tyranny are better than one hour of civil strife”<sup>153</sup>, and that “An evil doing and barbarous sultan (ruler), (who) can only with difficulty be deposed and (who) the attempt to depose ... would create unendurable strife, must of necessity be left in possession and obedience must be rendered to him...”.<sup>154</sup> The general rule however is that people have a right under Islamic law to challenge the abuse of power by rulers. This is known as “*naqd al-hâkim*” in Islamic law.<sup>155</sup> It is a fundamental Islamic political principle that entitles individuals to truthfully criticise and expose violations of ruling authorities even when this entails opposing the government. Individuals could also demand for redress. Taking further, this right forms part of the broader principle of maintaining social order (*hisbah*) and may thus be interpreted also as a “right of God” which thereby imposes a duty of challenging abuse of governmental authority.

Kamali quoting Khidr Husayn has observed that: “Islam made it an obligation of the community to monitor the conduct of the head of state and his officials with a view to rectifying those who deviate, and alerting those who might be neglecting the duties with which they are entrusted”.<sup>156</sup> There are many instances of the demonstration of this right by individuals during the period of the four rightly guided Caliphs. The incidence of the lady

<sup>151</sup> Siegman, H., “The State and the Individual in Sunni Islam” (1964) 54 *The Muslim World* p.14 at15.

<sup>152</sup> Q 4:59.

<sup>153</sup> See Coulson, N.J., (1957) *supra*, note 140 above at p.56.

<sup>154</sup> al-Ghazâlî, A. M., *Ihyâ’ ‘Ulûm al-Dîn*, Vol. II, (Arabic), p.124, English Trans. cited in Lambton, A.K.S., *State and Government in Medieval Islam*, (1981), p.116-117.

<sup>155</sup> See Kamali, M.H., *Freedom of Expression in Islam*, (1997), p.49.

<sup>156</sup> See Husayn M.H., *Naqd Kitâb al-Islâm wa Usûl al-Hukm* (Arabic) (1925) p.89 quoted by Kamali, M.H. (1997) *ibid*, p.52.

who protested against the declaration of Umar cited earlier above is still relevant here. Also, the inaugural address of the first Caliph Abubakr in which he encouraged the people to correct him whenever he goes wrong is an indication of this right.<sup>157</sup>

As observed by Seigman no specific procedural rules and institutions existed for the removal of barbaric rulers in the traditional theory of the Caliphate, but the same was not completely true for bringing complaints on violation of rights against the ruling authorities. The *mazâlim* institution earlier discussed<sup>158</sup> was meant to, *inter alia*, serve the later purpose. Whether the *mazâlim* was an effective institution for that purpose is a very relative and subjective question. While it may not have been as sophisticated or independent as would be expected for a twenty-first century notion of an institution for the enforcement of human rights, the fact that the need for such an institution was recognised and that it was established so early in the history of Islam confirms the concept of human rights both in the theory and practice of Islamic law.

#### BALANCE BETWEEN PUBLIC ORDER AND INDIVIDUAL RIGHTS

It is often argued that the material aim of Islamic law is public or societal regulation and thus it contradicts the individualistic nature of human rights. Islam views human dignity as a virtue in itself and thus the promotion of virtue is considered an important aspect of enhancing human dignity. The Islamic legal doctrine of *hisbah* (public order or societal vigilance) enjoins the promotion of virtues and prohibition of vices (*amr bi al-ma'rûf wa nahy an al-munkar*). It is a social responsibility placed on both the individual and the State.

Under Islamic law the *Shari'ah* indicates necessary virtues that must prevail in human society. The Qur'anic terminology for virtue in that regard is *ma'rûf* which literally means "well known" or "universally accepted". Virtue as dictated by the *Shari'ah* is thus projected as a universally recognisable value. Maududi has argued in that regard that human conscience has some sort of "uniform verdict in favour of certain moral qualities as being good and declared others as bad".<sup>159</sup> Renteln also expressed a similar view in her cross-cultural study on human rights by maintaining that values exist which all cultures share.<sup>160</sup> Although any individual has the free will either to enhance his inherent dignity or to debase it, the State also has a duty under Islamic law to ensure that no individual debases himself in

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<sup>157</sup> See Kamali, M.H., (1997) *ibid.*, pp.49-57 for further examples.

<sup>158</sup> See p. 59-61 above.

<sup>159</sup> See Maududi, A.A. *Islamic Way of Life* (1980) pp.25-28.

<sup>160</sup> See Renteln, R. D., *International Human Rights: Universalism Versus Relativism* (1990) p.86.

a manner that tarnishes human dignity generally. The State itself must not act in a manner that violates the dignity of any one. The *Sharî'ah* thus aims at preserving and enhancing human dignity through a balance between liberty of the individual on one hand and protection of the general social order on the other. This balance, where properly maintained, prevents an unqualified defence of individual rights that may have negative consequences on other individuals and on society at large. The need to balance between liberties and social responsibilities has been reiterated by the Inter Action Council<sup>161</sup> in its proposal for a "Universal Declaration of Human Responsibilities" submitted to the UN in 1997 as follows:

"Without a proper balance, unrestricted freedom is as dangerous as imposed social responsibility. Great social injustices have resulted from extreme economic freedom and capitalist greed, while at the same time cruel oppression of people's basic liberties has been justified in the name of society's interests or communist ideals. Either extreme is undesirable. At present, with the disappearance of the East-West conflict and the end of the Cold War, humankind seems closer to the desired balance between freedom and responsibility. We have struggled for freedom and rights. It is now time to foster responsibility and human obligations."<sup>162</sup>

The *Sharî'ah* should therefore not be interpreted as being anti-individual or de-emphasising the position of the individual. It neither over-stresses the individual above the State nor the State above the individual. One observes that the legal texts which assert human dignity and prohibit its violation, both in the Qur'an and the *Sunnah*, are almost always formulated in terms that refer to the individual. Islamic legal rules apply to every individual as much as it applies to the whole community. One reads Qur'anic verses such as: "We have indeed created *Man* in the best of moulds"<sup>163</sup>; "...if anyone slew *a person* unless it be for murder or for spreading mischief on the land, it would be as if he slew the whole people; and if anyone saved *a life*, it would be as if he saved the life of the whole people..."<sup>164</sup> All these and similar expressions aim at the individual human being (*Man, a person, a life*). The individual is not however addressed as an isolated entity but as part and parcel of society. This may be explained from the fact that society is actually made up of a collection of individuals. State, community and society are not material entities, they are

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<sup>161</sup> "The Inter Action Council consists of about 25 former heads of state and government who have been addressing long-term global issues. The members (who endorsed the proposed Declaration) included Schmidt (Germany), Lord Callaghan of Cardiff (UK), Jimmy Carter (United States), and other former heads of state from such countries as Australia, Brazil, Costa Rica, Cyprus, Israel, Japan, Lebanon, Singapore, Thailand, and Zambia. The Council submitted the proposed Declaration to the UN Secretary General for consideration for its proclamation by the UN General Assembly as a 'common standard for all peoples and all nations'. See Steiner, H., and Alston, P., *International Human Rights in Context: Law Politics Morals* (2<sup>nd</sup> Ed. 2000) p.351. See the Inter Action Council Website at: <http://www.asiawide.or.jp/iac/UDHR/EngDecl1.htm> [15/2/2001].

<sup>162</sup> Kung, H., and Schmidt, H., (ed.) *Global Ethic and Global Responsibilities* (1988) p.6.

<sup>163</sup> Q 95:4.

<sup>164</sup> Q 5:32.

social veils which when lifted reveals nothing but individuals. Thus while acknowledging that one of the material aims of Islamic law is societal regulation, Schacht has cautioned that this should not obscure the important fact that “(t)he formal structure of Islamic law is individualist.”<sup>165</sup>

While individualism is an important aspect of human rights it is not the whole of it. Stressing individualism in international human rights often tends to portray that human rights totally segregates the individual from society. This is not so. Human rights promote and protect the rights of a human being not only as an individual but sometimes as a member of a group against the excessive powers of the State. It does not actually set the individual aside from, nor place him totally above society. It only guarantees that his rights are not infringed through excessive use of State power. He is not an isolated individual but still part and parcel of the society.<sup>166</sup> Thus the UDHR for instance, recognises that the free and full development of the personality of the individual is possible only within a community and thus the individual has duties to that community.<sup>167</sup> Similar appreciation is expressed in the American Declaration of the Rights and Duties of Man <sup>168</sup>, the American Convention on Human Rights<sup>169</sup> and the African Charter of Human and Peoples Rights.<sup>170</sup>

The essence of human rights does not really lie in individualism but rather in its humanitarianism. Human rights today protect both individuals and collectives. The right of self-determination is an important collective human right provided today under international human rights law. Judge Weeramantry has drawn attention to some important facts in the history of international human rights that clearly demonstrate the need to appreciate a more rounded and humanitarian rather than a totally individualistic view of human rights. He noted that:

“On the eve of the fifth session of the General Assembly, in November 1950, a proposal was brought before the Third Committee by the representatives of Afghanistan and Saudi Arabia that the Human Rights Committee study in depth the problem of the right of peoples and nations to self-determination. The Saudi Arabian delegate drew attention to the fact, which Western proponents of human rights chose simply to ignore, that in the absence of an article containing the right to self-determination, colonial and mandatory powers would be merely encouraged to postpone indefinitely the establishment of equal rights among all nations.”

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<sup>165</sup> See Schacht, J., “Islamic Law in Contemporary States” (1959) 8 *American Journal of Contemporary Law*, 133 at 138-140.

<sup>166</sup> See generally Donnelly, J., “Human Rights and Western Liberalism” in An-Naim, A.A. and Deng, F.M., (eds.) *Human Rights in Africa, Cultural Perspectives* (1990) pp.31 at 35; and Bielefeldt, (1995) *supra*, note 27 above, p.591-2.

<sup>167</sup> See Art. 29(1) UDHR (1948).

<sup>168</sup> See Art. 29.

<sup>169</sup> See Art. 32.

<sup>170</sup> See generally Chapter II of ACHPR.

The learned judge thus concluded that:

“With the accumulated wisdom of the many years that have passed since then, we see how important this view has been to the future development of human rights. The ability to pinpoint this feature at that early stage and to have stressed its importance was no doubt attributable in the delegates mentioned to the more rounded view of human rights in their totality, which had been inculcated in them by the perspectives of Islamic jurisprudence. When eventually the right to self-determination came to be included in both Covenants (on Civil and Political Rights and Economic, Social and Cultural Rights) and became axiomatic, the countries of the Third World had taken human rights far beyond their traditional Western formulation. The contribution of the Islamic nations to this result was considerable and it is indeed the reverse of the truth for Western jurists to suggest that there was no doctrine of human rights in Islamic jurisprudence. In fact the Islamic concepts took the doctrine of human rights well beyond their Western formulation by reason of the more rounded and community-oriented attitudes of Islamic law”<sup>171</sup>

Viewed from these perspectives the balance that Islamic law maintains between the individual and the State does not constitute an irreconcilable deviation from international human rights principles as is often portrayed by many writers on the subject.

#### CODIFICATION OF HUMAN RIGHTS UNDER ISLAMIC LAW

As earlier observed, the founding jurists of Islamic law only addressed human rights issues within the general framework of rights and duties under the *Shari'ah* without specific codification or categorisation of the list of human rights under Islamic law. The nearest to such an endeavour was the six purposes of governance otherwise called the indispensable or fundamental human rights listed in the writings of some early jurists.<sup>172</sup> The Qur'an was taken as the general reference from which both rights and duties were generally established. The *Sunnah* also played a supplementary role in that respect. The case of the lady who protested against the declaration of Umar by reference to a verse of the Qur'an was an example of such practice.<sup>173</sup> However, it is important to observe here that there is no lack of a precedent in constitutionalism in the history of the Islamic State. At the very beginning of the nascent Islamic State in Medina, the Prophet Muhammad enacted an important document that has come to be known as the “Constitution of Medina”, which clearly defined certain basic rights and duties of members of the community and some important fundamental principles of State that could be easily referred to by all members of the community.<sup>174</sup> From

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<sup>171</sup> See Weeramantry, C.G., (1988) *supra*, note 122 above, p.126.

<sup>172</sup> See page 62 above.

<sup>173</sup> See page 49 above.

<sup>174</sup> See e.g. Hamidullah, M., *The First Written Constitution in the World* (1981); and also Watt, W.M., *Islamic Political*

a modern constitutional and positive law perspective, codification is of utmost importance for a clear identification of the content of rights and duties. Thus faced with the modern challenges of international human rights and to demonstrate the accommodation of human rights within an Islamic dispensation there have recently emerged some codification of Islamic human rights principles from the Muslim world.

The Universal Islamic Declaration of Human Rights (UIDHR) was issued in September 1981 under the auspices of the Islamic Council of London and presented to United Nations Educational, Scientific and Cultural Organisation (UNESCO).<sup>175</sup> The preamble of the Declaration refers to the Qur'an and *Sunnah* as the source of its rights and that "the human rights decreed by the Divine Law aim at conferring dignity and honour on mankind and designed to eliminate oppression and injustice". It also states that the rights can not be curtailed, abrogated, disregarded, surrendered or alienated. The rights proclaimed by the UIDHR are a mixture of civil, political, economic, social and cultural rights.

In August 1990 the Cairo Declaration on Human Rights in Islam was issued after the nineteenth meeting of the Organisation of Islamic Conference (OIC) in Cairo.<sup>176</sup> The Cairo Declaration bears more governmental authority having being adopted by an Organisation constituted of sovereign Muslim States, and endorsed by the foreign ministers of the Member States. In its Resolution adopting the Declaration, the OIC stated that the Declaration "will serve as a general guidance for Member States in the field of human rights".<sup>177</sup> The Cairo Declaration was also presented by the OIC to the 2<sup>nd</sup> International World Conference on Human Rights in Vienna in 1993 as representing the consensus of Muslim States on human rights.<sup>178</sup> In its preamble the Member States of the OIC indicated their wish to "contribute to the efforts of mankind to assert human rights, to protect man from exploitation and persecution, and to affirm his freedom and right to a dignified life in accordance with the Islamic *Shari'ah*." They also stated their belief that fundamental rights and universal freedoms are an integral part of the Islamic religion and that no one has the right to suspend, violate or ignore them because of their binding divine origin. The declaration is also a mixture of civil, political, economic, social and cultural rights.

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*Thought*, (1980) pp.130-134; and Baderin, M.A., "The Evolution of Islamic Law of Nations and the Modern International Order: Universal Peace through Mutuality and Cooperation" (2000) 17 *The American Journal of Islamic Social Sciences*, No.2., p.57 at 60-61.

<sup>175</sup> Islamic Council, *Universal Islamic Declaration of Human Rights*, 19 September 1981. The Islamic Council is a London based private Islamic Organisation affiliated to the Muslim World League.

<sup>176</sup> OIC, Cairo Declaration on Human Rights in Islam, of 5 August, 1990. UN Doc. A/45/5/21797 p.199.

<sup>177</sup> Resolution No. 49/19-P on the Cairo Declaration on Human Rights in Islam, reproduced in UN, *A Compilation of International Instruments*, Vol. II, Regional Instruments, p.477.

<sup>178</sup> UN Doc.A/CONF.157/PC/62/Add.18(1993). The OIC Cairo Declaration is listed in the Regional Instruments Volume of the UN's *A Compilation of International Instruments*, Vol. II, Regional Instruments, p.478-484.

Apart from the above declarations, the Council of the League of Arab States adopted the Arab Charter on Human Rights on 15 September 1994 in Cairo<sup>179</sup>. The League consists of twenty-two member States, all of which are Muslim States.<sup>180</sup> The Member States indicated in the preamble that the charter was “pursuant to the eternal principles of brotherhood and equality among all human beings which were firmly established by the Islamic Shari’a and the other divinely-revealed religions”.<sup>181</sup> The preamble also reaffirmed the principles of the UN Charter, the UN Bill of Rights and the Cairo Declaration on Human Rights in Islam. The rights covered by the Arab Charter are also a mixture of civil, political, economic, social and cultural rights.

### SCOPE OF HUMAN RIGHTS UNDER ISLAMIC LAW

The above analysis reveals the recognition of the concept of human rights in Islamic law and also the attempt by Muslim States and organisations to assert an Islamic notion of human rights. The scope of human rights under Islamic law is however not absolute. Since the *Shari’ah* is the legalising source of both Islamic morals and law, the scope of human rights in Islamic law is generally delimited by the injunctions of the *Shari’ah*. The *Shari’ah* is mentioned as a limiting factor in the two Islamic Declarations on Human Rights as well as in the Arab Charter. In addition to its reference to the Qur’an and *Sunnah* as the divine source of its rights in the preamble, the UIDHR subjects the rights it guarantees to “such limitations as are enjoined by the Law”, and paragraph 1(b) of the explanatory notes provides that: “the term Law denotes the *Shari’ah*, i.e. totality of ordinances derived from the Qur’an and the *Sunnah* and any other laws that are deduced from these two sources by methods considered valid in Islamic jurisprudence”. The OIC Cairo Declaration also provides in its Article 24 that “All the rights and freedoms stipulated in this Declaration are subject to the Islamic *Shari’ah*.” While the Arab Charter seems to emphasise Arab nationalism and does not specifically subject any of its provisions to the *Shari’ah*, it mentions the Islamic *Shari’ah* in its preamble. Its Article 4(a) also allows restriction on the rights and freedoms it provides “where such is provided by law and deemed necessary to protect the national security and economy, public order, health or morals or the rights and freedoms of others”. Although the

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<sup>179</sup> See a reproduction of the Arab Charter on Human Rights (1994) in: (1997) 18 *Human Rights Law Journal*, No.1-4, pp.151-153.

<sup>180</sup> Algeria, Bahrain, Comoros, Djibouti, Egypt, Iraq, Jordan, Kuwait, Lebanon, Libya Arab Jamahariya, Mauritania, Morocco, Oman, Palestine, Qatar, Saudi Arabia, Somalia, Sudan, Syrian Arab Republic, Tunisia, United Arab Emirates and Yemen.

<sup>181</sup> See 2<sup>nd</sup> Preambular paragraph of the Arab Charter on Human Rights (1994) *supra*, note 179 above.



Arab Charter does not give a definition of law, it could be argued that where Islamic law is the law of any of the Member States the rights and freedoms it guarantees will be brought within the scope of Islamic law through the provisions of Article 4(a). Furthermore, since the *Sharî'ah* determines both morality and legality in Islamic law, the countries in which morals are determined in accordance with the provisions of the *Sharî'ah* may be able to subject some of the provisions of the charter to the limits of the *Sharî'ah* as deemed necessary to protect morals.

Two important points are deducible from these formulations. The first is a demonstration of the Muslim worlds' appreciation of an Islamic concept of human rights and the second is their conviction that the scope of human rights in Islamic law must be in conformity with the *Sharî'ah*. While both the UIDHR and the OIC Cairo Declaration are emphatic on the second point, the Arab Charter is not as specific but still reflects that conviction. Placing the scope of human rights within the confines of the *Sharî'ah* has however been strongly criticised as cutting down the size of human rights.<sup>182</sup> This will be so from the perspective of international human rights law being interpreted in purely secular language without consideration for any religious compliance or from the *Sharî'ah* being interpreted in a very restrictive and hard-line manner without consideration for its humanitarian nature.<sup>183</sup> Although the *Sharî'ah*, like every legal system contains provisions usually aimed at the maintenance of morality, public order and the general welfare of society, which may restrict the scope of human rights, such limitations are exceptions that must not be over-emphasised to overshadow the general rule of permissibility evidenced by verses of the Qur'an such as: "God intends every facility for you, He does not want to put you in difficulties"<sup>184</sup> and "God has subjected to you all things in the heavens and on earth and Has made His bounties flow to you in exceeding measure, both seen and unseen...".<sup>185</sup> Facility and prevention of difficulties is thus an important rule of Islamic law applicable even in the application of the exceptional *Sharî'ah* rules of limitation.

Confining human rights within the scope of the *Sharî'ah* has raised important questions especially in respect of the international human rights principle of equality and non-discrimination,<sup>186</sup> and the prohibition of cruel, inhuman and degrading punishments.<sup>187</sup>

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<sup>182</sup> See e.g. Mayer, A.E., (1999) *supra*, note 13 above, p.63ff. See also An-Na'im, A.A., (1990) *supra*, note 104 above, p.170ff.

<sup>183</sup> See Chapter 5 below.

<sup>184</sup> Q2:185.

<sup>185</sup> Q31:20.

<sup>186</sup> See e.g. An-Na'im, A.A., (1990) *supra*, note 104 above, p.175-7.

<sup>187</sup> See e.g., "Toward a Cross-Cultural Approach to Defining International Standards of Human Rights: The Meaning of Cruel, Inhuman, or Degrading treatment or Punishment", in An-Na'im, A. A., (ed.) *Human Rights in Cross-Cultural*

While the question of equality and non-discrimination will be examined especially under Articles 2(1), 3 and 26 of the ICCPR in Chapter 6.<sup>188</sup> we will address the question of Islamic criminal punishment here due to its topical nature in relation to international human rights law. The severity of some of the criminal punishments under Islamic law has raised the question of their consistency with the prohibition of torture, cruel, inhuman or degrading treatment or punishment under international human rights law.<sup>189</sup> Bannerman has stated for example that “it would be foolish to deny that in Western eyes today, amputations, executions, stoning, and corporal punishment are brutal”.<sup>190</sup> Mayer has also observed that “laws imposing penalties like amputations, cross amputations, and crucifixions would seem to be in obvious violation of Article 7 (of the ICCPR)”.<sup>191</sup> We will now examine the arguments dialogically from the perspectives of both Islamic law and international human rights law.

#### ISLAMIC CRIMINAL PUNISHMENTS AND INTERNATIONAL HUMAN RIGHTS LAW

Criminal justice is an important aspect of public law. It is distributed by the State to maintain both public and private security within the State. The criminal jurisdiction of a State is thus generally not restricted to its nationals only but may extend also to foreign nationals who violate its laws. Normally, the determination of what constitutes criminal offences in a particular State and the prescription of sanctions and punishments for them are not the concern of international law but are within the discretion and sovereign authority of individual States. Although there are certain offences common to all civilised nations of the world, the punishments prescribed for them may differ in each State. While sovereign States have the autonomy of prescribing punishments for offences within their jurisdiction, international human rights law under the prohibition of torture also prohibits “cruel, inhuman or degrading” punishments.<sup>192</sup> International human rights law also restricts the imposition of the death penalty to the “most serious crimes”<sup>193</sup>, and continues to promote its abolition as a means of the “enhancement of human dignity and progressive development of human

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*Perspectives: A Quest For Consensus* (1992) pp.19-43.

<sup>188</sup> Reference is also made to the principle of equality and non-discrimination in other relevant articles of both the ICCPR and ICESCR in Chapters 6 and 7 due to its significance in the enjoyment of human rights generally.

<sup>189</sup> See under Article 7 of the ICCPR in Chapter 6, pp. 125-28 below.

<sup>190</sup> Bannerman, P., (1988) *supra*, note 4 above p.26; See also Dudley, J., “Human Rights Practices in the Arab States: The Modern Impact of Shari’a Values” (1982) 12 *GA Journal of International and Comparative Law*, 55 at 74.

<sup>191</sup> See Mayer, A.E., “A Critique of An-Na’im’s Assessment of Islamic Criminal Justice” in Lindholm, T., and Vogt, K., (eds.) *Islamic law Reform and Human Rights: Challenges and Rejoinders* (1993) p. 37 at 47.

<sup>192</sup> See Art. 5 UDHR (1948); Art.7 ICCPR (1966) and Art. 16 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) 1465 UNTS 85.

rights.”<sup>194</sup> The international human rights Covenants do not however define “cruel, inhuman or degrading punishment” or “most serious crimes”. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment only defines “torture” and excludes “pain or suffering arising from, inherent in or incidental to lawful sanctions” from the definition of torture.<sup>195</sup>

The HRC has however observed in its General Comment 20 to Article 7 of the ICCPR that the prohibition of cruel, inhuman or degrading punishment “must extend to corporal punishment, including excessive chastisement ordered as punishment for a crime...”<sup>196</sup>. This means that criminal sanctions of a State Party that may not amount to torture due to the exclusion of lawful sanctions from that definition by the Torture Convention, could still be considered by the HRC as amounting to “cruel, inhuman or degrading” punishment under the ICCPR if it involves corporal punishment and excessive chastisement.<sup>197</sup> This could be problematic because of the lack of a universal agreement on what punishments may be deemed “cruel, inhuman or degrading”. While it is not impossible, sociological factors may actually make a universal standard of criminal punishment quite difficult to achieve.<sup>198</sup>

Also in its General Comment 6 to Article 6 of the ICCPR the HRC observed that: “the expression “most serious crimes” must be read restrictively to mean that the death penalty should be a quite exceptional measure”.<sup>199</sup>

From the above perspectives punishments under Islamic criminal law provisions have been brought into issue within international human rights circles. For instance the UN Special Rapporteur on Sudan in his February 1994 report, had criticised the application of the Islamic law punishments in the Sudan as violating the prohibition of cruel, inhuman and degrading punishment under international law. Sudan denied this and argued that it was “an unwarranted interpretation of the international human rights instruments since they excluded from such category all punishments provided for in national legislation.”<sup>200</sup>

Islamic law prescribes fixed punishments called *hudûd* for certain offences, retributive punishments called *qisâs* for other offences and discretionary punishments called *t’azîr* for

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<sup>193</sup> See Art.6 ICCPR (1966).

<sup>194</sup> See Second Optional Protocol to the International Covenant on Civil and Political Rights aiming at the Abolition of the Death Penalty (1989). See also Paragraph 6 of Human Rights Committee General Comment 6 to Art. 6 of ICCPR UN Doc. HRI/GEN/1/Rev.1 at 6 (1994).

<sup>195</sup> See Art. 1 Convention Against Torture (1984) *supra*.

<sup>196</sup> See UN Doc. HRI/GEN/1/Rev.1 at 30 (1994), Par.5.

<sup>197</sup> See An-Na’im, A.A., (1992) *supra*, note 187 above, p. 29.

<sup>198</sup> See *ibid.*, p. 32 for an illustration of the difficulty that may be encountered in the effort to find a universal standard of criminal punishment.

<sup>199</sup> See Par.7. UN Doc. HRI/GEN/1/Rev.1 at 6 (1994).

<sup>200</sup> See UN Doc. E/CN.4/1994/122.

certain others. The *qisâs* and *t'âzîr* are variable punishments and within the discretion of the victim of the offence (or the heirs) and the judge (or State) respectively. A Muslim State's conformity to an international standard of punishment in crimes that attract *qisâs* or *t'âzîr* punishments under Islamic law therefore depends on the political will and other international considerations of a particular State. The tension with international human rights law is essentially in respect of the *hudûd* punishments which are fixed and invariable as long as the crime is fully established as provided by Islamic law.<sup>201</sup> The *hudûd* punishments are generally prescribed for six offences under traditional Islamic law. They are, amputation of a hand for theft (*sariqah*);<sup>202</sup> death, crucifixion, cross-amputation of the hand and foot or banishment for rebellion or armed robbery (*hirâbah*);<sup>203</sup> stoning to death for adultery and one hundred lashes for fornication (*zinâ*);<sup>204</sup> eighty lashes for false accusation of unchastity (*qadhf*);<sup>205</sup> death for apostasy (*riddah*) and forty or eighty lashes for intoxication (*sharb al-khamr*).<sup>206</sup> While there is consensus among Islamic jurists on the first four punishments, there are some differences about the offences of intoxication and apostasy. The majority of jurists concede that intoxication is a *hadd*-type offence while others consider it as *t'âzîr*-type. Also the punishment for intoxication is based on *Sunnah*, but while the *Hanafî*, *Hanbalî* and *Mâlikî* schools hold that the number of lashes for intoxication is eighty, the *Shâfi'î* school and other minority schools hold it to be forty lashes. Some contemporary Muslim scholars and jurists also argue that apostasy *simpliciter* is not a *hadd*-type offence and is not punishable with death on its own except when it involves acts of rebellion against the Islamic State.<sup>207</sup>

From the perspective of international human rights law, Mayer has argued that these punishments are inconsistent "with modern penological principles and modern human rights norms".<sup>208</sup> There is also the argument that most Muslims who advocate the implementation

<sup>201</sup> See e.g. El-Awa, M.S., *Punishment in Islamic Law*, (1982) p.1.

<sup>202</sup> See Q 5:38 which says: "As to the thief, male or female, cut off his or her hand: a punishment by way of example, from God, for their crime...".

<sup>203</sup> This punishment is based on Q 5:33 which says: "The punishment of those who wage war against God and His Messenger, and strive with might and main for mischief through the land is: execution, or crucifixion, or the cutting off of hands and feet from opposite sides, or exile from the land...".

<sup>204</sup> Q 24:2 says: "The woman and the man guilty of *zinâ*, flog each of them with a hundred stripes; Let no compassion move you in their case, in a matter prescribed by God if you believe in God and the last day...". While Muslim jurists agree that the term *zinâ* covers both adultery and fornication, the punishment prescribed here is applied only to unmarried persons (fornication) while according to the *Sunnah* the punishment for adultery in the case of married persons (adultery) is stoning to death (*rajm*). See e.g. Rizvi, S.A.H., et al. "Adultery and Fornication in Islamic Criminal Law: A Debate", in Mahmood, T., et al. (eds.) *Criminal Law in Islam and the Muslim World* (1996) pp.223-241 for a debate on the punishment of *zinâ* under Islamic law. See also Chapter 8, pp.314-16 below.

<sup>205</sup> Q 24:4 says: "And those who launch a charge against chaste women and produce not four witnesses (to support their allegations) flog them with eighty stripes...".

<sup>206</sup> See e.g. Safwat, S.M., "Offences and Penalties in Islamic Law" (1982) 26 *Islamic Quarterly*, 169.

<sup>207</sup> See Section on apostasy in Chapter 6, pp. 162-64 below.

<sup>208</sup> See Mayer, A.E., (1993) *supra*, note 191 above, p.37.

of the *hudûd* punishments in Muslim countries are themselves quite ambivalent about them because of the severity of the punishments.<sup>209</sup> While Muslim jurists and scholars may not subscribe to the categorisation of the *hudûd* punishments as “cruel and inhuman”, both classical and contemporary scholars of Islamic law do not deny the harshness of the punishments. Their justification however is that the harshness of the *hudûd* punishments are meant and actually serve as a deterrent to the offences for which they are prescribed. They further contend that the standard of proof for all the *hudûd* offences under Islamic law is very arduous, they must be proved beyond any atom of doubt based on the Tradition of the Prophet in which he said: “Avert the *hudûd* punishment in case of doubt ... for error in clemency is better than error in imposing punishment”,<sup>210</sup> which often makes the implementation of the punishments rare. Commenting on adultery and fornication (*zinâ*) for instance, Shalabî pointed out that the proof required makes the punishment for *zinâ* applicable only to those who committed the offence openly without any consideration for public morality at all, and in a manner that is almost impossible and intolerable in any civilised society.<sup>211</sup>

In a similar vein during a Conference in Riyadh, Saudi Arabia in 1972 on “Moslem Doctrine and Human Rights” between delegates of the Saudi Arabian Ministry of Justice and delegates from the Council of Europe,<sup>212</sup> a member of the Saudi Arabian delegate Dr. Al-Dawalibi observed as follows:

“I have been in this country (Saudi Arabia) for seven years ... and I never saw, or heard of, any amputation of the hand for stealing. This is because crime is extremely rare. So, all that remains of that punishment is its harshness, which has made it possible for all to live in perfect security and tranquillity, and for those who are tempted to steal, to keep their hands whole. Formerly, when these regions were ruled by the French-inspired Penal Code, under the Ottoman Empire, pilgrims travelling between the two Holy Cities - Mecca and Medina, could not feel secure for their purse or their life, unless they had a strong escort. But when this country became the Saudi Kingdom, the Koranic Law was enforced, crime immediately disappeared. A traveller, then, could journey, not only between the Holy Cities, but even from Al-Dahran on the Gulf to Jeddah on the Red Sea, and traverse a distance of more than one thousand and five hundred kilometers across the desert all alone in his private car, without harbouring any fear or worry about his life or property, be it worth millions of dollars, and be he a complete foreigner.”<sup>213</sup>

<sup>209</sup> See generally, *ibid.* pp.37-60 and Bannerman, P., *Islam in Perspective* (1988) p.26.

<sup>210</sup> See e.g. Al-Zuhayli, *Al-Fiqh al-Islâmî wa-Adillatuh* (Arabic) (1997) Vol.7., p.5307.

<sup>211</sup> Shalabî, M.M., *al-Fiqh al-Islâmiyy Bayn al-Mithâliyyah al-Wâqi'iyah* (Arabic) (1960) p.201.

<sup>212</sup> Comprising of Prof. Sean MacBride, former President of Council of Europe, Prof. Karel Vasak, Prof. Henri Laoust and Maitre Jean-Louis Aujol.

<sup>213</sup> See Ministry of Justice (ed.) *Conference of Riyad on Moslem Doctrine and Human Rights in Islam (March 23, 1972)* p.8. Saudi Embassy News Website: at [http://www.saudiembassy.net/press\\_release/hr-72.html](http://www.saudiembassy.net/press_release/hr-72.html) (2/3/2001).

Another delegate also stated that:

“In this manner, in the Kingdom of Saudi Arabia, where Islamic Law is enforced, state money is transferred from one town to another, from one bank to another, in an ordinary car, without any escort or protection, but the car driver. Tell me, Gentlemen: in any of your Western States, would you be ready to transfer money from one bank to another, in any of your capitals, without the protection of a strong police force and the necessary number of armoured cars?”<sup>214</sup>

This confidence in the deterrent nature of the *hudûd* punishments is just one of its influencing factors within Muslim societies. The most influencing factor however is the divine weight of the *hudûd* punishments since they are injunctions of the *Shari‘ah*. El-Awa has pointed out that while the considerations of social utility form the basis of the theories of punishment in Western penal systems, “in Islamic law the theory of punishment is based on the belief in the divine revelation contained in the Qur‘an and the Sunna of Prophet Muhammad.”<sup>215</sup> The *hudûd* punishments are thus classified as the rights of God (*huqûq Allah*). They are prescribed as punishment for violating divine injunctions that protect public interest and are therefore not remissible. Al-Mawardî had pointed out that the *hudûd* are “deterrent punishments prescribed by God to prevent Men from committing what He forbade...”<sup>216</sup> For the above reasons Muslim jurists hold that their severity cannot be questioned.<sup>217</sup>

While the need to punish those guilty of crimes is appreciated under international human rights law, the contention has been that offenders and criminals are still human beings and must therefore be treated with some dignity. Thus the punishment for crimes must not be excessively severe, degrading or inhuman, it must aim at reforming the offender. While Muslims are under a religious obligation to believe in the divine nature of the *hudûd* punishments and not question its severity, the same cannot be said of non-Muslims. Since criminal punishments are generally not restricted to Muslims alone within an Islamic State it becomes necessary to examine the principles of the Islamic criminal punishments outside the scope of strict divine penology.

From a pragmatic perspective, the factors that are usually considered in the prescription of punishments for crimes are: the interests of the society, that of the victim and that of the

<sup>214</sup> *ibid.* See also Mourad, F.A., and al-Sa‘aty, H., “Impact of Islamic Penal Law on Crime Situation in Saudi Arabia: Findings of A Research Study” in Mahmood, T., et. al. (ed.) *Criminal Law in Islam and the Muslim World* (1996) p.340-374 for an empirical comparative study on the crime situation in Saudi Arabia.

<sup>215</sup> El-Awa, M.S., (1982) *supra*, note 201 above, p.xi.

<sup>216</sup> See al-Mawardi, A., *al-Ahkâm al-Sultâniyyah* (Arabic) (1386AH). See also the English Translation by Yate, A., *The Laws of Islamic Governance* (1996).

<sup>217</sup> See generally, e.g., Ibn al-Qayyim, *I‘lâm al-Muwaqq‘în ‘An Rabb al-‘Alamîn* (Arabic) (1996), Abû Zahrah, S.M., *al-*



offender. Thus, penological policy is usually based on the theories of deterrence, retribution and reform. Although there may be some overlapping, basically deterrence may be viewed as serving the interest of society, retribution that of the victim, and reform that of the offender. There could indeed be difficulty in defining a balance between these interests in the prescription of punishments for particular offences. For instance, while a generality of opinion in a particular society may reveal that a particular punishment is too severe for a particular offence, the opinion of victims of that offence in the same society, depending on their ordeals, might reveal that no punishment is too severe for perpetrators of such offences. It may be argued too that offenders are products of the society, so it is their reform that must be given priority in the determination of a penal policy.

Against this background, El-Awa has pointed out that the *hudûd* punishment “cares very little for the criminal and his reform, and concentrates on preventing the commission of offences.”<sup>218</sup> That is, it gives priority to the interest of society, by wanting to prevent, *ab initio*, the occurrence of the *hadd*-type offences through a deterrent and retributive philosophy. This suggests that Islamic law aims at an ideal society. But if despite the deterrent nature of the severe punishments the offences still occur, there would then arise the question of whether or not the society has played a contributory role for the commission of the offence. Thus, even in the enforcement of the *hudûd*, the rule also is that there must exist an ideal Islamic society. Where it can be reasonably proved that the offender was a product of the society’s sociological problems then his interest must be taken into consideration and the *hudûd* punishments would not be applied. There is evidence that the Prophet suspended the enforcement of the *hadd* punishment for theft during war, and the second Caliph, Umar, suspended its enforcement at a time of widespread famine in Medina.<sup>219</sup> El-Awa also referred to the account of Abu Yûsuf, the great eighth century *Hanafi* jurist, in his famous work *Kitâb al-Kharâj*<sup>220</sup>, to indicate that circumstances could make it necessary to relax or suspend the enforcement of the *hudûd* punishment by the ruling authority.<sup>221</sup> It could be argued therefore that while to Muslims the prescription of the *hudûd* punishment is not questionable, its application by the State is however not in isolation of other sociological factors within the State. The determination of the enabling or inhibiting sociological factors

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*Jarîmah wa al-'Uqûbah fî al-Fiqh al-Islâmî* (Arabic) (n.d.).

<sup>218</sup> El-Awa, M.S., (1982) *supra*, note 201 above pp.23-35 and p.134.

<sup>219</sup> See e.g. Abû Zahrah, M., *Usûl al-Fiqh* (Arabic) (1958) p.222 -228 Ibn Qayyim, *I'lam al-Muwaqq'în* (Arabic) (1996) Vol. 1 p.185. See also Kamali, M.H., *Principles of Islamic Jurisprudence* (1991) p.247 and 270.

<sup>220</sup> Abû Yûsuf, Y., *Kitâb al-Kharâj* (Arabic) (1352A.H.) pp.149-152.

<sup>221</sup> El-Awa, (1982) *supra*, note 201 above, p.137. See also Qutb, M., *Islam the Misunderstood Religion* (1978) pp.165-171.

for the application of the *hudûd* punishment is, as shown by the examples above, left to the discretion of the State to be exercised in good faith.

While the *hudûd* punishment is deterrent in nature for the public interest, the *ta'zîr* punishments, due to the wide authority that the State has in its prescription, provide means for punishments that aim for the criminals reform. The *qisâs* punishments complete the cycle by taking the interest of the victim into consideration in the enforcement of the retributive punishment.<sup>222</sup> It could be argued therefore that the three tiers of punishment under Islamic law are interpretable pragmatically to accommodate modern penological principles depending on the political and humanitarian will of the ruling authority in the Islamic State.

Against the foregoing background, the conflict between criminal punishments under Islamic law and the prohibition of cruel, inhuman and degrading punishments under international human rights law can be addressed from two dimensions. The first dimension concerns the punishment of non-*hudûd* offences. Since the State has discretion under Islamic law to impose less harsh punishments for non-*hudûd* offences, Muslim States can thus effectively exercise that discretion in cognisance of their international human rights law obligations, and directly proscribe their non-*hudûd* punishments that violate the prohibition of cruel, inhuman and degrading punishments. It must be observed however that apart from religious factors, developing nations, for many reasons that include economic limitations, do often prefer an effectively deterrent "harsh" criminal punishment over a "humane" reformatory one even where the legislative authority lies completely within the prerogative of the State.

The second dimension concerns the *hudûd* offences, which are specifically prescribed by direct injunctions of the Qur'an. An-Na'im has observed in respect of the *hudûd* punishments that "in all Muslim societies, the possibility of human judgment regarding the appropriateness or cruelty of a punishment decreed by God is simply out of the question", and that "(n)either Islamic re-interpretation nor cross-cultural dialogue is likely to lead to the(ir) total abolition... as a matter of Islamic law".<sup>223</sup> Questioning the *hudûd* punishments is considered as questioning the divine wisdom underlying them and impugning the divinity of the Qur'an and the theocentric nature of Islamic law. From an Islamic legal perspective the conflict may however be addressed indirectly through procedural means. Islamic legalists concede the fact that it is lawful to utilise "any strategem which averts the (*hudûd*) penalty

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<sup>222</sup> The victim (or his heir) in *Qisâs* cases has a mediating role in the punishment of the offender.

<sup>223</sup> See An-Na'im, A.A., (1992) *supra*, note 187 above, pp.35-36. Emphasis added.



without impugning the Law”,<sup>224</sup> the Prophet having advised that one should avert the *hudûd* punishment in case of doubt because error in clemency is better than error in imposing punishment.<sup>225</sup> Chief Justice Afzal Zullah (as then was) of the Pakistan Supreme Court had thus observed in *The State v Ghulam Ali*<sup>226</sup> that:

“an uncontroverted principle of Hudood (is) that not only the maximum benefit of every reasonable doubt will be extended to the accused, but also...effort is to be made not to inflict the Hadd so long (as) it can be avoided by all legitimate and established means”.<sup>227</sup>

Thus even though Muslim States can not, for the divine weight, directly proscribe the *hudûd* punishments, they can regulate its application through legally valid procedural devices under Islamic law.<sup>228</sup> Mayer has however raised the question that “if one attempts such a compromise, how does one go about defending it against fundamentalist critics, who are likely to accuse one of failing to take divine commands seriously?”<sup>229</sup> This question highlights the volatility of the issue but can be answered through internal dialogue within Muslim States and among Muslim groups. It is establishable by reference to classical Islamic jurisprudence that averting *hudûd* punishments through procedural means does not amount to impugning divine commands. Such aversion does not necessarily mean that there would be no punishment at all, but that through adherence to strict and lawful procedural rules of Islamic law *ta'zîr* punishments are applied instead of the *hudûd* punishments as highlighted by Chief Justice Zullah above.

Although the obligations of State parties under international human rights instruments often require direct legislation abolishing punishments considered cruel, inhuman and degrading, such direct legislation can divest a ruling authority of its Islamic legitimacy in many parts of the Muslim world today. The reverence of Qur'anic injunctions by Muslims thus puts at a cross-roads the Human Rights Committee's demand on Muslim States to directly abolish the *hudûd* punishments. With the current resurgence and restoration of Islamic law in many Muslim States, it is more feasible to seek for reconciliation between the *hudûd* punishments and the prohibition of cruel, inhuman and degrading punishments under

<sup>224</sup> See Eaton, G., *Islam and the Destiny of Man* (1994) p.185.

<sup>225</sup> See e.g. Al-Zuhayli, *Al-Fiqh al-Islâmî wa-Adillatuh* (Arabic) (1997) Vol.7., p.5307.

<sup>226</sup> (1986) 38 PLD (S.Ct) 741.

<sup>227</sup> *ibid.*, at 759.

<sup>228</sup> See Chapter 8, p.314 below on how the Islamic Republic of Pakistan has for instance demonstrated this in practice. See also Mayer, E.A., (1993) *supra*, note 191 above, pp.54-55. And for an analysis of the practice in Libya See Mahmood, T., “Legal System of Modern Libya: Enforcement of Islamic Penal Laws” in Mahmood, T., et al. (eds.) *Criminal Law in Islam and the Muslim World* (1996) pp.375-388 and Mayer, A.E., “Libyan Legislation in Defense of Arabo-Islamic Sexual Mores”, in Mahmood, T., *ibid.*, pp.389-421.

international human rights law indirectly through legal procedural shields under Islamic law as is currently demonstrated in the practice of some Muslim States that apply Islamic law as State law.

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<sup>229</sup> See Mayer, E.A., *ibid.*, p.47.

## CHAPTER 5

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### Conceptual Differences in Islamic Law and International Human Rights Law

We established the concept of human rights within the themes of Islamic law in the last chapter but identified that this is subjected to the provisions of the *Shari'ah*, which is religious based. Conversely, international human rights law is today interpreted in a purely secular language influenced by strong notions of Western liberalism and not constrained by any religious orthodoxy. This creates what has been described as “theocentric” and “anthropocentric” differences between Islamic law and international human rights law.<sup>1</sup> To accommodate Islamic law is often feared as accommodating fundamentalism and a barrier against the liberties offered by international human rights law.<sup>2</sup> Advocates of Islamic law also often consider Western liberalism as too permissive and intrusive upon religious ideals and morality. Thus the issues of “fundamentalism” and “liberalism” also raise some conceptual conflicts between Islamic law and international human rights law respectively.

Traditionally, these conceptual differences have been mostly addressed from a monological “either/or” perspective. There is often the temptation to hang on to stereotyped negative notions of those terms, which does shut out consideration of any positive interrelationship of the concepts in their application to Islamic law and international human rights law respectively. In this chapter we will examine and traverse the traditional arguments on those conceptual differences, and propose a more accommodative consideration of the differences.

#### THE THEOCENTRIC VERSUS ANTHROPOCENTRIC DIFFERENCES

Theocentric means having God as the central point of focus while Anthropocentric means having Man (i.e. human being) as the central point of focus. The former is a religious perspective while the latter is a secular one. Based on religion, Islamic law follows the

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<sup>1</sup> See Brohi, A.K., “Islam and Human Rights”, in Gauher, A., *The Challenge of Islam* (1980) p.179 and Weeramantry, C.G., *Islamic Jurisprudence: An International Perspective* (1988) pp.116-117.

theocentric approach and makes direct reference to God as the original granter of human rights.<sup>3</sup> The main and important effect is to instil an element of God-consciousness and religiosity in the duty to respect human rights under Islamic law. The Islamic commitment to human rights can thus be described as both religious and humanitarian. It is a dual relationship, one vertical between human beings and God, and the other horizontal between human beings themselves.<sup>4</sup> The vertical relationship is the religious commitment, which when fulfilled strengthens the horizontal and humanitarian commitment.<sup>5</sup> Conversely, International human rights law follows the anthropocentric approach. It has a secular approach that makes no direct reference to God. The commitment is only a humanitarian one and has the freedom and liberty of the individual human being at heart. Although international human rights law recognises freedom of religion as a human right<sup>6</sup>, it does not consider religion as a basis for human rights. Human rights are rather considered as a social practice that arises from human action and not granted by God.<sup>7</sup> A sharp and indicting divide is thus often advocated between the theocentric and anthropocentric perspectives by the champions of each approach.

On one hand, there is often the tendency to want to portray the anthropocentric approach of international human rights law as being totally incompatible with the principles of Islamic law. On the other hand, a proposal during the drafting discussions of the UDHR of 1948 to inject an iota of “theocentricism” into the Declaration was defeated.<sup>8</sup> This raises the question of whether the non-reference to God in international human rights documents makes them irreverent and non-binding in Islamic law. In opposing any such suggestion, Riffat Hassan has stated that:

“...even though many charters of human rights originating in the Western world do not make direct reference to God, it does not necessarily follow that God-centred or God-related concepts and laws are excluded from them. Reference to God does not necessarily make sacred, nor does nonreference to God necessarily make profane, any human document. To me it seems truly remarkable that an organisation such as

<sup>2</sup> See examples cited in Chapter 2 at p. 22 above.

<sup>3</sup> See e.g. the Preamble of the OIC Cairo Declaration on Human Rights in Islam (1990); and the Preamble of the Universal Islamic Declaration on Human Rights (1981).

<sup>4</sup> The horizontal relationship here will include also the relationship between the State and the individual because the State is equally constituted of individual human beings placed in positions of authority as trustees.

<sup>5</sup> See e.g. Weeramantry, C.G., (1988) *supra*, note 1 above, p.116-117.

<sup>6</sup> See e.g. Art. 18 of the ICCPR.

<sup>7</sup> See e.g. Donnelly, J., *Universal Human Rights in Theory and Practice*, (1989) pp. 16-19.

<sup>8</sup> See e.g. Abu-Sahlieh, S.A., ‘Muslims And Human Rights: Challenges and Perspectives’ in Schmale, W., (ed.) *Human Rights and Cultural Diversity*, (1993) p.239 at 242. See also Little, D., Religion- Catalyst or Impediment to International Law? The Case of Hugo Grotius” (1993) *American Society of International Law Proceedings*, p. 322 at 323, where it is observed that “The legislative history of the Universal Declaration, in fact, clearly indicates that the drafters, after considerable controversy, deliberately refrained from including references to a deity...”.

the United Nations, where every word of every declaration is fought over in an attempt by each country and bloc to protect its vested interest, could arrive at a document such as the Universal Declaration of Human Rights which, though “secular” in terminology, seems to me to be more “religious” in essence than many “*fatwas*” given by Muslim and other religious authorities and agencies.”<sup>9</sup>

The reference to “inherent dignity” of human beings in the UDHR represented a compromise language with which every State may feel comfortable, as is the diplomacy of drafting international instruments. While religiously inclined States may perceive the inherent dignity of the human being as emanating from God, States with no religious inclination were equally free to view the same as emanating from whatever source they choose to assign it.

However, the conflict is not really in whether or not direct reference is made to God in international human rights instruments. It rather lies in the capacity to interpret the theocentric into the anthropocentric and *vice versa*. The proposition of some scholars on this subject suggests that every aspect of the *Shari‘ah* should be reformed to fall in line with present interpretations of international human rights law. Such proposition presumes the present interpretations of international human rights law as a *fait accompli* that fully satisfies a universalism acceptable in all respects to every culture and civilisation. Often there is a theoretic presumptive validity of universalism in international human rights discourse requiring that “everything else (be) adjusted in order to maintain that assumption.”<sup>10</sup> It is highly utopian to presume however that Muslim States would want to repudiate every aspect of their Islamic legal and moral autonomy for a universalism not inclusive of their religious sensitivities. Despite her strong argument for the UDHR above, one observes that Riffat Hassan still turned round to demonstrate the theocentric perspective by which Muslims generally look at life. She still concluded that human rights were given by God and are not a human invention and thus she does not, as a Muslim, “look for their origin or essence in books of law or history but in those books of scripture which contains God’s eternal message and guidance to humankind.”<sup>11</sup> After which she enumerated a list of rights from the Qur‘an. This confirms Luca’s observation that the Qur‘an (i.e. *Shari‘ah*) has a stronger hold than any other legislation on the mind of Muslims.<sup>12</sup> It also demonstrates the impossibility or great difficulty of divesting the concept of human rights in Islamic law from its theocentric basis.

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<sup>9</sup> Hassan, R., ‘On Human Rights and the Qur‘anic Perspective’, in Swidler, A., (ed.) *Human Rights in Religious Traditions*, (1982), p. 51 at 52.

<sup>10</sup> Watson, J.S., *Theory and Reality in the International Protection of Human Rights* (1999) p.15.

<sup>11</sup> Hassan, R., (1982) *supra*, note 9 above, at 55.

<sup>12</sup> See Luca, C., ‘Discrimination in the Arab Middle East’, in Veenhoven, W.A., (ed.) *Case Studies On Human Rights and*

It is a matter of faith that needs to be appreciated.

For the realisation of the ideals of international human rights law in the Muslim world, there is need for a bilateral harmonisation of the theocentric and anthropocentric differences. The divine and the secular need not be imperatively conflicting nor reproaching. They must of necessity interact. There cannot be a total separation between Man and God, especially on matters concerning human well being and welfare. This is because of the strong influence which religion has on a great population of the world's people. Although religions had been misused by some in the past in a very myopic manner to commit selfish atrocities against people, it is also true that principles of religion have equally been used to greatly alleviate human sufferings. There are still many individuals and groups today who are motivated only by religious principles in their involvement in humanitarian activities all over the world. For the well being of humanity, the harmonisation of the theocentric and anthropocentric perspectives of human rights is as essential as inhaling and exhaling<sup>13</sup>. On the part of Islam, the theocentric perspective of Islamic law must therefore not be seen or projected as a totally exclusionist one. It is equally humanitarian and must therefore be accommodative of the anthropocentric perspective of international human rights law. As eloquently expressed by Manzoor, "(t)he logic of Islam is to conjoin the paradigmatic truth of faith with the pragmatic order of the Community. Holding fast to the transcendence of truth, Islam does not allow the world to slip out of its hands"<sup>14</sup>. The underlying principle here, as is reflected in the practices of the Prophet Muhammad, the rightly guided Caliphs and the early Islamic jurists, is that although secular principles can not override Islamic moral and legal values, yet valuable human ideas for the betterment of humanity cannot be prejudicially rejected. It was in that regard that the great twelfth century *Mâlikî* jurist and Islamic philosopher, Ibn Rushd (Averroes), considered it an Islamic duty to study the thought of earlier scholars and thinkers and benefit from them. He said:

"When we read the books of earlier thinkers, we see their thoughts in these books. If there is something there that corresponds to the truth, we accept this and rejoice over it... And if we find something in their thoughts that does not correspond to the truth, we call attention to it and warn against it."<sup>15</sup>

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*Fundamental Freedoms*, Vol.1. , (1975) p.113 at 215.

<sup>13</sup> This simile is borrowed from Manzoor, P., "Faith and Order: Reclaiming the Islamic Theory of Practice", (1990) 10 *The Muslim World Book Review*, No. 2, p.3.

<sup>14</sup> *ibid.*

<sup>15</sup> See *Fasl al-Maqâl* 13 in *Falsafah Ibn Rushd* (Arabic) (1968) cited in Zakzouk, M., "Cultural Relations Between the West and the World of Islam: Meeting Points and Possibilities of Co-operation on the Academic Level", Translated by Walpole, M., (1992) 3 *Islam and Christian-Muslim Relations*, No.1, p.69 at 74.

This demonstrates the accommodating nature of the Islamic theocentric approach. It does not mean blindly shutting the door against everything emanating from human thought and secular. It is a Qur'anic injunction upon Muslims to always co-operate for the attainment of the common good of humanity.<sup>16</sup> Thus Khoury has pointed out that the contemporary Muslim world must, without losing its theocentric identity, be able to contribute –

“towards the realization of the universal solidarity of all people and towards the realization of a social order in which all (human beings) are essentially equal before the law and enjoy equal rights in their daily life, and where tolerance is not only practised, but the irrevocable human rights of all are unreservedly recognized.”<sup>17</sup>

This is fully reflected in the Qur'anic injunction upon Muslims that says:

“O you Believers! Stand out firmly for God as witnesses to fair dealing, and let not the hatred of others to you make you swerve to wrong and depart from justice. Be just: that is next to piety: and fear God for God is well acquainted with all that you do.”<sup>18</sup>

Equally, there is the need in the interpretation of international human rights law for the appreciation and accommodation of the theocentric nature of Islamic law. The interpretations of the liberties and freedoms contained in the international human rights instruments should be sensitive to the moral values of the *Sharī'ah*. That is the inclusive approach of interpreting and implementing international human rights law. A productive interpretation should appreciate the religious sensitivities of Islamic law in the quest for a true universalism in international human rights law within Muslim States. Where the door is shut completely against the Islamic theocentric perspective it will be difficult if not impossible to interpret international human rights law in the language of the *Sharī'ah* or vice versa, no matter how hard the effort. For, as stated by Eaton, “(t)here is a limit to how far men can go in interpreting the Divine Word in terms of a language from which all the appropriate words have been excluded.”<sup>19</sup>

The theocentric approach was not actually alien to the origins of Western perspectives of human rights too. The Magna Carta of 1215, which is considered as the basis of English constitutional liberties, was issued under the “grace of God”<sup>20</sup>. The formulators of the

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<sup>16</sup> See e.g. Q 5:2.

<sup>17</sup> Khoury, A. Th., *Toleranz in Islam* (1982) p. 185 cited in Zakzouk, M., (1992), *supra*, note 15 above, p.73.

<sup>18</sup> Q 5:8.

<sup>19</sup> Eaton, H.G., *The Keys To The Kingdom* (1977) p.180.

<sup>20</sup> See the preamble of the Magna Carta (1215). See e.g. Dickonson, J.C., *The Great Charter* (1955) p.17.

American Declaration of Independence of 1776 also recognised that the rights it proclaimed were endowed unto men by “their Creator”<sup>21</sup>. They also appealed to the “Supreme Judge of the world for the rectitude of (their) intentions”<sup>22</sup> in declaring those rights. Similarly, the rights contained in the French Declaration of the Rights of Man and the Citizens of 1789 were considered to be “*sacred*” and were declared “in the presence of the Supreme Being, and with the hope of His blessing and favour.”<sup>23</sup>

Departure from the theocentric approach to both law and morality in the West, was an aftermath of the Enlightenment Age when a strong faith was developed in materialism and the power of human reason as a tool of endless progress not only in technological development but even in moral values. Due to the earlier conflict between religion and scientific advancement in the West as well as the political use of religion for the destruction of opponents, religion came to be perceived as stifling and repressive. The Church was considered as an institution that had enslaved the human mind. Through philosophical scholarship human aspiration was thus motivated towards worldly happiness and against the belief in religious salvation. The Church was harshly criticised and stripped of authority in political and State matters. It was argued that Man must take control of his own destiny by separating religion and God from the public affairs of the State. Both political and legal authorities were therefore freed of any consideration of religious morality, which was considered to be a clog in the wheel of human civilisation.

The atrocities of both the first and second world wars however proved that it was neither religion nor God that was savage or barbaric. It was Man himself who could be very unjust in the use of authority. Making Man more political and materialistic and less religious and God-conscious did not therefore stop him from being brutal. Men similarly misused secular political authority and again the need for morality became imperative even in secular political authority. International human rights law was thus an attempt to re-introduce the moral back into the political. So far a completely pragmatic and secular morality has still been adopted. The fact that there continues to be violations of human rights in both religious and secular societies of today’s world indicate that the fault lies with Man himself. Having a theocentric perception therefore does not in any way accommodate the violation of human rights more than an anthropocentric perception does. The violations are more often political and

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<sup>21</sup> See the preamble of the American Declaration of Independence (1776).

<sup>22</sup> See the conclusion of the American Declaration of Independence (1776).

<sup>23</sup> See the preamble of the Declaration of the Rights of Man and of Citizen, *Translated in* Paine, T, *Rights of Man*, (1984) p.110.



economic than religious. They are the evils of humans against humans. The Qur'an emphatically says that: "Verily God will not deal unjustly with mankind, it is mankind that deal unjustly with themselves."<sup>24</sup> Actually Muslims do argue that a sincere commitment to the theocentric perspective compels the religiously inclined to fulfil the obligations of human rights, because they would then be considered also as a religious obligation that will be accounted for in the hereafter.

Human rights do not therefore have to be imperatively secular, nor depend on the existence of a secular State or society.<sup>25</sup> If they are, that will be difficult to reconcile with Islamic socio-legal thought. A common ideal shared by most Muslims, whether traditionalists or modernists, is their opposition to the replacement of the Islamic polity with a totally secular one.<sup>26</sup> The theocentric factor is therefore a theoretic constant in Islamic political, moral and legal thought that cannot be totally dislodged. An appreciation of this in international human rights law will facilitate some harmony in human rights values that will go a long way in creating a theoretical balance upon which a realistic universal application of international human rights law can be achieved, especially in the Muslim world. In that respect, one insightful authority has observed notably that:

"The morality of religion has provided some of the glue that has made international law stick. The binding force of any law, international included, cannot rest solely on force. The legitimacy of international law and international organizations ultimately is a function of widespread individual beliefs that the law and its authorities are right and appropriate. International lawyers have long recognized the potential of religious and moral belief for building a sense of international community whereby peoples of the globe will be concerned with the fate of all the nations, not just their own".<sup>27</sup>

It is clear from the above analysis that the theocentric and anthropocentric perspectives to human rights are not vehemently incompatible. Both perspectives are accommodative of each other through constructive analysis and proper understanding of the concepts. While the recognition of the right to freedom of religion and belief<sup>28</sup> does facilitate the accommodation of the theocentric perspective within international human rights law, *Shari'ah* provisions such as "...God intends every facility for you (humans); He does not want to put you in

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<sup>24</sup> Q 10:44.

<sup>25</sup> *But see e.g.* Little, D., (1993) *supra*, note 8 above, p. 323 for the view that human rights has to be secular.

<sup>26</sup> *See* Binder, L., *Islamic Liberalism: A Critique of Development Ideologies*, (1988) p.244. *See also* An-Na'im, A.A., *Towards an Islamic Reformation* (1990) p.10.

<sup>27</sup> Janis, M.W., "Religion and International Law", (1993) *American Society of International Law Proceedings*, at 322.

<sup>28</sup> *See e.g.* Art. 18 of the UDHR (1948) and Art. 18 of the ICCPR (1966).

difficulties...”<sup>29</sup> also facilitate the accommodation of the anthropocentric perspective within Islamic law.

## INTERNATIONAL HUMAN RIGHTS LAW AND WESTERN LIBERALISM

Liberalism advocates values such as freedom, liberty, individualism, utilitarianism, pluralism, empiricism, and tolerance.<sup>30</sup> It is generally understood as a political or philosophical theory that postulates the complete liberty of the human person. Applied to human rights, liberalism embraces liberty and tolerance as a moral theory as well as a politico-legal philosophy.<sup>31</sup> Liberalism is considered in Western thought as the main vehicle to ensure perfect liberty of the individual and guarantee the enjoyment of his full human rights everywhere. Western liberalism has always been linked with the Enlightenment and its defence of rationalism and skirmish with religion. Thus liberalism is often considered to be mostly secular and anti-religious. Muslim States generally consider Western liberalism to be too permissive and fear that it can corrupt the moral values set by the *Shari'ah*. Western liberalism is often seen as promoting the notion of absolute liberty and freedom of the individual even against societal morality.

Canvassing liberalism as a notion of absolute liberty and freedom of the individual is however misleading. A notion of absolute freedoms and liberties opposes the very foundation of political philosophy and the theory of law. This is because both law and political authority do in fact essentially constitute some limitation upon the liberties and freedoms of individuals.<sup>32</sup> The fallacy of an absolute notion of liberty had long been expressed by Locke as follows:

“...*Liberty* is to be free from restraint and violence from others, which cannot be, where there is no law: But *Freedom* is not, as we are told, *A Liberty for every Man to do what he lists*”.<sup>33</sup>

Under what has been described as the “fundamental liberal principle” there only exists a kind of presumption in favour of liberty, which places the burden of proof on anyone who

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<sup>29</sup> Q2:185.

<sup>30</sup> e.g. See generally Gaus, G.F., “Liberalism”, in Zalta, E.N., (ed.) *Stanford Encyclopaedia of Philosophy*, Online: <http://plato.stanford.edu> [12/2/2001].

<sup>31</sup> Although there exist different ideological approaches to human rights even in the West, the UN international human rights treaty bodies do demonstrate a liberalistic approach in their interpretation of international human rights treaties as is demonstrated for example in the practices of the HRC and the ESCR Committee in Chapters 6 and 7 below.

<sup>32</sup> See e.g. Dworkin, *The Theory and Practice of Autonomy* (1988) pp.22-23.

<sup>33</sup> Locke, J., *Two Treatises of Government*, Laslett, P.,(ed.) (1967) p.324.

contends for any restriction on it.<sup>34</sup> Thus the power of the State to interfere in the actions of individuals is not completely ousted under liberal theory but is only curtailed. The necessity of control by the political authority through law is recognised, but any limitations they impose upon individual liberties and freedoms must be publicly justifiable to be acceptable. That is what is often referred to as the “justificatory principle” in liberal theory. This thus exposes the fallacy of the postulation that there exists a complete freedom to do whatever one desires in liberal societies. The justificatory principle establishes that restrictions upon the rights of individuals may not in themselves be wrong provided they are determinable and justifiable. The difficult question however is how to determine the parameters of justification for any limitations or restrictions that political authority and law may place on individual liberty. This involves a question of values. Values are without doubt subjective and also not static, whether in relation to international law or to Islamic law. The differences in values are reflected even in western liberalism by the fact that liberal traditions vary with respect to the different Western nations and over time.<sup>35</sup> Thus while liberalism is associated closely with civil and personal liberties in some Western countries, it centres on democracy or economic freedom or secularism in others.

With respect to human rights, liberalism is more relevant to the civil and political rights. In international human rights law, both political authority and law must be geared towards ensuring the liberty of individuals. The theory of liberalism recognises both a positive and a negative conception of liberty in that respect. The negative conception of liberty is more emphasised than the positive conception of it in the West. The negative conception of liberty considers a person “to be free to the degree to which no man or body of men interferes with (his) activity” without compelling justification.<sup>36</sup> The State is generally prohibited (negative obligation) from interfering with the freedom of the individual to determine his own moral values, with the consequence that individuals may even have the right to do what is wrong from the moral point of view of the society as a whole.<sup>37</sup> A moralist regime is thus often detested in most Western societies today. This is why many Islamic analysts see Western societies as being too permissive. It must be acknowledged however that this emphasis on the negative conception of liberty has, in many respects, greatly contributed to the guarantee

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<sup>34</sup> See e.g. Gaus, G.F., *Justificatory Liberalism: An Essay on Epistemology and Political Theory*, (1996) pp.162-166.

<sup>35</sup> For instance, women got the right to vote in the United States in 1920 and in Britain in 1928, and it was only in 1965 that African-Americans could vote freely in the United States after the Voting Rights Act suspended certain voter qualifications that kept them out.

<sup>36</sup> See e.g. Berlin, I., “Two Concepts of Liberty” in Berlin, I., *Four Essays on Liberty*, (1969) p 122.

<sup>37</sup> See Waldron, J., *Liberal Rights: Collected Papers 1981-1991*. (1993) pp.63-87.

of the human rights of individuals in some Western countries. It restrains the State from unnecessarily interfering with the liberties and freedoms of individuals.

Islamic legal and political theory also recognises the negative approach to liberty, but not independent of religious morality and consciousness.<sup>38</sup> Under Islamic law the political authority has a moralist tendency due to its urge to ensure the maintenance of Islamic moral standards in the Islamic State. The State has an obligation to maintain public order by “commanding virtues and prohibiting vices”.<sup>39</sup> Basically therefore, the individual does not have absolute liberty under Islamic law. He is not, as expressed by Locke, the “absolute Lord of his own Person”,<sup>40</sup> but owes some obligations to his Creator. Some of these obligations fall within the scope of public law, which the political authority has a duty to uphold. Individual liberty is thus subjected to both the *Sharî‘ah* and to the political authority, which itself is in turn also subject to the *Sharî‘ah*.<sup>41</sup> Because the *Sharî‘ah* is divine, the attitude of Muslims to its provisions is expected to be “we hear and we obey”.<sup>42</sup> Although the Qur’an often gives some justification for its provisions regulating matters of human relations (*mu‘âmalât*), it is not a condition in Islamic legal and political theory that such justification must be absolutely within human rationality. This is based on the Islamic belief that human knowledge is limited and God, being Omniscience, knows what human beings know not.<sup>43</sup> It is interesting to note that a liberal theorist such as Hayek had also appreciated the limitation of human knowledge.<sup>44</sup> Karl Popper had also, criticised philosophers such as Plato, Hegel and Marx for failing to appreciate the limits of human knowledge.<sup>45</sup> Although the arguments of both Hayek and Popper were not aimed at accommodating religious principles within the liberal theory but to expose the defects in complete reliance on utilitarianism, it provides secular evidence for the main argument why Islamic law does not rely completely on rationalism, namely, Man’s limited knowledge.

The argument above does not however mean a total subjugation of the individual by the power of the State under Islamic law. The Islamic legal doctrine of *hisbah* (public order) only

<sup>38</sup> See Rahman, A., *Readings in Political Philosophy, Vol.1 LIBERTY*, (1987) p.129.

<sup>39</sup> This is termed *Hisbah* (meaning “public order”) in Islamic politico-legal theory and expressed by the phrase “*Amr bi al-M‘arûf Wa Nahy ‘an al-Munkar*”.

<sup>40</sup> Locke, J., “The Second Treatise of Government”, in Laslett, P., (1967) *supra*, note 33 above, p.368.

<sup>41</sup> See Q 4:59.

<sup>42</sup> See Q 2:285. See also An-Naim, A.A., “Toward a Cross-Cultural Approach to Defining International Standards of Human Rights: The Meaning of Cruel, Inhuman, or Degrading Treatment or Punishment”, in An-Na’im, A.A., (ed.) *Human Rights in Cross-Cultural Perspectives: A Quest For Consensus*, (1992) p.19 at 35 where he explains the binding nature of Qur’anic injunctions upon Muslims.

<sup>43</sup> See e.g. Q 3:66 “...It is God Who knows, and you (human beings) who know not.”

<sup>44</sup> See Hayek, F.A., *The Mirage of Social Justice* (1976) p. 20.

<sup>45</sup> See generally Popper, K., *The Open Society and its Enemies* (1945).

allows for what may be termed “benevolent interference” by the State in the affairs of individuals to enhance their liberty according to the divine provisions of the *Shari’ah*. This is similar to the positive conception of liberty in western liberal theory, whereby there may be positive restrictions on some liberties of individuals to further enhance their overall liberty and freedom. Thomas Green had argued for positive liberty on the grounds that an individual cannot be said to be free or to possess liberty if he is actually subject to a personal desire or craving that he cannot control.<sup>46</sup> An example is that of an alcoholic, to whom the prohibition of intoxicants under Islamic law will appear as a limitation on his liberty to consume what pleases him. But intoxicants do, in fact, hinder people from acting independently and thus takes away the freedom and liberty of the alcoholic. Green equated such a person to a bondsman who has lost his liberty to his cravings.<sup>47</sup> An important ideal of freedom recognised generally within liberal theory is that of a person who is independent, whose actions are his own and able to reflect on his ideals.<sup>48</sup> In the example of alcohol given above, the prohibition therefore actually increases the individual’s inclination to act independently and is thus freedom-enhancing and a positive approach to liberty. Thus Rousseau had argued that a person can be “forced to be free”.<sup>49</sup> The fact however is that this positive approach to liberty, in form of paternalistic interference of the State, is prone to abuse by the political authority, especially where the limits of the State’s positive interference upon individual liberty are not clearly defined or where there are no independent supervisory judicial or quasi-judicial institutions to monitor such interference. Advocates of the negative approach thus see the positive approach to liberty as a threat to the overall freedom and human rights of individuals. Narveson has therefore argued that: “if we think people’s liberty important, we should think it important enough not to violate it for the sake of promoting any ... goal, even if it be called liberty.”<sup>50</sup> The truth however is that individuals can not have absolute freedom within any political dispensation. The exemptive doctrine of public order in almost every legal system confirms that fact. The realistic approach is therefore the adoption of a principle of justificatory interference whereby the intervention of the State upon individual freedoms is recognised but can only be lawful where reasonably and legally justified. Such justifications must however be very specific, well defined and not just general or sweeping justifications

<sup>46</sup> Green, T.H., *Lectures on the Principles of Political Obligation and Other Essays*, (eds.) Harris, P., and Morrow, J., (1986) p.228.

<sup>47</sup> *ibid.*

<sup>48</sup> See generally e.g. Mill, J.S., *J S Mill On Liberty: In Focus*. (ed.) Gray, J., pp.471-582; Benn, S.I., *A Theory of Freedom* (1988); Dworkin, G., *The Theory and Practice of Autonomy* (1988); and Raz, J., *The Morality of Freedom* (1986).

<sup>49</sup> Rousseau, J., *The Social Contract and Discourses*, Trans. Cole, G.D.H., (1973) p.177.

that may be abused with impunity by the political authority.

Under Islamic law the political authority owes a duty not only to the people but to God not to violate the freedom of the ruled without justification. The justificatory principle generally finds support from the fact that in the Qur'an itself a justifying clause usually accompanies nearly every regulation concerning inter-human relations (*mu'âmalât*). The perimeter of justification in Islamic law is thus the Qur'an itself. Theoretically, it is the only perimeter that can be free of human bias because it is a divine revelation that preceded the State itself. This is why Muslims put it above every human legislation. While the text of the Qur'an is not subject to amendment, its provisions may however be interpreted in the light of societal changes within the holistic values of the *Sharî'ah* in a manner that ensures that there is no deviation from its theocentric basis. It is with respect to this that an Islamic legal maxim states that "*tatagayyar al-ahkâm bi tagayur al-zamân*" meaning that legal rulings (i.e. their interpretations) may change with the change in time.<sup>51</sup> This applies mostly to matters concerning human relations (*mu'âmalât*). Examples of this can be found in the practices of Muslim jurists of all ages. This facilitates the interpretation of the Islamic legal texts to accommodate the dynamic changes in human life. Also, when the justifications attaching to certain legal provisions change then the legal rule may change as well.

An example can be cited of the Northern Nigerian<sup>52</sup> case of *Tela Rijiyan Dorawa v. Hassan Daudu*<sup>53</sup> which involved a land dispute between one Dorawa and one Daudu. The parties appeared before an Upper Area Court in Sokoto<sup>54</sup>, each calling a witness in evidence. Dorawa called one John (a Christian) as his witness while Daudu called one Hausa (a Muslim) as his own witness. The Upper Area Court after reviewing the evidence before it rejected the testimony of John on grounds that the evidence of a non-Muslim was not acceptable under Islamic law applicable by the court. Judgement was thus entered in favour of Hassan Daudu. Dorawa appealed to the Sokoto High Court. The learned High Court judge, himself a Muslim, in consultation with the Grand Kadi of the State,<sup>55</sup> allowed the appeal and overturned the ruling of the lower court. The high court cited Islamic legal literature to illustrate, *inter alia*, that the traditional reason for the disqualification of the

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<sup>50</sup> Narveson, J., *The Libertarian Idea*, (1988) p.33.

<sup>51</sup> See e.g. al-Ghunaimi, M.T. *Durûs fî Usûl al-Qânûn al-Wada'î* (Arabic) p.150, cited in al-Ghunaimi, M.T., *The Muslim Conception of International Law and the Western Approach* (1968) p.101.

<sup>52</sup> Nigeria is a multi-religious nation with a predominant Muslim population, especially in the Northern part where Islamic law is applicable.

<sup>53</sup> (1975) *Northern Nigerian Law Report*, 87.

<sup>54</sup> The Upper Area Courts apply Islamic law.

<sup>55</sup> The Grand Kadi of a State in Nigeria is the most senior Islamic law judge within the State's judiciary. He is the head of

testimony of non-Muslims under Islamic law was the fear of their giving false evidence due to their lack of Islamic belief, and that their evidence was acceptable when there is no such fear or in case of necessity. The high court was said to have “regarded the condition of Nigeria today being a country with large Muslims, Christian and animist communities, living side by side and transacting business with each other, as satisfying the necessity” making the evidence of a non-Muslim admissible in Islamic law.<sup>56</sup>

One can thus correctly conclude that being liberal is not un-Islamic. Islamic law also accommodates the concept of liberalism but, as usual, in a sense that is not independent from Islamic religious and moral consciousness. The difference between Islamic liberalism and Western liberalism is thus a matter of degree, which rules out an absolute incompatibility between the two. This brings us to the question of “Islamic fundamentalism”, a term often associated with the application of Islamic law.

#### INTERNATIONAL HUMAN RIGHTS LAW AND “ISLAMIC FUNDAMENTALISM”

Fundamentalism is defined in the ordinary sense as “(u)nswerving belief in a set of basic and unalterable principles of a religious or philosophical nature”.<sup>57</sup> The term was originally used in reference to a faction of a Protestant Christian group in the United States of America that adhered strictly to traditional orthodox tenets of Christianity. They believed in the infallibility of the Bible and emphasised adherence to the pristine purity of the Christian faith.<sup>58</sup> The term “Fundamentalism” became prominently associated with Islam when Western commentators used it to describe the Islamic element of the Iranian revolution that deposed the late Shah of Iran in 1979.<sup>59</sup> Since then “Islamic Fundamentalism” has become a specific dictionary word and has been defined as “the belief that the revitalisation of Islamic societies can come about only through a return to the fundamental principles and practices of early Islam.”<sup>60</sup> If the belief in the infallibility of the Qur’an and the revitalisation of Islamic society through adherence to the fundamental principles of Islam are the factors of Islamic fundamentalism, then almost every Muslim would be described as an Islamic

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the Sharī’ah Court of Appeal of the State.

<sup>56</sup> See Hon. Justice Mohammed, U., “Shariah and the Western Common Law: A Comparative Analysis”, in Abdul-Rahmon, M.O., (ed.) *Thoughts in Islamic Law and Ethics* (1992) p.16 at 25.

<sup>57</sup> See *Readers Digest Universal Dictionary* (1987) p.619.

<sup>58</sup> See generally, Barr, J., *Fundamentalism* (1981) 2<sup>nd</sup> Ed., and Marsden, G., *Fundamentalism and American Culture* (1980).

<sup>59</sup> See e.g. Chandra, M., *Human Rights and the New World Order* (1993) p.177.

<sup>60</sup> See Pearsall, J., and Trumble, B., *The Oxford English Reference Dictionary*, 2<sup>nd</sup> Ed. (1996) p.746.

fundamentalist,<sup>61</sup> because those factors are common inclinations of all Muslims.

Fundamentalism has however acquired a general usage today, in relation to Islam, which is negative and different from the ordinary dictionary meaning. The term has been used derogatively to refer to demands for the political implementation of Islam or the application of the *Sharî'ah* in Muslim States, and also used to connote fanaticism and terrorism. For instance the New York Times published an article in 1993, which stated, *inter alia*, that:

“Muslim fundamentalism is fast becoming the chief threat to global peace and security as well as a cause for national and local disturbance through terrorism. It is akin to the menace posed by Nazism and fascism in the 1930s and then by communism in the 1950s”.<sup>62</sup>

The term “Islamic Fundamentalism” or “Muslim Fundamentalism” thus tends to project Islam and Islamic law as threats to international human rights and global peace. Muslims generally consider this as inaccurate and misleading and have objected to the use of the term in such derogative manner in reference to contemporary Islamic resurgence.<sup>63</sup> Certainly there have been instances where Muslim militant groups have been alleged and have also accepted responsibility for bombings, hijacking aeroplanes, kidnappings, issuing death threats and holding innocent people hostage. In many of such incidents innocent lives are lost, people are terrified and human rights are grossly violated. These incidents are normally reported in the Western media as acts of Islamic fundamentalism. The pertinent question to ask is whether these acts find support within Islamic law. Miah has observed in this regard that:

“Islam prohibits all forms of terror and tyranny particularly against innocent people. It further prohibits, even in war, any unjust or cruel treatment of women, children and elderly persons; deliberate destruction of livestock and environment as well as cruelty towards the defeated enemy”.<sup>64</sup>

It has therefore been argued on one hand that these acts are rather acts of extremism and fanaticism on the part of Muslims who commit them and are not tolerated by Islam and should thus not be addressed as acts advocated or supported by Islamic law.<sup>65</sup> On the other

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<sup>61</sup> See Chandra, M., (1993), *supra*, note 59 above, pp. 177-8; See also An-Naim, A.A., (1990) *supra*, note 26 above p.3.

<sup>62</sup> See *The New York Times*, 9 September 1993. See also statement by the former NATO Secretary General Willy Claes, that: “Islamic Fundamentalism is at least as dangerous as Communism. Please do not underestimate this risk” cited in FOSIS and Islamic Foundation, *Essays on Islam*, (1995) p.112.

<sup>63</sup> See e.g. Chandra, M., (1993), *supra*, note 59 above, pp.177-180; Ahmad, K., “The Nature of the Islamic Resurgence”, in Esposito, J.L.,(ed.)*Voices of Resurgent Islam* (1983)pp.225-226. See generally also the articles on “Fundamentalism” in *Essays on Islam* (1995), *supra*, note 62 above pp. 77-180.

<sup>64</sup> Miah, F., in *Essays on Islam*, (1995), *supra*, note 62 above, p. 112 at117.

<sup>65</sup> *ibid.*



hand it has also been argued that such acts of extremism are usually reactions to social and political injustice taking place in Muslim lands and to which the international community usually closes its eyes or tacitly support. Al-Qaradawi thus observed that:

“Extremism does not originate haphazardly (but) must indeed have causes and motives, ...events and actions do not come out of the blue...(but) are governed by the law of cause and effect... Knowledge of the causes in this respect is essential to enable us to define the remedy...”<sup>66</sup>

Akbar Ahmed has illustrated further, with reference to the reaction of the West to the cancellation of the democratic elections in Algeria in 1992 as an example of frustrations that could lead to such extreme acts by Muslim groups. He said:

“...when the army prevented FIS (Islamic Salvation Front) from taking power and the tanks rolled into the streets, the West was jubilant. The beatings and killings, even in the mosques, the arrests and harassments did not appear to dim Western joy. The main news was that another Islamic movement had been stopped. There were no tears for democracy... Muslims were appalled at the double standards of the West. Had there been a similar military action, say in Pakistan, the Western media would have become hysterical with stories of the tyranny or martial law. They would have paraded the old arguments about the death of democracy in Muslim society, the inherent predilection of Muslims for authoritarian rule. But here was a situation where the West was gloating over the denial of power to the duly elected FIS. The double standards cause Muslims to ask, ‘Why is the West constantly hostile to us?’ ... This manner of negative Western response will provoke a virulently anti-Western position.”<sup>67</sup>

The arguments go to the effect that the contemporary resurgence of Islam and calls for the application of the *Shari‘ah* as public law in many Muslim countries should not be seen as fundamentalism in the sense of promoting extremism and fanaticism that violate the principles of international human rights. The call for the complete application of the *Shari‘ah* in Muslim lands is in itself a protest against social and political deterioration in the Muslim world today and is not inherently antagonistic to the ideals of international human rights law, but rather “hostile to whatever or whoever is perceived to be the cause of frustration and oppression, be it internal or external.”<sup>68</sup>

Fingers are however often pointed to some Muslim States to argue that the implementation of Islamic law in those countries have sometimes revealed pictures that

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<sup>66</sup> al-Qaradawi, Y., *Islamic Awakening Between Rejection and Extremism* (1990) p.25; See also the Introduction in Tamimi, A., (ed.) *Power Sharing Islam?* (1993).

<sup>67</sup> Ahmed, A.S., *Living Islam* (1995) p.148-149.

<sup>68</sup> See Ahmad, K., ‘The Nature of Islamic Resurgence’ (1983) *supra*, pp.219.

greatly fall short of the threshold of international human rights standards.<sup>69</sup> Does this not indicate that even when understood in its ordinary sense, Islamic fundamentalism as an “unswerving belief” in the basic and traditional principles of the *Shari’ah* will still put Islamic law in conflict with the provisions of international human rights law? This is not necessarily so. Human rights violations occur in every country of the world due to many different factors. Violations of human rights in the United States of America for instance will not necessarily mean that the political ideology of the US is in conflict with international human rights law. The guarantee of human rights depends much on the attitude of governments in power who are the actual guarantors of human rights at every particular point in time. Every government or regime in power has a way of manipulating laws, attitudes, cultures, beliefs and even the very principles of international law to consolidate control and gain legitimacy. Even the most fundamental human rights are sometimes violated in that process. The guarantee or abuse of human rights in any given society does not solely depend on the ideology or beliefs of a State, it depends much more on the political and humanitarian will of the ruling authority.

The fundamental belief of Muslims in the immutability of the Qur’an is the strength of both Islam and Islamic law. Any acceptance or acquiescence by Muslims to its mutability or fallibility repudiates the divine basis of both the Islamic religion and the law. Muslims are thus very careful of not jeopardising the divine basis of their faith and that of the *Shari’ah*. But while they hold strongly to the belief that the Qur’an being a revelation of God, is eternal and unchanging, Muslims also believe in the benevolence of God and that His law was revealed to bring justice and comfort to humanity. Thus in considering that they owe some duties to God under the *Shari’ah*, they do not also lose sight of the munificence of God upon them through the *Shari’ah*.<sup>70</sup> The *Shari’ah* is thus not supposed to be interpreted nor implemented by rulers in any manner that would be oppressive upon the ruled. In one of his Traditions, Prophet Muhammad is reported to have said that God said: “I have forbidden oppression for myself, and have made it forbidden amongst you, so do not oppress one another”.<sup>71</sup> That Tradition explains precisely the message of international human rights. Thus adhering to the fundamentals of Islam does not necessarily advocate oppression, brutality or violation of international human rights law.

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<sup>69</sup> See e.g., Lawyers Committee for Human Rights, *Beset By Contradictions: Islamization, Legal Reform and Human Rights in Sudan* (1996); Levitt, M.A., “The Taliban, Islam and Women’s Rights in the Muslim World” (1998) 22 *The Fletcher Forum of World Affairs*, 113-116.

<sup>70</sup> See e.g. Q 2:185.

The Muslim world today may however be classified, in its interpretation of the *Sharî'ah*, into the main divisions of “traditionalists” and “modernists”. The “traditionalists” are those who see value in a tenacious adherence to the classical interpretations of the *Sharî'ah* as laid down from the tenth century in the traditional treatises of Islamic law. They are sometimes also referred to as “conservatives” or “hard-liners” due to the sometimes strict “back-looking” interpretations and non-compromising adherence to the classical treatises of the founding jurists of Islamic law. The “modernists” are those who, while identifying with the classical jurisprudence and methods of Islamic law, seek to make it relevant to modern times. They believe in the continual evolution of Islamic law and argue that if the *Sharî'ah* must really cope meaningfully with modern developments and be applicable for all time then such modern developments must be taken into consideration in the interpretation of the *Sharî'ah*. They are also referred to as Islamic liberals or moderates. They adopt a “back and forward-looking” approach in their interpretations of the *Sharî'ah*. The scope of harmonisation between Islamic law and international human rights law in the different Muslim countries depends therefore upon whether the political authority follows a hard-line or moderate approach in its interpretation of the *Sharî'ah*. The expediency of each approach will continue to become visible in the continuing arguments of this thesis.

### CONCLUDING REMARKS

The above analysis reveal that the conceptual differences on human rights in Islamic law and international human rights law may not be beyond harmonisation. It is clear that the theocentric concept of Islamic law cannot be ignored in its relationship with international human rights law because it influences every aspect of the Islamic polity. The theocentric concept cannot however be used as camouflage for oppression or abuse of human rights. There is need for an upright political and humanitarian will in Muslim States that will demonstrate an interpretation and application of Islamic law in a manner that shows that God is Most Gracious and Most Merciful to Mankind.<sup>72</sup>

Equally, there must be an appreciation of the theocentric perspective of Islamic law within the international human rights regime which will accommodate a justificatory approach rather than a strictly secular and exclusionist approach in the interpretation of

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<sup>71</sup> See e.g. Ibrahim, E., and Johnson-Davies, D., *Forty Hadith, An-Nawâwî's* (3<sup>rd</sup> Ed. , 1985) p.80

<sup>72</sup> Every Chapter of the Qur'an, except one, is headed by the “preamble” “*In the Name of God, Most Gracious, Most Merciful*”.

international human rights principles. Professor Rene David has rightly observed the impossibility of rejecting the Islamic legal tradition without rejecting the entire Islamic civilisation.<sup>73</sup> Since such rejection is not the goal of the international human rights regime, the accommodation of the Islamic legal tradition is of utmost importance for realising the ideals of international human rights in the Muslim world. It is in that perspective that the ICCPR and the ICESCR, representing the International Bill of Rights, will be examined in the light of Islamic law in the following two chapters.

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<sup>73</sup> See R. David, and E.C. Brierley, *Major Legal Systems in the World Today* (1985), p.482.

PART TWO:

**Comparative Legal Analysis**

## CHAPTER 6

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### The International Covenant on Civil and Political Rights (ICCPR) in the Light of Islamic Law

#### INTRODUCTORY REMARKS

Within the international human rights objective of the UN, the ICCPR constitutes the positive international law guarantee of civil and political rights. It entered into force on 23 March 1976 and has to date been ratified by 148 States, including 39 of the 56 Member States of the Organisation of Islamic Conference (OIC).<sup>1</sup> Of the 6 Muslim States that are used for case studies in Chapter 8 of this thesis, three (Iran, Sudan and Tunisia) have ratified the ICCPR while the other three (Saudi Arabia, Pakistan and Turkey) have not.<sup>2</sup>

This chapter will follow up the arguments of the preceding chapters by examining the provisions of the ICCPR in the light of Islamic law to determine its practical compatibility. Reference will be made to the practice of the Human Rights Committee (HRC) and also to scholarly expositions on the rights guaranteed under the Covenant. In respect of Islamic law, the main sources, i.e. the Qur'an and *Sunnah*, will be cited as basic authority while the juristic views of the different schools of Islamic jurisprudence will also be analysed in respect of the rights guaranteed under the ICCPR. Although the State practice of some Muslim States will be examined later in Chapter 8, reference will still be made to some State practice where necessary in this chapter to throw light on the meaning of the ICCPR as interpreted by the HRC. The OIC Cairo Declaration on Human Rights in Islam will also be cited for further elaboration of the human rights standards acceptable in Islamic law where relevant. Each of the substantive rights of the ICCPR will be analysed as interpreted by the HRC, followed by an Islamic law perspective to identify areas of agreement, differences and possible reconciliation.

Although this chapter is specifically on the ICCPR, reference will be made to necessary Articles of the 1979 Convention on the Elimination of all Forms of Discrimination Against

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<sup>1</sup> See the Status of Ratification of the ICCPR at the UN Human Rights Treaty Website at: [http://www.unhchr.ch/html/menu3/b/a\\_ccpr.htm](http://www.unhchr.ch/html/menu3/b/a_ccpr.htm) [15/2/2001].

<sup>2</sup> Turkey signed the ICCPR on 15 August 2000 but is yet to ratify it.

Women (CEDAW)<sup>3</sup> in the analysis of the rights of women under the Covenant due to its topicality in the international human rights *cum* Islamic law debate.

### THE RIGHTS GUARANTEED UNDER THE ICCPR

The ICCPR guarantees twenty-four substantive civil and political rights. They are:

- |           |   |
|-----------|---|
| Article 1 | The Right of self-determination.  |
| 3         | Equality of Rights between men and women.                                     |
| 6         | The Right to life.  |
| 7         | Freedom from torture or cruel, inhuman or degrading treatment and punishment. |
| 8         | Freedom from slavery, servitude and forced labour.                            |
| 9         | The Right to liberty and security of person.                                  |
| 10        | The Right to humane incarceration system.                                     |
| 11        | Freedom from imprisonment for contractual obligation.                         |
| 12        | The Right to liberty of movement and choice of residence.                     |
| 13        | Freedom of aliens from arbitrary expulsion.                                   |
| 14        | The Right to fair hearing and due process of law.                             |
| 15        | Freedom from retroactive criminal law.  |
| 16        | The Right to recognition as a person before the law.                          |
| 17        | The Right to privacy.   |
| 18        | The Right to freedom of thought, conscience and religion.                     |
| 19        | The Right to freedom of opinion and expression.                               |
| 20        | The Prohibition of propaganda for war and incitement to hatred.               |
| 21        | The Right of peaceful assembly.   |
| 22        | The Right to freedom of association.  |
| 23        | The Right to marry and found a family.  |
| 24        | The Rights of the child.  |
| 25        | Political rights.   |
| 26        | The Right to equality before the law.   |
| 27        | The Rights of ethnic, religious or linguistic minorities.                     |

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<sup>3</sup> 1249 UNTS 13. Entered into force on 3 September 1981 and has been ratified by 44 of the 56 Member States of the OIC.

*Prima facie*, the above list of rights as contained in the ICCPR should raise no problems in the light of Islamic law. But as is the case with all legal provisions it is the interpretation of those rights that determine their scope. Being an international treaty the ICCPR is subject to the general rules of interpretation of treaties under the Vienna Convention on the Law of Treaties.<sup>4</sup> Basically the Vienna Convention provides that an international treaty “shall be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose”.<sup>5</sup> Before proceeding to examine the substantive rights as listed above, we shall first identify the object and purpose of the Covenant and also analyse the obligation of the State Parties as provided under Article 2 of the Covenant.

### THE OBJECT AND PURPOSE OF THE COVENANT

Legally, the object and purpose serves as a parameter of interpretation that prevents the destruction of the essence of the substantive provisions of a treaty.<sup>6</sup> The HRC has broadly outlined the object and purpose of the ICCPR as follows:

“... The object and purpose of the Covenant is to create legally binding standards for human rights by defining certain civil and political rights and placing them in a framework of obligations which are legally binding for those States which ratify; and to provide an efficacious supervisory machinery for the obligations undertaken.”<sup>7</sup>

It follows from the above statement that the object and purpose of the ICCPR is to guarantee the civil and political rights of individuals from States. To realise that objective, the HRC is established under the Covenant as the supervisory machinery for the obligations undertaken by the State Parties. The preamble of the ICCPR also declares the purpose and aspirations that motivated the adoption of the Covenant.<sup>8</sup> It refers to the inherent dignity of the human person as the bedrock of human rights and also recognises the “equal and inalienable rights of all members of the human family” as the “foundation of freedom, justice and peace in the world.” Through the enforcement of the ICCPR the State Parties aspire

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<sup>4</sup> See e.g. *Alberta Union v. Canada*, Communication No. 118/1998, Human Rights Committee, UN. Doc. CCPR/C/OP/1 at 34 (1984), Par. 6.3.

<sup>5</sup> See Art. 31 of the Vienna Convention on the Law of Treaties (1969), 1155 UNTS 331. See also Nowak, M., *Commentary on the UN Covenant on Civil and Political Rights* (1993) (1993) p. xxiii for a brief analysis of the rules governing the interpretation of the ICCPR provisions.

<sup>6</sup> See e.g. Buergenthal, T., “To Respect and to Ensure: State Obligations and Permissible Derogations” in Henkin, L., (ed.) *The International Bill of Rights, The Covenant on Civil and Political Rights* (1981) p.72 at 90

<sup>7</sup> See General Comment. 24, Par. 7.

<sup>8</sup> See UN Doc. A/2929 *Annotation of the Draft International Covenants on Human Rights prepared by the Secretary General* (1955) pp. 32-36.



towards the enhancement of human dignity by fostering an ideal human community that guarantees freedom from fear and want; civil and political freedoms that lead to justice, and peace and general well being of all human beings.<sup>9</sup>

From the Islamic perspective the above objectives of the ICCPR are commensurate with the general provisions and ultimate objective of the *Sharī'ah* as already established in the preceding chapters of this thesis.<sup>10</sup> The Cairo Declaration on Human Rights in Islam reiterates a similar aspiration in its preamble by declaring the wish of Muslim States “to contribute to the efforts of mankind to assert human rights, to protect man from exploitation and persecution, and to affirm his freedom and right to a dignified life in accordance with the Islamic Shari‘ah”.<sup>11</sup> It also states that the fundamental rights and universal freedoms are an integral part of Islam and are binding divine commandments which no one has the right to suspend, violate or ignore.<sup>12</sup> Reference to Islamic *Sharī'ah* in the Cairo Declaration reaffirms the theocentric approach to human rights under Islamic law as distinguished from the anthropocentric approach under the ICCPR<sup>13</sup>, but does not impede the shared noble objective of protecting and enhancing human dignity.

## OBLIGATIONS OF STATES PARTIES UNDER THE ICCPR

### *Article 2*

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.
3. Each State Party to the present Covenant undertakes:
  - (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
  - (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any

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<sup>9</sup> See Pechota, V., “The Development of the Covenant on Civil and Political Rights” in Henkin, L., (1981) *supra*, note 6 above p.32-33.

<sup>10</sup> We have already established in Chapter 4 above that the ultimate objective of the *Sharī'ah* (i.e. *maqâsid al-Sharī'ah*) is to realise the well being of human beings. See p.69 above.

<sup>11</sup> See Par. 2 of the preamble of The Cairo Declaration on Human Rights in Islam (1990) UN. Doc. A/CONF.157/PC/62/Add.18(1993).

<sup>12</sup> See *ibid.*, Par. 4.

<sup>13</sup> See Chapter 5, p.81 above.

other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

Does Islamic law restrict the Muslim States in anyway from fulfilling these obligations? Under Article 2(1) the States Parties undertake “to respect” and “to ensure” the effective and appropriate national implementation of all the rights guaranteed under the covenant “without distinction of any kind”. The duty “to respect” is a negative obligation on the part of the State not to violate the rights while the duty “to ensure” is a positive obligation to take necessary steps to enable the enjoyment of the rights. An important aspect of this positive obligation is the enactment, where not already provided, of necessary domestic legislation by each State Party to ensure the guaranteed rights.<sup>14</sup> Under Islamic law, the legislative power of the State is not totally unlimited. It is theoretically proscribed by the philosophy that God is the ultimate Legislator Who has prescribed what is lawful and unlawful through revelation in the Qur’an. According to Justice Iqbal:

“The legislature in an Islamic state has a restricted role; technically speaking, its authority is delegated and can be exercised only within the limits prescribed by the Qur’an and Sunnah. ... Generally speaking, there are three possible spheres for legislative activity in a Muslim national state:

- (1) to enforce laws which have specifically been laid down in the Qur’an and *Sunnah*;
- (2) to bring all existing laws in conformity with the Qur’an and Sunnah, and
- (3) to make laws as subordinate legislation which do not violate the Qur’an and Sunnah.”<sup>15</sup>

Islamic jurists generally consider any State legislation that makes lawful what God has prohibited in the Qur’an or prohibits what God has made lawful in the Qur’an as exceeding the limits of human legislation allowed under Islamic law.<sup>16</sup> For instance during the consideration of Sudan’s second periodic report on the ICCPR, the Sudanese representatives stated, *inter alia*, that:

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<sup>14</sup> Art. 2(2) ICCPR .

<sup>15</sup> See Justice Iqbal, J., “The Concept of State in Islam”, in Ahmad, M., (ed.) *State Politics and Islam* (1986) 37 at 49-50. This is, for example, evidenced in practice by the provision in the Constitution of Islamic Republic of Pakistan that “No law shall be enacted which is repugnant to the injunctions of Islam as laid down in the Holy Qur’an and Sunna ... and existing law shall be brought into conformity with such injunctions”.

<sup>16</sup> See e.g. al-Qaradawi, Y., *The Lawful and the Prohibited in Islam* (1984) p.18.

“The Sudanese parliament had decided against abolition of the death penalty. The jurisprudential argument for its continued existence was that the death penalty was mandatory for certain offences under Islamic law.”<sup>17</sup>

This general rule does not however mean that the Islamic State is precluded from undertaking legislation at all. Today all Muslim States do legislate on various aspects of life and State policy as required by the needs of time. While conscious of the general rule of non-violation of the *Shari‘ah* in enacting subsidiary legislation, most Muslim States often rely on Islamic legal principles such as *siyâsah shar‘iyyah* (legitimate governmental policy), *darûrah* (necessity), and *maslahah* (welfare) in necessary instances to legislate for the realisation of human welfare and State policy. A combination of these facilitating principles of Islamic law together with some margin of appreciation under international human rights law are necessary paradigms to ensure the positive realisation of the rights guaranteed under the ICCPR within an Islamic legal dispensation.

The undertaking under Article 2(1) to respect and ensure all the rights guaranteed “without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status” is of utmost importance. It reiterates the principle of equality and non-discrimination in the enjoyment of human rights. After analysing the preparatory works on the Covenants, Ramcharan concluded that both the terms “distinction” and “discrimination” as used in the ICCPR and ICESCR “exclude only arbitrary or unjust distinction or discrimination”.<sup>18</sup> Islamic law also generally prohibits arbitrary or unjust discrimination, but there is notable tension in respect of distinction on grounds of sex and religion vis-à-vis international human rights law, which will be examined under the relevant substantive Articles below.

Under Article 2(3) States undertake to provide effective domestic remedies against violations of the rights guaranteed under the Covenant and to ensure that such remedies when granted, shall be enforced by the competent authorities. This accommodates judicial, political and administrative remedies in respect of human rights violations, but Nowak has observed notably that the intendment of Article 2(3)(b) is to place priority on judicial remedies.<sup>19</sup> This places the primary obligation of effectively protecting human rights on State Parties and is substantiated by the provision in Article 5(2) of the First Optional Protocol (OP1)<sup>20</sup> to the ICCPR that the HRC “shall not consider any communication from an individual unless it has

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<sup>17</sup> See Human Rights Committee Summary Record of the 1629th Meeting: Sudan. 31/10/97. U.N. Doc. CCPR/C/SR.1629, Par.15.

<sup>18</sup> See Ramcharan, B.G., “Equality and Non-discrimination”, in Henkin, L., (1981) *supra*, note 6 above, p.247 at 258-259.

<sup>19</sup> Nowak, M., *supra*, note 5 above, p.59.

ascertained that... (t)he individual has exhausted all available domestic remedies”. In *R.T. v France* the HRC observed that the reference to “all available remedies” in Article 5(2) of the OP1 “clearly refers in the first place to judicial remedies”.<sup>21</sup>

There is nothing under Islamic law that inhibits Muslim States from fulfilling this obligation to provide effective domestic remedies in case of the violation of the rights of individuals guaranteed under the Covenant. Islamic law does also prescribe for remedies in form of compensation for violation of a person’s right payable by the injurer be it an individual or the State.<sup>22</sup>

## THE RIGHT OF SELF-DETERMINATION

### *Article 1*

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

Both the ICCPR and ICESCR contain this Common Article 1 on right of self-determination. Although it is a right of peoples rather than of individuals,<sup>23</sup> its importance and relationship to the realisation of individual human rights has been expressed by the HRC as follows:

“The right of self-determination is of particular importance because its realization is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights. It is for that reason that States set forth the right of self-determination in a provision of positive law in

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<sup>20</sup> 999 UNTS 171.

<sup>21</sup> *R. T. [name deleted] v. France*, Communication No. 262/1987 (30 March 1989), U.N. Doc. Supp. No. 40 (A/44/40) at 277 (1989). Par. 7.4.

<sup>22</sup> See e.g. Qadri, A.A., *Islamic Jurisprudence in the Modern World* (1986) pp.341-358.

<sup>23</sup> In *Lubicon Lake Band .v. Canada* the HRC observed that: “the author, as an individual, could not claim under the Optional Protocol to be a victim of a violation of the right of self-determination enshrined in article 1 of the Covenant, which deals with rights conferred upon peoples, as such”. See Par. 13.3, Communication No. 167/1984 (26 March 1990), UN Doc. Supp. No. 40 (A/45/40) at 1 (1990). See also Joseph, S., Schultz, J., and Castan, M., *The International Covenant on Civil and Political Rights, Cases, Materials, and Commentary* (2000) pp.106-107.

both Covenants and placed this provision as article 1 apart from and before all of the other rights in the two Covenants.”<sup>24</sup>

The fact that two Muslim States, Afghanistan and Saudi Arabia, championed in 1950 the proposal that culminated in Article 1 on right of self-determination after an earlier initiative by the USSR had failed,<sup>25</sup> suggests that the right is not in conflict with Islamic law. This right was originally conceived and utilised as an instrument of decolonisation that accelerated the independence of most colonies. It essentially guaranteed the right of people to freely determine their own political status and independence and to pursue their economic, social and cultural development.<sup>26</sup>

The scope of the right was subsequently broadened and divided into external self-determination and internal self-determination.<sup>27</sup> External self-determination covers the scope of alien or colonial subjugation, both politically and economically, and is considered to be a peremptory norm of international law.<sup>28</sup> Internal self-determination is the right of “peoples” within a given State to internal political and economic autonomy, that is “the right to choose the form of their political and economic future.”<sup>29</sup> Sometimes in the exercise of that right a “people” within an existing sovereign State may choose the path of independence which could lead to the creation of a separate State from an existing one. This usually arises as a consequence of the substantive State’s denial of the fundamental rights of the “people” claiming such autonomy.<sup>30</sup> This has enormous political problems with respect to state-sovereignty and often leads to violations of other human rights especially when invoked as a minority right within an existing State. During the deliberating stage of the Covenant, most

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<sup>24</sup> HRC General Comment 12, Par. 1; UN. Doc. HRI\GEN\I\Rev.1at 12 (1994). (*The HRC General Comments will hereinafter be referred to as General Comment followed by its number*). Many of the countries that participated in the drafting of the Covenant had also expressed similar views on the importance of the right of self-determination to the realisation of all other individual human rights. See Cassese, A., “The Self-Determination of Peoples”, in Henkin, L, (1981) *supra*, note 6 above, p.92 at 101.

<sup>25</sup> See Cassese, A., *ibid.*, p.92.

<sup>26</sup> See Art. 1(1) of the ICCPR and the 4<sup>th</sup> Principle in the G.A. Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations 1970, G.A. Res. 2625 (XXV) of 24 October 1970.

<sup>27</sup> See Cassese, A., (1981) *supra*, note 24 above, p. 96ff; Kiss, A., “The People’s Right to Self-Determination” (1986) 7 *Human Rights Law Journal* 165 at 170 ff; and Nowak, M., (1993) *supra*, note 5 above, pp.6-25; Higgins, R., *Problems and Process, International Law and How to Use It* (1994) pp.111-128. See also Principle VIII of the Helsinki Final Act 1 adopted on 1 August 1975 by the Conference on Security and Co-operation in Europe (CSCE) which, by virtue of the right of self-determination, recognises the right of all peoples “to determine, when and as they wish, their internal and external political status, without external interference...”.

<sup>28</sup> See e.g. Cassese, A, (1981) *supra*, note 24 above, p.111; Dinstein, Y., “Collective Human Rights of Peoples and Minorities” (1976) 25 *International and Comparative Law Quarterly* 102 at 106; Kiss, A., (1986) *supra*, note 27 above, p. 174; Gros Espiell, H., *The Right to Self-Determination, Implementation of United Nations Resolutions, Study of the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities* (1980) U.N. Doc. E/CN.4/Sub.2/405/Rev.1, p.11ff and p.40.

<sup>29</sup> See Higgins, R., (1994) *supra*, note 27 above, p.118. See also McCorquodale, R., “Self-determination: A Human Rights Approach” (1994) 43 *International and Comparative Law Quarterly*, 857 at 864.

<sup>30</sup> See Higgins, R., *ibid*, p.124.

of the developing nations had opposed the extension of the right of self-determination beyond colonial situations for the fear of it conferring alleged rights of secession on minorities.<sup>31</sup> Harris has pointed out notably in this regard that the right of self-determination “does not extend to claims for independence by minority groups in a non-colonial context”.<sup>32</sup> This is corroborated by the UN Committee on the Elimination of Racial Discrimination (CERD) in its General Recommendation No. 21 on right of self-determination that:

“...in accordance with the Declaration of the General Assembly on Friendly Relations, none of the Committee’s actions shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states conducting themselves in compliance with the principle of equal rights and self-determination of peoples and possessing a government representing the whole people belonging to the territory without distinction as to race, creed or colour. In view of the Committee international law has not recognized a general right of peoples to unilaterally declare secession from a state. In this respect, the Committee follows the views expressed in the Agenda for Peace (paras. 17 et seq.), namely that a fragmentation of States may be detrimental to the protection of human rights as well as to the preservation of peace and security. This does not, however, exclude the possibility of arrangements reached by free agreements of all parties concerned.”<sup>33</sup>

Since the tendency for invoking the right of self-determination towards independence by minorities is often triggered by oppression or gross denial of their civil and political rights within a State, wherever the rights guaranteed under the Covenant are respected and ensured by the State to all without discrimination the right of internal self-determination would have been fulfilled. Apart from its significance as a civil and political right, the right of self-determination also has an important link with economic, social and cultural development. This is evidenced by its repetition in the ICESR and also in Article 1(2) of the Declaration on the Right to Development.<sup>34</sup> Nowak has observed in that regard that “(s)elf-determination and development are closely associated”, and has pointed out that “the continually spiralling difference between over- and under-development and the current debt crisis in the countries of the Third World show that most peoples of the South are still far removed from true self-determination.”<sup>35</sup>

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<sup>31</sup> See Cassese, A., (1981) *supra*, note 24 above, p.93.

<sup>32</sup> See Harris, D.J., *Cases and Materials on International Law*, (5<sup>th</sup> Ed., 1998) p.113. See also Higgins, R., (1994) *supra*, note 28 above, p.124, and McCorquodale, R., “The Right of Self-determination” in Harris, D. J., and Joseph, S., (eds.) *The International Convention on Civil and Political Rights and United Kingdom Law* (1995) p.91 at 104.

<sup>33</sup> See Par. 6., Committee on the Elimination of Racial Discrimination, General Recommendation XXI on Self-determination, UN Doc. CERD/48/Misc. 7/Rev. 3 (1996). See also Art. 8 of UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992) GA Res. 47/135.

<sup>34</sup> G. A. Res. 41/128 of 1986. See also General Comment 12, Par. 5 for the HRC’s comment on the economic content of the right of self-determination.

<sup>35</sup> See Nowak, (1993) *supra*, note 5 above, p.8.

It is in the context of this last statement and against colonisation that developing nations generally and Muslim States specifically tend to view and advocate the right of self-determination. The right of external self-determination against colonisation and subjugation can be fully justified within the general context of *Shari'ah* prohibitions of oppression and subjugation of peoples. Article 11(b) of the OIC Cairo Declaration provides that:

“Colonialism of all types being one of the most evil forms of enslavement is totally prohibited. Peoples suffering from colonialism have the full right to freedom and self-determination. It is the duty of all States and peoples to support the struggle of colonized peoples for the liquidation of all forms of colonialism and occupation, and all States and peoples have the right to preserve their independent identity and exercise control over their wealth and natural resources.”

Apart from colonial contexts Muslim States strongly abhor the invocation of the right of self-determination by minority groups as a basis for independence or secession. The classical Islamic politico-legal notion of a single Islamic political empire that transcends ethnic, tribal, racial or territorial distinctions disfavours any claim to secession on the basis of right to self-determination. Hashmi has observed that Muslim States tend to “condone only the self-determination of Muslims living within states with a non-Muslim majority” and consider as illegitimate “(c)laims of self-determination advanced by Muslim minorities within existing Muslim states, especially when pressed to the point of secession”.<sup>36</sup> In agreement with the requirements for internal self-determination, a Muslim State has a duty under Islamic law to deal equitably with all peoples within its jurisdiction and to guarantee the fundamental human rights of everyone so that the need for the minority’s advocating secession may not arise. Where such claim arises in a Muslim State, it would suggest the ruling authority’s failure to discharge its human rights obligations in respect of such minorities and would in that case have to discharge the obligations rather than for the minorities to secede. This is ideally in consonance with ensuring the fundamental rights of everyone within a State rather than accommodating secession that often leads to graver human rights violations. CERD had observed in its General Recommendation 21 that governments should be sensitive towards the right of minority groups “to lead lives of dignity, to preserve their culture, to share equitably in the fruits of national growth, and to play their part in the government of the country of which its members are citizens”.<sup>37</sup> The pertinent question of whether or not non-

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<sup>36</sup> See Hashmi, S.H., “Self-Determination and Secession in Islamic Thought”, in Sellers, M., (ed.) *The New World Order, Sovereignty, Human Rights and the Self-determination of Peoples* (1996) p.117.

<sup>37</sup> See CERD General Recommendation 21, *supra* note 33 above, Par.5.

Muslim minority subjects of an Islamic State can as of right take part in the governance of the State, will be addressed under Article 25 below.<sup>38</sup>

## EQUALITY OF RIGHTS BETWEEN MEN AND WOMEN

### *Article 3*

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

Equality and non-discrimination are very fundamental principles of human rights. Both principles are usually taken as equivalent to each other. They indicate a positive and negative means of ensuring an important component of justice – impartiality, and have been described as “the most fundamental of the rights of man” and “the starting point of all other liberties.”<sup>39</sup> It had also long been noted that “inequality of rights has been the cause of all the disturbances, insurrections and civil wars that ever happened”.<sup>40</sup> It was the root cause of slavery, the Holocaust and colonisation, and it continues to be the cause of many inhuman treatments that exist in human society today. From the context of international human rights law, the principle of equality is based on the recognition that “(a)ll human beings are born free and equal in dignity and rights”,<sup>41</sup> thus human rights are supposed to be egalitarian in nature and to be enjoyed by all human beings in full equality. The principle of non-discrimination is an extension of that, whereby the enjoyment of human rights shall be “*without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*”<sup>42</sup>

Apart from the general rule of equality and non-discrimination established within international human rights law,<sup>43</sup> Articles 2(1), 3, and 26 expressly guarantee equality and prohibits non-discrimination under the ICCPR. Reference has already been made to Article 2(1) above under the obligation of State Parties “to respect and to ensure...the rights recognised in the... Covenant” without discrimination.<sup>44</sup> The grounds of discrimination under Articles 2(1) and 26 are general and identical, i.e. “race, colour, sex, language,

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<sup>38</sup> See pp. 221-223 below.

<sup>39</sup> See Justice Tanaka in the *South West Africa* case (1996) *ICJ Reports*, p.304. See also Bayefsky, A.F., “The Principle of Equality or Non-Discrimination in International Law” (1990) 11 *Human Rights Law Journal*, p.1.

<sup>40</sup> Paine, T., *Works* (ed.) Mendun, J.P., (1878) cited in McKean, W., *Equality and Discrimination under International Law* (1983) p.2.

<sup>41</sup> See Art.1 UDHR .

<sup>42</sup> See Art.2 UDHR , and Art.2(1) ICCPR. (emphasis added).

<sup>43</sup> See Ramcharan, B., (1981) *supra*, note 18 above, p.246.

<sup>44</sup> See pp.102-3 above.



religion, political or other opinion, national or social origin, property, birth or other status". Article 3 thus seems superfluous because it only underlines the prohibition of discrimination on grounds of sex by guaranteeing equality of rights between men and women.<sup>45</sup> The HRC has however restated Article 3's "important impact ... on the enjoyment by women of the human rights protected under the Covenant".<sup>46</sup> This is due to the culture of discrimination that had existed from time immemorial against women in all societies and which has placed women in positions of disadvantage in many spheres of civil and political rights.

Articles 2(1) and 3 are basically of an accessory character to ensure the equal enjoyment of the rights guaranteed under the Covenant, while Article 26 is of a general character. The Committee has observed however that the positive obligation of States "to ensure" under Article 3 "may have an inevitable impact on legislation or administrative measures specifically designed to regulate matters other than those dealt with in the Covenant but which may adversely affect rights recognized in the Covenant".<sup>47</sup> We shall address Article 3 now on equality of rights between men and women under the Covenant and address Article 26 later in respect of equality and non-discrimination generally.

The HRC has issued General Comment 28 to update its former General Comment 4 on Article 3 in which it re-emphasised the need for ensuring the equality of rights between men and women and stated that "State parties should take account of the factors which impede the equal enjoyment of women and men of each right specified in the Covenant".<sup>48</sup> The Committee further observed that:

"Inequality in the enjoyment of rights by women throughout the world is deeply embedded in tradition, history and culture, including religious attitudes... States parties should ensure that traditional, historical, religious or cultural attitudes are not used to justify violations of women's right to equality before the law and to equal enjoyment of all Covenant rights. States parties should furnish appropriate information on those aspects of tradition, history, cultural practices and religious attitudes which jeopardise, or may jeopardise, compliance with article 3, and indicate what measures they have taken or intend to take to overcome such factors".<sup>49</sup>

The obligation under Article 3 is understood to require both measures of protection and affirmative action for women through legislation, enlightenment and education to effect the

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<sup>45</sup> See e.g. Joseph, S., and Lord Lester, "Obligations of Non-Discrimination" in Harris, D.J., and Joseph, S., (eds.) (1995) *supra*, note 32 above p.564 at 565.

<sup>46</sup> See Par. 1, HRC General Comment 28 on Equality of Rights between men and women (Article 3) of 29/03/2000. U.N. Doc. CCPR/C/21/Rev.1/Add.10, CCPR.

<sup>47</sup> General Comment 4 Par. 3.

<sup>48</sup> See General Comment 28, Par. 6.

<sup>49</sup> *ibid.* Par. 5.

positive and equal enjoyment of the rights between men and women under the Covenant.<sup>50</sup> This derives from the concept that total elimination of discrimination against women and the achievement of total equality between the genders form an important aspect of international human rights law.<sup>51</sup>

Islamic law also recognises equality between men and women but does not advocate absolute equality between them. Article 6 of the OIC Cairo Declaration states that:

“(a) Woman is equal to man in human dignity and has rights to enjoy as well as duties to perform; she has her own civil entity and financial independence, and the right to retain her name and lineage.

(b) The husband is responsible for the support and welfare of the family”.

Mayer has argued that the guarantee of equality “in human dignity” under the OIC Cairo Declaration falls short of the guarantee of equality to the enjoyment of all civil and political rights under the ICCPR.<sup>52</sup> That will be true with a narrow interpretation of human dignity. A broad interpretation of human dignity will of course imply the enjoyment of all rights incidental to human dignity. The OIC Cairo Declaration has not in any case been subjected to any judicial or quasi-judicial interpretation to ascertain the scope of its provisions. The HRC has however observed that: “Equality during marriage implies that husband and wife should participate equally in responsibility and authority within the family”.<sup>53</sup> Article 6(b) of the OIC Cairo Declaration may no doubt foreclose women’s right of equality in responsibility within the family. While the wife is not debarred from providing support and welfare for the family under Islamic law, it is the husband that is legally bound to do so, as will be further expatiated under family rights in Article 23 below. Equality of women is recognised in Islam on the principle of “equal but not equivalent”. Although males and females are regarded as equal, that may not imply equivalence or a total identity in roles, especially within the family.<sup>54</sup> Muhammad Qutb has observed that while the demand for equality between man and woman as human beings is both natural and reasonable, this should not extend to a transformation of roles and functions.<sup>55</sup> This creates instances of differentiation in gender roles under Islamic law that may amount to discrimination by the threshold of international

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<sup>50</sup> See Nowak, M., (1993) *supra*, note 5 above, pp.66-68.

<sup>51</sup> See e.g. The Convention on the Elimination of all Forms of Discrimination Against Women (1979), 1249 UNTS 13; and Nowak, M., (1993) *supra*, note 5 above, p.66.

<sup>52</sup> See e.g. Mayer, A.E., *Islam and Human Rights* (1999) p.120 and, Mayer, A.E., “Universal versus Islamic Human Rights: A Clash of Cultures or a Clash with a Construct?” (1994) 15 *Michigan Journal of International Law*, p. 306 at 330.

<sup>53</sup> General Comment 28, Par. 25.

<sup>54</sup> See e.g. al-Faruqi, I.R., and al-Faruqi, L.L., *The Cultural Atlas of Islam* (1986) p.150.

<sup>55</sup> See Qutb, M., *Islam the Misunderstood Religion* (1978) pp.129.

human rights law. Although the UN annotations on the draft of Article 3 on equal rights of men and women records the appreciation of the drafters that “(i)t was difficult to share the assumption that legal systems and traditions could be overridden, that conditions which were inherent in the nature and growth of families and organized societies could be immediately changed, or that articles of faith and religion could be altered, merely by treaty legislations”,<sup>56</sup> the HRC now seems convinced that “in the light of the experience it has gathered in its activities over the last 20 years”,<sup>57</sup> it intends to push through a universal standard of complete gender equality under the Covenant aimed at changing traditional, cultural and religious attitudes that subordinate women universally.

Muslim scholars argue that Islamic law had, over fourteen centuries ago, addressed the problem of gender discrimination and established the woman’s position as a dignified human being sharing equal rights with her male counterpart in almost all spheres of life.<sup>58</sup> However, due to factors such as patriarchal conservatism, illiteracy and poverty, women in most parts of the Muslim world still suffer one form of gender discrimination or the other. Mayer has observed that “the most extensive conflicts between past interpretations of Islamic requirements and international human rights norms lie in the area of women’s rights”, and that “conservative interpretations of the requirements of Islamic law” may result in many disadvantages for women, especially in the enjoyment of civil and political rights.<sup>59</sup>

Apart from the prohibition of discrimination on grounds of sex in nearly all international human rights instruments, the Convention on the Elimination of all Forms of Discrimination Against Women<sup>60</sup> specifically advocates equality for women and prohibits all forms of discrimination against them. It is noteworthy however that even Muslim countries, such as Tunisia,<sup>61</sup> considered today as having adopted a most liberal approach in their interpretation of Islamic law, entered reservations to the Women’s Convention.<sup>62</sup> This may not be unconnected with the revolutionary approach of the Women’s Convention. It aims at “a change in the traditional role of men as well as the role of women in society and in family

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<sup>56</sup> See UN Doc. A/2929, *supra*, note 8 above, p. 62; See also Ramcharan, B.G., (1981) *supra*, note 18 above, p. 253ff.

<sup>57</sup> See General Comment 28, Par. 1.

<sup>58</sup> See generally e.g. Doi, A.R., *Woman in Shari’ah* (1989); El-Bahnassawi, S., *Woman between Islam and World Legislations* (1985); and Al-Faruqi, L., *Women, Muslim Society and Islam* (1988); See also Chaudhry, Z., “The Myth of Misogyny: A Re-analysis of Women’s Inheritance in Islamic Law”(1997) 61 *Albany Law Review*, 511 at 512-515.

<sup>59</sup> See Mayer, E.A., (1994) *supra*, note 52 above, p. 323 and 329 (See particularly n. 49 at 323).

<sup>60</sup> *Supra* note 3 above.

<sup>61</sup> The CEDAW Committee had described Tunisia “as a shining example for other (Muslim) countries, because of its progressive and programmatic interpretation of Islam”. See UN Doc. A/50/38, Par. 222.

<sup>62</sup> See UN Human Rights Treaty Database Website at: <http://www.unhchr.ch/html/intlinst.htm> [16/2/2001]. See also Cook, R., “Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women” (1990) 30 *Virginia Journal of International Law*, 643 at 688.

and at achieving *full equality between men and women*".<sup>63</sup> Muslim States tend to be cautious in that regard because both the society and family are very important institutions in Islam. The family and societal structures are based on principles prescribed by the religion, reinforced by law and cherished by individuals. Some family rights and obligations are not considered as entirely private family affairs but of concern to society.<sup>64</sup> No impetuous change in these two institutions, i.e. family and society, can thus occur in Muslim States without prompting serious debates on its Islamic legality. Authorities in Muslim States would thus be cautious to prevent total erosion upon Islamic norms, which could in turn undermine their own Islamic credibility from within. Even individuals either because of sincere convictions or for fear of societal reproach are often very cautious in flouting Islamic norms without valid Islamic evidence. It is important to observe however that some of the specific CEDAW reservations by some Muslim States, such as to Article 7 (elimination of discrimination against women in political and public life), Article 9 (equal rights of men and women to acquire, change or retain their nationality) and Article 15 (equality before the law, in civil matters and in choice of residence and domicile) are on grounds of national laws and not Islamic law *per se*. The specific reservations on grounds of Islamic law or *Shari'ah* are those in respect of Article 2 and Article 16 of the Convention relating specifically to marriage and family matters.

Unlike its former General Comment 4, the HRC has offered a broader view on equality of rights between men and women in its General Comment 28. It interprets Article 3 in the context of almost all the other substantive articles of the Covenant and obviously raises issue with Islamic law in the following paragraphs of General Comment 28.

- ¶ 13: "States parties should provide information on any specific regulation of clothing to be worn by women in public. The Committee stresses that such regulations may involve a violation of a number of rights guaranteed by the covenant, such as article 26, on non-discrimination; article 7, if corporal punishment is imposed in order to enforce such a regulation; article 9, when failure to comply with the regulation is punished by arrest; article 12, if liberty of movement is subject to such a constraint; article 17, which guarantees all persons the right to privacy without arbitrary or unlawful interference; articles 18 and 19, when women are subjected to clothing requirements that are not in keeping with their religion or their self-expression; and, lastly, article 27, when the clothing requirements conflict with the culture to which the woman can lay a claim."

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<sup>63</sup> See 14<sup>th</sup> Preambular paragraph of CEDAW (emphasis added), *supra*, note 3 above.

<sup>64</sup> See generally 'Abd al 'Ati, H., *The Family Structure in Islam* (1977).

- ¶ 14: “With regards to article 9 States parties should provide information on any laws or practices which may deprive women of their liberty on an arbitrary or unequal basis, such as by confinement within the house.”<sup>65</sup>
- ¶ 16: “As regards article 12, States parties should provide information on any legal provision or any practice which restricts women's right to freedom of movement as, for example, the exercise of marital powers over the wife or parental powers over adult daughters, legal or de facto requirements which prevent women from travelling such as the requirement of consent of a third party to the issuance of a passport or other type of travel documents to an adult woman. States parties should also report on measures taken to eliminate such laws and practices and to protect women against them, including reference to available domestic remedies”.<sup>66</sup>
- ¶ 18 “States should inform the Committee...whether women may give evidence as witnesses on the same terms as men...”<sup>67</sup>
- ¶ 24: “...the right to choose one's spouse may be restricted by laws or practices that prevent the marriage of a woman of a particular religion with a man who professes no religion or a different religion. States should provide information on these laws and practices and on the measures taken to abolish the laws and eradicate the practices... It should also be noted that equality of treatment with regard to the right to marry implies that polygamy is incompatible with this principle. Polygamy violates the dignity of women. It is an inadmissible discrimination against women. Consequently, it should be definitely abolished wherever it continues to exist.”<sup>68</sup>
- ¶ 25: “... Equality during marriage implies that husband and wife should participate equally in responsibility and authority within the family.”<sup>69</sup>
- ¶ 26: “States must also ensure equality in regard to the dissolution of marriage... The grounds for divorce and annulment should be the same for men and women... Women should also have equal inheritance rights to those of men when the dissolution of marriage is caused by the death of one of the spouses.”<sup>70</sup>
- ¶ 27: “In giving effect to recognition of the family in the context of article 23, it is important to accept the concept of the various forms of family, including unmarried couples and their children...”<sup>71</sup>

The Committee had already expressed concern on some of the above issues in its concluding observations on the reports of some Muslims States. In its concluding observations on the Islamic Republic of Iran in 1993 the Committee had observed that “the punishment and harassment of women who do not conform with a strict dress code; the need for women to obtain their husband's permission to leave home; their exclusion from the

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<sup>65</sup> See p.131 below.

<sup>66</sup> See p.136 below.

<sup>67</sup> See p.141 below.

<sup>68</sup> See pp.177 and 183 below.

<sup>69</sup> See pp. 111 above and n. 446 below.

<sup>70</sup> See pp. 185 and 188 below.

magistracy; discriminatory treatment in respect of the payment of compensation to the families of murder victims, depending on the victim's gender and in respect of the inheritance rights of women; prohibition against the practice of sports in public; and segregation from men in public transportation” were incompatible with Article 3 of the ICCPR.<sup>72</sup> Also on Sudan in 1997 the Committee expressed concern at the “official enforcement of strict dress requirements for women in public places, under the guise of public order and morality, and at inhuman punishment imposed for breaches of such requirements, (and that) (r)estrictions on the liberty of women under the Personal Status of Muslims Act, 1992 are matters of concern under articles 3, 9 and 12 of the Covenant”.<sup>73</sup>

The general regulation on women’s clothing under Islamic law would be examined here, while each of the other issues raised in the quoted paragraphs of General Comment 28 above would be addressed under the relevant articles of the ICCPR cited. Under Islamic law, clothing is generally for the enhancement of human dignity. It serves as cover for private parts, adornment and protection against atmospheric hazards.<sup>74</sup> Due to the prohibition of adultery and fornication under Islamic law, both men and women are required to dress modestly and not to seductively expose sensuous parts of their body in public. Specifically, the Qur’an directs women to “draw their veils over their bosoms” and not to publicly display their beauty “except for what must ordinarily appear”.<sup>75</sup> Opinions differ regarding the exception - “what must ordinarily appear”, resulting in division of juristic views as to the extent of women’s covering in Islamic law.<sup>76</sup> While the *Sha’fi’i* and the *Hanbalî* schools of jurisprudence hold that women must cover up their whole person without exception in public, the *Malikî* and *Hanafî* schools of jurisprudence allow exposure of the face, the hands up to the wrists and the feet up to the ankles.<sup>77</sup> Many contemporary Muslim thinkers and jurists have disagreed with the view on complete covering of women.<sup>78</sup> On one hand, Muslim women in many parts of the world today follow the view that allows exposure of the face,

<sup>71</sup> See p. 172 below.

<sup>72</sup> Concluding Observations on Islamic Republic of Iran (1993) UN Doc. CCPR/C/79/Add.25., Par. 13. See further Chapter 8 on the Islamic Republic of Iran.

<sup>73</sup> Concluding Observations on Sudan, (1997) UN. Doc. CCPR/C/79/Add.85. Par. 22. See further Chapter 8 on Sudan.

<sup>74</sup> See e.g. Q7:86 and Q16:81. See right to clothing under Article 11 of the ICESCR in the next chapter.

<sup>75</sup> See Q24:30-31.

<sup>76</sup> See e.g. Ali, S.S., “Women’s Rights in Islam: Towards a Theoretical Framework”, (1997-98) *Yearbook of Islamic and Middle Eastern Law*, Vol. 4., p.117 and references cited there in respect of the differences of opinion with regards to the veiling of women in Islam.

<sup>77</sup> See e.g. Darwish, M.H., *Fasl al-Khitâb fi Mas’alah al-Hijâb wa al-Niqâb* (Arabic) (1987) p.51; See also Stowasser, B.F., *Women in the Qur’an, Traditions, and Interpretation* (1994) pp.93-94 and Al-Zuhayli, W., *Al-Fiqh Al-Islami wa-Adillatuh* (Arabic) (1997) Vol.1, pp.743-754 and al-Juzayrî, A.R., *al-Fiqh ala Madhâhib al-‘Arba’ah* (Arabic) (1996) Vol.1, p.184.

<sup>78</sup> See e.g. Rahman, F., *Status of Women in the Qur’an* in Nashat., G., (ed.) *Women and Revolution in Iran* (1983). See also the judgement of the Pakistan Federal Shariat Court in *Ansar Burney .v. Federation of Pakistan* , (1983) PLD (FSC) 73 at 75ff.

hands and feet, without hindrance to their daily life and careers. On the other hand, Muslim States such as Saudi Arabia and Afghanistan enforce the rule that women must cover up completely in public. This restricts the liberty of women in many ways and sometimes curtails them to the four walls of their homes.<sup>79</sup> While Islam was the first to liberate women more than fourteen hundred years ago from the inhuman conditions they were in, it is hypocritical if men on one hand acquire and enjoy many rights and liberties of today's world often through constructive and modernist interpretations of the *Shari'ah*, but on the other hand consider the rights and liberties of women stagnated upon the juristic views of the classical schools of Islamic law. The Prophet Muhammad had stated that women are full sisters of men which is an expression of equality.<sup>80</sup> Women are therefore equally entitled to the rights and liberties of today's world, subject to respect for the principles of public morality as applicable to both men and women under Islamic law.<sup>81</sup>

## THE RIGHT TO LIFE

### *Article 6*

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.
3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.
4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.
5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.
6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

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<sup>79</sup> See Levitt, M.A., "The Taliban, Islam and Women's Rights in the Muslim World" (1998) 22 *The Fletcher Forum*, p.113.

<sup>80</sup> See Yammani, M., "Muslim Women and Human Rights: The New Generation" *Paper delivered at the Cairo Conference on Democracy and the Rule of Law*, (Dec. 7<sup>th</sup> - 9<sup>th</sup> 1997) p.2.

<sup>81</sup> See e.g. Qutb. M., *Islam the Misunderstood Religion* (1978) pp.118-164.

Life is mankind's most valuable asset from which all other human possibilities arise. There is thus agreement on the fact that the right to life is the supreme and most fundamental human right without which all other human rights will be meaningless.<sup>82</sup> Many scholars are of the view that right to life is *jus cogens* under international law.<sup>83</sup> It is a non-derogable right under the ICCPR,<sup>84</sup> and the HRC has stated that "(i)t is a right which should not be interpreted narrowly".<sup>85</sup>

Article 6(1) provides for the sanctity of human life and it imposes a positive obligation on the State to protect life and a negative obligation not to take life arbitrarily. Apart from the duty to prohibit and punish criminal homicide as a means of protecting the right to life, the HRC has interpreted the scope of the States' obligation under Article 6(1) to include, *inter alia*, "the supreme duty to prevent wars, acts of genocide and other acts of mass violence causing arbitrary loss of life";<sup>86</sup> the duty "to take all possible measures to reduce infant mortality and increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics";<sup>87</sup> the prohibition of "production, testing, possession, deployment and use of nuclear weapons";<sup>88</sup> and also making effort to "strengthen international peace and security".<sup>89</sup>

The right to life under the Covenant is however non-absolute. Article 6(1) only prohibits the arbitrary deprivation of life. While the term "arbitrarily" is not defined by the Covenant, it generally connotes that the deprivation of life by the State is strictly limited.<sup>90</sup> It must be in full accordance with due process of law and strictly proportionate on the facts. The State must also prevent arbitrary killing by its security forces and law enforcement agents.<sup>91</sup>

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<sup>82</sup> See e.g. General Comments 6 and 14. See also Nowak, M., (1993) *supra*, note 5 above, p.104; Ramcharan, B.G., "The Right to Life" (1983) *Netherlands International Law Review* 297 at 311 - 314.; Dinstein, Y., "The Right to Life, Physical Integrity and Liberty" in Henkin, L., (1981) *supra*, note 6 above, p.114. See also Art. 1 Universal Islamic Declaration of Human Rights 1981; Chaudhry, M.S., *Islam's Charter of Fundamental Rights and Civil Liberties* (1995) p.9; al-Ghazali, M., *Huqûq al-Insân Bayn T'âlîm al-Islâm wa I'lân al-Umam al-Mutahidah* (Arabic) (1993) p.245; Doi, A.R., *Shari'ah: The Islamic Law*, (1984), p. 229.

<sup>83</sup> See Ramcharan, B.G., (1983) *supra*, note 82 above, pp. 307, 308, 311ff; Higgins, R., "Derogations under Human Rights Treaties", (1976/77) 48 *British Yearbook of International Law*, 281 at 282 and further references therewith.

<sup>84</sup> See Art. 4(2).

<sup>85</sup> General Comment 6, Par. 1.

<sup>86</sup> General Comment 6, Par. 2.

<sup>87</sup> General Comment 6, Par. 5; *c.f.* Dinstein, Y., (1981) *supra*, note 82 above, pp.115-116 for the view that the right to life is a civil right safeguarding against arbitrary killing and does not include issues such as guarantee against death from lack of medical attention or reduction of infant mortality. Nowak argues differently that such restrictive interpretation is due to "an improper merging of the second and third sentences in Art. 6(1). See Nowak, M., (1993) *supra*, note 5 above, p.106 n.16.

<sup>88</sup> General Comment 14, Par. 4. This opinion of the HRC created some controversy on the part of many States such as USA, UK etc.

<sup>89</sup> See General Comment 6 Par. 2 and 5 and General Comment 14.

<sup>90</sup> See UN Doc. A/2929 *supra*, note 8 above, p.83, Par. 3, where it is stated that the term "arbitrarily" was explained to mean both "illegally" and "unjustly" during the drafting.

<sup>91</sup> See Joseph, Schultz, and Castan (2000) *supra*, note 23 above, p.108ff; and General Comment 6, Par. 3. See also the cases of *Suarez de Guerrero v. Colombia*, Communication No. R.11/45 (5 February 1979), UN Doc. Supp. No. 40 (A/37/40) at 137 (1982); and *Rickly Burrell v. Jamaica*, Communication No. 546/1993, UN Doc. CCPR/C/53/D/546/1993 (1996).



Both the substantive provision and general interpretation of Article 6(1) are in concordance with Islamic law. There are many verses of the Qur'an and Traditions of the Prophet Muhammad that acknowledge the sanctity of human life, enjoin its protection and prohibit its arbitrary deprivation. The *Shari'ah* provisions on the sanctity and protection of human life are so fundamental and emphatic that they cannot be denied. The following Qur'anic verses are examples in that respect.

“Take not life which God has made sacred, except by way of justice and law; thus does He (God) command you that you may learn wisdom”<sup>92</sup>

“Nor take life – which God has made sacred – except for just cause. And if anyone is slain wrongfully, We have given his heir authority (to demand *Qisâs* [retribution] or to forgive): but let him not exceed bounds in the matter of taking life: for he is helped (by the Law).”<sup>93</sup>

“...if anyone slew a person – unless it be for murder or for spreading mischief in the land – it would be as if he slew humanity as a whole: and if anyone saved a life, it would be as if he saved humanity as a whole.”<sup>94</sup>

The above verses apply to the State as much as to individuals. Also in his oft-quoted sermon given at the end of his farewell pilgrimage, the Prophet Muhammad is reported to have declared, *inter alia*, that: “Verily your lives and properties are sacred to one another till you meet your Lord on the Day of Resurrection”. In another Tradition he is also reported to have warned that: “The first offences to be judged by God between mankind on the judgement day will be unlawful taking of lives.”<sup>95</sup>

Based on the above injunctions, Islamic jurists are unanimous on the sacredness of human life and that there is an obligation on the ruling authority in the Islamic State to protect the right to life of every individual.<sup>96</sup> The protection of life in Islamic law also includes the prohibition of suicide, thus shutting out the notion of a “right to die” under Islamic law.<sup>97</sup> Article 2 of the OIC Cairo Declaration thus provides that:

- (a) Life is a God-given gift and the right to life is guaranteed to every human being. It is the duty of individuals, societies and states to protect this right from any

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<sup>92</sup> Q 6:151.

<sup>93</sup> Q 17:33.

<sup>94</sup> Q 5:32.

<sup>95</sup> Reported by al-Bukhari and Muslim. See al-Juzayrî, A.R., *Kitâb al-Fiqh Alâ al-Madhâhib al-Arba'ah* (Arabic) (1997) Vol. 5., p.218.

<sup>96</sup> See e.g. *ibid.*, p. 214 – 223; and al-Ghazali M., (1993) *supra*, note 82 above, p. 245.

<sup>97</sup> See e.g. Ahmed, B.D. and Umri, J., “Suicide and Euthanasia: Islamic Viewpoint”, in Mahmood, T., *et al.*, (eds.) *Criminal Law in Islam and the Muslim World* (1996) pp. 164 –177.

violation, and it is prohibited to take away life except for a Shari'ah prescribed reason.

- (b) It is forbidden to resort to such means as may result in the genocidal annihilation of mankind.
- (c) The preservation of human life throughout the term of time willed by God is a duty prescribed by Shari'ah.
- (d) Safety from bodily harm is a guaranteed right. It is the duty of the state to safeguard it and it is prohibited to breach it without a Sharia-prescribed reason."

The "*Shari'ah* prescribed reason" proviso on the right to life in the Cairo Declaration is in respect of crimes attracting the death penalty under Islamic law, which must be strictly in accordance with the due process of law. This is reflected in the terms "except by way of justice and law" and "except for just cause" in the Qur'anic verses on the sanctity and protection of human life cited above.<sup>98</sup>

This brings us to the exception to the right to life under the ICCPR in respect of the death penalty. Although Article 6(1) does not prohibit the death penalty, Articles 6(2) to 6(6) place some restrictions on its imposition. Five specific restrictions on the death penalty may be identified from the provisions.

The first is that the death penalty may not be imposed except only for the most serious crimes and in accordance with the law in force at the time of the commission of the crime.<sup>99</sup> Thus while Article 6 does not abolish the death penalty, it restricts its imposition to the "most serious crimes" and the HRC has stated the need for State Parties to review their criminal laws to that effect.<sup>100</sup> The term "most serious crimes" is however not defined in the Covenant. During the drafting of this provision of the Covenant, the phrase 'most serious crimes' "was criticised as lacking precision, since the concept of 'serious crimes' differed from one country to another."<sup>101</sup> The HRC has however observed that this expression "must be read restrictively to mean that the death penalty should be a quite exceptional measure".<sup>102</sup> The Committee has concluded that "robbery,<sup>103</sup> traffic in toxic dangerous wastes,<sup>104</sup> abetting suicide, drug-related offences, property offences,<sup>105</sup> multiple evasion of military service,<sup>106</sup> apostasy, committing a third homosexual act, embezzlement by officials, theft by force,<sup>107</sup>

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<sup>98</sup> See note 92 above.

<sup>99</sup> Art. 6(2).

<sup>100</sup> See General Comment 6, Par. 6.

<sup>101</sup> See UN Doc. A/2929, *supra*, note 8 above, p.84, Par. 6; See also Dinstein, Y., (1981) *supra*, note 82 above, p.116.

<sup>102</sup> General Comment 6, Par. 7.

<sup>103</sup> Concluding Observations on Republic of Korea (1992) UN Doc. A/47/40, 122-4, Par.9.

<sup>104</sup> Concluding Observations on Cameroon (1994) UN Doc. CCPR/C/79/Add.33, Par.9.

<sup>105</sup> Concluding Observations on Sri Lanka (1996) UN Doc. CCPR/C/79/Add.56, Par.14.

<sup>106</sup> Concluding Observations on Iraq (1997) UN Doc. CCPR/79/Add.56, Par.11.

<sup>107</sup> Concluding Observations on Sudan (1997) UN Doc. CCPR/C/79/Add.85, Par.8

crimes of an economic nature, adultery, corruption, and ‘crimes that do not result in the loss of life’”<sup>108</sup> are all not most serious crimes. Thus, according to Joseph, Schultz and Castan “it appears that only intentional killings or attempted killings, or the intentional infliction of grievous bodily harm, may permissibly attract the death penalty under article 6(2)”.<sup>109</sup>

Under traditional Islamic law the death penalty is prescribed basically for the offences of murder, adultery, apostasy, armed/highway robbery. The views of the HRC above puts all these offences except murder outside its definition of “most serious crimes” under the Covenant. The argument of Muslim jurists and scholars is that the manner and circumstances in which the stated offences must be committed to attract the death penalty makes them very serious offences under Islamic law.<sup>110</sup> Murder is on retaliatory grounds of life for life. Armed/highway robbery attracts the death penalty only if it results in the death of the victim. Adultery basically requires the unanimous eye-witness evidence of four sane Muslim adult male witnesses to the sexual act. For apostasy to attract the death penalty, many Islamic scholars now define it in the context of sedition or treason against the State, and not merely as apostasy *simpliciter*.<sup>111</sup>

The HRC has also observed that the provisions of Article 6(2) and 6(6) suggest the desirability of abolishing the death penalty under international law.<sup>112</sup> There is however no unanimity amongst the States of the world yet on the abolition of the death penalty. While some States are considered as “abolitionist States” others are considered as “non-abolitionist States” in respect of the death penalty. Muslim States generally belong to the group of “non-abolitionist States.” Apart from the Republic of Azerbaijan, no other Muslim State has abolished the death penalty or become a Party to the Second Optional Protocol (OP2) to the ICCPR adopted in 1989 specifically aimed at abolishing the death penalty.<sup>113</sup> Since the Qur‘an specifically prescribes the death penalty as punishment for certain crimes, Islamic jurists would consider any direct legislation against its legality as being outside the scope of human legislation under the *Sharî‘ah*.<sup>114</sup>

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<sup>108</sup> Concluding Observations on the Islamic Republic of Iran (1995) UN Doc. CCPR/C/79/Add.25, Par.8. See Joseph, Schultz and Castan, (2000) *supra* note 23 above, p.120.

<sup>109</sup> See Joseph, Schultz and Castan, (2000) *ibid*.

<sup>110</sup> See e.g. al-Juzayrî, A.R., (1997) *supra*, note 95 above, Vol. 5.

<sup>111</sup> See further pp.162-64 below.

<sup>112</sup> General Comment 6, Par. 6. See also Robertson, A.H., “The United Nations Covenant on Civil and Political Rights and The European Convention on Human Rights” (1968-69) 43 *British Yearbook of International Law* 21 at 31.

<sup>113</sup> Azerbaijan acceded to the OP2 on 22 January 1999. See UN Doc. A/RES/44/128.

<sup>114</sup> See e.g. Reference to the Sudanese Parliament on abolition of the death penalty at note 17 above. See also al-Qaradawi, Y., (1984) *supra*, note 16 above and main text thereof; and ‘Uthmân, M.F., *Huqûq al-Insân Bayn al-Sharî‘ah al-Islâmiyyah wa al-Fikr al-Qânûnî al-Garbî* (Arabic) (1982) p.67-68.

Islamic jurists often cite the Qur'anic verse which says: "In the law of *qisâs* (retribution) there is (saving of) life for you, O people of understanding; that you may restrain yourselves"<sup>115</sup>, to argue that the death penalty for murder, is itself a legal protection for the right to life and thus it will impugn the right to life to abolish it.<sup>116</sup> Most Muslim States who apply Islamic criminal law only try to avoid the death penalty through either procedural or commutative provisions available within the *Shari'ah* instead of direct prohibition of it. Islamic law demands strict evidential requirements for capital offences. A strict compliance with the evidential requirements of Islamic law would often lead, for instance, to payment of blood-money for murder, and discretionary (*ta'zîr*) punishments for the other capital offences in place of effecting the death penalty. In the case of murder, the *Shari'ah* allows for the alternative of payment of blood money by the offender to the heirs of the victim in lieu of the death penalty. Thus Sudan stated during consideration of its second periodic report on the ICCPR that: "...since 1973...execution had been avoided in cases involving the death sentence, either because the higher court or the President had not confirmed the sentence or because blood money – the *diya* had been paid" instead.<sup>117</sup> The Prophet Muhammad is also reported to have recommended that the death penalty should be avoided as much as possible.<sup>118</sup>

The second restriction on the death penalty under Article 6 is that no deprivation of life must be contrary to the provisions of the Covenant, thus for instance a fair hearing must be guaranteed,<sup>119</sup> there must be no discrimination in capital punishment<sup>120</sup> and the methods of execution must not amount to torture or to cruel, inhuman or degrading punishment.<sup>121</sup> Also deprivation of life must not be contrary to the Convention on the Prevention and Punishment of Genocide,<sup>122</sup> thus judicially imposed death sentences that may constitute genocide (as did the Nazi tribunals) are prohibited.<sup>123</sup>

Islamic law also emphasises a fair hearing, especially in capital-offence cases as will be further elaborated under Article 14 below. Islamic jurists however differ on the question of discrimination in capital punishment. The *Shâfi'î* and the *Hanbalî* schools of jurisprudence hold that a Muslim will not be executed for the murder of a non-Believer. They base their

<sup>115</sup> Q2:179.

<sup>116</sup> See e.g. Uthmân, M.F., (1982) *supra*, note 114 above, p. 68; and Ibn Rushd al-Qurtubi, M., *Bidâyah al-Mujtahid wa Nihâyah al-Muqtasid* (Arabic) (10<sup>th</sup> Ed., 1988), Vol.2, p.400.

<sup>117</sup> See HRC Summary Record of the 1628<sup>th</sup> Meeting: Sudan; U.N. Doc. CCPR/C/SR.1628 of 02 October 1998, Par.15.

<sup>118</sup> See e.g. Al-Zuhayli, W., (1997) *supra*, note 77 above, Vol.7., p.5307.

<sup>119</sup> Pursuant to Art. 14 ICCPR.

<sup>120</sup> Pursuant to Art. 2(1) and Art. 26 ICCPR.

<sup>121</sup> Pursuant to Art. 7 ICCPR.

<sup>122</sup> Art. 6(2) and (3).

<sup>123</sup> See Nowak, (1993) *supra*, note 5 above, p.108 and pp.116-117.

view on a Tradition in which the Prophet is reported to have said that: “A Believer will not be executed for a non-Believer”. The *Mâlikî* school holds similar view with a proviso that if the murder is brutal and for the purpose of taking property then the Muslim will be executed.<sup>124</sup> The *Hanafî* school however makes no such religious discrimination in capital punishment. The *Hanafîs* hold that a Muslim will be executed for the murder of a non-believer and *vice versa*.<sup>125</sup> This is based on the lack of a Qur’anic basis for such discrimination and the specific Qur’anic reference to the rule of “life for life” in one verse.<sup>126</sup> The *Hanafîs* argue that the other three schools had interpreted the Prophet’s Tradition out of context to arrive at their view. The *Hanafî* jurists further contend that since Islamic law does not discriminate between Muslims and non-Muslims in the punishment for theft and other offences the same rule must apply in the case of murder. The *Hanafîs* further support their position with another Tradition in which the Prophet Muhammad was reported to have ordered the execution of a Muslim for killing a non-Muslim. The first three schools contend that this was a special case and an exception.<sup>127</sup> The *Hanafî* view is more consistent with other Traditions of the Prophet on equality of human beings and also compatible with the principle of non-discrimination under the Covenant.

The prohibition of genocidal capital punishment under the Covenant is also in full concordance with the sanctity of life under Islamic law. Article 2(b) of the Cairo Declaration provides that: “It is forbidden to resort to such means as may result in the genocidal annihilation of mankind”.

The third restriction is that the death penalty can only be carried out pursuant to a final judgement rendered by a competent court.<sup>128</sup> This proviso also aims at preventing the arbitrary deprivation of life and ensures justice as well as compliance with due process of law. This is in full agreement with the principle of justice under Islamic criminal law.<sup>129</sup> As earlier stated above, the Qur’an states clearly that: “Take not life which God has made sacred, *except by way of justice and law*; thus does He (God) command you that you may learn wisdom”.<sup>130</sup> Islamic law differentiates the judgement (*qadâ’*) of a competent court from a legal opinion (*fatwâ*) given by a jurisconsult (*muftî*) on a particular issue. A final and

<sup>124</sup> See al-Juzayrî, A.R., (1997) *supra*, note 95 above, Vol. 5, pp.244-245 and Ibn Rushd al-Qurtubî, M., (1988) *supra*, note 116 above, Vol. 2, p.399.

<sup>125</sup> *ibid.* See also Al-Zuhayli, W., (1997) *supra*, note 77 above, Vol.7., p.5671.

<sup>126</sup> Q5:45.

<sup>127</sup> See al-Juzayrî, A.R., (1997)*supra*, note 95 above, Vol. 5, p. 246 and Ibn Rushd al-Qurtubî, M.,(1988) *supra*, note 116 above, Vol.2, p.399.

<sup>128</sup> Art. 6(2).

<sup>129</sup> See generally e.g. Awad, A.M., “The Rights of the Accused under Islamic Criminal Procedure”, in Bassiouni, M.C., (ed.) *The Islamic Criminal Justice* (1982) 91-107.

<sup>130</sup> Q 6:151. Emphasis added.

executable judgement (*qadâ'*) can only be given by a competent judge (*qâdî*) after the full consideration of a case in accordance with due process of the law. A *fatwâ*, on the other hand, is only a legal opinion given by a *muftî* (jurisconsult), which is neither legally binding nor executable.<sup>131</sup> Only competent judges may consult a *muftî* for legal opinion to help them reach a legal decision on matters before the court. Thus under Islamic law, a *muftî* has no legal competence to give a binding *fatwâ* imposing the death penalty or any other punishment for any offence under Islamic law without the case first being tried by a competent court and affording the accused person opportunity to defend himself in accordance with the law.<sup>132</sup>

The fourth restriction is that anyone sentenced to death shall be entitled to seek pardon or commutation of sentence and may be granted amnesty, pardon, or commutation of sentence.<sup>133</sup> The entitlement to pardon, commutation of sentence or grant of amnesty arises only after the final judgement and conviction by the highest court. It relates to the execution of the sentence after a fair trial and due process of law. The power normally lies with the Head of State. It is a prerogative act of clemency and thus subjective to other non-legal and non-judicial considerations. It stands as a last resort by which a death penalty may be avoided, whereby the Heads of State in countries that still implement the death penalty may within their power avoid the execution of death sentences.

In Islamic law pardon or amnesty may be granted by the Ruler under the principle of *haqq al-'afw 'an al-'uqûbah* (i.e. the right to pardon from punishment). The State may pardon any *ta'zîr* punishment provided that the victim's right is not undermined. According to the *Hanafi* school, *hudûd* punishments cannot be pardoned by the State because they are the "rights of God". The other schools however hold that only the *hudûd* punishment for *zinâ* and theft may not be pardoned by the State after a judge's decision. Their argument in the case of *zinâ* is that the difficulty of proving *zinâ* through eyewitnesses is enough mitigation on the crime requiring no additional amnesty if an offender could be so heinous to commit the offence in the broad glare of four male witnesses. Also, the right to commute the death penalty in homicide cases (*qisâs*) for blood money (*diyâh*) lies principally with the victim's heirs.<sup>134</sup>

<sup>131</sup> See e.g. al-Maqdisî, B.A.R. *al-'Udah Sharh al-'Umdah* (Arabic) (5<sup>th</sup> Ed., 1997) 601.

<sup>132</sup> See e.g. Kamali, M.H., *Freedom of Expression in Islam* (1997) 296-297 for views of Islamic Scholars and Institutions on this point in relation to the Salman Rushdie affair.

<sup>133</sup> Art. 6(4).

<sup>134</sup> See al-Juzayrî, A.R. (1997) *supra*, note 95 above, Vol. 5, pp. 224-227.

The fifth restriction is that the death penalty shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.<sup>135</sup> By this restriction the Covenant totally prohibits the sentencing of juveniles less than 18 years to death for any crime whatsoever, including the “most serious crimes”. In the case of pregnant women, they may be sentenced to death for the “most serious crimes”, but the sentence shall not be carried out until after the delivery of the pregnancy. Both cases are a consequence of appreciating the innocence of childhood.

The execution of the death penalty against pregnant women is also prohibited under Islamic law. The same exemption extends even to women breast-feeding a child until the child is weaned after two years. A child will also not be liable to death penalty under Islamic law based on a Tradition in which the Prophet Muhammad stated, *inter alia*, that a child is free from responsibility until he attains maturity.<sup>136</sup> The only difference being that it is possible for a child to attain maturity under Islamic law before the age of 18 years.

Finally, the HRC has observed in relation to the right of women to life under Article 6 that:

“When reporting on the right to life protected by Article 6 ... States parties should give information on any measures taken by the State to help women prevent unwanted pregnancies, and to ensure that they do not have to undertake life-threatening clandestine abortions”.<sup>137</sup>

Similarly, the Committee has expressed in many of its concluding observation of States’ reports on the ICCPR that “criminalization of abortion leads to unsafe abortions which account for a high rate of maternal mortality”.<sup>138</sup> The Committee has not also interpreted the right to life to include that of the unborn child, leading Joseph, Schultz and Castan to conclude that “(c)ertainly, HRC comments have indicated that the *prohibition* of abortion is more likely to breach the ICCPR than the *permissibility* of abortion”.<sup>139</sup> While Islamic law does not prohibit the prevention of pregnancy<sup>140</sup> it prohibits abortion except for valid reasons such as where continuance of the pregnancy endangers the woman’s life.<sup>141</sup> On the debate of what amounts to an “unwanted pregnancy”, the CEDAW Committee emphasises freedom of

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<sup>135</sup> Art. 6(5).

<sup>136</sup> See al-Juzayrî, A.R. (1997) *supra*, note 95 above, Vol. 5, p.269.

<sup>137</sup> General Comment 28, Par. 10.

<sup>138</sup> See e.g. Concluding Observations on Cameroon (1999) UN. Doc. CCPR/C/79/Add.116, Par.13. See also Joseph, Schultz and Castan (2000) *supra*, note 23 above pp.135-137.

<sup>139</sup> Joseph, Schultz and Castan (2000) *ibid.*, p.474-475.

<sup>140</sup> Muslim jurists however hold divergent views on reasons and methods of prevention. See e.g. Musallam, B.F., *Sex and Society in Islam* (1986); and Omran, A. R., *Family Planning in the Legacy of Islam* (1992).

<sup>141</sup> See e.g. Omran, A.R., *ibid.* p.8-9.

choice for women.<sup>142</sup> Muslim States are mostly anti-abortion States who may consider abortion simply on the demand of a pregnant mother as violating the right to life of an unborn child. An anti-abortionist argument for the unborn child would be that being “unwanted” is no justification to be killed. An alternative middle way would be adequate State provision of social help for both mothers carrying “unwanted pregnancies” and for the “unwanted children” after birth.<sup>143</sup>

## PROHIBITION OF TORTURE OR CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

### *Article 7*

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

The prohibition of torture is quite well established and is considered as a peremptory norm of international law.<sup>144</sup> The ICCPR does not define torture, but Article 1(1) of the Convention against Torture (CAT)<sup>145</sup> contains a widely accepted definition of torture which provides that:

“For the purposes of this Convention, (i.e. CAT) the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions”.

Torture is usually distinguished from “cruel, inhuman or degrading treatment and punishment” on intent, severity and intensity of pain or suffering. In *Ireland .v. UK*, the European Court of Human Rights observed that the term “torture” attaches “a special stigma to deliberate inhuman treatment causing very serious and cruel suffering.”<sup>146</sup> Also in *Tyrer*

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<sup>142</sup> See Joseph, Schultz and Castan (2000) *supra*, note 23 above p. 137.

<sup>143</sup> See Rights of the Child in Article 24 below.

<sup>144</sup> See e.g. American Law Institute, *Restatement (Third) of Foreign Relations Law*, Par.702; and O’Boyle, M., “Torture and Emergency Powers under the European Convention on Human Rights: *Ireland v. The United Kingdom*” (1977) 71 *American Journal of International Law* 674 at 687-688.

<sup>145</sup> 1465 UNTS 85. See also Art. 7(2)(E) of the Statute of the International Criminal Court. UN Doc. A/CONF.183/9 of 17 July 1998.

<sup>146</sup> (1978) *Eur. Crt. Human Rights Reports*, Series A, No.3, Par.167.



.v. *UK*,<sup>147</sup> the same court held that intensity of suffering justifying the use of the term “inhuman” is higher than in what may be described as “degrading”. Inhuman relates to pain and suffering while degrading relates to humiliation. Thus there is some presumed “scale of aggravation in suffering which commences with degradation, mounts to inhumanity and ultimately attains the level of torture.”<sup>148</sup> Also cruel treatment is presumed to lie “somewhere between inhuman conduct and torture”.<sup>149</sup> Thus even though a particular act may escape being categorised as torture, it may still amount to either, cruel, inhuman or a degrading treatment which are all prohibited under the Covenant. The underlying aim of the provision is “to protect both the dignity and the physical and mental integrity of the individual”.<sup>150</sup>

The prohibition of subjecting anyone to medical or scientific experimentation without his or her free consent under Article 7, “was intended as a response to the atrocities such as committed in concentration camps during World War II”<sup>151</sup> and thus excludes “(n)ormal medical treatment in the interest of the patient’s health”.<sup>152</sup>

Based on the dignified nature of the human person under the *Shari’ah*, there is no conflict under Islamic law with the general prohibition of torture or cruel, inhuman or degrading treatment or subjecting a human being to scientific experimentation without consent.<sup>153</sup> There are many verses of the Qur’an and Traditions of the Prophet that enjoin compassion and prohibit cruelty and oppression even to animals. Bassiouni observed that the Qur’an warns against persecution of human beings in two hundred and ninety-nine places.<sup>154</sup> The Prophet was also reported to have warned against torture saying that: “God will torture, in the hereafter, those who torture people in this life.”<sup>155</sup> And when he entrusted anyone with the affairs of the State the Prophet would instruct him thus: “Give glad tidings and do not terrorise, give ease and do not molest the people.” Following this humane principle of the *Shari’ah*, Caliph Umar ibn Abdul Azîz<sup>156</sup>, was reported, in reply to a request of one of his governors who sought permission to torture those who refused to pay tax due to the public treasury, to have stated as follows:

<sup>147</sup> (1978) *Eur. Cort. Human Rights Reports*, Series A, No. 28, Par. 30.

<sup>148</sup> See Dinstein, Y., (1981) *supra*, note 82 above, pp. 123 – 124; See also General Comment 7, Par. 2.

<sup>149</sup> *ibid.*

<sup>150</sup> See General Comment 7, Par. 1, and General Comment 20, Par. 2.

<sup>151</sup> See UN Doc. A/2929, p.87, Par.14.

<sup>152</sup> See Nowak, M., *supra*, note 5 above, p.139.

<sup>153</sup> See al-Saleh, O.A., “The Rights of the Individual to Personal Security in Islam”, in Bassiouni, M.C., (ed.) *The Islamic Criminal Justice System* (1982) p.72.

<sup>154</sup> Bassiouni, M.C., “Sources of Islamic Law, and the Protection of Human Rights in the Islamic Criminal Justice System”, in Bassiouni, M.C., (ed.) *The Islamic Criminal Justice System* (1982) p.3 at 19.

<sup>155</sup> See al-Saleh, O.A., (1982) *supra*, note 153 above.

<sup>156</sup> He ruled under the Umayyad Caliphate between 717 –720CE.

“I wonder at your asking permission from me to torture people as though I am a shelter for you from God’s wrath, and as if my satisfaction will save you from God’s anger. Upon receiving this letter of mine accept what is given to you or let him give an oath. By God, it is better that they should face God with their offenses than I should have to meet God for torturing them”.<sup>157</sup>

Muslim jurists thus generally agree that torture or cruel and inhuman treatment or punishment is prohibited during the interrogation of offenders.<sup>158</sup> Article 20 of the OIC Cairo Declaration thus provides that:

“It is not permitted to subject (an individual) to physical or psychological torture or to any form of humiliation, cruelty or indignity. Nor is it permitted to subject an individual to medical or scientific experimentation without his consent or at the risk of his health or of his life. Nor is it permitted to promulgate emergency laws that would provide executive authority for such actions.”

The difference however lies in the interpretation of what amounts to torture or cruel, inhuman or degrading punishment. The HRC has plainly stated that punishments under Islamic law such as amputation, flogging and stoning are incompatible with Article 7 of the ICCPR<sup>159</sup>, to which some Muslim States have consistently objected.<sup>160</sup> The main pragmatic justification consistently advanced by Islamic jurists for those punishments under Islamic law, is their deterrent nature.<sup>161</sup> The HRC however rules out any limitation or justification in respect of Article 7.<sup>162</sup> The European Human Rights Court has also held under Article 3 of the European Convention in *Tyrrer .v. UK* that: “A punishment does not lose its degrading character just because it is...an effective deterrent or aid to crime control.”<sup>163</sup> The difficulty here for Islamic legalists is that flogging and amputation for example are specifically prescribed as legal punishments for certain offences in the Qur’an and thus considered as divine injunctions. Thus the representatives of Sudan argued before the HRC that the punishments are lawful sanctions under Islamic law and must be exempted even though they cause pain or suffering. In its definition of torture, the UN Torture Convention excludes “pain or suffering arising only from, inherent in or incidental to, lawful sanctions”.<sup>164</sup> Nowak has argued that this “lawful sanction clause” may not be applicable to Article 7 of the

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<sup>157</sup> See al-Saleh, O.A., (1982) *supra*, note 153 above, p.72.

<sup>158</sup> *ibid.*

<sup>159</sup> See e.g. Concluding Observations on Sudan (1997) UN Doc. CCPR/C/79/Add.85, Par. 9; Concluding Observations on Libya (1994) UN Doc. CCPR/C/79/Add.45, Par. 9; Concluding Observations on Islamic Republic of Iran (1993) UN Doc. CCPR/C/79/Add.25, Par. 11.

<sup>160</sup> See Chapter 8 below.

<sup>161</sup> See Chapter 4, pp. 72-80 above on Islamic Criminal Punishments.

<sup>162</sup> General Comment 20, Par. 3.

<sup>163</sup> *supra*, note 147 above, Par. 31.

<sup>164</sup> See Art. 1(1) of CAT, *supra*.

ICCPR. Even where this “lawful sanction clause” is relied upon, it only applies to torture and does not extend to cruel, inhuman or degrading punishments.<sup>165</sup>

One way adopted, for example, by the Islamic Republic of Pakistan to get around this difficulty is through strict adherence to procedural and evidential requirements for those Qur’anic offences. This often results in the application of *ta’zîr* (discretionary) punishments due to the difficulty of satisfying the required valid evidence to enforce the *hudûd* punishments.<sup>166</sup> The HRC has however observed that Article 7 must be read in conjunction with Article 2 of the Covenant to the effect that a State Party is under an obligation to specifically abrogate any law considered incompatible with Article 7 of the Covenant.<sup>167</sup>

## FREEDOM FROM SLAVERY, SERVITUDE AND FORCED LABOUR

### Article 8

1. No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.
2. No one shall be held in servitude.
3. (a) No one shall be required to perform forced or compulsory labour;  
(b) Paragraph 3 (a) shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of sentence to such punishment by a competent court;  
(c) For the purpose of this paragraph the term ‘forced or compulsory labour’ shall not include:
  - (i) Any work or service, not referred to in subparagraph (b), normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention;
  - (ii) Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors;
  - (iii) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community;
  - (iv) Any work or service which forms part of normal civil obligations.

Article 8 is aimed at protecting individuals from the most deplorable and degrading exploitation by fellow beings. The prohibition of slavery, slave trade and servitude is total without exception and is non-derogable under Article 4(1) irrespective of whether or not the victim has consented to slavery or bondage.<sup>168</sup> The prohibition of slavery qualifies as an established norm of customary international law.<sup>169</sup> The prohibition of forced or compulsory

<sup>165</sup> See e.g. An-Na’im, A., “Towards a Cross-Cultural Approach to Defining International Standards of Human Rights: The Meaning of “Cruel Inhuman or Degrading Treatment” in An-Na’im, A, (ed.) *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus* (1992) pp.29-32.

<sup>166</sup> See examination of Islamic Criminal Justice of Pakistan in Chapter 8 at pp.314-16 below.

<sup>167</sup> General Comment 20, Par.14. See also p 102-103 above on legislative obligations of State Parties under the Covenant and the limitation of Muslim States in that regard under Islamic law.

<sup>168</sup> See Nowak, M,(1993) *supra*, note 5 above, pp.143-ff; also Dinstein, Y., (1981) *supra*, note 82 above, pp.126-128.

<sup>169</sup> See e.g. American Law Institute, *Restatement (Third) of Foreign Relations Law*, Par.702.

labour is however subject to five exceptions under the Covenant, viz, (i) the performance of hard labour in pursuance of a sentence imposed by a competent court, (ii) any other work or service required of a person in lawful detention or during conditional release from such detention, (iii) any service of a military character or national service required by law for conscientious objectors to military service, (iv) any service exacted in cases of emergency or calamity threatening the life or well-being of the community, and (v) any work or service which forms part of normal civil obligation.<sup>170</sup> Apart from the traditional forms of slavery, servitude and forced labour, other forms of modern slavery such as traffic in women for prostitution, exploitation of children, debt bondage, and exploitation of migrant workers have also been condemned in a UN Report on Slavery published in 1984.<sup>171</sup>

The question of slavery under Islamic law has been extensively examined earlier in Chapter 4 above.<sup>172</sup> The fact that most modern Muslim States are State Parties to the international conventions prohibiting slavery and slave trade indicates the general consensus of Muslims on the compatibility of the prohibition of slavery with the principles of Islamic law. This is further buttressed by Article 11(a) of the OIC Cairo Declaration which provides that:

“Human beings are born free, and no one has the right to enslave, humiliate, oppress or exploit them, and there can be no subjugation but to God the Most-High”.

## THE RIGHT TO LIBERTY AND SECURITY OF PERSON

### *Article 9*

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.
4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

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<sup>170</sup> See Art. 8 (3)(b) and (c) of ICCPR. See also Nowak, M., (1993) *supra*, note 5 above, pp.149-157.

<sup>171</sup> See Whitaker, B., Report on Slavery, U.N. Doc E/CN.4/Sub.2/1982/20/Rev.1, UN Sales No. E.84.XIV.1, p.10; See also the UN Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1949).

<sup>172</sup> See pp.53-54 above. See also Qutb, M., *supra*, note 55 above, pp.45-77.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

The right to liberty and security of person is perhaps next only to the right to life. The State may however deprive a person of his liberty only in accordance with the due process of law. Article 9(1) is thus aimed on one hand at preventing the arbitrary and unlawful deprivation of the liberty of individuals by the State, and on the other hand, providing for the positive obligation of the State to ensure the security of all persons within its jurisdiction. Articles 9(2) to 9(5) provides the necessary procedural guarantees to ensure that liberty is only deprived according to law.<sup>173</sup> Although the deprivation of liberty is more often associated with criminal offences and imprisonment, the HRC has stated that Article 9(1) extends the prohibition of arbitrary deprivation of liberty to cases of “mental illness, vagrancy, drug addiction, educational purposes, immigration control, e.t.c.”<sup>174</sup> Thus it has indicated that deprivation of liberty for these purposes must also be in accordance with law to ensure that the inherent liberty of the human person is fully secured from violation except for justifiable and necessary reasons.

Also in *Katombe Tshishimbi .v. Zaire*<sup>175</sup> the HRC observed that the right to security under Article 9 must not be limited only to situations of formal deprivation of liberty but extends to threats to the personal security of non-detained persons within a State’s jurisdiction.<sup>176</sup> Thus the right to security “applies to persons in and out of detention”.<sup>177</sup>

The right to personal liberty and security is also fully sanctioned under Islamic law.<sup>178</sup> It is the duty of the State to ensure it. The State cannot violate the personal liberty and security of anyone without justification. There is evidence for this from the practice of the Prophet as reported in a Tradition by Abû Dâwûd. Some persons were arrested during the Prophet’s time in Medina on suspicion. While the Prophet was giving a sermon in the mosque a man stood up and asked: “O Prophet of God! Why have my neighbours been arrested and detained?” The Prophet kept quiet, expecting the officer in-charge of the arrests and detention who was present in the mosque, to give an explanation. The complainant asked the question a second and a third time, and when there was no answer from the officer in-charge, the Prophet ordered that the detained persons be released since their arrest and detention

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<sup>173</sup> For comprehensive illustration of the procedural guarantees under Articles 9(2)-9(5) See Joseph, Schultz and Castan (2000) *supra*, note 23 above, p. 291.

<sup>174</sup> See General Comment 8, Par. 1.

<sup>175</sup> Communication No. 542/1993, UN Doc. CCPR/C/53/D/542/1993(1996). Par. 5.4.

<sup>176</sup> See also *Delgado Páez v. Colombia*, Communication No. 195/1985 (12 July 1990), UN Doc. Supp. No. 40, Par. 5.5 (A/45/40) at 43 (1990).

<sup>177</sup> See Joseph, Schultz and Castan (2000) *supra*, note 23 above, p.207.

could not be justified.<sup>179</sup> This incident accommodates the modern constitutional law remedy of *habeas corpus* guaranteed under Article 9(4). There is therefore no conflict between Islamic law and the important procedural guarantees to ensure liberty and security of the individual under Articles 9(2) to 9(5). Scholars representing all schools of Islamic jurisprudence unanimously agreed during the Pakistan Constitutional debate of 1953 that the right of *habeas corpus* was in consonance with Islamic law and that the *Sharī'ah* fully recognises the right of the individual to be able to move the highest court for redress against any unlawful detention.<sup>180</sup>

Islamic jurists are thus agreed that a person cannot be deprived of his liberty without a legally valid justification.<sup>181</sup> Abu Yûsuf, the great eighth century *Hanafî* jurist, in his famous work *Kitâb al-Kharâj*, had instructed the Caliph Harûn al-Rashid to order all governors in the provinces to investigate into the affairs of prisoners daily. They should punish those guilty of a charge and release them forthwith and release immediately those who are not charged with any specific offence.<sup>182</sup> The OIC Cairo Declaration thus provides, *inter alia*, in Article 18(a) that: "Everyone shall have a right to live in security for himself, his religion, his dependants, his honour and his property" and in Article 20 that: "It is not permitted without legitimate reason to arrest an individual, or restrict his freedom, to exile or to punish him". In the context of international human rights standards this must certainly accommodate the right to be tried within reasonable time, right to bail, and right to compensation for illegal detentions as provided under Article 9 of the ICCPR.

In its General Comment 28 the HRC observed that laws and practices which "deprive women of their liberty on an arbitrary or unequal basis, such as by confinement within the house" may violate Article 9.<sup>183</sup> It is sometimes alleged that Islamic law requires the confinement of women within the house. Many Muslim scholars and jurists refute this. According to El-Bahnssawi:

"A Muslim woman was not doomed to be a crippled member in the society, with the sole task of welcoming her husband at his arrival and bidding him farewell at his departure. Stories reported from the early days of Islam demonstrated that women, immunized by their deep faith and chastity, had performed similar work as men... The Muslim society did not object to woman's work in many fields. Needless to say, the Prophet did not deny woman's active participation in social life and, in some

<sup>178</sup> See e.g. al-Saleh, O.A., (1982) *supra*, note 157 above, pp.55-90.

<sup>179</sup> See Maududi, A.A., *Human Rights in Islam*, (1993) p.26.

<sup>180</sup> See Maududi, A.A., *The Islamic Law and Constitution* (1997) 338-40.

<sup>181</sup> See e.g. Ibn Qayyim, J., *Al-Turuq al-Hukmiyyah fi al-Siyâsah al-Shar'iyah* (Arabic) (1961)p.103 and Ibn Hazm, A.A., *al-Muhallâ*, (Arabic) (n.d.)Vol.11, p.141.

<sup>182</sup> See e.g. Ali, A.A., (Trans.) *Kitab-ul-Kharaj* (1979) p.303.

<sup>183</sup> General Comment 28, Par. 14.

instances, beside man, as in military operations aimed at defending the religion of Islam".<sup>184</sup>

The Qur'an had earlier prescribed confinement within the house as punishment for adultery.<sup>185</sup> If women were generally required to be confined within the house, its prescription as punishment would have been meaningless.

## THE RIGHT TO A HUMANE INCARCERATION SYSTEM

### *Article 10*

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.
2. (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;  
(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.
3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

Public interest and the right to security of others may sometimes demand that certain persons be incarcerated in accordance with law as indicated in Article 9 above. Article 10 ensures that any such incarcerated person is still "treated with humanity and with respect for the inherent dignity of the human person."<sup>186</sup> The usual association of incarcerations with criminal offences and imprisonment mentioned above is portrayed here also by the references to "accused persons" and "treatment of prisoners" in Articles 10(2) and 10(3). The HRC has pointed out that the right to humane treatment during incarceration is not restricted only to prisons but also include "for example, hospitals (particularly psychiatric hospitals), detention camps or correctional institutions" etc.<sup>187</sup> Incarcerated persons shall not be tortured or subjected to inhuman treatment and their living conditions must also be humane.

The presumption of innocence until conviction is protected by the provision in Article 10(2)(a) for the segregation of accused persons from convicted persons. Due to the vulnerability of juveniles Article 10(2)(b) also provides for their separation from adults

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<sup>184</sup> El-Bahnassawi, S., (1985) *supra*, note 58 above, p.64.

<sup>185</sup> Q4:15.

<sup>186</sup> Art. 10(1).

<sup>187</sup> See General Comment 9, Par. 1 and General Comment 21, Par. 2.

during incarceration. There is an obligation also on the State to ensure that the penitentiary system aims essentially for the reform and social rehabilitation of prisoners.

Under Islamic law, imprisonment of offenders falls within *ta'zîr* (discretionary) punishments. It is known as *habs* and could either be a preventive confinement pending investigation (*habs ihtiyâti*), imprisonment upon conviction for an offence, or even have a wider meaning of general deprivation of personal liberty.<sup>188</sup> The humane treatment of such incarcerated persons is generally covered by the rules of *asîr* (i.e. captive in the custody of the State) under Islamic law. The humane treatment of captives and prisoners is found mentioned in the Qur'an. Yusuf Ali observes that in those times "when captives of war had to earn their own food,... (and) prisoners...often starved unless food was provided for them by private friends or from their own earnings", the Qur'an declared the feeding, for God's sake, of prisoners, *inter alia*, as a means of gaining paradise in the hereafter.<sup>189</sup> The Prophet is also reported to have ordered in respect of the prisoners of war taken by the Muslims at the Battle of Badr as follows: "Take heed of the admonition to treat prisoners fairly."<sup>190</sup>

The Muslim jurists are agreed that since a prisoner is in the custody of the State, it is responsible for his feeding, clothing, medical care and other essential needs. The prisoners right to the integrity of his person, body, mind and honour must be respected. Married prisoners are also entitled to periodic conjugal visitations.<sup>191</sup> Ali ibn Abî Tâlib, the fourth Caliph after the Prophet, was reported to make surprise visits to prisons to ensure the humane treatment of the inmates and to hear their complaints.<sup>192</sup> There are also numerous Traditions of the Prophet ordering the humane treatment and kindness to both the physically and mentally sick, whether or not under incarceration. Abu Yûsuf had stated in his *Kitâb al-Kharâj* that:

"all the Caliphs used to bestow upon the prisoners what would sustain them as regards their food and other goods and their clothing in winter and summer. The first one to do this was Ali b. abi Talib in Iraq, then Mu'awiya did that in Syria then the rest of the Caliphs followed the practice after him."<sup>193</sup>

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<sup>188</sup> See e.g. Awad, A.M., (1982) *supra*, note 129 above, p.91 at 102.

<sup>189</sup> See generally Q76: 5-22 and Commentary note 5839 to Q76:8 in Ali, A.Y., *The Meaning of the Holy Qur'an* (1992) p.1572.

<sup>190</sup> See Tabarî, *History I*, pp.1337-8 cited in Hamîdullah, M., *Muslim Conduct of State* (Revised 7<sup>th</sup> Ed., 1977) p.214, Par.441.

<sup>191</sup> The Saudi Arabian government is reported to apply this principle by allowing conjugal visitations to married prisoners of both sexes. See Al-Alfi, A.A., "Punishment in Islamic Criminal Law", in Bassiouni, M.C., (ed.) *The Islamic Criminal Justice* (1982) p. 227 at 235-236. See also Document issued by Saudi Arabian Ministry of Foreign Affairs on *Protection of Human Rights in Criminal Procedure and in the Organization of the Judicial System* (2000). Section III: The Post-Trial Stage, Par.7(a) and (b). Available Online at Saudi Embassy News Website: [http://www.saudiembassy.net/press\\_release/hr-judicial-1-menu.html](http://www.saudiembassy.net/press_release/hr-judicial-1-menu.html) [7/03/2001].

<sup>192</sup> See Al-Alfi, A.A., *ibid.* pp.235-236.

<sup>193</sup> See Ali, A.A., (Trans.) *Kitab-ul-Kharaj* (1979) p.301.



The OIC Cairo Declaration does not however contain any specific provision for a humane incarceration system.

## FREEDOM FROM IMPRISONMENT FOR CONTRACTUAL OBLIGATION

### *Article 11*

No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.

Article 11 prohibits detention for liability arising from contractual obligations. There was agreement during the drafting that “the article should cover any contractual obligations, namely, the payment of debts, performance of services or the delivery of goods.”<sup>194</sup> This indicates that such liabilities are not considered as constituting a crime. The freedom from imprisonment does not however extend to criminal offences related to the liability, such as criminal conviction for fraud or embezzlement of public funds. The provision also applies only in cases of “inability (of the debtor) to fulfil” such obligation and does not cover a refusal to fulfil contractual obligations or fraudulent and negligent bankruptcy.<sup>195</sup>

Islamic law does not also consider the inability to fulfil contractual obligations as permitting imprisonment or any other punishment. Although the *Shari‘ah* strongly advocates the fulfilment of all obligations – “O you who believe! Fulfil (all) obligations”<sup>196</sup>, yet the obligor shall have respite for the obligee in case of inability of the latter to fulfil his contractual obligation. The obligor is even encouraged to write off the debt in case of total inability of the obligee. The Qur’an 2:280 provides that: “If the debtor is in difficulty, grant him time till it is easy for him to repay, but if you remit it by way of charity, that is best for you if you only knew.” The Prophet is also reported to have stated that: “Whoever gives respite to a debtor or grants him remission, God will save him from the difficulties of the Resurrection Day.”<sup>197</sup> To indicate that the rule applies only in cases of inability of the debtor, the Prophet further stated that; “Delay by a solvent debtor to settle his debt is an oppression (against the creditor)”.<sup>198</sup> The OIC Cairo Declaration does not provide specifically for this right.

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<sup>194</sup> UN Doc.A/2929, *supra*, p.106 Par. 46.

<sup>195</sup> See Nowak, M., (1993) *supra*, note 5 above, p. 193ff.

<sup>196</sup> Q5:1.

<sup>197</sup> Reported by Muslim. See Karim, F., (1994) *supra*, note 197 above, Vol.2, p.206, Hadith No. 3.

<sup>198</sup> Reported by al-Bukhari and Muslim. See *ibid*, p.207, Hadith No. 6.

## THE RIGHT TO FREEDOM OF MOVEMENT AND CHOICE OF RESIDENCE

### Article 12

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.
3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.
4. No one shall be arbitrarily deprived of the right to enter his own country.

Freedom of movement is an important human right and a cardinal element of right to personal liberty. It is thus vital for the enjoyment of other human rights. Article 12 guarantees both internal and external freedom of movement and choice of residence for those “lawfully within the territory of a State”. The HRC has therefore observed that the provision “does not recognize the right of aliens to enter or reside in the territory of a State party. It is in principle a matter for the State to decide who it will admit to its territory”.<sup>199</sup> The right is also subjected to limitations provided by law necessary to protect national security, public order, public health, morals, rights and freedoms of others consistent with the Covenant.<sup>200</sup> Article 12(4) prohibits the arbitrary deprivation of the right to enter one’s own country. Although the right to enter one’s own country is not subjected to the limitations in Article 12(3), there seem nevertheless to be some implied limitations in the wordings of Article 12(4) itself. Article 12(4) prohibits only “arbitrary” deprivation of the right to enter one’s own country. Nowak has pointed out that based on the *travaux preparatoires* this limitation must be strictly interpreted “to relate exclusively to cases of *lawful exile as punishment for a crime*”.<sup>201</sup> Jagerskoild has however argued that perhaps exile as punishment for a crime “is now prohibited under customary international law, and it may even be *jus cogens*.”<sup>202</sup> This finds support in the HRC’s Concluding Observation on the Dominican Republic that “punishment by exile is not compatible with the Covenant”.<sup>203</sup> Also in *Charles Stewart .v. Canada* the Committee observed that the obligation of a State under Article 12(4) to allow

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<sup>199</sup> General Comment 15, Par. 5. See also *Charles Stewart .v. Canada*, Communication No. 538/1993, Human Rights Committee, UN Doc. CCPR/C/58/D/538/1996, (16 December 1996) Par.12.5 and 12.6; and *Canepa v. Canada*, Communication No. 558/1993, Human Rights Committee, UN Doc. CCPR/C/59/D/558/1993 (20 June 1997) Par 11.3.

<sup>200</sup> Art. 12(3). See also Jagerskoild, S., “Freedom of Movement”, in Henkin, (1981) *supra*, note 6 above, p.166 at 174, and Nowak, M., (1993) *supra*, note 5 above, pp.206ff.

<sup>201</sup> See Nowak, *ibid.* p.219.

<sup>202</sup> See Jagerskoild, S., (1981) *supra*, note 200 above at 181.

<sup>203</sup> Concluding Observations on Dominican Republic, (1993) UN. Doc. CCPR/C/79/Add.18, Par.6. See also Concluding Observations on Islamic Republic of Iran (1993) UN Doc. CCPR/C/79/Add.25, Par. 14.

entry of a person into his own country also prohibited from deporting a person from his own country.<sup>204</sup>

Freedom of movement and choice of settlement is recognised in Islamic law on the basis of the Qur'anic provision that: "It is He (God) Who has made the earth tractable for you (mankind), so traverse through its tracts and enjoy of the sustenance which He (God) furnishes; but unto Him is the Resurrection."<sup>205</sup> The Qur'an even indicates that people who refused to emigrate from persecution and died in sin would be confronted with the question on Judgement Day that: "Was not the earth of God spacious enough for you to emigrate therein?"<sup>206</sup> There are also numerous verses of the Qur'an that charge human beings to traverse the earth to appreciate the majesty and benevolence of God.<sup>207</sup>

This right to freedom of movement and choice of settlement is reported to have been demonstrated by the fourth Caliph, Ali ibn Abî Tâlib, even in the face of the difficult political crisis with Mu'âwiyah during his reign. Ali was advised then to prevent the movement of some people who were crossing from Medina to Syria to join Mu'âwiyah who was then contending the leadership of the Islamic Empire with the Caliph. Caliph Ali declined to prevent the movement on grounds that the people had a God-given right of movement over the land, which the Caliph could not revoke without justification. He is reported to have even assured the Dissenters (*Khawârij*) that they may live wherever they wished within the Islamic empire as long as they did not indulge in bloodshed and acts of oppression.<sup>208</sup> Article 12 of the OIC Cairo Declaration thus provides that:

"Every man shall have the right, within the framework of *Shari'ah*, to free movement and to select his place of residence whether inside or outside his country..."

However, with regards to the right of women to freedom of movement under Article 12, the HRC has alluded to the requirements in some Muslim States that a male relative must accompany women on a journey.<sup>209</sup> This requirement is based on the Tradition of the Prophet Muhammad that "No woman shall make journey covering the distance of a day and night except accompanied by a male relative (*Mahram*)."<sup>210</sup> In a similar Tradition a man was reported to have then asked the Prophet saying that he had enrolled to take part in an

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<sup>204</sup> *supra* note 199 above, Par. 12.2.

<sup>205</sup> Q67:15.

<sup>206</sup> Q4:97.

<sup>207</sup> See e.g. Q6:11; 27:69; 29:20; 30:42.

<sup>208</sup> See, Tabandeh, S., *A Muslim Commentary on the Universal Declaration of Human Rights* (1970) p.33. and Chaudhry, M.S., (1995)*supra*, note 82 above, p.21.

<sup>209</sup> See e.g. HRC Summary Record of the 1628th Meeting: Sudan, UN Doc. CCPR/C/SR.1628 of 02/02/98, Par. 49. See also General Comment 28, Par. 16.

expedition but his wife also intended to travel for Pilgrimage. The Prophet instructed the man to abandon his expedition and follow his wife for her pilgrimage.<sup>211</sup> The latter explains that rather than being a restriction on the right of women to freedom of movement, the requirement was a security right to which women were entitled to ensure their safety on long journeys in those times. Kamali has observed in that regard as follows:

“...Another example of ongoing reinterpretation is the scholarly contribution of the Egyptian scholar Yusuf al-Qaradawi, who validated air travel by women unaccompanied by male relatives. According to the rules of fiqh that were formulated in premodern times, women were not permitted to travel alone. Al-Qaradawi based his conclusion on the analysis that the initial ruling was intended to ensure women’s physical and moral safety, and that modern air travel fulfills this requirement. He further supported this view with an analysis of the relevant hadiths on the subject and arrived at a ruling better suited to contemporary conditions.”<sup>212</sup>

## FREEDOM OF ALIENS FROM ARBITRARY EXPULSION

### *Article 13*

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before the competent authority or a person or persons especially designated by the competent authority.

As is clear from the above provision, the guarantee here is not absolute, it only protects legal aliens from arbitrary expulsion and also sets out some procedural guarantees that must be fulfilled in case of expulsion.<sup>213</sup>

The above provision is in full consonance with Islamic law. Hamidullah quotes al-Shaybânî on the rights of aliens to enjoy protection and justice within the Islamic State as follows:

“It is a principle (of Muslim law) that the sovereign of the Muslims has the obligation to protect foreigners coming with permission as long as they are in our (Muslims) territory, and to do justice to them - this in the same way as he has an obligation regarding non-Muslim subjects.”<sup>214</sup>

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<sup>210</sup> Reported By al-Bukhari and Muslim, *See e.g. Karim, F., (1994) supra*, note 197 above, Vol.3, p.572, Hadith No. 11.

<sup>211</sup> Reported By al-Bukhari and Muslim, *See e.g. Karim, F., (1994) supra*, note 197 above, Vol.3, p.571, Hadith No. 9.

<sup>212</sup> *See Kamali, M.H., “Law and Society: the Interplay of Revelation and Reason in the Shariah” in Esposito, J. L., (ed.) The Oxford History of Islam (1999) p.107 at 118.*

<sup>213</sup> *See General Comment 15, Par. 9 and 10. See also Joseph, Schultz and Castan (2000) supra*, note 23 above, pp.268-276.

<sup>214</sup> Hamidullah, M., (Revised 7<sup>th</sup> Ed., 1977) *supra*, note 190 above, p. 133, Par. 249.

While Article 12 of the OIC Cairo Declaration recognised the right of residence outside one's own country it failed however to specifically provide for the right of aliens not to be arbitrarily expelled.

## THE RIGHT TO FAIR HEARING AND DUE PROCESS OF LAW

### *Article 14*

The right to fair hearing and due process of law is aimed at guaranteeing equity and fair play in the administration of justice. It protects the individual especially against the abuse of the criminal process by the State or its agents. The real importance of Article 14, which is the longest of the substantive provisions of the ICCPR, lies in the fact that the realisation of all human rights often depend on the proper administration of justice through equitable procedural guarantees.

The procedural guarantees under Article 14(1) apply not only in criminal trials but also in matters concerning the determination of "rights and obligations in a suit at law". The HRC has observed that "(l)aws and practices dealing with these matters vary widely from State to State."<sup>215</sup> Nowak has pointed out that the provisions in Article 14 are based on Anglo-American (and Civil Law) "*liberal principles of separation of powers and the independence of the judiciary vis-à-vis the executive*".<sup>216</sup> If it is perceived however, as stated by the HRC that "(a)ll of these provisions (in Article 14) are aimed at ensuring the proper administration of justice"<sup>217</sup> and not at imposing the Anglo-American or Civil Law systems, then it will be easier to interpret the guarantees under Article 14 in relation to other systems such as the Islamic legal system.<sup>218</sup>

Under Islamic law the issue of fair trial and due process, being procedural, is covered by the methods rather than by the sources of Islamic law.<sup>219</sup> The *Sharî'ah* per se mainly covers the substantive aspects of Islamic law while the procedural aspects fall within the realms of *fiqh* as formulated by the jurists. While the Qur'an and *Sunnah* may specify the crime, prescribe punishments, and enjoin substantive justice, they do not give details of procedural matters such as arrest, detention, investigation, prosecution, hearing, judicial review, e.t.c.

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<sup>215</sup> See General Comment 13, Par. 2.

<sup>216</sup> See Nowak, M., (1993) *supra*, note 5 above, p.237.

<sup>217</sup> See General Comment 13, Par. 1.

<sup>218</sup> It is important to note that Islamic law is based on a complete legal system having rules, procedures, courts and specialised judicial personnel apart from the clergy. See e.g. Azad, G.M., *Judicial System of Islam* (1987) and note 220 below.

<sup>219</sup> See Chapter 3 above on the nature of Islamic law.

The *Shari'ah* mainly emphasises substantive justice leaving the procedure of its realisation for the State to decide in accordance with the best interests of society.<sup>220</sup>

Drawing from the Prophet's practice and that of the rightly guided Caliphs, the early Muslim jurists endeavoured to lay down judicial procedures which they believed would facilitate the realisation of substantive justice as prescribed by the *Shari'ah*. The judicial procedures as found in the works of the classical jurists were not rigid but were adjusted in practice under the doctrine of *siyâsah shar'îyyah*, especially during the Abassid Caliphate. Muslim scholars fully agree that the particularities of the Islamic judicial system are not inflexible, but leave room for necessary refinement as the needs of substantive justice demand.<sup>221</sup> Thus although the judicial procedures found in the works of classical Islamic jurists may not *expressis verbis* contain the list of guarantees provided in Article 14 of the ICCPR, it is not difficult to establish those guarantees within the *Shari'ah* and the principles of Islamic administration of justice laid down by the jurists. Tabandeh had pointed out that all the six articles relating to fair trial and due process of law under the Universal Declaration of Human Rights<sup>222</sup> "conform fully to Islamic law, which has long dealt with all the points they raise under its perfect social regulations".<sup>223</sup>

Due to the complexity of the provisions of Article 14 we shall examine the paragraphs one after the other and analyse the procedural rights they guarantee within the principles of Islamic law.

- 14(1) All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

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<sup>220</sup> For classical analysis of the development of the Islamic judicial procedure, See e.g. Ibn Khaldûn, *al-Muqaddimah*, Vol 2. p.35-37; Ibn Qayyim al-Jawziyyah, M., *al-Turuq al-Hukmiyyah fi al-Siyâsah al-Shar'îyyah* (Arabic) (1953) p. 218ff and al-Mawardi, *supra*, note 270 above, pp.69-73. See also contemporary analysis on the subject by Awad, A.M. (1982) *supra*, note 129 p. 91-92; Al-Alwani, T.J., "Judiciary and Rights of the Accused in Islamic Criminal Law", in Mahmood, T., *et al*, (eds.) *Criminal Law in Islam and the Muslim World* (1996) p.256-263; Mahmood, T., "Criminal Procedure at the Shari'ah Law as Seen by Modern Scholars: A Review", in Mahmood, T., *et al*, *ibid.*, pp. 292ff; and generally Lippman, M., *et al*, (eds.) *Islamic Criminal Law and Procedure: An Introduction* (1988).

<sup>221</sup> *ibid.*

<sup>222</sup> *i.e.* Articles 6,7,8,9,10, and 11.

<sup>223</sup> See Tabandeh, S., A (1970) *supra*, note 208 above, p.28.

The important rights guaranteed here are (i) equality of parties before the courts in both criminal and civil proceedings and (ii) fair and public hearing by legally competent tribunals. The HRC observed in *Bahamonde .v. Equatorial Guinea* that “the notion of equality before the courts and tribunals encompasses the very access to the courts and that a situation in which an individual’s attempts to seize the competent jurisdictions of his/her grievances are systematically frustrated runs counter to the guarantees of article 14, paragraph 1”.<sup>224</sup> The Committee has also observed that States parties must ensure that courts “are independent, impartial and competent, in particular with regard to the manner in which judges are appointed, the qualifications for appointment, and the duration of their terms of office; the conditions governing promotion, transfer and cessation of their functions”.<sup>225</sup> These guarantees are in full consonance with the provisions of the *Shari’ah*. The Qur’anic injunctions on justice are always laden with the idea of equality and fairness. For example:

“O you who believe! Be maintainers of justice, bearers of witness for God’s sake, even though it be against your own selves, your parents, or your near relatives, and whether it be against (the) rich or (the) poor...”<sup>226</sup>

“O you who believe! Be upright for God, bearers of witness with justice; and let not the hatred of a people swerve you to act inequitably. Act equitably, for that is nearer to piety...”<sup>227</sup>

“.... And when you judge between people judge with equity; certainly God counsels you excellently, and God hears and sees (all things)”<sup>228</sup>

“God commands (the doing of) justice and fairness ... and prohibits indecencies and injustice...”<sup>229</sup>

Doing justice is considered under Islamic law as a duty to God from which emanates the rights to equality and fairness for all human beings without regard to status, race, gender or religion. The Qur’an says:

“O Mankind! Be mindful of your duty to your Lord who created you all from a single soul and from it created its mate and from the two of them spread out a multitude of men and women. Be careful of your duty toward God, through Whom you claim (your rights from one another) ... and God is ever-watchful over you all.”<sup>230</sup>

<sup>224</sup> Communication No. 468/1991, UN Doc. CCPR/C/49/D/468/1991 (1993). Par. 9.4.

<sup>225</sup> General Comment 13, Par. 3.

<sup>226</sup> Q4:135.

<sup>227</sup> Q5:8.

<sup>228</sup> Q4:58.

<sup>229</sup> Q16:90.

<sup>230</sup> Qur’an 4:1.

The expression “O Mankind!” with which the above verse begins is an important indicator of non-regard to status, race, gender or religion in the claiming of rights and the doing of justice with which the verse ends. The notion that “the Crown or the King can do no wrong” has never existed in Islamic legal theory. The Prophet himself and the righteous Caliphs after him demonstrated the principle of equality before the courts and tribunals both in words and deeds. An illustrative example of this was in a case brought by a commoner called Ubay ibn Ka‘b against Caliph Umar ibn al-Khatâb during the latter’s rule as second Caliph of the Islamic empire. The case was before Zayd ibn Thâbit. When Caliph Umar entered the courtroom to defend the suit brought against him by the commoner, Zayd (the judge) stood up as a sign of respect for Caliph Umar. For doing that, the Caliph rebuked Zayd saying: “that is your first injustice to the other party in this case”. After the hearing, Ubay could not adduce enough evidence to establish his claim against the Caliph, but requested, in accordance with the prescribed rules of evidence under Islamic law, that the Caliph must make an oath to sustain his denial of the claim. Zayd, again out of respect for the Caliph, requested Ubay to spare Umar from that formality since it was clear that the Caliph could not be lying. Caliph Umar frowned at this favouritism and said to Zayd, “If an ordinary man and Umar are not equal before you, then you are not fit to be a judge.”<sup>231</sup> al-Mâwardi also cited another instance in which Caliph Umar sent a message to one of the judges during his reign ordering him as follows: “Make people equal before you in your dispensation of justice, so that no noble may look forward to your favouritism and no commoner may despair of your justice”.<sup>232</sup> There is thus a consensus among Muslim jurists that it is obligatory on a judge to maintain equality among the parties before him in every case.<sup>233</sup> In General Comment 28 the HRC raised the point of women giving evidence as witnesses “on the same terms as men” under Article 14. This brings the evidential capacity of women under Islamic law into issue as a matter concerning the equal right to fair hearing.

The rules of evidence in Islamic law requires in some cases the evidence of two men or alternatively, one man and two women (i.e. two women replacing one man). This is based on Qur’an 2:282 which provides, *inter alia*, that:

“O you who believe! When you contract a debt for a fixed period, write it down. ...  
And get two witnesses out of your own men, and if there are not two men (available)

<sup>231</sup> See e.g. Hussain, S.S., “Human Rights in Islam: Principles and Precedents” (1983) 1 *Islamic and Contemporary Law Quarterly*, p.103 at 121-126 and Maudûdi, A.A., (1993) *supra*, note 179 above, pp. 21-22 & 31-32 for further illustrations.

<sup>232</sup> al-Mawardi, *supra*, note 270 above, p. 76.

<sup>233</sup> See e.g. Ibn Rushd al-Qurtubî, A., (1988) *supra*, note 116 above, Vol. 2, p. 472, The Chapter on How to dispense justice.



then a man and two women, such as you agree for witnesses, so that if one of them (two women) errs, the other can remind her...”<sup>234</sup>

It will be observed that the above verse substitutes the evidence of one man with that of two women and thus raises the question of inequality and discrimination on grounds of sex under international human rights law. Although this provision has traditionally been imposed generally upon all testamentary evidences under Islamic law, Muslim scholars have argued that it does not apply in all cases but is restricted only to testimony in business transactions, civil debts and contracts. They have contended that rather than being discriminatory, the provision is mainly precautionary, because such transactions being then seldom assumed by women, they ordinarily lacked experience in the intricacies involved and were more likely to err in the presentation of issues in that respect. Therefore the reason for requesting two women in the place of one man here was that “if one of them errs” in the presentation of issues “the other can remind her”.<sup>235</sup> One observes that in all other provisions concerning the procurement of evidence other than in business or financial transactions, the Qur’an does not discern between the male and the female. For evidence in divorce cases the Qur’anic provision is that:

“...When you divorce women ... either take them back on equitable terms or part with them on equitable terms; and take for witnesses *two persons* from among you endowed with justice...”<sup>236</sup> (emphasis added).

For evidence in bequest matters the Qur’anic provision is:

“Oh you who believe! When death approaches any of you, (take) witnesses among yourselves when making bequests – *two just persons* of your own ...”<sup>237</sup> (emphasis added).

And in evidence for adultery the Qur’anic provision is that:

“And those of your women who commit illegal sexual intercourse, take the evidence of *four witnesses* from amongst you against them....”<sup>238</sup> (emphasis added).

In all these other cases a generic term “two just persons” (*dha wâ adlin*) or “witnesses” (*shuhadâ’*) is used without any differentiation of gender as was adopted in the first case. It can therefore be argued that the transposing of the provision concerning commercial

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<sup>234</sup>Q 2:282 touches basically on financial transactions and obligations.

<sup>235</sup> See e.g. El-Bahnassawi, S., (1985) *supra*, note 58 above, p130-131.

<sup>236</sup> Q 65:1-2.

<sup>237</sup> Q 5:106.

transactions upon all other types of testamentary evidence arose from the traditional position of women in society, not from a direct Qur'anic text. In the same way there is consensus among the jurists that female evidence alone is admissible in cases where men lack adequate knowledge or where it is impossible for men to have knowledge except women.<sup>239</sup> El-Bahnassawi thus concluded that:

“It should be borne in mind that Islam attributed this differentiation between the sexes to their respective natural dispositions, though it had acknowledged their creation from the same origin and essence. It is not indicative of woman's inferiority but touches directly on people's interests and the safeguarding of Justice. Should the law treat the testimony of a woman- as she is (was?) inexperienced in business and commercial fields – equal to that of a man, it would be detrimental to the cause of justice and the interests of the contracting parties. Woman, it is clear, shall not draw any gain or advantage therefrom.”<sup>240</sup>

While generally conceding to the principle of equality Islamic law also takes specific social needs that may arise in certain contexts into consideration.<sup>241</sup> The greatest desire is that of doing substantive justice. The prescription for two women in place of one man thus occurs only in business transactions in which women used not to have the same experience as men. This would then raise the question that, since women now partake in business transactions and many women have acquired professional experience commensurate to that of men in commerce, can the rule of two women witnesses in place of one man be suspended where no miscarriage of justice will be incurred? The argument of desire to do substantive justice can sway Muslim countries that adopt a liberal interpretation of the *Sharî'ah* to leave out this rule on grounds of necessity or in the interest of justice as demonstrated in the Northern Nigerian case of *Rijiyān Dorawa* earlier cited in Chapter 5.<sup>242</sup> The Pakistan Federal Shariat Court had also in the case of *Ansar Burney .v. Federation of Pakistan*<sup>243</sup> referred to possible instances of a single female witness. States that maintain a hard-line traditional approach may however not be swayed by the same argument and will be in breach of Article 14(1) as interpreted by the HRC.

With respect to public trials and legally competent tribunals, the first is evident under Islamic law from the fact that traditionally mosques were mostly used as the courtrooms.

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<sup>238</sup> Q 4:15. The rule applies vice versa for men who commit adultery.

<sup>239</sup> See e.g. Al-Jazâ'irî, A.J. *Minhâj al-Muslim* (Arabic) (1976) 8<sup>th</sup> Edition, p.467; and Al-Zuhayli, W., *supra*, note 77 above, Vol.8., pp. 6045-6046. See also Qadri, A.A., (1986) *supra*, note 259 above, p.505 and El-Bahnassawi, S., (1985) *supra*, note 58 above, p.132.

<sup>240</sup> Bahanssawi, S., (1985) *ibid*.

<sup>241</sup> See Hallaq, W.B., *A History of Islamic Legal Theories* (1997)p.184.

<sup>242</sup> See pp. 92-93 above.

<sup>243</sup> *supra*, note 78 above.

This was the most obvious public place within the Islamic Empire. Islamic law also provides specific qualifications for the appointment of judges, and only competent and duly appointed judges can give binding judgements.<sup>244</sup>

Thus, the guarantees in Article 14(1) are generally compatible with Islamic law. This is substantiated by Article 19 of the OIC Cairo Declaration which provides that: “(a) All individuals are equal before the law, without distinction between ruler and ruled; (b) The right to resort to justice is guaranteed to everyone”.

14(2) Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

Islamic law fully recognises this right. The presumption of the defendant’s innocence is an important principle depicted in various rules of evidence under Islamic law. Basically, every human being is considered to be inherently immaculate.<sup>245</sup> Thus, by the Islamic legal principle of *istishâb*, (presumption of continuity)<sup>246</sup> an accused person is considered innocent until the contrary is proved. Generally, the Qur’an enjoins Muslims to ascertain the truth of every allegation to avoid wrongfully harming innocent persons.<sup>247</sup> This is more specifically demonstrated through the general rule of Islamic evidence, which provides that the onus of proof lies on the Claimant or Complainant. For instance, the Qur’an provides that: “And those who launch a charge against chaste women and produce not four witnesses (to support their allegation) flog them with eighty stripes and reject their evidence ever after, for such men are wicked transgressors”.<sup>248</sup> Also the Prophet had stated that: “The onus of proof lies upon the Claimant, and an oath is required of one who denies the claim.”<sup>249</sup> A possible argument from a Western legal perspective would be that the requirement of an oath to sustain the defendant’s denial under Islamic law impugns the total presumption of the defendant’s innocence. This requirement of an oath to sustain the defendant’s denial under Islamic law derives from the need to do substantive justice especially in civil claims, because it is possible that a Claimant may sometimes fail to prove his case only for lack of eloquence or simply on technicalities. Thus, in such cases the defendant’s oath is only to ensure positive

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<sup>244</sup> *ibid.*, p.460. See also Ibn Khaldûn, *Al-Muqaddimah*, Vol.2 p. 746.

<sup>245</sup> This is based on a Prophetic Tradition that: “Everyone is born inherently pure...”.

<sup>246</sup> *Istishâb* is a principle of Islamic law which denotes the continuation of an established state of affairs until the contrary is proven. For an analysis of its application see e.g. Kamali, M.H., *Principles of Islamic Jurisprudence* (1991) pp.297-309.

<sup>247</sup> Q49:6.

<sup>248</sup> Q24:4. Note that this onus of proof lies upon the accuser of both men and women of adultery.

<sup>249</sup> Reported By al-Bayhâqî. See e.g. al-Asqalanî, Ibn Hajar, *Bulugh al-Maram (With English Translations)* (1996) p.499, Hadith 1210.

justice.<sup>250</sup> The presumption of the defendant's innocence under Islamic law is further demonstrated by the unanimity of the Islamic jurists that any balance of probabilities or doubt in criminal trials must be resolved in favour of the accused. This is based on the Prophet's instruction that the *hudûd* punishments should be averted with the slightest iota of doubt.<sup>251</sup> Article 19(e) of the OIC Cairo Declaration thus provides that: "A defendant is innocent until his guilt is proven in a fair trial in which he shall be given all the guarantees of defence."

14(3) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality;

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

Prompt information of the accused person of the nature and cause of the charges against him aims, *inter alia*, at preventing arbitrary charges and also leaves the accused in no doubt of the charges against him. The HRC has stated in its General Comment 13 that the right of an accused person "to be informed of the charge 'promptly' requires that information is given in the manner described as soon as the charge is first made by a competent authority."<sup>252</sup> Because the liberty and freedom of an accused person may be restricted to facilitate investigation, a prompt information in the language that the accused person understands will ensure certainty of the wrong committed to warrant any such restriction and the subsequent sanction that may be imposed thereafter if found guilty of the alleged wrong. This is in full consonance with Islamic law since the Qur'an provides that blame can only be against those who have certainly committed wrong.<sup>253</sup>

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

The guarantee in Article 14(3)(b) is related to the accused person's general right to defence, which is examined in detail under paragraph (d) below.

(c) To be tried without undue delay;

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<sup>250</sup> This may also be compared with the Oath or Affirmation undertaken by litigants to speak "the truth and nothing but the truth" at the commencement of evidence under Western legal systems.

<sup>251</sup> See Al-Zuhayli, W., (1997) *supra*, note 77 above, Vol. 4., p.3144; and al-'Awwa, M.S., "The Basis of Islamic Penal Legislation" in Bassiouni, M.C.,(ed.) *The Islamic Criminal Justice* (1982) p.127 at pp.143-144.

<sup>252</sup> General Comment 13, Par. 8.

<sup>253</sup> See e.g. Q42:42.

The guarantee to be tried without undue delay is consequential to the right to justice, because justice delayed is justice denied. Due to the great emphasis that Islam places on justice, any undue delay in the administration of justice is also prohibited. The Islamic jurists stress that the presentation of evidence for criminal offences must not be delayed. Some of the Islamic jurists are of the opinion that delayed evidence in criminal trial amounts to doubtful evidence which cannot sustain punishment for *hudûd* crimes under Islamic law.<sup>254</sup>

- (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

The accused person's right of appearance and defence are both very much recognised under Islamic law. The Qur'an establishes the right of defence in its narration that even when Adam violated God's order in the Garden of Eden, he was given the opportunity of defence, even though he apparently had none.<sup>255</sup> Also the Qur'an presents us with scenarios of the fact that even in the hereafter God will give sinners an opportunity to present their defences, if any, before being punished.<sup>256</sup> The Prophet and the Caliphs after him also set examples in that respect. For instance when the Prophet appointed Ali ibn Abî Tâlib as Governor to Yemen he instructed him not to decide any matter brought to him without first hearing the defence of the other party.<sup>257</sup> Caliph Umar ibn Abdul Azîz was also reported to have handed down instructions to judges during his rule as follows: "If a litigant comes complaining with a blinded eye, do not be quick to decide in his favour until the other party appears, for it is possible that the former has blinded the latter in both eyes."<sup>258</sup>

Qadri has pointed out that Islamic law "does not favour the trial of a claim in the absence of the defendant" and that if the court is forced to proceed *ex-parte* by the non-availability of the defendant, a representative must be appointed to protect the defendant's interest.<sup>259</sup> The right to defence has been so much emphasised under Islamic law to the extent that every effort must be made to ensure its adequacy. The right to adequate time and facilities to prepare one's defence under Article 14(3)(b) is very much incidental to the substantive enjoyment of this general right to defence and is thus also protected by the rules

<sup>254</sup> See Salama, M.M., "General Principles of Criminal Evidence in Islamic Jurisprudence", in Bassiouni, M.C., (ed.) *The Islamic Criminal Justice* (1982) p. 113-115.

<sup>255</sup> See Q 7: 22-24.

<sup>256</sup> See e.g. Q7:22-35; 67:6-11.

<sup>257</sup> See Ibn Rushd al-Qurtubi, M., (1988) *supra*, note 116 above, at 472.

<sup>258</sup> See Awad, A.M., (1982) *supra*, note 129 above p. 97; and Al-alwani, T.J., (1996) *supra*, note 220 above, p.274.

<sup>259</sup> Qadri, A.A., (1986) *supra*, note 22 above, p. 495.

stated above. The same applies to the right to counsel of one's choice.<sup>260</sup> It is often erroneously portrayed that representation by counsel is disallowed under Islamic law. Although the early Islamic jurists concentrated largely on the litigant presenting his case personally, they also recognised the right of a litigant to appoint another person to represent him. It is reported for instance that the fourth Caliph, Ali ibn Abî Tâlib disliked litigation, so in any case in which he was a party he usually appointed Ukail ibn Abî Tâlib to represent him.<sup>261</sup> Also in his work titled *The History of the Judges of Cordova*, al-Khushânî stated the instance of two men who brought a matter before the judge Ahmad ibn Bâqî. In presenting their cases, the judge observed that one of the men was very eloquent while the other had problems presenting his case eloquently. The judge thus advised the latter saying: "Would it not be better if you were represented by someone who can match the verbal skills of your opponent?" The man answered saying: "But I only speak the truth". The judge in insisting that he engaged an attorney said: "How many men have perished telling the truth! (for lack of eloquence)".<sup>262</sup> Although representation by counsel is not generally practised in the Islamic judicial system of some Muslim countries, there is nothing in Islamic law that prevents the use of counsel to protect the interest of litigants and to ensure substantive justice. Due to the fact that most individuals are generally ignorant of the law and oblivious of their rights under the *Sharî'ah*, the right to engage counsel and to communicate with counsel of one's own choice has actually become more imperative today under Islamic law. The guarantee of the right to counsel will no doubt ensure equality of arms at law especially in criminal trials between individuals and State Prosecutors who on their part are often not oblivious of the law as is the accused person.

Islamic jurists are so particular about the right to defence to the extent that the *Hanafî* school holds that the *hudûd* punishment cannot be inflicted upon a dumb person because perhaps if he were capable of speaking he may have been able to raise some defence that may create some doubt and thus negate the application of the *hudûd* punishment. Many contemporary writers on Islamic law thus argue strongly that the right to engage counsel actually falls within the "theory of protected interest" of the individual under Islamic law and must be fully ensured by the State.<sup>263</sup> Provision of free legal aid by the State, in accordance

<sup>260</sup> See e.g. Al-Alwani, T.J., (1996) *supra*, note 220 above, pp. 273-276.

<sup>261</sup> See al-Bayhâqî, A., *Kitâb al-Sunan al-Kubrâ* (Arabic) (1925) 26 cited in al-Saleh, O. A., (1982), *supra*, note 157 above, p. 81.

<sup>262</sup> See Al-Khushani, *Târîkh Qudât Qurtubah* (Arabic) cited in Awad, A.M., (1982) *supra*, note 129 above p. 99.

<sup>263</sup> See e.g. Al-Alwani, T.J., (1996) *supra*, note 220 above, pp.274-276; al-Saleh, O. A., (1982), *supra*, note 157 above, pp. 81-84; Awad, A.M., (1982) *supra*, note 129 above p. 95; Mahmood, T., "Criminal Procedure at the Shari'ah Law as Seen by Modern Scholars: A Review", (1996) *supra*, note 220 above, p. 300.

with Covenant obligations, to those who cannot afford to pay for such services will be very much advantageous in that regard and will thus not be contrary to Islamic law.

- (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

Both the right to examine witnesses and the right to an interpreter are natural and essential aspects of the substantive right to defence earlier addressed above. Their denial will no doubt lead to injustice. Both guarantees are therefore fully recognised under Islamic law. On the issue of language the Qur'an states that God does not send a messenger "except in the language of his people, in order to make things clear to them".<sup>264</sup> This indicates the divine recognition of the right of human beings to be communicated in the language they understand.

- (g) Not to be compelled to testify against himself or to confess guilt.

Under Islamic law an accused person may be convicted through his voluntary confession but he is protected against being compelled to confess guilt or incriminate himself. The *Shari'ah* provides that a person will not be punished for things done involuntarily or under compulsion. Even for the sin of apostasy, compulsion exonerates from God's punishment in the hereafter. The Qur'an provides that:

"Anyone who after accepting faith in God, disbelieves, *except under compulsion*, ... on them is anger from God and theirs will be a severe punishment".<sup>265</sup> (emphasis added)

Prophet Muhammad had also stated that his community is exempted from responsibility for things committed through mistakes, forgetfulness and under duress.<sup>266</sup> The same rule applies to confession as a means of evidence. Islamic jurists have considered the probability of a forced confession being false as greater than its veracity. In prohibiting the extraction of evidence through coercion, Umar ibn al-Khatâb is reported to have stated that "A person

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<sup>264</sup> Q14:4.

<sup>265</sup> Q16:106 (emphasis added).

<sup>266</sup> Reported By Ibn Majâh. See e.g. Ibrahim, E., and Johnson-Davies, D., (Trans.) *Forty Hadith, An-Nawawî's* (1985) pp.120-121, Hadith 39.

would not be secure from incriminating himself if you made him hungry, frightened him or confined him.”<sup>267</sup> Also a man accused of theft was beaten until he confessed and was brought to Abdullah ibn Umar for punishment, but ibn Umar did not punish him because he confessed under coercion.<sup>268</sup> Islamic law thus specifies strict rules for confession and the majority of the Islamic jurists thus hold that any admission of guilt or confession obtained by coercion or interdiction amounts to inadmissible evidence.<sup>269</sup> The accused person has a right to remain silent and not to respond to questions put to him. Also the accused person has the right to retract his confessions in *hudûd* offences even up to the last minute of executing the punishment.

Where the accused person is however known to be a notorious criminal and there are other contributing circumstances to the effect that he has hidden the stolen property, some scholars hold that he may be coerced to confess. An example has been given of a known thief who denied stealing some goods and was coerced to confess where he had hidden the stolen goods. The jurist, Islam ibn Yusuf, who witnessed the coercion exclaimed saying: “never have I seen injustice appear so similar to justice than in this case”. That the coercion was described by Ibn Yusuf in this instance as an injustice suffices to indicate its abhorrence. The jurists have therefore contended that conviction in such a situation would not be based on the confession but on the recovery of the stolen goods.<sup>270</sup>

- 14(4) In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

Rather than stigmatising young offenders with criminality and focusing on their punishment, this provision promotes their rehabilitation and re-integration “back onto the path of socially acceptable conduct.”<sup>271</sup> This is very well supported by the Islamic teachings on the proper upbringing and training of children who are considered as the future generation. In fact the Prophet exonerated immature persons completely from responsibility by stating that “Three (categories of) people are free from responsibility, the insane until he is sane, the sleeping until he wakes and the child until it reaches maturity.”<sup>272</sup>

<sup>267</sup> See al-Saleh, O.A., (1982) *supra*, note 157 above, p. 73.

<sup>268</sup> *ibid.*

<sup>269</sup> See e.g. Salama, M.M., (1982) *supra*, pp.119-120.

<sup>270</sup> See al-Wani, T.S., (1996) *supra*, at 276ff. See also al-Mawardi, A., *al-Ahkâm as-Sultâniyyah*, Trans. Yate, A., (1996) p. 310.

<sup>271</sup> See Noor Muhammad N.A., “Due Process of Law for Person Accused of a Crime”, in Henkin, L., (1981), *supra*, note 6 above, p.155.



- 14(5) Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

The right to an appeal to a higher court is recognised under Islamic law. Abu Yûsuf was the first *Qâdi al-Qudât* (Chief Justice) in the administration of Islamic justice. He was appointed during the rule of the Abassid Caliph, Hârûn al-Rashîd in Baghdad in the eighth century and could hear appeals and review the decisions of other judges throughout the Islamic Empire.<sup>273</sup> Islamic jurisprudence thus provides for the principles of appeal and revision of judgements. This is under the Islamic legal principle of *murâfa'ah* which exists in the Islamic legal system of many Muslim States.<sup>274</sup>

- 14(6) When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

Islamic law also recognises the right to compensation of a person who suffers injury or is punished through judicial error or miscarriage of justice. The jurists rely on an incident in which Ali ibn Abî Tâlib ruled that the second Caliph Umar ibn al-Khatâb should pay compensation to a woman who suffered miscarriage as a result of the Caliph's mistaken orders. There are however differences of opinion among the jurists as to whether the compensation should be paid from public funds or from the private funds of the officer or judge responsible for such error or miscarriage of justice.<sup>275</sup>

- 14(7) No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

This is to avoid double prejudice against the offender and is in full conformity with the Islamic principles of justice.

It is evident from the above analyses that even though Anglo-American and Civil law procedure may differ in some respects from Islamic judicial procedure, the principles of a fair hearing and the rule of law formulated into Article 14 of the ICCPR to ensure proper

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<sup>272</sup> Reported By Ahmad. See e.g. al-Zuhayli, W., (1997) *supra*, note 77 above, Vol.4., p.2969.

<sup>273</sup> See e.g. Ibn Sa'd Âl Darîb, S., *al-Tandhîm al-Qadâ'î fî al-Mamlakah al-Arabiyyah al-Sa'udiyyah fî Daw' al-Sharî'ah al-Islâmiyyah*, (Arabic) (1984) Vol.1., p. 250.

<sup>274</sup> See Qadrî, A.A., *Justice in Historical Islam* (1968) and Qadri, A.A., (1986), *supra*, note 22 above, pp.484 and 497-498.

<sup>275</sup> See e.g. al-Alwani, T.J., (1996) *supra*, note 220 above, 284-286.

administration of justice and legal protection of all other human rights are generally compatible with Islamic law. In the Resolution adopted after the First International Conference on the Protection of Human Rights in the Islamic Criminal Justice System held in Siracusa, Italy in 1979, the Conference resolved that “the letter and spirit of Islamic Law on the subject of the protection of the rights of the criminally accused are in complete harmony with the fundamental principles of human rights under international law”.<sup>276</sup> The Resolution identified the following minimum guarantees for the criminally accused under Islamic law:

- (1) the right of freedom from arbitrary arrest, detention, torture, or physical annihilation;
- (2) the right to be presumed innocent until proven guilty by a fair and impartial tribunal in accordance with the Rule of Law;
- (3) the application of the Principle of Legality which calls for the right of the accused to be tried for crimes specified in the Qur’an or other crimes whose clear and well-established meaning and content are determined by Shariah Law (Islamic Law) or by a criminal code in conformity therewith;
- (4) the right to appear before an appropriate tribunal previously established by law;
- (5) the right to a public trial;
- (6) the right not to be compelled to testify against oneself;
- (7) the right to present evidence and to call witnesses in one’s defense;
- (8) the right to counsel of one’s own choosing;
- (9) the right to a decision on the merits based upon legally admissible evidence;
- (10) the right to have the decision in the case rendered in public;
- (11) the right to benefit from the spirit of Mercy and the goals of rehabilitation and resocialization in the consideration of the penalty to be imposed; and
- (12) the right of appeal.<sup>277</sup>

The minimum guarantees identified above are applicable to all individuals under Islamic law without discrimination of any kind.<sup>278</sup> Thus Article 19(b) of the OIC Cairo Declaration provides that: “The right to resort to justice is guaranteed to everyone”.

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<sup>276</sup> The Conference was held at the International Institute of Advanced Criminal Sciences in Siracusa, Italy between May 28-31 1979 and was attended by 55 penal jurists from 18 different countries including Algeria, Egypt, Jordan, Libya, Mauritania, Syria, Saudi Arabia, Somalia, Sudan and United Arab Emirates. Also in attendance were jurists from Belgium, France, Italy, Switzerland, United States of America, Yugoslavia, and the United Kingdom. See Bassiouni, C.M., (ed.) *The Islamic Criminal Justice* (1982) at 249.

<sup>277</sup> See a reproduction of the Resolution in Bassiouni, C.M., (ed.) (1982) *ibid*, at 249-250.

<sup>278</sup> See p. 140 above, for Qur’anic reference to the fact that the whole of mankind has right to justice under Islamic law without discrimination.

## FREEDOM FROM RETROACTIVE CRIMINAL LAW

### *Article 15*

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.
2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

This right which reiterates the principle of legality also falls within the guarantee of the due process of law. The wordings of Article 15(1) does not limit this right only to the prohibition of retroactive criminal laws but also prohibits a penalty heavier than the one prescribed by law at the time the offence was committed. This places a duty on the State to ensure that criminal offences and their penalties remain clearly defined by law for legal certainty. The reference to international law in Article 15(1) makes it imperative that international crimes must also be well defined for legal certainty. Article 15(2) excludes from the prohibition of retroactivity, acts or omissions that were at the time committed, criminal offences under international customary law. Thus State Parties can under this exception possibly punish war crimes, piracy or genocide through retroactive national laws. In that case the punishment is made legal by the prohibition of those offences under international law.

The non-retroactivity principle is also reversed in respect of a lighter punishment enacted after the commitment of an offence. The last sentence of Article 15(1) which allows for the retroactive application of a lighter penalty, was proposed by Egypt during the drafting.<sup>279</sup> It places a duty on the State to retroactively apply a lighter penalty subsequently enacted in place of a heavier one after the commission of the relevant offence. This demonstrates a humanitarian approach to criminal law. Most international law scholars consider this exception to the rule of non-retroactivity as a trend of modern criminal law. It is interesting to note however that, based on the precedent of the Prophet, the classical Islamic jurists had also stated in their writings an exception to the rule of non-retroactivity of criminal law where the new law provides for a lesser penalty than that existing when the

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<sup>279</sup> See E/CN.4/425; E/CN.4/SR.159 Par. 94, cited in Nowak, M., (1993) *supra*, note 5 above, p.279.

offence was committed, in which case the lesser penalty was held to apply retroactively.<sup>280</sup> It is possible therefore that Egypt's proposal in that respect during the drafting of Article 15 of the ICCPR was influenced by Islamic jurisprudence.

The Qur'an had from inception reflected the rule of non-retroactivity in some of its injunctions and so did the Prophet in some of his Traditions. Generally the Qur'an points out that God never punishes a people until He first sends a Messenger with His laws.<sup>281</sup> A specific instance of non-retroactivity of laws in the Qur'an is demonstrated in the laws prohibiting some types of marriage that were formerly lawful among the Arabs. The Qur'an provided as follows:

“And marry not women whom your fathers married, *except what is past*; it was a shameful, odious and abominable custom indeed. Prohibited to you (also) are your mothers, daughters, sisters... *except what is past*; for God is Most-forgiving, Most Merciful.”<sup>282</sup>

Thus while those who violate the prohibited degrees in marriage after the revelation of these verses were committing a sin, those who did it before the law was revealed (*what was past*) were exempted on grounds of non-retroactivity of the law. Also during his last sermon the Prophet declared that any blood guilt traced back to the period of ignorance, (i.e. before the dawn of Islam in Arabia) should be disregarded because the Islamic provision on blood-money for homicide and torts was not operative then. That this applies to all other rules of Islamic law is also reflected in the saying of the Prophet that Islam wipes out any prohibited conduct that preceded it.<sup>283</sup> Thus any person who comes into Islam is not accountable for any prohibited conduct committed before becoming a Muslim. This indicates clearly that there is no liability under Islamic law prior to legislation. Thus Article 19(d) of the OIC Cairo Declaration provides that “There shall be no crime or punishment except as provided in the Shari‘ah”.

## THE RIGHT TO RECOGNITION AS A PERSON BEFORE THE LAW

### *Article 16*

Everyone shall have the right to recognition everywhere as a person before the law.

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<sup>280</sup> See e.g. al-Saleh, O.A., (1982) *supra*, note 157 above pp. 62-65; See also Kamel, T., “The Principle of Legality and its Application in Islamic Criminal Justice”, in Bassiouni, C.M., (ed.) *The Islamic Criminal Justice* (1982) pp.149-169.

<sup>281</sup> See e.g. Q 4:165; 6:19; 17:15-16; 28:59; 35:25.

<sup>282</sup> Q4:22-23 (*emphasis added*).

The importance of this right derives from the fact that the violation of any human right may only be remedied through the due process of law. Without recognition as a person before the law an individual will never be able to bring any claims before the law. Conversely, if everyone has a right to be recognised as a person before the law then everyone has capacity to bear rights and duties.<sup>284</sup> This is in full harmony with Islamic law. In case of the insane, imbecile or infant, Islamic law provides that their guardian shall represent them in law.<sup>285</sup> Article 8 of the OIC Cairo Declaration thus provides that:

“Every human being has the right to enjoy his legal capacity in terms of both obligation and commitment, should this capacity be lost or impaired, he shall be represented by his guardian.”

## THE RIGHT TO PRIVACY

### *Article 17*

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

The right to privacy guarantees individual autonomy and thus an important aspect of freedom, liberty and respect for human dignity. Article 17(1) however prohibits only arbitrary or unlawful interference with privacy. The HRC has interpreted this to mean that no interference with privacy can take place “except in cases envisaged by the law...which itself must comply with the provisions, aims and objectives of the Covenant” and “reasonable in the particular circumstances.”<sup>286</sup> Article 17(2) also guarantees the right to protection of the law against such interference or attacks and thus places a positive obligation on the State to enact laws to protect that right both vertically and horizontally. Generally, the right to privacy therefore “guarantees the respect for the individual existence of the human being”.<sup>287</sup>

The scope of right to privacy can however be very vague.<sup>288</sup> Volio has notably observed that “(a)lthough it is an old right and some of its manifestations have long been recognized, the right to privacy has acquired a new and special place in the law, as the means for invading the private life of individuals have multiplied and become more sophisticated and

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<sup>283</sup> Reported by Muslim. See e.g. Karim, F., (1994) *supra*, note 197 above, Vol.1, pp.137-138, Hadith No. 63.

<sup>284</sup> See Joseph, Schultz and Castan, (2000) *supra*, note 23 above, pp.201-205.

<sup>285</sup> See e.g. Qadri, A.A., (1986) *supra*, note 22 above, p.406.

<sup>286</sup> General Comment 16, Par. 3 and 4.

<sup>287</sup> Nowak, M., (1993) *supra*, note 5 above, p.288.

<sup>288</sup> See e.g. Dissenting Opinion of Mr. Herndl in *Coeriel and Aurik .v. The Netherlands*, Communication No. 453/1991, U.N. Doc.CCPR/C/52/D/453/1991 (1994).

intrusive”.<sup>289</sup> Specific aspects of privacy addressed by the HRC include family<sup>290</sup>, home,<sup>291</sup> correspondence,<sup>292</sup> honour and reputation,<sup>293</sup> name,<sup>294</sup> person and body.<sup>295</sup> The regulation of sexual behaviour that takes place in private has also been considered as interference with privacy under Article 17. The HRC observed in *Toonen .v Australia*<sup>296</sup> that: “In so far as article 17 is concerned, it is undisputed that adult consensual sexual activity in private is covered by the concept of ‘privacy’”. The Committee went on to find that a Tasmanian law that criminalised homosexual practices interfered with the author’s privacy and thus violated Article 17 of the ICCPR even if the provisions had not been enforced for a decade.<sup>297</sup> The Committee had also rejected the State Party’s argument that the law was justified on grounds of public morals, which must be left to the domestic law of the State. It held that it “cannot accept ... for the purpose of article 17 of the Covenant (that) moral issues are exclusively a matter of domestic concern, as this would open the door to withdrawing from the Committee’s scrutiny a potentially large number of statutes interfering with privacy”.<sup>298</sup>

The right to privacy is also generally well stressed under Islamic law. The *Sharî‘ah* prohibits any unlawful intrusion into the private life, home and correspondence of others or the violation of a person’s honour and integrity. There is actually a chapter in the Qur’an titled “Private Apartments” or “The Chambers”,<sup>299</sup> in which many Islamic rules on privacy and morality are specified. Generally the *Sharî‘ah* prohibits arbitrary suspicion and spying on others by providing that “... Avoid much suspicion; ...And spy not on each other...”.<sup>300</sup>

<sup>289</sup> Volio, F., “Legal Personality, Privacy, and the Family Life”, in Henkin, L., (1981) *supra*, note 6 above, p185 at 192-3.

<sup>290</sup> See General Comment 16, Par.5. See also *Shirin Aumeeruddy-Cziffra and 19 Other Mauritian Women v. Mauritius*, Communication No.35/1978 (9 April 1981), UN Doc. CCPR/C/OP/1 at 67 (1984).

<sup>291</sup> See General Comment 16, Par. 8. “Searches of a person’s home should be restricted to a search for necessary evidence and should not be allowed to amount to harassment.”

<sup>292</sup> See General Comment 16, Par. 8. “Compliance with article 17 requires that the integrity and confidentiality of correspondence should be guaranteed *de jure* and *de facto*. ... Surveillance, whether electronic or otherwise, interceptions of telephonic, telegraphic and other forms of communications, wire-tapping and recording of conversations should be prohibited”. See also *Miguel Angel Estrella v. Uruguay*, Communication No. 74/1980 (17 July 1980), UN Doc. Supp. No. 40 (A/38/40) at 150 (1983), Par.9.2.

<sup>293</sup> See General Comment 16, Par.11. “Article 17 affords protection to personal honour and reputation and States are under an obligation to provide adequate legislation to that end”. See also *Tshisekedi .v. Zaire*, Communication Nos. 241/1987 and 242/1987.

<sup>294</sup> *Coeriel and Aurik .v. The Netherlands*, *supra*, note 288 above. Par.10.2. “The Committee is of the view that a person's surname constitutes an important component of one's identity and that the protection against arbitrary or unlawful interference with one's privacy includes the protection against arbitrary or unlawful interference with the right to choose and change one's own name”.

<sup>295</sup> See General Comment 16, Par.8. “So far as personal and body search is concerned, effective measures should ensure that such searches are carried out in a manner consistent with the dignity of the person who is being searched. Persons being subjected to body search by State officials, or medical personnel acting at the request of the State, should only be examined by persons of the same sex”.

<sup>296</sup> Communication No. 488/1992, Human Rights Committee, ( 04 April 1994), UN Doc. CCPR/C/50/D/488/1992.

<sup>297</sup> *ibid.*, Par. 8.1 and 8.2.

<sup>298</sup> *ibid.*, Par. 8.6.

<sup>299</sup> *i.e.* Q 49.

<sup>300</sup> Q49:12.

More specifically on right to privacy for the family and home, Qur'an 24:27-28 provides that:

“... Enter not houses other than your own, until you first announce your presence and invoke greetings of peace upon those therein; that is best for you, that you may be heedful. Even if you find no one therein, do not enter until permission is given to you, and if you are asked to go away then go away; that is purer for you; and God knows all that you do.”

To drive this point home, the Prophet had stated in one Tradition that a man should not even peep into a house without permission, for if he does so he would have entered it. Islamic law also prohibits interference with the correspondence of others. The Prophet had warned that: “Anyone who reads the letter of another without permission will read it in hell-fire”.<sup>301</sup> Also in prohibiting the violation of the honour and reputation of others the Qur'an prohibits scoffing, defamation, insults and offensive nicknames.<sup>302</sup> These rules apply to both State and private intrusions into privacy.

Under Islamic law, only State officials conferred with the necessary jurisdiction may violate the above Islamic injunctions on right to privacy. They may only do so for the purpose of conducting reasonable searches or investigations, and this must be in accordance with the due process of law.<sup>303</sup> It is reported that during the Caliphate of Umar ibn al-Khatâb he used to go round on night patrol of the city of Medina. One night while on patrol he heard some noise of drunkenness coming from a house and he knocked on the door to find out but no one answered him. He then climbed over the wall and saw a drunken party inside, he shouted down and accused the homeowner of breaking the law prohibiting intoxicants. The man replied, if I have committed one sin you have committed four sins to find out. You spied on us against God's command that “spy not on each other”<sup>304</sup>; You climbed over the wall despite God's command that “enter houses through the proper doors”<sup>305</sup>; You entered without announcing yourself nor greeting in violation of God's command that “announce your presence and invoke greetings of peace upon those therein”<sup>306</sup>; You entered without permission in violation of God's command that “do not enter until permission is given you”.<sup>307</sup> The Caliph Umar was abashed and he said, “You are right and I must forgive you your sin”. The man then indicted the Caliph saying “that is your fifth sin, you claim to be the

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<sup>301</sup> See Al-Suyûtî, J., *al-Jâmi' al-Sagîr* (Arabic) (1964) p.165.

<sup>302</sup> Q49:11.

<sup>303</sup> See al-Saleh, O.A., (1982) *supra*, note 157 above, p. 69.

<sup>304</sup> Q49:12.

<sup>305</sup> Q2:189.

<sup>306</sup> Q24:27

Caliph and protector of Islamic law, how can you then say you forgive what God has prohibited.”<sup>308</sup> This vividly illustrates the importance of right to privacy under Islamic law and that the privacy of individuals cannot for any reason be violated contrary to due legal process. Article 18 of the OIC Cairo Declaration thus provides that:

- “(b) Everyone shall have the right to privacy in the conduct of his private affairs, in his home, among his family, with regard to his property and his relationships. It is not permitted to spy on him, to place him under surveillance or to besmirch his good name. The State shall protect him from arbitrary interference”
- (c) A private residence is inviolable in all cases. It will not be entered without permission from its inhabitants or in any unlawful manner, nor shall it be demolished or confiscated and its dwellers evicted.”

However, since Islamic law prohibits and criminalises homosexuality the question may be raised whether the HRC will follow its decision in *Toonen's* case if faced with a Muslim State's domestic law prohibiting homosexuality vis-à-vis the right to privacy under Article 17. The question of reasonableness and public morals are relevant here. *Toonen's .v. Australia* does not provide a clear answer and may be distinguishable from a Muslim State on grounds, *inter alia*, that: (i) with the exception of Tasmania, all laws criminalizing homosexuality had been repealed throughout Australia; (ii) the Tasmanian law had never been used and there was ongoing debate for its repeal; (iii) the Federal Government of Australia had acknowledged also that a complete prohibition of homosexuality was unnecessary to sustain the moral fabric of Australian society and therefore did not argue that the challenged laws were based on reasonable and objective criteria.<sup>309</sup>

The situation will apparently be different in the case of Muslim States. Homosexuality is generally seen to be strongly against the moral fabric and sensibilities of Islamic society and is prohibited morally and legally under Islamic law. The HRC may perhaps distinguish a similar case involving the domestic law of a Muslim State from its decision in *Toonen's* case. That will however require a consideration of the public sensibility and morality obtainable within Muslim societies and on that basis concede some margin of appreciation on moral grounds to Muslim States in that regard. Although the HRC does not presently apply the margin of appreciation doctrine, one of the arguments of this thesis is that the HRC need to

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<sup>307</sup> Q24:28

<sup>308</sup> This incident has been reported in slightly varied versions by different narrators but all depict the same important principle of prohibition of violation of individual privacy under Islamic law. See e.g. Tabandeh, S., A., (1970) *supra* note 208 above, pp.31-32.

<sup>309</sup> See note 296 above.



adopt the margin of appreciation doctrine because of its utility for resolving cases involving public morals issues of States Parties to the Covenant. The cultural background and orientation of the Committee Members at the point in time will also play an influential role in that case. It is instructive to observe here that the US Supreme Court had in *Bowers v Hardwick* rejected on grounds, *inter alia* of public sensibility and morality, the claim that homosexual sodomy was protected by the US constitutional right to privacy.<sup>310</sup>

## THE RIGHT TO FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION

### *Article 18*

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Despite the diverse ideological and religious leanings of the international community there is an acceptance in modern society of the basic notion of the right to freedom of thought, conscience and religion as contained in the first sentence of Article 18(1). It is one of the foundations of a pluralistic and democratic society. The attempt to define the content of Article 18 of the ICCPR in terms of Article 18 of the UDHR to include the clause that “this right includes freedom to change (ones) religion or belief” met with opposition principally from Muslim countries such as, Egypt, Saudi Arabia, Yemen and Afghanistan, who pressed for its deletion.<sup>311</sup> Instead of a complete deletion a compromise was achieved in the change of the language to “(t)his right shall include freedom to have or to adopt a religion or belief of (ones) choice”. The HRC has however indicated that the freedom “to have or to

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<sup>310</sup> (1986) 478 US 186. See also the view of the European Court of Human Rights in *Otto-Preminger-Institut .v. Austria* in a case of blasphemy under Article 10 of the European Convention, at p. 187 below. *c.f.* Self, J., “Bowers v Hardwick: A Study of Agression”, (1988) 10 *Human Rights Quarterly*, p.395 and Thornton, B., “The New International Jurisprudence on the Right to Privacy: A Head-on Collision with Bowers v Hardwick” (1995) 58 *Albany Law Review*, p.725.

<sup>311</sup> See Partsch, K.J., “Freedom of Conscience and Expression, and Political Freedoms”, in Henkin, L., (1981) *supra*, note 6 above, p. 207 at 211.

adopt” include the freedom “to replace one’s current religion or belief with another or to adopt atheistic views, as well as the right to retain one’s religion or belief”.<sup>312</sup>

The interpretation of the right to freedom of thought, conscience and religion to include freedom to change one’s religion or even to adopt atheistic views has not been without controversy among Islamic scholars with respect to the crime of apostasy under Islamic law.<sup>313</sup> The different views will be analysed below. However, the trend among contemporary Islamic scholars on the issue of religious freedom under Islamic law has mostly been towards emphasising the Qur’anic provision which states that:

“There is no compulsion in religion: truth stands out clear from error; whoever rejects evil and believes in God has grasped the most trustworthy handhold that will never break, and God hears and knows all things.”<sup>314</sup>

Elaborating on the principle of non-compulsion to adopt Islam, Ismail al-Farûqî had emphasised that by the wordings of the Qur’an every human is endowed with the capacity to know God if the intellect is exercised with candidness and integrity. He illustrated the human capacity to understand with reference to a story invented by the early Islamic thinkers about a mythical being called *Hayy ibn Yaqzân*<sup>315</sup> “who grew up on a deserted island devoid of humans and hence tradition, and who gradually led himself by sheer intellectual effort from ignorance, to naïve realism, to scientific truth and finally, to natural reason and the discovery of transcendent God.”<sup>316</sup> There is however also the human capacity to misunderstand, especially when influenced or sometimes misled by the surrounding circumstances of non-isolated existence. Thus the Muslim is obliged by his faith, which he believes as the only true one, to present its claims to humanity not dogmatically nor by coercion but rationally through intellectual persuasion, wise argument and fair preaching.<sup>317</sup> The Qur’an points out that whoever accepts it does so for his own good and whoever rejects it does so at his own loss and none may be compelled.<sup>318</sup> To advocate thought or religion by coercion is, in the words of al-Fârûqî, “(t)o tamper with the process of intellection (and) constitutes a threat to man’s integrity and authenticity” and is null and void from the standpoint of the *Sharî’ah*.<sup>319</sup>

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<sup>312</sup> General Comment 22, Par. 5.

<sup>313</sup> See e.g. Tabandeh, S., (1970), *supra*, note 208 above, pp.70-73.

<sup>314</sup> Q2:256. For e.g. See generally al-Faruqi, I.R., *Islam and other Faiths*, Ed. Siddiqui, A., (1998) especially pp.129-160 and 281-302.

<sup>315</sup> meaning “The Living” son of “The Awake”.

<sup>316</sup> al-Faruqi, I.R., *supra*, note 314 above, p.45. For an English translation of the story of Hayy ibn Yaqzân See Ockley, S., (Trans.) *The History of Hayy ibn Yaqzan* (1986).

<sup>317</sup> See e.g. Q16:125.

<sup>318</sup> See e.g. Q10:108.

<sup>319</sup> al-Farûqî, (1998) *supra*, note 314 above, p.291.

Uthmân has also observed that although the Islamic State has a duty to promote the religion of Islam, it is not allowed to force anyone to embrace Islam, but rather a duty to monitor and prevent those who seek to deny people their freedom of belief.<sup>320</sup> The rule under Islamic law that a Muslim male who marries a non-Muslim wife cannot compel her into Islam and also the recognition of the status of non-Muslims within the Islamic State indicates that Islamic law does not advocate forced conversions. According to the 12<sup>th</sup> Century *Hanbalî* jurist, Ibn Qudâmah:

“It is not permissible to force a non-believer into embracing Islam. For instance if a non-Muslim citizen (*Dhimmî*) or a protected alien (*Musta'min*) is forced to embrace Islam, he will not be considered as a Muslim except his embrace of Islam is of his own choice... The authority for this prohibition of coercion is the words of God Most High that says: “There is no compulsion in religion”. ”<sup>321</sup>

Some traditional interpreters of the Qur'an such as al-Tabarî however hold that the “no compulsion” verse applied only to the “people of the book” (e.g. Christians and Jews) and did not extend to the Arab idolaters or polytheists who did not follow any “heavenly” religion. Al-Tabarî's view was based on the cause of revelation of the verse. He narrated that the two sons of a certain Muslim man of the tribe of Salim ibn 'Awf, both of whom had embraced Christianity before the advent of Islam came to visit their father in Medina. The father was very grieved about them and requested them to convert to Islam but they declined. The father then brought both of them to the Prophet Muhammad and asked him to intervene. It was on this occasion that the “no compulsion” verse was revealed, and the man had to leave the two sons with their faith. Al-Tabarî thus held that the verse applied only to either Christians or other “peoples of the book” and not to idolaters.<sup>322</sup> Where this view is followed, it will deny polytheists a right to freedom of thought, conscience and religion under international human rights law. Conversely, other interpreters, such as al-Zamakhsharî, cite additional Qur'anic verses such as Qur'an 10:99 which states that: “And had your Lord willed, everyone on earth would have believed. So will you, (O Muhammad), compel mankind until they become believers?”, to contend that not only the “people of the book” but all human beings are free from being compelled into belief since if God had willed, “everyone on earth would have believed”.<sup>323</sup> Ibn Hazm and some other jurists contend that

<sup>320</sup> Uthmân, M. F., (1982) *supra*, note 114 above, p. 91.

<sup>321</sup> Ibn Qudâmah, *al-Mugnî*, (Arabic) Vol.8., p.144.

<sup>322</sup> See al-Tabari, M., *Tafsîr al-Tabarî*, (Arabic) (1968) Vol.9 p.347.

<sup>323</sup> See al-Zamakhshari, J., *al-Kashâf An Haqâ'iq al-Tanzîl* (Arabic) (n.d.); See also Q 6:107-108, which says: “Had God willed, they would not have taken others beside Him in worship and We have not made you a watcher over them nor are you set over them to dispose of their affairs. And insult not those whom they worship besides God, lest they insult God

the “no-compulsion verse” had been abrogated by the “verse of the sword” which says: “And fight the polytheists altogether as they fight you altogether, and know that God is with those who keep their duty (to Him)”<sup>324</sup> and thus, according to him, compulsion is allowed in religion.<sup>325</sup>

Some contemporary Muslim scholars and jurists dispel this view and point out that this was an extreme position that has narrowed the Qur’anic experience.<sup>326</sup> Abû Zahrah has also stated a precedent of the second Caliph, Umar, which supports no compulsion into Islam. An old Christian woman was reported to have come to the Caliph with some request which the Caliph fulfilled, after which the Caliph invited her to Islam. The woman declined. The Caliph was reported to have then stated his sincerity of purpose in the following words: “My Lord, I did not intend to compel her, because I am aware that there must be no compulsion in religion... the right path has certainly become distinct and distinguished from the wrong path.”<sup>327</sup> This incident no doubt indicates an attitude of non-compulsion and freedom of religion. Today, most Muslim scholars who address the human rights question of freedom of thought, conscience and religion, follow the moderate view and hold that Islamic law prohibits the compulsion of anyone in matters of faith.<sup>328</sup> The rule of religious dissemination under Islamic law is “Invite (all) to the Way of thy Lord with wisdom and beautiful preaching and argue with them in ways that are best and most gracious...”<sup>329</sup> which does not also support or imply any notion of forced conversion. Thus Art. 10 of the OIC Cairo Declaration states that: “...It is prohibited to exercise any form of compulsion on man or to exploit his poverty or ignorance in order to convert him to another religion or to atheism”.

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wrongfully without knowledge. Thus We have made fair-seeming to each people its own doings; then to their Lord is their return and He shall then inform them of all that they used to do”.

<sup>324</sup> Q9:36.

<sup>325</sup> See e.g. Abû Zayd, M., *al-Nâsikh Wa al-Mansûkh: Dirâsah Tashrî’iyyah, Ta’rikhiyyah Naqdiyyah* (Arabic) (1963) Vol.2., pp503-583 and Ibn Hazm, A., *al-Muhallâ*, (Arabic)(n.d.)Vol. 2,p.195.

<sup>326</sup> See e.g. AbûSulaymân, A.A., *Towards An Islamic Theory of International Relations: New Directions for Islamic Methodology and Thought* (1993) pp. 44-45.

<sup>327</sup> See Abû Zahrah, M., *Tanzîm al-Islâm li al-Mujtama’* (Arabic) (n.d) p. 192.

<sup>328</sup> See e.g. Chaudhry, M.S., (1995) *supra*, note 82 above, pp. 26-30; Ahsan, M.M., “Human Rights in Islam: Personal Dimensions” (1990) 13 *Hamdard Islamicus*, p.3 at 7-8; Ishaque, K.M., “Human Rights in Islamic Law” (1974) 12 *Review of the International Commission of Jurists*, p.30 at 35; Husain, S.S., “Human Rights in Islam: Principles and Precedents” (1983) 1 *Islamic and Contemporary Law Quarterly*, p.103 at 113-114 and Mahmood, T., “The Islamic Law of Human Rights” (1984) 4 *Islamic and Comparative Law Quarterly*, p.32 at 34-38; See also e.g. Art. 7 of “Basic Principles of Islamic State” adopted by the Convention of Muslim Scholars and Thinkers representing all schools of Islamic thought in Pakistan in 1951 which stated that: “The citizens shall be entitled to all the rights conferred upon them by Islamic Law i.e. they shall be assured within the limits of the law,... freedom of religion and belief, freedom of worship...” in Maududi, A.A., *The Islamic Law and Constitution* (1980) 7th Ed., p.333. See also the Communiqué of the International Conference on Islamic Law held between the leading scholars of Arabia and Europe which stated inter alia, that: “The individual is free in regard to the creed he wishes to embrace, and it is unlawful to compel anyone to embrace a religion” and citing the no-compulsion verse as authority to that effect, in al-Dawalibi, *Nadwah ‘Ilmiyyah Hawl al-Shari’ah al-Islâmiyyah Wa Huqûq al-Insân fî al-Islâm* (Arabic) cited in Kamali, H.M., *Freedom of Expression in Islam* (1997) p.88. See also Art. XIII of the Universal Islamic Declaration of Human Rights(1981) which says: “Every person has the right to freedom of conscience and worship in accordance with his religious beliefs”.

<sup>329</sup> Q 16:125.

This brings us to the question of apostasy under Islamic law vis-à-vis the right to freedom of thought, conscience and religion.

Apostasy from Islam is a topical issue under the concept of freedom of thought, conscience and religion because of its classification as a crime punishable with death under traditional Islamic law. This apparently contradicts the basic principle of non-compulsion advanced above. It also conflicts with the international human rights understanding of freedom of thought, conscience and religion. In paragraph 5 of its General Comment 22, the HRC observed, *inter alia*, that:

“Article 18.2 bars coercion that would impair the right to have or adopt a religion or belief, including the use of threat of physical force or penal sanctions to compel believers or non-believers to adhere to their religious beliefs and congregations, to recant their religion or belief or to convert.”<sup>330</sup>

There had been differences amongst Muslim jurists and scholars about the definition and punishment of apostasy under traditional Islamic law since the early times of Islam. The *Hanbalî* jurist Ibn Taimiyyah observed that some of the successors to the companions of Prophet Muhammad known as *al-Tâbi'ûn* such as Ibrahim al-Nakha'î (d.95A.H/718C.E) who was a leading jurist of his time, and Sufyân al-Thawrî (d.161A.H/884C.E) the author of *al-Jâmi' al-Kabîr* and *al-Jâmi' al-Sagîr* (two important compilations of the Prophet's Traditions), held the view that a Muslim apostate must never be sentenced to death but should be invited back to Islam.<sup>331</sup> Their views conform with the Qur'anic rule of propagation that says: “Invite (all) to the way of thy Lord with wisdom and beautiful preaching; and argue with them in ways that are best and most gracious...”<sup>332</sup>

Both El-Awa and Kamali show through references to the Qur'an, the *Sunnah*, the practice of the rightly guided Caliphs, and views of some of the classical as well as contemporary Islamic jurists and scholars to establish that simple apostasy neither constitutes a *hadd*-type offence nor attracted the death penalty.<sup>333</sup> They both cited the twelfth century *Mâlikî* jurist, Abu al-Walîd al-Bâjî as stating that apostasy is “a sin for which there is no *hadd* punishment.”<sup>334</sup> Although Hamidullah included the crime of apostasy in his *Muslim*

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<sup>330</sup> General Comment 22, Par. 5.

<sup>331</sup> See Ibn Taymiyyah, T., *al-Sarîm al-Maslûl 'alâ Shâtîm al-Rasûl* (Arabic) Abd al-Hamîd, M.M., (Ed.) (1398AH) p. 318; al-Sha'rânî, A.W., *Kitâb al-Mizân* (Arabic) (1329AH) Vol.2, p.134; Ibn Qudâmah, M., *al-Mugnî* (1981) Vol.8.p126.

<sup>332</sup> Q 16:125.

<sup>333</sup> See El-Awa, M.S., *Punishment in Islamic Law* (1982) p50-56 and Kamali, M.H., (1997) *supra*, note 328 above pp. 87-107 See also. Sachedina, A.A., “Freedom of Conscience and Religion in the Qur'an” in Little, D., Kelsay, J., and Sachedina, A.A., (eds.) *Human Rights and the Conflict of Cultures: Western and Islamic Perspectives on Religious Liberty* (1988) p.53 at 76-83.

<sup>334</sup> El-Awa, M.S., (1982) *ibid.* Kamali, M.H. (1997) *ibid.*

*Conduct of State*, he went on to indicate that: “The basis of Muslim polity being religious and not ethnological or linguistic, it is not difficult to appreciate the reason for penalizing this act of apostasy. For it constitutes a politico-religious rebellion.”<sup>335</sup> Contemporary Muslim jurists and scholars thus differ as to whether apostasy *simpliciter* in the form of a person denouncing the Islamic faith is a *hadd*-type offence at all, and also as to whether it attracted the death penalty. Many of the scholars and jurists define apostasy in terms of rebellion against the State, where a Muslim-subject of the Islamic State after denouncing Islam joins with those who take arms against the Islamic State and thus commits a political offence against the State.<sup>336</sup> The contention is that simple apostasy, in the sense of an individual denouncing Islam without more, wherever mentioned in the Qur’an does not stipulate any worldly punishment but is only described as attracting severe punishments in the hereafter.<sup>337</sup> The death punishment for apostasy was based on a reported Tradition of the Prophet that said: “Anyone who changes his religion, kill him”.<sup>338</sup> Some Muslim scholars have however identified this Tradition as a solitary (*âhâd*) Tradition while others allege weakness in its transmission (*isnâd*). It has been contended also that there is no precedent of the Prophet compelling anyone into Islam or sentencing anyone to death for apostasy *simpliciter*.<sup>339</sup> El-Awa thus concluded that “the Qur’an prescribes no punishment in this life for apostasy, (and) (t)he Prophet never sentenced a man to death for it, (but) (s)ome of the companions of the Prophet recognized apostasy as a sin for which there was a *ta’zîr* (discretionary) punishment.”<sup>340</sup> Thus placing the matter within the legislative discretion of the Islamic State.

Under Article 18(3) of the ICCPR, the right to freedom of religion and beliefs is not absolute. There is a restriction by the provision that:

“Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others”.

<sup>335</sup> Hamîdullah, M., (Revised 7<sup>th</sup> Ed., 1997) *supra*, note 190 above, p.174, Par.330.

<sup>336</sup> See e.g. Abduh, M., *Tafsîr al-Manâr* (1947-48) Vol.5, p.327; El-Awa, M.S., (1982) *supra*, note 333 above, pp.49-56; Rahman, S.A., *Punishment of Apostasy in Islam* (1978) Chapter 2. Al-Ganûshî, R., *al-Huriyyât al-Amah fî al-Dawlah al-Islâmiyyah* (Arabic) (1993) pp.47-51; Shaltût, M., *al-Islâm ‘Aqîdah Wa Sharî‘ah* (Arabic) (n.d.) p.292-293; al-Samura‘î, A.R.N., *Ahkâm al-Murtadd fî al-Sharî‘ah al-Islâmiyyah* (Arabic) (1968) p.144; Mahmassânî, S., *Arkân Huqûq al-Insân fî al-Islâm* (Arabic) (1979)p.123-124.

<sup>337</sup> See e.g. Q 2:217; Q 3:86-91; Q 5:54; Q 16:106.

<sup>338</sup> Reported By al-Bukhârî. See e.g. al-Asqalânî, Ibn Hajar, *Bulugh al-Maram (With English Translations)* (1996) p.428, Hadith 1032.

<sup>339</sup> See e.g. Rahman, S.A.,(1978) *supra*, note 336 above, p.63; al-‘Îlî, A.H.H., *al-Huriyyah al-‘Âmah* (Arabic) (1983) p.339; and Mahmassânî, S., (1979) *supra*, note 336 above.

<sup>340</sup> El-Awa, (1982) *supra*, note 333 above, p.56.

That would perhaps be in consonance with the argument of contemporary Islamic scholars<sup>341</sup> and that of some Muslim States that it is not the changing of one's religion *simpliciter* that is prohibited under Islamic law but its manifestation in a manner that threatens public safety, morals, freedom of others or even the existence of the Islamic State itself. In its second ICCPR periodic report Sudan stated in that regard that "conversion from Islam is not an offence in Sudan but only the manifestation of such conversion in a manner that adversely affects public safety".<sup>342</sup> In accordance with the requirements of due process of law the HRC has further observed that:

"Article 18(3) permits restrictions on the freedom to manifest religion or belief *only if limitations are prescribed by law* and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others. The freedom from coercion to have or to adopt a religion or belief and the liberty of parents and guardians to ensure religious and moral education cannot be restricted." (emphasis added).

## THE RIGHT TO FREEDOM OF OPINION AND EXPRESSION

### *Article 19*

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary;
  - (a) For respect of the rights or reputation of others;
  - (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

The intellect is the greatest instrument of human life and its full potential can only be achieved through interaction of ideas among individuals. Freedom of opinion and expression is a birthright of every human being which stimulates dialectical intercourse that aids human development and well being. Expression is the outward manifestation of a person's opinion, thus a person's liberty is completely denied where freedom of expression is denied. Freedom

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<sup>341</sup> See e.g. note 339 above.

<sup>342</sup> See e.g. Par. 127 and 133 of Sudan's 2<sup>nd</sup> ICCPR Periodic Report of 1997 (U.N. Doc. CCPR/C/75/Add.2. of 13/03/97).

of opinion and expression has therefore been long recognised as “one of the most precious rights of man”<sup>343</sup> and also of “great importance for all other rights and freedoms”.<sup>344</sup>

The right to hold opinions, being internal and private, is absolute and is here separated from the right to freedom of expression. “Opinion” and “thought” are quite synonymous, but since “thought” has been associated with religion or beliefs in Article 18 above, “opinions” here is deemed to point more towards political, secular and civil matters.<sup>345</sup> Although a person’s opinion may be influenced by external factors, it cannot actually be restricted because it is an event of the mind and hardly interferes with the rights of others. In contrast, freedom of expression is a public matter that could easily interfere with the right of others if not controlled. Freedom of expression is thus not absolute. During the drafting of Article 19, it was appreciated that while “freedom of expression was a precious heritage” it could also be “a dangerous instrument” against public order and the personality of others.<sup>346</sup> Thus while the right to freedom of expression was made as comprehensive as possible to cover the seeking, receiving and imparting of information and ideas of all kinds through any media of one’s choice, it carried with it “special duties and responsibilities”<sup>347</sup> and also subjected to certain restrictions under Article 19(3).

Due to the importance and preciousness of the right to freedom of expression, there were differences of opinion as to the scope of the limitations upon the right during the drafting.<sup>348</sup> In its effort to define that scope, the HRC has pointed out that “when a State party imposes certain restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself (and) the restrictions must be “provided by law”; they may only be imposed for one of the purposes set out in subparagraphs (a) and (b) of paragraph 3; and they must be justified as being “necessary” for that State party for one of those purposes.”<sup>349</sup> Moreover, “the word ‘necessary’ imports ‘an element of proportionality’ into Article 19(3): the law must be appropriate and adapted to achieving one of the enumerated ends.”<sup>350</sup>

The recognition of freedom of expression under Islamic law as a birthright of every human being is confirmed by Qur’an 55:1-4 which states that:

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<sup>343</sup> See Art.XI French Declaration of the Rights of Man and of Citizen (1789) *Translated in Paine, T., Rights of Man, With An Introduction by Eric Foner* (1984) p.110.

<sup>344</sup> Partsch, K.J., (1981) *supra*, note 311 above, p. 208 at 216.

<sup>345</sup> *ibid.*, p.217.

<sup>346</sup> See UN Doc. A/2929, *supra*, note 8 above, p.148.

<sup>347</sup> These duties and responsibilities were however not defined.

<sup>348</sup> See UN Doc. A/2929, *supra*, note 8 above, pp.147-152. See also Nowak, M.,(1993) *supra*, note 5 above, p. 348ff.

<sup>349</sup> General Comment 10, Par. 4.

<sup>350</sup> See Joseph, Schultz and Castan (2000) *supra*, note 23 above, p.392.



“(God) The most Gracious!. Taught the Qur’an. Created Man (and) *Taught him eloquent speech (expression).*” (emphasis added).

In his pioneering work on freedom of expression in Islam, Kamali has observed that “it is generally acknowledged that freedom of expression in Islam is in many ways complementary to freedom of religion; that it is an extension and a logical consequence of the freedom of conscience and belief which the *Sharī‘ah* has validated and upholds.”<sup>351</sup> There are a whole lot of recorded Traditions and practice during the lifetime of Prophet Muhammad and during the reign of the Rightly Guided Caliphs after him to support that freedom of speech and expression was acknowledged right from the inception of Islamic law.<sup>352</sup> Under the *Sharī‘ah* the main objective of this right is the “discovery of truth and upholding human dignity”.<sup>353</sup> Islamic law endeavours a balance between these two principal objectives and does not accommodate the spread of evil or obscenity under its threshold of freedom of expression. While the Qur’an affirms that God gave mankind the power and freedom of expression, it also directs mankind to always be apposite in speech. It states clearly that: “God loves not the public utterance of evil speech”<sup>354</sup> and that “Those who love (to see) scandal broadcasted among the believers will have a grievous penalty in this life and in the hereafter”.<sup>355</sup>

Thus the freedom of expression under Islamic law is also not absolute but restricted to apposite speech and expressions. Examples of expressions and speech that amount to abuse of this right are specifically stated by the Qur’an and some Traditions of the Prophet. Kamali classifies these *Sharī‘ah* limitations on freedom of expression into “moral restraints” and “legal restraints”. The moral restraints are essentially “addressed to the conscience of the believer” and include, *inter alia*, defamation, backbiting, lying, derision, exposing the weaknesses of others, and acrimonious disputation. The legal restraints, some of which are backed by specific sanctions include, *inter alia*, public utterance of evil or hurtful speech, slanderous accusation, libel, insult, cursing, seditious speech and blasphemy.<sup>356</sup> Of all these *Sharī‘ah* restraints, blasphemy is perhaps portrayed as the most controversial limitation on freedom of expression under international human rights law as was demonstrated through the

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<sup>351</sup> Kamali, H.M., (1997) *supra*, note 328 above, p.6.

<sup>352</sup> See e.g. Chaudhry, M.S., (1995) *supra*, note 82 above, pp.31-33.

<sup>353</sup> See Kamali, H.M., *op. cit.*, p.8.

<sup>354</sup> Q4:148.

<sup>355</sup> Q24:19.

<sup>356</sup> See Kamali, M.H., (1997) *supra*, note 328 above, pp.117-258. It is interesting to note that the section on the restraints takes the largest lump of Professor Kamali’s work on Freedom of Expression in Islam. This perhaps portrays the non-absolute nature of the right to freedom of expression and the difficulty of balancing between the right itself and the restraints upon it.

reactions attracted by the Salman Rushdie affair from both international human rights advocates and Islamic legalists world-wide.<sup>357</sup>

Blasphemy is broadly referred to under Islamic law as “*Sabb Allah aw Sabb al-Rasûl*”, meaning “Reviling God or Reviling the Messenger”. Blasphemy overlaps with apostasy in the sense that an act of blasphemy by a Muslim also amounts to apostasy. Thus classical Islamic jurists often paired the two together in their legal treatises and prescribed the death penalty for both under traditional Islamic law. Blasphemy is however separable from apostasy especially when committed by a non-Muslim against Islam.<sup>358</sup>

The Encyclopaedia of Religion and Ethics defines blasphemy in Islam broadly as “All utterances expressive of contempt for Allah (God) Himself, for His Names, attributes, laws, commands or prohibitions (and) All scoffing at Muhammad or any other prophets or apostles of Allah (God).”<sup>359</sup> Being a religious law, Kamali points out that the prohibition of blasphemy under Islamic law is mainly “to defend the dogma and belief-structure of Islam”.<sup>360</sup> It is noteworthy that despite Islam’s claim to being “the only religion acceptable to God”<sup>361</sup>, it however recognises the reciprocal rule with respect to other faiths under its prohibition of blasphemy. The Qur’an enjoins Muslims also “not to revile those whom they (non-Muslims) worship beside God, lest they (non-Muslims) revile God wrongfully without knowledge. Thus We (God) have made fair-seeming to each people its own doings; to their Lord is their final return and He shall inform them of all that they did.”<sup>362</sup>

The *Shari’ah* prohibition of blasphemy as a limitation to freedom of expression thus aims at protecting the sensibilities and beliefs of the Muslim community in particular and that of other faiths in general. Seen in that perspective, that limitation is explicable within the proviso of Article 19(3)(b) of the ICCPR on the protection of public order or morals. The ability of blasphemous expressions to incite Muslims to public disorder is evidenced, for example, by the upheavals in many parts of the world that followed the publication of Salman Rushdie’s *Satanic Verses*, which was considered as being offensive to the religious

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<sup>357</sup> See e.g. generally Appignanesi, L., and Maitland, S., *The Rushdie File* (1990); also Kidwai, A.R., and Ahsan, M.M., (eds.) *Sacrilege versus Civility: Muslim Perspectives on the Satanic Verses Affair* (1991).

<sup>358</sup> See Kamali, (1997) *supra*, note 328 above, p.217. Professor Kamali concluded after a detailed analysis of blasphemy under Islamic law that “The Qur’an has made no reference to the death penalty for blasphemy, and the text does not warrant the conclusion that it is a Qur’anic obligation, or a prescribed punishment or a mandate. On the contrary, we would submit that the general language of the Qur’an can only sustain the broad conclusion that the perpetrator of blasphemy disgraces himself and invokes the curse of God upon himself, and that it is a criminal offence which carries no prescribed mandatory punishment, and, as such, automatically falls under the category of *ta’zir* offences, whose punishment may be determined by the head of state or competent judicial authorities.” See *ibid*, p.244.

<sup>359</sup> Hastings, J., (Ed.) *Encyclopaedia of Religion and Ethics*, (1909) Vol. 2, p.672.

<sup>360</sup> See Kamali, (1997) *supra*, note 328 above, p.8.

<sup>361</sup> Q3:19.

<sup>362</sup> Q6:108.

sensibilities of Muslims not only by Muslims but even by non-Muslim religious leaders.<sup>363</sup> There is need however in this realm to always carefully and objectively distinguish constructive reasonable intellectual critiques of religious interpretations from expressions that insult or revile the sensibilities of reasonable adherents of particular religions under the guise of freedom of expression. Maududi has pointed out in that regard that Islam does not prohibit decent intellectual debate and religious discussions, what it prohibits is evil speech that encroaches upon the religious beliefs of others.<sup>364</sup> Article 22 of the Cairo Declaration provides that:

- (a) Everyone shall have the right to express his opinion freely in such manner as would not be contrary to the principles of the Sharî'ah.
- (b) Everyone shall have the right to advocate what is right, and propagate what is good and warn against what is wrong and evil according to the norms of Islamic Sharî'ah.
- (c) Information is a vital necessity to society. It may not be exploited or misused in such a way as may violate sanctities and the dignity of Prophets, under moral and ethical values or disintegrate, corrupt or harm society or weaken its faith.

Applying the margin of appreciation doctrine to a case of blasphemy under Article 10 of the European Convention, the European Court of Human Rights held in the case of *Otto-Preminger-Institut .v. Austria*<sup>365</sup> that the seizure and forfeiture of a blasphemous film in which God, Jesus Christ and the Virgin Mary were ridiculed did not violate the author's freedom of expression guaranteed under Article 10 of the European Convention. The Court observed, *inter alia*, that:

"The Court cannot disregard the fact that the Roman Catholic religion is the religion of the overwhelming majority of Tyroleans. In seizing the film, the Austrian authorities acted to ensure religious peace in that region and to prevent that some people should feel the object of attacks on their religious beliefs in an unwarranted and offensive manner. It is in the first place for the national authorities, who are better placed than the international judge, to assess the need for such a measure in the light of the situation obtaining locally at a given time. In all the circumstances of the present case, the Court does not consider that the Austrian authorities can be regarded as having overstepped their margin of appreciation in this respect."<sup>366</sup>

It is submitted that the HRC should follow a similar approach in considering issues of moral and religious sensibilities.

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<sup>363</sup> See e.g. Appignanesi, L., and Maitland, S., (1990) *supra*, note 357 above, pp. 235-236.

<sup>364</sup> See Maududi, A.A., (1993) *supra*, note 179 above, p.30.

<sup>365</sup> (1994) *Eur. Crt. Human Rights Reports*, Series A, Vol.295-A.

<sup>366</sup> *ibid.* Par. 56.

## THE PROHIBITION OF PROPAGANDA FOR WAR AND INCITEMENT TO HATRED

### Article 20

1. Any propagation for war shall be prohibited by law.
2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Differences of race, nationality and religion are part of the realities of human society that do not by themselves create any problems. It is the advocacy or incitement to hatred on grounds of those differences that creates problems which lead to serious violations of human rights. Article 20 thus aims at the important objective of promoting tolerance, mutuality and peaceful co-existence despite human differences.

This provision constitutes a further limitation on the freedom of expression guaranteed under Article 19 above. The HRC has opined that “these required prohibitions are fully compatible with the right of freedom of expression as contained in article 19 the exercise of which carries with it special duties and responsibilities.” The Committee has also stated that the propaganda prohibited under Article 20(1) “extends to all forms of propaganda threatening or resulting in an act of aggression or breach of the peace contrary to the Charter of the United Nations”.<sup>367</sup> The object of Article 20(2) is also to combat the re-occurrence of the horrors of Nazism that resulted mainly from incitement of racial hatred. There is a positive obligation on States to enact laws prohibiting such propaganda of war and advocacy of hatred.

The *Shari'ah* also prohibits aggression and mischief on earth, prohibits racial or religious hatred and incitement to discrimination, violence or hostility. The Qur'an condemns, in many verses, those who spread mischief on earth and incite to hatred. Prophet Muhammad had also stated in one of his Traditions that “Whoever incites to partisanship is not of us”.<sup>368</sup> Article 22(d) of the OIC Cairo Declaration also provides that: “It is not permitted to arouse nationalistic or doctrinal hatred or to do anything that may be an incitement to any form of racial discrimination.”

Islamic law however approves the call to war in case of self-defence and to counter aggression or persecution. The Qur'an states that “Permission to fight is given to those against whom war is made because they are wronged, and certainly God is most capable to aid them.”<sup>369</sup> In that case the authority to call to war lies with the Head of State and not with

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<sup>367</sup> General Comment 11, Par. 2.

<sup>368</sup> Reported By Abû Dâwûd. See e.g. Karim, F., (1994) *supra*, note 197 above, Vol.1, p. 488, Hadith No. 244.

<sup>369</sup> Q22:39.

individuals. In similar vein the HRC has also stated that Article 20(1) of the ICCPR does “not prohibit advocacy of the sovereign right of self-defence or the right of peoples to self-determination and independence in accordance with the Charter of the United Nations.”<sup>370</sup>

## THE RIGHT OF PEACEFUL ASSEMBLY

### *Article 21*

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.

Article 21 guarantees the right of peaceful assembly and prohibits any restriction of the right except as is necessary in a democratic society in the interests of national security or public safety, public order, protection of public health or morals or protection of the rights and freedoms of others. Such restriction where necessary must also be in conformity with the law. This aims at protecting the right of people to come together and peacefully pursue a common purpose. The right is usually related to political liberty. Nowak however observes that the limiting proviso “is so broad that more than enough possibilities are available to suppress assemblies critical of the regime or threatening to the State.”<sup>371</sup>

The right of peaceful assembly is recognised under Islamic law by virtue of the Qur’anic provision enjoining co-operation in the pursuit of righteousness and goodness and not in nurturing transgression and hostility.<sup>372</sup> There is nothing in the *Shari’ah* that prohibits the right to participate in peaceful assembly for a rightful cause of one’s choice as long as it is not an incitement to aggression or public disorder as stressed in the proviso of Article 21. This same Islamic principle applies to the right to freedom of association addressed in Article 22 below.

## THE RIGHT TO FREEDOM OF ASSOCIATION

### *Article 22*

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

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<sup>370</sup> General Comment 11, Par. 2.

<sup>371</sup> Nowak, M., (1993) *supra*, note 5 above, p.371 and p.380-383 for an analysis of the permissible purposes for interference on freedom of assembly. See also Joseph, Schultz and Castan (2000) *supra*, note 23 above, pp.425-432.

<sup>372</sup> Q5:2.

2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.
3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

Freedom of association is linked to freedom of assembly in Article 21 above. Freedom of association is here associated with the right to form and join trade unions, which is an economic right.<sup>373</sup> Although the right is subjected to similar restrictions imposed upon freedom of assembly, the State is granted the possibility of further restricting members of the armed forces and the police in the exercise of this right due to its link with trade unions.<sup>374</sup>

While the freedom of peaceful assembly and freedom of association are not treated separately in the legal treatises of classical Islamic jurists, Kamali has pointed out that the *Sharî'ah* certainly "takes an affirmative stand on rights and encourages association in pursuit of lawful objectives." He further elaborated that "the Qur'ânic principle of *hisbah*, that is commanding good and forbidding evil, the principle of *nasîhah*, sincere advice, and *shûrâ*, consultation, can equally be quoted *mutatis mutandis* as the basic authority in the *Sharî'ah* for freedom of association."<sup>375</sup>

Article 22 also mentions the right to form and join trade unions for the protection of the interest of workers. This is very legitimate under Islamic law considering the tendency of exploitation that often exists in the employer-employee relationships all over the world today. The Prophet had enjoined in one of his Traditions that the adequate wage of the employee should be paid by the employer before the labour-sweat of the employee dries out. There is no doubt that the individual employee is always the weaker party in every employer-employee relationship. It is through the formation of trade unions that the above injunction of the Prophet can be realised and the interest of employees adequately protected within modern economies. Within the modern economic practices that operate in modern Muslim States today, it will be inconsistent with the Islamic injunction of fair-dealing not to allow the formation of trade unions to protect the interest of employees as provided under Article 22.

<sup>373</sup> See Article 8 of the ICESCR in the next chapter.

<sup>374</sup> See Joseph, Schultz and Castan (2000) *supra*, note 23 above, pp.432-441.

<sup>375</sup> Kamali, M.H., (1997) *supra*, note 328 above, p.73ff.

## THE RIGHT TO MARRY AND FOUND A FAMILY

### *Article 23*

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
2. The right of men and women of marriageable age to marry and to found a family shall be recognized.
3. No marriage shall be entered into without the free and full consent of the intending spouses.
4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

Article 23 of the ICCPR is unique in the sense that it provides for an institutional guarantee. It recognises the family institution as “the natural and fundamental group unit of society” that is “entitled to protection by society and the State.” It also recognises the “right of men and women of marriageable age to marry and to found a family”, and makes mandatory “the free and full consent of the intending spouses” in every marriage. Neither the ICCPR nor the ICESCR gives a definition of family. The HRC has however stated that:

“In giving effect to recognition of the family in the context of article 23, it is important to accept the concept of the various forms of family, including unmarried couples and their children and single parents and their children and to ensure the equal treatment of women in these contexts...”<sup>376</sup>

The recognition and importance of the family institution under Islamic law can not be over emphasised. However, marriage is the legitimate means of founding a family under Islamic law. In that regard paragraphs (1), (2), and (3) of Article 23 are in full consonance with Islamic law, they in fact re-echo important principles of Islamic family law.

There are however some apparent differences between the thresholds of Islamic law and international human rights law regarding equality of rights and responsibilities of spouses during marriage and at its dissolution under Article 23(4). Similar provision is found in Article 16 of the Convention on the Elimination of all forms of Discrimination Against Women<sup>377</sup> During the discussions of the draft Women’s Convention in the Third Committee of the General Assembly, Muslim countries raised some objections with respect to Article 16 and its conformity with principles of Islamic law on rights and responsibilities of spouses

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<sup>376</sup> General Comment 28, Par. 27. The matters addressed here are further considered under family rights in Article 10 of ICESCR in the next Chapter.

<sup>377</sup> *supra*, note 60 above.

during marriage and at its dissolution. They succeeded in achieving only a few amendments to the original draft.<sup>378</sup> In consequence, most Muslim countries that ratified the Women's Convention entered a reservation to Article 16.<sup>379</sup> The Committee on the Elimination of Discrimination Against Women, believing that it would be useful for it to have material on the subject, requested the UN in its reports of 1987 and 1988 to "promote or undertake studies on the status of women under Islamic laws and customs".<sup>380</sup> The request was however turned down at the meetings of both the Economic and Social Council (ECOSOC) and the UN General Assembly due to objections by some Muslim States.<sup>381</sup> According to Lijnzaad this has so far made it difficult to "reconcile the cause of women's rights with Islamic law".<sup>382</sup> We will therefore elaborately examine here those specific areas of differences with regard to equality of rights and responsibilities of spouses under Islamic law.

The first important issue in this regard is the concept of superiority of the male over the female in Islamic law. 'Abd al 'Ati has observed that almost all writers, Oriental and Occidental, classical and modern, have variously interpreted the following Qur'anic verses to mean the superiority of men (husbands) over women (wives) in Islamic law.

"...And women shall have rights similar to the rights against them, according to what is equitable; but *men have a degree above them...*"<sup>383</sup> (emphasis added)

"*Men are the protectors and maintainers of women because God has given the one more strength than the other, and because they support them from their means...*"<sup>384</sup> (emphasis added)

Ibn Qudâmah in his highly esteemed legal treatise, *al-Mugnî*, indicated the complementary role of the two genders but went on to state that the husband's rights were greater than the wife's because God says that "*men have a degree above them*". He also referred to a Tradition in which the Prophet Muhammad is reported to have said that if it were lawful for a human being to prostrate before another, wives would have been ordered to

<sup>378</sup> See UN Doc. A/C.3/34.SR., pp.70-73. See also Khaliq, U., "Beyond the Veil?: An Analysis of the Provisions of the Women's Convention and the Law as Stipulated in Shari'ah", (1995) 2 *The Buffalo Journal of International Law*, p.1. at 29.

<sup>379</sup> For Texts of Reservations See e.g. Lijnzaad, L., *Reservations to UN-Human Rights Treaties: Ratify and Ruin?* (1995) pp. 320-322. See also Cook, R.J., "Reservations to the Convention on the Elimination of All forms of Discrimination Against Women" (1990) 30 *Yale Journal of International Law*, p.644 at 687-706. See also UN Human Rights Treaty Website at: <http://www.unhchr.ch/html/menu3/b/elcedaw.htm> [17/2/2001].

<sup>380</sup> See (1987) Report of the Committee on the Elimination of Discrimination Against Women Sixth Session, UN Doc. A/42/38 (1987), par. 580, (Decision 4); and (1988) Report of the Committee on the Elimination of Discrimination Against Women, Seventh Session, UN Doc. A/43/38 (1988), Par. 61.

<sup>381</sup> See UN Doc. E/1987/SR.10-SR.14 (1987); UN Doc. A/C.3/42/SR.22 (1987); UN Doc. A/C.3/42/SR.26-SR.28 (1987) and UN Doc. A/C.3/42/SR.30 (1987). See also Byrnes, A.C., "The "Other" Human Rights Treaty Body: The Work of the Committee on the Elimination of Discrimination Against Women" (1989) 14 *Yale Journal of International Law*, 1 at 53-55.

<sup>382</sup> See Lijnzaad, L., (1995) *supra*, note 379 above, p.320.

<sup>383</sup> Q 2:228.



prostrate to husbands due to the rights of husbands over wives.<sup>385</sup> This has often been taken to mean a confirmation of the superiority of the husband over the wife under Islamic law. Thus the French writer Gaudefroy-Demombynes has asserted that Islamic law and customs “give the husband absolute authority over his wife and children. ...The husband is superior to his wife: ‘men having a degree above them,’ says the Qur’an”.<sup>386</sup> This idea of superiority of men over women is inferred from the “degree” that men are stated to have above women in Qur’an 2:228. But what is meant by this “degree”? One observes that both classical and contemporary interpreters of the Qur’an differ on the meaning of this “degree”. An example of the contrast in interpretations of the “degree” is found for instance, in the English interpretations of Yusuf Ali which says “...men have a degree (*Of advantage*) over them”<sup>387</sup> and that of Muhsin Khan which says “...men have a degree (*of responsibility*) over them”.<sup>388</sup> The parenthesising of the phrases “*Of Advantage*” and “*of responsibility*” by the respective interpreters indicate that those are not express statements of the Qur’an but the understanding of the content by the interpreters. ‘Abd al ‘Ati therefore pointed out that the interpretations are “probably better understood as a reflection of certain psychological dispositions or of the *actual* status of women, which has been low on the whole, at least on the surface”, and that the “idea that men are superior to women and have power over them without reciprocity or qualifications stemmed from sources apparently alien to the spirit as well as the letter of” the Qur’anic verses.<sup>389</sup>

It is noteworthy that both Qur’an 2:228 and Qur’an 4:34 revolve around the family institution. Rather than advocating the superiority of one gender above the other, the verses must be understood in the context of the Islamic appreciation of role differentiation within the family. From sociological perspectives, authority and power are necessary elements of any group structure. The family structure is not an exception. Bernard quoting Allport pointed out that the concepts of status, authority, power, e.t.c., “run through all human and animal relationships”, and that “the social psychologist sees ascendance-submission or

<sup>384</sup> Q 4:34.

<sup>385</sup> See Ibn Qudāmah, M.A., *al-Mugnī* (Arabic) (1981) Vol.7, p.223.

<sup>386</sup> Gaudefroy-Demombynes, M., *Muslim Institutions*, Trans. MacGregor, J.P., (1968) p.132 See also Honarver, N., “Behind The Veil: Women’s Rights in Islamic Societies” (1988) 6 *Journal of Law and Religion*, p.355 at 384-385.

<sup>387</sup> See Ali, A.Y., *The Meaning of The Holy Qur’ān (New Edition with Revised Translation and Commentary)* (1992) p.92. (emphasis added). In footnote 255 to the translation Yusuf Ali states that “The difference in economic position between the sexes makes the man’s rights and liabilities a little greater than the woman’s. Q.4:34 refers to the duty of the man to maintain the woman, and to a certain difference in nature between sexes. Subject to this, the sexes are on terms of equality in law, and in certain matters the weaker sex is entitled to special protection.”

<sup>388</sup> See Muhsin Khan, M., and Taqi-ud-Din Al-Hilali, M., *Interpretations of the Meanings of the Noble Qur’An in English Language: A Summarized Version of At-Tabari, Al-Qurtubi and Ibn Kathir with Comments from Sahih Al-Bukhari* (1996) p.57. (emphasis added).

<sup>389</sup> ‘Abd al ‘Ati, H., (1977), *supra*, note 64 above p178-182.

dominance-compliance wherever two persons are in contact with each other.”<sup>390</sup> This explains why Islam required leadership in every group activity to ensure cohesion in human relationships. For instance in acts of worship involving two or more people, one of them who is more qualified will lead the others. Also when two or more people travel together, the Prophet instructed that one of them must be selected as leader of the group. In all these situations the leader is not considered as being superior to the others, it is only to ensure cohesion in the group. To enhance the success of family life therefore there arises the need to differentiate and identify roles within the family structure. The husband would necessarily be more influential in certain roles while the wife would be in others. Zeldich has pointed out that in most societies the instrumental and protective roles are played by the husband-father, while the wife-mother plays the expressive roles.<sup>391</sup> It is in exceptional cases that the wife-mother assumes the protective role within the family structure. That perhaps explains the degree (*of responsibility*) that men have above women and which is consistent with the second verse that says:

“Men are the protectors and maintainers of women because God has given the one more strength than the other, and because they support them from their means...”<sup>392</sup>

The word interpreted here as protectors and maintainers (*qawâmûn*) is also sometimes translated as “guardians” which in that case involves some element of authority on the part of the husband. However the role of a guardian, protector or maintainer is substantially rather that of responsibility than of authority. It would be more consistent therefore to understand the “degree” that men are stated to have above women in Qur’an 2: 228 as a degree of responsibility. It is clear that neither the two verses under examination nor any other verse of the Qur’an mentions specifically that men are superior to women. It is also not mentioned directly that men have absolute authority over women. Where the husband/father adequately discharges the degree of responsibility placed upon him, some reflective rights will reciprocally ensue to him from the wife/mother in the family relationship. Thus the authority of the male is at best inferred only as a consequence of the structural role of the husband-father in the family. Authority and leadership is thus not really generalised or attached *per se* to the idea of the male being superior to the female. It relates to specific roles in the family structure and is delegated to the gender best suited for that role within Islamic teachings.

<sup>390</sup> See Bernard, J., *American Family Behaviour* (1942) p.420.

<sup>391</sup> Zeldich, M., *Family*, “Marriage and Kinship” in Faris, R.E.L., *Handbook of Modern Sociology* (1964)p.680 at 699 and 703.

<sup>392</sup> Q 4:34.

Whether men are the best suited for that role than women is an open question subject to diverse cultural arguments.

Marriage and the family institution are very strong traditions of Islam that cannot be neglected except for valid necessities. Islamic law does not promote celibacy and also generally prohibits sexual relations outside wedlock. The Prophet Muhammad is reported to have said that marriage was part of his Traditions (*Sunnah*) which should not be neglected.<sup>393</sup> Esposito has thus pointed out that:

“Islam considers marriage, which is an important safeguard for chastity, to be incumbent on every Muslim man and woman unless they are physically or financially unable to lead conjugal life”<sup>394</sup>

Muslim jurists therefore tend to protect the family institution resolutely and are cautious in accommodating any norms that would tend to disrupt that tradition of Islam. Khan as quoted by Badawi expressed the fear of Muslim societies about disintegration of the family institution in the following words:

“Of all the family problems in advanced countries, divorce tops the list. The fact that the majority of marriages in these countries end up in divorce has ruined family life completely, for children do not enjoy the love and care of parents who are still alive, whereas it was formerly only death which separated children from their parents.”<sup>395</sup>

The urge to protect the family institution while guaranteeing equality of the spouses is not peculiar to Islamic law. It was such considerations, *inter alia*, that defeated the ratification of the Equal Rights Amendment to the US Constitution by the American States in 1982.<sup>396</sup> Also as at December 2000 the United States of America had not ratified the Women’s Convention on grounds, *inter alia*, that the Convention has the potential of prohibiting even “non-invidious gender distinctions.”<sup>397</sup>

Meron has alluded to the wide scope of the Women’s Convention with regard to the prohibition of religious inspired norms within the family and suggested that “religious practices within the family which have relatively less significance for women’s ability to function as full human beings in society might be permitted even though those practices

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<sup>393</sup> Reported by al-Bukhârî. See e.g. al-Asqalânî, Ibn Hajar, *Bulugh al-Maram (With English Translations)* (1996) p.342, Hadith 825.

<sup>394</sup> Esposito, J.L. *Women in Muslim Family Law* (1982)p.15.

<sup>395</sup> See e.g. Badawi, J.A., *The Muslim Woman’s Dress According to the Qur’an and Sunnah* (nd) pp.13-14.

<sup>396</sup> See Feinberg, R., *The Equal Rights Amendment. An Annotated Bibliography of the Issues 1976-1985* (1986)p.3.

<sup>397</sup> See Zearfoss, S., “The Convention for the Elimination of All Forms of Discrimination against Women: Radical, Reasonable, or Reactionary?” (1991)12 *Michigan Journal of International Law*, p.905. The USA signed the Women’s Convention on 17 July 1980 but is yet to ratify it.

perpetuate stereotype roles while practices which impair women's ability to exercise their rights and foreclose opportunities to function outside stereotyped roles (for instance a prohibition on women working outside the home) must not be allowed."<sup>398</sup> He submitted that to require the elimination of sex-roles in the family structure as required by religious teachings could constitute coercion to alter religious practice or belief, contrary to Article 1(2) of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.<sup>399</sup> Of relevance is also the issue of abortion. The Women's Convention does not specifically sanction abortion but a wide interpretation of Article 16(1)(e) of the Women's Convention which provides for the same rights to decide *freely* on the number and spacing of the couple's children can accommodate the right to abortion where the wife decides that she has had enough children and then finds that she is pregnant.<sup>400</sup>

With regard to equality of rights "as to marriage, within marriage and at its dissolution" under Article 23(4) the apparent areas of conflict with Islamic law are: the right of conditional polygyny for men with no right of polyandry for women; the right of Muslim men to marry women of the "people of the book" (i.e. Christian and Jewish women), but no similar right for Muslim women to marry men of the "people of the book" - i.e. female religious endogamy; the female's share in inheritance, and the right to divorce. We shall now examine these issues together with the juristic views and justifications advanced for them under Islamic law and possible reconciliation of the differences.

### *Polygyny in Islamic Law and Equality of Rights as to Marriage*

The HRC observed in its General Comment 28 that polygamy is incompatible with equality of rights in marriage under the Covenant and that "it should be definitely abolished wherever it continues to exist."<sup>401</sup> Muslim scholars and jurists have advanced reasons such as demographic needs, economic factors, barrenness of the wife, chronic illness of the wife, higher sexual needs of men, e.t.c., in their attempt to justify the conditional permissibility of

<sup>398</sup> See Meron, T., *Human Rights Law-making in the United Nations: a Critique of Instruments and Process* (1986) p.159, see pp.62-66 and 153-160.

<sup>399</sup> *ibid*, pp. 159-60.

<sup>400</sup> See e.g. Meron, (1986) *supra*, note 398 above, p.72. See also the issue of "unwanted pregnancy" and the presumption that the decision is that of the woman addressed at page 124-125 above.

<sup>401</sup> General Comment 28, Par. 24. See also the Committee's Concluding Observations on Nigeria (1996), UN Doc. CCPR/C/79/Add.65; Par.291; Concluding Observations on Libya (1998), UN Doc. CCPR/C/79/Add.101.Par.17; Concluding Observations on Cameroon (1999), UN Doc. CCPR/C/79/Add.116. Par. 10. See also CEDAW's General Recommendation 21, UN Doc. HRI/GEN/1/Rev.1 at 90 (1994). Par.14.

polygyny in Islamic law.<sup>402</sup> Most of these justifications may be stiffly contested in the light of present day circumstances. Problems like the barrenness of the wife are however quite tenacious in the arguments for the justification of conditional polygyny in Islamic law. Similar arguments exist also in other cultures. In traditional African society for instance, procreation is usually the main purpose of marriage. Thus where the wife is found barren, the husband is usually inclined towards taking another wife, even though he does not divorce his barren wife.<sup>403</sup> The obvious question here is, what of when the man is the one barren? It is often assumed, albeit wrongly, amongst the local populace in many developing countries that the fault for lack of conception in marriage is always with the wife. Islamic law however recognises defects of the husband such as impotence, lack of semen or ejaculation during intercourse, lack of testicles and amputated sexual organ, all of which constitute grounds on which the wife may seek for a dissolution of the marriage. al-Zaylâ'î, the twelfth century *Hanafi* jurist stated that since these defects defeat the very purpose of marriage i.e., satisfaction of sexual urge and procreation of children, the wife has a right to demand for a dissolution.<sup>404</sup> The same principle applies and the woman may seek dissolution where the man is found barren. The question then would be why a right to dissolution for the woman and not a right to polyandry like her male counterpart? The medieval Islamic jurist, Ibn Qayyim, has responded with a list of socio-legal arguments to this question. The most compelling perhaps of which is that polyandry can more easily lead to family and societal disintegration because both the concepts of legitimacy of offspring and family lineage would be impaired. There would always be a contest of legitimacy between the male spouses each time a child is born in a polyandrous union, which is not the case in a polygynous marriage.<sup>405</sup>

In case of a barren woman it is often argued that to take a second wife is better than either divorcing the barren wife or having offspring outside the marriage through adulterous relations with other women. For such exceptional reasons, some Muslim scholars have argued that "Islam permitted polygamy – as a remedy for some social diseases – under certain conditions without which plurality of wives shall be prohibited... (because, - see below) Islam, since the very beginning, favours monogamy."<sup>406</sup> According to 'Abd al Ati,

<sup>402</sup> See e.g. Ibn Qayyim, A., *Kitâb Akhbâr al-Nisâ'* (Arabic) (1900) Vol.2, pp.85-87; Doi, A.R., (1984), *supra*, note 82 above, p.146, and al-Qaradawi, Y., (1984) *supra*, note 16 above, pp.192-193.

<sup>403</sup> See Doi, (1984) *ibid*, p.153-154 and footnote 15 thereof.

<sup>404</sup> See al-Zaylâ'î, *Tabyîn al-Haqâ'iq: Sharh Kanz al-Daqâ'iq* (Arabic) (1313AH) Vol.3, p.25.

<sup>405</sup> Ibn Qayyim, A., *supra* note 402 above. See also 'Abd al'Ati, (1977), *supra*, note 64 above, pp.125-126.

<sup>406</sup> See e.g. El-Bahnassawi, S., (1985) *supra*, note 58 above, p.157; and Al-Zuhayli, W., (1997) *supra*, note 77 above, Vol. 9., p.6670.

polygyny should not be viewed entirely as a blessing for one sex and a curse for the other, but “as a legitimate alternative applicable to some difficult, “crisis” situations”.<sup>407</sup>

The permissibility of polygyny in Islamic law is based on Qur’an 4:3 which provides that:

“...marry women of your choice, two three, or four; but if you fear that you shall not be able to deal justly (with them) then only one, or (a captive) that your right hands possess. That is nearer to prevent you from doing injustice”.

Men are thus allowed to have a maximum of four wives at a time. Both classical and contemporary Muslim jurists generally agree that the ability to treat co-wives justly, as stated in the Qur’anic verse above, is a prerequisite to this permissibility of polygyny.<sup>408</sup> Some of the classical jurists such as Imâm al-Shâfi‘î, the eponym of the *Shâfi‘î* school of Islamic jurisprudence, did not consider the requirement for doing justice between co-wives as an essential legal requirement but only as a “moral exhortation binding on the husband’s conscience”.<sup>409</sup> Many contemporary scholars and jurists however hold that the mere apprehension of not being able to deal justly between co-wives removes the permissibility of polygyny and advocates monogamy. They refer to the concluding sentence of the Qur’an 4:3 above, which says: “...That (monogamy) is nearer to prevent you from doing injustice”, and conclude that monogamy is the rule while polygyny is only an exception. The view that the ability to deal justly between co-wives is a legal prerequisite to polygyny had been further argued by other scholars and taken together with Qur’an 4:129, which says “You will never be able to do perfect justice between wives even if it is your ardent desire...”, to reach a conclusion that polygyny is actually prohibited under Islamic law. According to that view the Qur’an itself confirms the inability of men to fulfil that prerequisite of dealing justly with co-wives. The pioneer advocate of that interpretation was the nineteenth century Egyptian jurist, Muhammad Abduh, who, at the close of that century, argued that the abuse of polygyny created injustice to women and he advocated its proscription through a combined interpretation of those two *Qur’anic* verses. However, that view was and is still strongly opposed by Muslim scholars who support the traditional interpretation that permits polygyny provided that justice is ensured between co-wives.<sup>410</sup> Despite that the trend in the Muslim world today generally favours, at least, a restricted polygyny if not outright monogamy, most

<sup>407</sup> ‘Abd al’Atî, (1977), *supra*, note 64 above, p.126.

<sup>408</sup> See e.g. Tanzil-ur-Rahman, *A Code of Muslim Personal Law* (1978), Vol.1, pp.92-101; and Al-Zuhayli, W., (1997) *supra*, note 77above, Vol. 9., pp.6669-6670.

<sup>409</sup> See Coulson, N.J. *History of Islamic Law* (1964)p.208.

Muslim scholars and jurists would hesitate to declare its outright prohibition for the fear of violating the sanctity of its Qur'anic permissibility.

The combined interpretation of Qur'an 4:3 and Qur'an 4:129 as advocated by Muhammad Abduh was subsequently relied upon by some Muslim States to either restrict or abrogate polygyny. In 1956 Tunisia enacted the Tunisian Code of Personal Status<sup>411</sup>, which provided that:

“Polygamy is forbidden. Any person who, having entered into a bond of marriage, contracts another marriage before the dissolution of the preceding one, is liable to one year's imprisonment or to a fine...”<sup>412</sup>

That prohibitory approach has been controversial under Islamic law and it has been criticised as contravening the Qur'an.<sup>413</sup> This has been particularly so because the Tunisian code criminalised polygyny with a sentence of one year's imprisonment, despite the fact that some schools of Islamic jurisprudence consider it permissible in exceptional circumstances. Iraq had also followed the prohibitory approach in 1959 and specified imprisonment and a fine for any violator. Due to strong opposition and non-compliance by Muslims who considered it as contrary to Qur'anic provisions, the law was revised in 1963 and the article prohibiting polygamy was removed. The Tunisian code was however retained despite similar opposition.<sup>414</sup> Syria had also in 1953 enacted the Syrian Code of Personal Status restricting the right to polygyny. Article 17 of the Syrian Code, which remains operative, provided that:

“The judge is empowered to refuse permission to a married man to marry another woman if it is established that he is not in a position to support two wives.”<sup>415</sup>

Although this is substantively a restrictive approach, it could almost serve as a procedural means of closing the door to polygyny since the discretion of determining the ability to do justice is taken away from the husband and placed with the judiciary.<sup>416</sup>

In many of the Muslim societies where polygyny is practised, the prerequisite of being able to do justice between co-wives is seldom given any consideration by men. The

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<sup>410</sup> See e.g. Doi, (1984), *supra*, note 82 above, pp.149-154; and Al-Zuhayli, W., (1997) *supra*, note 77 above, Vol. 9., pp.6670.

<sup>411</sup> Law of 13/8/1956 (as amended).

<sup>412</sup> *ibid.* Art. 18.

<sup>413</sup> See Qadri, A.A., (1986) *supra*, note 22 above, p.368; and Doi, A.R.,(1984), *supra*, note 82 above, p.149-154.

<sup>414</sup> See Khadduri, M., “Marriage in Islamic Law: The Modernist Viewpoints” (1978) 26 *American Journal of Comparative Law*, p. 213 at 216.

<sup>415</sup> See also the Moroccan Code of Personal Status of 1958 and the Pakistan Family Law Ordinance of 1961. See also Mahmood, T., *Statutes of Personal Law in Islamic Countries, History, Texts and Analysis* (2<sup>nd</sup> Ed. 1995) pp. 246 –248.

<sup>416</sup> See e.g. Al-Zuhayli, W., (1997) *supra*, note 77 above, Vol.9, p.6674 for a critique of this approach.

permissibility of polygyny is often abused in a way that actually works against the family institution itself. Quoting Ibn al-Qayyim, ‘Abd al-‘Ati, has observed that “polygamy in Islam is no more and no less than that of a permissible act, (which) like any other act lawful in principle, it becomes forbidden if it involves unlawful things or leads to unlawful consequences such as injustice.”<sup>417</sup> It is arguable on the above grounds that the permissibility could be controlled under Islamic law for reasons of public welfare.<sup>418</sup> It is noteworthy however that most discussants of women’s rights proceed from the premise that there is only one way of redressing the inequality and abuse of polygyny, that is, by “equalising down” through a direct prohibition to strip men of that right. Under Islamic law this will continue to be controversial in view of its Qur’anic permissibility. Are there other means through which Muslim countries may therefore address the problem of polygyny within acceptable limits of Islamic law to remove the disadvantage against women and also satisfy their obligations under international human rights law? One approach that has not been fully utilised and which could prove realistic is the “equalising up” approach of redressing inequality.

There are normally two alternative routes to redress situations of inequality or disadvantage; - either by raising the rights of victims of the inequality, i.e. “equalising up” or by lowering the rights of those advantaged, i.e. “equalising down”.<sup>419</sup> Will situations where women have a right to polyandry similar to that of men to polygyny not satisfy the requirements of equality of rights to marriage? Although that could satisfy the requirements because nothing prohibits polyandry in international law, practical considerations indicate that most societies would not endorse such alternative as a solution to polygyny.<sup>420</sup> Islamic law actually prohibits polyandry by *ijmâ’* (legal consensus), so “equalising up” in that manner is not legally possible under Islamic law, and that is not what is suggested here either. Rather, there are provisions within Islamic law that allow for a sort of “equalising up” by legally activating the rights of women to “suspended repudiation” (*ta’liq al-talâq*) and/or “delegated repudiation” (*tafwîd al-talâq*) of marriage. The legal activation of such rights will not only redress the disadvantage and abuse of polygyny against women but also lead to a

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<sup>417</sup> ‘Abd al-‘Ati, (1977), *supra*, note 64 above, p.119. He made reference to Ibn al-Qayyim’s, *Kitâb Akhbâr al-Nisâ* (1900) *supra* note 402 above, and observed that Ibn Qayyim “cites ninety-nine cases in confirmation of this principle and makes extensive reference to the Qur’an and Sunnah, and the rulings of leading jurists.” See *endnote 44 thereof*.

<sup>418</sup> However, for the doctrine of public welfare (*maslahah*) to apply the abuse that makes such control necessary need to be sufficiently established.

<sup>419</sup> See e.g. Harris, D.J., and Joseph, S., (eds.) *The International Covenant on Civil and Political Rights and United Kingdom Law* (1995)p.594.

<sup>420</sup> See e.g. *Dietmar Pauger v. Austria*, Communication 415/1990, See also Joseph, Schultz and Castan (2000) *supra*, note23 above, p. 570.



smooth harmonisation of the conflict in this area between Islamic law and international human rights law. How can that be achieved?

There is consensus in Islamic law that polygyny can neither be imposed upon a woman or a man, it is only a permissible act. Also all the schools of Islamic law, except the *Shi'ah*, endorse the doctrines of "suspended repudiation" (*ta'liq al-talâq*) and "delegated repudiation" (*tafwîd al-talâq*).<sup>421</sup> By the first doctrine of "suspended repudiation", the husband stipulates at the time of marriage that the marriage becomes repudiated if he does certain things unfavourable to the wife, such as taking another wife. By the second doctrine of "delegated repudiation" the wife is vested, by the husband, during the marriage contract with the right to divorce herself should there arise circumstances unfavourable to her, such as the husband taking another wife.<sup>422</sup> The wife has a right under Islamic law to make stipulations in the marriage contract. It is possible therefore for Muslim countries, for reasons of public welfare, to enact that women shall be specifically informed of these rights during the marriage contract, and thus have the discretion either to utilise it or not.<sup>423</sup> The State would have in that way legally activated the rights of women and "equalised up" their formerly available but suppressed rights against the rights of men to polygyny, and thus give them a choice in the matter. Supplementary to this, women should also be adequately educated of the existence of such right to them in law. The importance of educating Muslim women about their rights in Islamic law, is manifested in the observation of Coulson that:

"There has perhaps been a natural tendency in recent years to exaggerate the picture of Muslim wives labouring under the shackles of the traditional law. Miserable though the lot of Muslim wives may have been in practice, this was often not so much the direct result of the terms of the law itself as the responsibility of society. The customary seclusion of women, and especially the lack of educational facilities, left them ignorant of their rights and unable to insist upon the proper use of machinery which the law had provided for their protection."<sup>424</sup>

Any disadvantage of polygyny could thus be redressed by women utilising an alternative legal right available to them in Islamic law, while at the same time the liberty of women who

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<sup>421</sup> See e.g. Al-Zuhayli, W., (1997) *supra*, note 77 above, Vol.9, p.6935-6941; and 'Abd al'Atî, (1977), *supra*, note 64 above, p.119. The *Shi'ah* (Twelvers) recognise the right of the husband to delegate his right of divorce to his wife, by appointing her as an agent to do so. This is called *Tawkil*. Although the rules differ technically, this can also achieve similar results with *Tafwîd* and *Ta'liq*. See e.g. Mir-Hosseini, Z., "The Delegated Right To Divorce: Law and Practice in Morocco and Iran", in Carroll, L, and Kapoor, H., (eds.) *Talaq-i-Tafwid: The Muslim Woman's Contractual Access to Divorce* (1996) pp.121-133.

<sup>422</sup> See Ibn Qudâmah, M.A., *al-Mugnî* (Arabic) (1981) Vol.7, p.13; 'Abd al'Atî, (1977), *ibid*, pp.119-120 and Coulson, N.J., (1964) *supra*, note 409 above, p. 207.

<sup>423</sup> Similar rules can be found in the Jordan, Morocco and Egypt Personal Status Laws respectively, allowing the wife to stipulate that the husband shall not take another wife and entitles her to sue for divorce if he does. See Generally Carroll, L, and Kapoor, H., (1996) *supra*, note 421 above.

<sup>424</sup> Coulson, N.J., (1964) *supra*, note 409 above, p.207.

may still like to be co-wives, when exceptional circumstances so demand, would still be guaranteed without the law interfering in their way by the prohibitory approach. Neither monogamy nor polygyny would then be an imposition upon men and women respectively, but would actually be put in its correct perspective under Islamic law as a matter of choice. This would not contravene the *Shari'ah* in any way and should also indirectly satisfy the obligations of the Muslim States to ensure equality of rights in marriage. This way the focus of international human rights law will be seen to be specifically on human rights and not on questioning the basis of religious teachings *per se*, and thus promote a complementary approach to solving human rights problems.<sup>425</sup>

### *Female Endogamy in Islamic Law and Equality of Rights as to Marriage*

Based on Qur'an 2:221 and Qur'an 60:10 there is consensus among both *Sunni* and *Shi'ah* jurists that a Muslim woman is prohibited under Islamic law from marrying any non-Muslim man.<sup>426</sup> Conversely, Qur'an 5:5 permits Muslim men to marry "women of the people of the Book" (i.e. Christian and Jewish women). In international human rights law this will be considered discriminatory against women. The HRC has observed in that regard that:

"...the right to choose one's spouse may be restricted by laws or practices that prevent the marriage of a woman of a particular religion with a man who professes no religion or a different religion. States should provide information on these laws and practices and on the measures taken to abolish the laws and practices..."<sup>427</sup>

Muslim jurists have also advanced some justifications for this provision under Islamic law.<sup>428</sup> The foremost being that, under Islamic law a Muslim man who marries a Christian or Jewish woman has a religious obligation to honour and respect both Christianity and Judaism. Thus the woman's religious beliefs and rights are not in jeopardy through the marriage, because she would be free to maintain and practice her religion as a Christian or Jew. Conversely, a Christian or Jewish man who marries a Muslim woman is not under such obligation within his own faith, so allowing a Muslim woman to marry a Christian or a Jewish man may expose her religious beliefs and rights to jeopardy. This justification is therefore hinged mainly on wanting to protect the religious beliefs and rights of Muslim women. al-Qaradawi has thus argued that:

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<sup>425</sup> See Levitt, M.A., "The Taliban, Islam and Women's Rights in the Muslim World" (1998) 22 *The Fletcher Forum*, p.113 at 115.

<sup>426</sup> See e.g. Nasir, J.J., *The Islamic Law of Personal Status* (1990) 2<sup>nd</sup> Ed., pp.69-70.

<sup>427</sup> General Comment 28, Par. 24.

“..while Islam guarantees freedom of belief and practice to the Christian or Jewish wife of a Muslim, safeguarding her rights according to her own faith, other religions, such as Judaism and Christianity, do not guarantee the wife of a different faith freedom of belief and practice, nor do they safeguard her rights. Since this is the case, how can Islam take chances on the future of its daughters by giving them into the hands of people who neither honor their religion nor are concerned to protect their rights?”<sup>429</sup>

On grounds of the guarantee of freedom of thought, conscience and religion under international human rights law, it is arguable that other religions, such as Judaism and Christianity would now also be under an international obligation to guarantee the freedom of belief and religion to a Muslim wife and thus safeguarding her rights according to her own faith. If so, will this remove the prohibition of Muslim women from marrying men of the “people of the book” (i.e.. Christians and Jews)? ‘Abd al ‘Ati, has contended that the honour and reverence that the Muslim must give to the faith of his Christian or Jewish counterpart is an integral part of the Islamic faith while the same “reciprocity” is not an integral part of either the Christian or Jewish faith. The required unreserved honour and reverence is a matter of faith that can not be imposed by law. For the same reason the Muslim male is prohibited in Islamic law from marrying an idolatress because of the psychological factors involved. Faith, concluded ‘Abd al ‘Ati, “is the most private relationship between man and God; it cannot be imposed or conferred. Nor is it the question of discrimination between men and women in Islam”<sup>430</sup> Can this then be categorised as “differentiation” for the purpose of protecting the religious rights of Muslim women instead of discrimination?. We will then have to also consider whether the prohibition causes any disadvantages to women. Love do transcend religious boundaries, the prohibition under Islamic law may therefore, on some occasions, deny a Muslim woman from marrying a man she loves, where he happens to be a non-Muslim. According to ‘Abd al ‘Ati, “Of course, love may be invoked ... as omnipotent, capable of solving all problems, emotional, ideological, or social. But love is perhaps one of the most abused words; and if it were so omnipotent as is sometimes claimed, social interaction would be much simpler and human life much less problematic.”<sup>431</sup> The socio-legal arguments are quite broad and can no doubt be continued, for and against, *ad infinitum*.

Naturally, every religion, ideology or cult treasures its adherents and will have rules that close the door to or at least minimise deflections. Such rules may often be contrary to the right to freedom of thought, conscience and religion under international human rights law.

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<sup>428</sup> See e.g. ‘Abd al ‘Ati, H., (1977) *supra*, note 64 above, pp.140-145.

<sup>429</sup> See e.g. al-Qaradawi, Y., (1984) *supra*, note 16 above, p.184-186.

<sup>430</sup> See ‘Abd al ‘Ati, H., (1977) *supra*, note 64 above, p143.

The prohibition of Muslim women from marrying non-Muslim men thus seem to be one of the areas where achieving complete equality is difficult between Islamic law and international human rights law for the reason stated by al-Qaradawi above. No non-secular Muslim State has enacted any law to abrogate that prohibition of Islamic law. Nasir, has thus observed that:

“Under the Sharia and all modern Islamic laws, both for the Sunni and Shia sects, a marriage of a Muslim woman to a non-Muslim man is null and void, even if it is validly solemnized according to the laws of any given non-Muslim state. For such a marriage to be valid the man must have converted to Islam at the time of the contract”.<sup>432</sup>

However, the juristic view of some contemporary Muslim jurists is that since Muslim women are prohibited completely from marrying non-Muslim men, the Muslim men would also be temporarily prohibited from marrying women of the “people of the book” in a situation where there is apprehension of a high number of Muslim women remaining unmarried, until the situation is remedied.<sup>433</sup> This is based on the doctrine of public welfare (*maslahah*) under Islamic law.

#### *Female’s Share in Islamic Inheritance and Equality of Rights in Marriage*

While advocates of Islamic law contend that the “Islamic inheritance scheme contains one of the most comprehensive and detailed systems of succession known to the world”<sup>434</sup>, the female’s share in the Islamic law of inheritance is viewed under international human rights law as being inconsistent with the principles of equality of women. According to the HRC, “Women should have equal inheritance rights to those of men when the dissolution of marriage is caused by the death of one of the spouses”.<sup>435</sup> Basically, under Islam law the male heir receives double the share of the female heir. This is based on the Qur’anic provision which states that:

“God (thus) directs you as regards your children’s (inheritance): to the male, a portion equal to that of two females...”<sup>436</sup>

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<sup>431</sup> *ibid*, p.142.

<sup>432</sup> Nasir, J.J., (1990) *supra*, note 426 above, p.84 also pp.69-70.

<sup>433</sup> See e.g. al-Qaradawi, Y., (1984) *supra*, note 16 above, p.184.

<sup>434</sup> See Chaudry, Z., (1997) *supra*, note 58 above, p.511 at 527.

<sup>435</sup> General Comment 28, Par. 26.

<sup>436</sup> Q 4:11.

This rule of double share of the male does not however apply in all cases under Islamic law.<sup>437</sup> There are some instances where the female gets the same share of inheritance as the male. For example a father and mother gets equal share (a sixth each) when they survive and inherit their deceased son in the same capacity as parents;<sup>438</sup> the uterine sister gets equal share (in the same capacity) with her uterine brother;<sup>439</sup> and where the sole inheritors are a husband and a full sister of the deceased, the husband gets one-half and the full sister of the deceased equally gets one-half. There are also instances where the female could receive double the share of the male.<sup>440</sup> The female will also receive the entire estate if she inherits alone.<sup>441</sup> This contradicts any emphatic allegation of unqualified discrimination on grounds of sex in the scheme of Islamic inheritance. Historically, Islamic law was the first legal system to grant women a fixed portion in inheritance either as a mother, wife, daughter or sister at a time when such a right was not available to them in any civilisation or under any legal system. This was on the basis of the Qur'anic verse which provided that:

“From what is left by parents and those nearest related, there is a share for men and a share for women, whether the property be small or large – a determinate share.”<sup>442</sup>

Muslim scholars contend that Islamic law must actually be seen as having removed the pre-Islamic discrimination that the female was subjected to in every society which had denied her of any inheritance alongside her male counterpart. The fact that there are instances when the female obtains equal share in the same capacity with the male, and can also obtain a higher share than the male in some instances, shows that the basic rule of double share for the male is not an indication of superiority of the male above the female nor discrimination on grounds of sex. Badawi summarises the justifications for the rule as follows:

“The variation in inheritance rights is only consistent with the variations in financial responsibilities of man and woman according to the Islamic Law. Man in Islam is fully responsible for the maintenance of his wife, his children, and in some cases of his needy relatives, especially the females. This responsibility is neither waived nor reduced because of his wife's wealth or because of her access to any personal income gained from work, rent, profit, or any other legal means.

Woman, on the other hand, is far more secure financially and is far less burdened with any claims on her possessions. Her possessions before marriage do not transfer

<sup>437</sup> See generally Chaudry, Z., (1997) *supra*, note 58 above.

<sup>438</sup> Q 4:11.

<sup>439</sup> Q 4:12.

<sup>440</sup> An instance is where the inheritors are a husband, one daughter and one full brother. In that case, the husband gets one quarter of the estate, the daughter as an only child gets one-half and the full brother gets the remaining one-quarter. See Chaudry, Z., (1997) *supra*, note 58 above, 535-536.

<sup>441</sup> See e.g. Nasir, J.J. (1990) *supra*, note 426 above, p.253.

<sup>442</sup> Q 4:7.

to her husband. She has no obligation to spend on her family out of such properties or out of her income after marriage. She is entitled to "Mahr" (Dowry) which she takes from her husband at the time of marriage. If she is divorced she may get an alimony from her ex-husband.

An examination of the inheritance law within the overall framework of the Islamic Law reveals not only justice but also an abundance of compassion for woman."<sup>443</sup>

Thus while the share of the male and the female, where the double share applies, appears arithmetically unequal, Muslim scholars contend that the shares are morally equitable in the final analysis, considering the varied financial responsibilities of each gender.<sup>444</sup> This argument indicates that the variation in the Islamic inheritance scheme takes the overall family structure under Islamic law into consideration. From that perspective, will counter arguments that the family structure has already changed, that the nuclear family is now dominant even in many Muslim countries, that many women for one reason or the other are bread-winners of the family, coupled with feminist calls for the empowerment of women and the promotion of their non-dependence on men, make any difference? This relates to the economic, social and cultural rights of women. It is important to note here that the financial responsibilities of men within the family structure of Islamic law are without prejudice to the financial independence of the women.<sup>445</sup> While it is reasonable and appreciative that a financially buoyant wife can assist with the financial responsibilities of the family, Islamic law does not impose this responsibility on her. Such responsibility is legally placed on the husband and where he fails to discharge it without necessity, the man becomes an irresponsible husband under Islamic law, against whom the wife has a right of dissolution on grounds of lack of maintenance.<sup>446</sup>

In addressing any problem of inheritance, succession rules can hardly be imposed upon any person who does not intend to follow such rules. There is always a way of circumventing any such imposition. The most legally approved of which is gifting away the estate to whomever one pleases during one's lifetime. It is the belief in the divine basis of the *Shari'ah* rules on Islamic inheritance that keeps Muslims attached to it. If the Islamic law of succession is considered generally, it would be observed that the fixed-shares actually make it impossible for some certain heirs to be completely disinherited for any reason. A displacement of Islamic law will therefore actually expose those secured heirs, which include

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<sup>443</sup> Badawi, J., *The Status of Woman in Islam* (1971) 8 *Al-Ittihad*, No.2, September, 33.

<sup>444</sup> See e.g. 'Abd al 'Ati, (1977) *supra*, note 64 above, p. 268.

<sup>445</sup> See *ibid*, pp.269-270. See also Chaudhry, Z., (1997) *supra*, note 58 above, 544-545.

women, to the possibility of being completely disinherited through testamentary dispositions and put them at a greater disadvantage.<sup>447</sup> It may actually be more difficult to compel any individual through secular law to dispose his estate equally and non-discriminatorily among his male and female heirs. People usually prefer to distribute their estate as it pleases them. What Islamic law has successfully established through the fixed-shares is to ensure that certain close relations are not disinherited by the testator. That does not however prevent testators from exercising their discretion to make a gift of any part of their estate during their lifetime to any of their heirs (male or female) through the doctrine of *hibah* which is an in-built mechanism in Islamic law for legally tilting the balance of the fixed-shares as one pleases during one's lifetime.<sup>448</sup>

In 1959 Iraq enacted the Personal Status Act giving equal shares to males and females in all cases. Due to its unpopularity the provision was abrogated in 1963 and the *Shari'ah* provisions restored.<sup>449</sup> Islamic inheritance rules continue to apply to Muslims within the personal law codes of most Muslim States.<sup>450</sup> During the consideration of its initial report before the Committee on the Rights of the Child, the Saudi Arabian representative, Mr. Al-Nasser, stated that "because Saudi inheritance law was taken directly from the Koran, it was considered to be the word of God, hence there was no room for interpretation or the adoption of another system" and that "in some cases, a woman's entitlement could be much greater than that of a man".<sup>451</sup>

### *Dissolution of Marriage in Islamic Law and Equality Rights of Women*

In its General Comment 28, the HRC observed that in the dissolution of marriages States must ensure that "grounds for divorce and annulment should be the same for men and women".<sup>452</sup>

Marriage may be dissolved under Islamic law either through Unilateral Repudiation (*talâq*), Discharge at wife's request (*khul'*) Dissolution by Mutual Agreement (*mubara'ah*), or Dissolution through Judicial Order (*faskh*). Unilateral Repudiation (*talâq*) is a right of the

<sup>446</sup> See e.g. Tanzil-ur-Rahman, (1978) *supra*, note 408 above, Vol.1., pp.641-652. Note the observation of the HRC that: "Equality during marriage implies that husband and wife should participate equally in responsibility and authority within the family". General Comment 28, Par. 25.

<sup>447</sup> See e.g. the Nigerian case of *Adesubokan v Yinusa* (1971) *Northern Nigerian Law Reports*, 77.

<sup>448</sup> See e.g. Powers, D.S., "The Islamic Inheritance System: A Socio-Historical Approach" in Mallat, C., and Connors, J., *Islamic Family Law* (1990) p.11 at 19-21 and Chaudry, Z., (1997) *supra*, note 58 above, p.546

<sup>449</sup> See Anderson, J.N.D., "Modern Trends in Islam: Legal Reform and Modernisation in the Middle East" (1971) 20 *International and Comparative Law Quarterly*, p.1 at 11.

<sup>450</sup> See e.g. Art.139-179 of the Algerian Family Code (1988). See also Mahmood, T., (1995) *supra*, note 415 above.

<sup>451</sup> See Summary Record of the 688<sup>th</sup> Meeting of CRC: Saudi Arabia, UN Doc. CRC/C/SR.688 of 24/01/2001, Par.59.

<sup>452</sup> General Comment 28, Par.26.

husband while the other three forms (*khul'*, *mubara'ah* and *faskh*) are invocable by the wife. Unilateral Repudiation (*talâq*) is however the simplest method of marriage dissolution and can be legally exercised exclusively by the husband at his discretion for any or no reason at all. Thus, although it may be morally wrong or even sinful in some circumstances, a husband could legally divorce his wife by a simple statement such as "I divorce you". Conversely, the wife can dissolve the marriage through either a Discharge (*khul'*), Mutual Agreement (*mubâra'ah*) with the husband's consent or through a Judicial Order (*faskh*) on grounds of certain legal circumstances only. According to Jeffery therefore, "The Qur'an grants man complete liberty of divorce and demands of him no justification for divorcing his wife. Thus he can divorce her at his own caprice, but no such facility exists for her."<sup>453</sup> While it may be a misconception to state that men have an exclusive right of marriage dissolution under Islamic law, it will also be misleading to contend that men and women have "equal" or the "same" rights of divorce under Islamic law. Men certainly have an advantage over women in the procedure of marriage dissolution. This is most probably connected to the fact that it is men who ordinarily propose marriages and pay the dowry and are also expected to be able to act more resolutely when difficulties arise in the marriage relationship.

Although the Qur'anic verses permitting marriage dissolution begin and end with strong moral admonitions for husbands to safeguard their wives' welfare in the matter of divorce,<sup>454</sup> and the Prophet Muhammad had also declared that "In the sight of God, divorce is the most hateful of all lawful things"<sup>455</sup>, yet the right of Unilateral Repudiation (*talâq*) had been abused by men from as far back as the second decade of Islam.<sup>456</sup> Furthermore, even though divorced women are free to remarry under Islamic law, men in many Muslim countries consider it as a taboo to marry divorced women. They are thus often subjected to misery and destitution. On the other hand even in the exercise of the right to Discharge (*khul'*) by a wife, the husband may, in bad faith, also withhold consent and thus continue to punish the woman and keep her under retention.<sup>457</sup> Thus the woman will be left only with the alternative of seeking a Judicial Order of dissolution (*faskh*) which she may also not be able to obtain if her grounds of dissolution fall outside the traditional legal limits for granting such order. As observed by Coulson above<sup>458</sup>, this was certainly not the spirit by which Islamic law was ordained to be applied, rather it is the men who have often failed to meet the moral

<sup>453</sup> Jeffery, A., "The Family in Islam" in Anshen, R.N., (ed.) *The Family: Its Future and Destiny*. (1949) p.39 at 60.

<sup>454</sup> Q 2:229-232.

<sup>455</sup> Reported By Abû Dâwûd. See e.g. Karim, F., (1994) *supra*, note 197 above, Vol.2, p.688, Hadith No. 137.

<sup>456</sup> See 'Abd al 'Ati, H., (1977) *supra*, note 64 above, p.220-221.

<sup>457</sup> It is however morally wrong and very sinful to do so in Islam.

<sup>458</sup> See note 424 above and text thereto.



expectation of Islam with respect to piety and prudence in the exercise of their procedural advantage in marriage dissolution. It is evidenced that the abuse of this procedural advantage by men in marriage dissolution had in fact been a matter of concern as early as the seventh century during the rule of Umar ibn al-Khatâb, the Second Caliph, who legislated against its abuse by men. Ibn Taimiyyah also addressed it in the fourteenth century,<sup>459</sup> and the problem persists in many Muslim societies today. There is reasonable ground therefore to argue for the need to combine the moral content with the procedural aspect of marriage dissolution in Islamic law.

Some Muslim States already have sections in their Personal Status Laws that modify, in a variety of ways, the traditional rules of marriage dissolution under Islamic law.<sup>460</sup> The most radical modifications prohibit the husband's right to divorce his wife extra-judicially through Unilateral Repudiation (*talâq*). For example Article 30 of the Tunisian Code of Personal Status (1956) provides that "Divorce outside a court of law is without legal effect".<sup>461</sup> This was achieved by reference to the Qur'anic verse which provides that "If you fear a breach between the two of them (husband and wife), appoint two arbiters...".<sup>462</sup> The Court is placed in the position of "two arbiters" to ensure a combination of the moral content and procedural aspect of the divorce and thus placing the couple on the same procedural footing in the dissolution of marriage. In other countries such as Morocco, Syria, Algeria and Iran, the court is empowered to order the husband to pay compensation to the wife where the Unilateral Repudiation (*talâq*) is for no just cause.<sup>463</sup> In Pakistan Unilateral Repudiation (*talâq*) by the husband will only be effective 90 days after it has been reported to an Arbitration Council, which tries to reunite the couple during the period.<sup>464</sup>

Considering the consensus of Muslim jurists that divorce is recommended only as a last resort when it has become clearly impossible for the couple to remain together, and the Tradition of the Prophet Muhammad that "In the sight of God, divorce is the most hateful of all lawful things"<sup>465</sup>, coupled with a finding that the procedural advantage enjoyed by men over women in the matter of divorce has often been misused, the control of marriage

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<sup>459</sup> See e.g. 'Abd al 'Ati, (1977) *supra*, note 64 above p.221 and Coulson, N.J., (1964) *supra*, p.194-195.

<sup>460</sup> See Mahmood, T., (2<sup>nd</sup> Ed. 1995) *supra* note 415 above.

<sup>461</sup> See also Art. 49 of the Algerian Family Code (1988).

<sup>462</sup> Q4:35. This verse however mentions specifically that the arbiters shall be: "one from his (husband's) family and one from her (wife's) family". Here the State considered itself best to take over that role through its judiciary on grounds of public interest.

<sup>463</sup> Perhaps as a deterrent for unjustifiable use of the right of Unilateral Repudiation (*talâq*) by the man. See e.g. Art. 49 of Algerian Family Code (1988) and Art. 117 Syrian Code of Personal Status (1953) (As amended). See also Al-Zuhayli, W., (1997) *supra*, note 77 above, Vol.9, p.7065-6.

<sup>464</sup> This is more like a supervisory role over the traditional waiting period under Islamic law after the *talâq* has been pronounced. See further Chapter 8 below.

<sup>465</sup> *supra*.

dissolution through judicial control by the State can be as well justified under the doctrine of public welfare (*maslahah*).<sup>466</sup> The doctrine of *hisbah* could also be relied upon here, so that the State would be seen as encouraging good and preventing evil by such judicial control whereby marriage dissolution is restricted to dissolution by Judicial Order to facilitate the amalgamation of both the moral and legal content of the rules of divorce. Since dissolution by Judicial Order (*faskh*) is a method sanctioned already by Islamic law, this will not amount to making any new law but the removal of a procedural advantage which has been generally subjected to abuse. However Khallaf considered such abrogation of men's right of Unilateral Repudiation and vesting dissolution of marriages entirely in the courts as dubious and non-genuine welfare (i.e. *maslahah wahmiyyah*).<sup>467</sup> One could disagree with this view of Khallaf, on grounds that the approach does not violate or come in conflict with any direct Qur'anic verse on Unilateral Repudiation (*talâq*). The approach is consistent with the Prophet's Tradition which states that: "There should be no harming nor should any harm be remedied with another harm".<sup>468</sup> It removes genuine hardship from women without placing any consequential hardship on men, since it does not totally block every avenue to divorce for men, but only ensures that they divorce for justifiable reasons.

An alternative approach is through the exercise of the right of stipulation by women during the marriage contract. This is known in Islamic law as *khiyâr al-talâq* meaning the option (of the wife) to divorce. Under traditional Islamic law, the wife has a right to stipulate during the marriage contract that the husband delegates to her, absolutely or conditionally, the right of Unilateral Repudiation whereby she will have a right to invoke it when absolutely necessary. This does not divest the husband of his own original right to divorce. Both he and the wife can then exercise the right unilaterally.<sup>469</sup> Fyzee has observed that: "This form of delegated divorce is perhaps the most potent weapon in the hands of a Muslim wife to obtain her freedom without the intervention of any court and is now beginning to be fairly common in India."<sup>470</sup> As stated in the case of polygyny above, the same approach could be adopted in the case of divorce whereby the State will make it mandatory under law that the wife shall be informed during the marriage contract, of this right to stipulate. Supplementary to that is the

<sup>466</sup> See e.g. the reported view of Sheikh al-Qaradawî by Heba Raouf Ezzat on the possibility of the control of the abuse of the power of divorce by men through the doctrine of *maslahah*, in Lawyers Committee on Human Rights, *Islam and Justice* (1997) p.122-3.

<sup>467</sup> Khallaf, A.W., *Ilm Usûl al-Fiqh* (1398AH) p. 86.

<sup>468</sup> Reported By Ibn Mâjah. See e.g. Ibrahim, E., and Johnson-Davies, D., (Trans.) *Forty Hadith, An-Nawawî's* (1985) pp.106-107, Hadith 32.

<sup>469</sup> See e.g. Ibn Âbidîn, M.A., *Radd al-Muhtâr* (Arabic) (1994) Vol.2., p.497.

<sup>470</sup> Fyzee, A.A.A., *Outlines of Muhammadan Law* (1974) 4<sup>th</sup> Ed. p.159. This is still true today. See generally Carroll, L., and Kapoor, (1996) *supra*, note 421 above.

need to create awareness and educate women of this legal right under Islamic law.<sup>471</sup> There is nothing under the *Shari'ah* that prohibits the State from ensuring that women are adequately informed about their rights under the law, especially if it is for removing difficulties from them within society. In fact they have a right to be informed if they are so ignorant to know.

### *Concluding Observation*

The above analysis reveal that the questions raised by gender equality and rights are not so simple to answer and that they do raise socio-legal justifications for some differences that may exist between Islamic law and international human rights law. The issues are of great socio-legal importance and a great demonstration of good faith is required in addressing them from both the Islamic law and international human rights perspectives. Only a superficial view of Islamic law or a very restrictive interpretation of its sources gives an impression of total deadlock between Islamic law and international human rights law on the issues of gender equality. But the differences are not trivial as well. There are certainly issues to be resolved but which may not be possible if addressed monologically from either the single perspective of secular international human rights jurisprudence or the single perspective of hard-line traditional Islamic jurisprudence. There is need for complementary understanding of the issues. Feminist human rights advocates need to appreciate the importance of the family institution to Islamic society and the importance of the female gender to its subsistence. The obvious question here may be, why must it be women that have to bear the brunt for the subsistence of the family institution. In redressing the disadvantages and inequalities that has existed against women, it is important not to swing from one extreme to another in a manner that may create a conflict of cultures or portray the arguments as an attack against Islamic institutions rather than against non-justifiable discriminations. The socio-legal justifications of Muslim jurists in the instances where differences exist must be examined in good faith. Some of the arguments are certainly rebuttable. Many others are without consensus and not really absolute. A study of them from a combined pragmatic and transcendental perspective will certainly help to argue the unsustainable ones out. While it is true that the male gender enjoys some role-advantage under Islamic law in accordance with the structural roles within the Islamic family institution, such role-advantage is meant for the cohesion and success of the family. Conversely there are in-built rights within Islamic law

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<sup>471</sup> See generally Carroll, L., and Kapoor, (1996) *supra*, note 421 above, See also Tanzilu-ur-Rahman, (1978) *supra*, note

that may be activated for the benefit of the female gender whenever there is apprehension of abuse of the role-advantage enjoyed by the male. The debilitating factor is that women are generally ignorant of their rights under Islamic law and men often callously abuse that ignorance.

The *Sharī'ah* promotes the normative equality of both sexes and women have rights within Islamic law that have been suppressed over the centuries due to ignorance on their part and callousness on the parts of men in many Muslim countries.<sup>472</sup> However, in recent times due to the challenges of the international human rights movement women in many parts of the Muslim world are becoming more aware of their rights within the legal sources of Islamic law through education and enlightenment. It is important therefore to take both the Islamic law and international human rights law discourses seriously if the inequalities against women in Muslim States must be realistically redressed. It is believed that as more women become aware of Islamic legal sources that support their equal status they will not fail to utilise it to their advantage in order to activate their inherent rights within Islamic law. Where they do, the barriers of discrimination and inequality will definitely be broken.

### *Protection of Children*

Article 23(4) of the ICCPR also provides that in case of dissolution of marriage, "provision shall be made for the necessary protection of any children". Islamic law also fully recognises the need for the necessary protection of any children in case of marriage dissolution. Under the rules of *hidānah* (Child custody) in Islamic family law, there are elaborate rules for the protection of children in case of divorce, which essentially reflect consideration for the best interest of the child.<sup>473</sup>

## THE RIGHTS OF THE CHILD

### *Article 24*

1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.
2. Every child shall be registered immediately after birth and shall have a name.

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408 above Vol.1, pp.339-352.

<sup>472</sup> See generally Bouthaina, S., "The Muted Voices of Women Interpreters" in Afkhami, M., (ed.) *Women's Human Rights in the Muslim World* (1995) pp.61-77.

<sup>473</sup> See e.g. Qadri, A.A., (1986) *supra*, note 22 above, pp. 406-409; and Doi, A.R., (1984) *supra*, note 82 above, p.214.

3. Every child has the right to acquire a nationality.

Despite that all the other provisions of the Covenant apply *mutatis mutandis* to children, Article 24 provides further for the special protection of children due to their vulnerability as minors.<sup>474</sup> Article 24(1) places the responsibility of protecting the child on family, society and State. As to how this obligation is to be fulfilled between family, society and State, the HRC Committee has observed that:

“Responsibility for guaranteeing children the necessary protection lies with the family, society and the State. Although the Covenant does not indicate how such responsibility is to be apportioned, it is primarily incumbent on the family, which is interpreted broadly to include all persons composing it in the society of the State party concerned, and particularly on the parents, to create conditions to promote the harmonious development of the child's personality and his enjoyment of the rights recognized in the Covenant. However, since it is quite common for the father and mother to be gainfully employed outside the home, reports by States parties should indicate how society, social institutions and the State are discharging their responsibility to assist the family in ensuring the protection of the child. Moreover, in cases where the parents and the family seriously fail in their duties, ill-treat or neglect the child, the State should intervene to restrict parental authority and the child may be separated from his family when circumstances so require. If the marriage is dissolved, steps should be taken, keeping in view the paramount interest of the children, to give them necessary protection and, so far as is possible, to guarantee personal relations with both parents. The Committee considers it useful that reports by States parties should provide information on the special measures of protection adopted to protect children who are abandoned or deprived of their family environment in order to enable them to develop in conditions that most closely resemble those characterizing the family environment.”<sup>475</sup>

Article 24 together with other provisions on children rights guarantees a secure foundation for the proper development of the child and in that regard the best interest of the child is always paramount.<sup>476</sup>

Being religious based, Islamic law obviously also recognises the need for special protection of children due to their vulnerable nature. The Qur'an describes children as the “comfort of our eyes”<sup>477</sup> and there are many verses of the Qur'an and Traditions of the Prophet that remind parents and society about their responsibility to children. Islam emphasises that children are born innocent and should therefore not be made part of the conflicts and viciousness of adult society. The right of the child to have a good name is

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<sup>474</sup> See General Comment 17, Par.1.

<sup>475</sup> General Comment 17, Par. 6.

<sup>476</sup> See the Convention on the Rights of the Child(1989),1577 UNTS 3; and generally Van Bueren, G., *The International Law on the Rights of the Child* (1995). See also Joseph, Schultz and Castan (2000) *supra*, note 23 above, pp.467-494.

<sup>477</sup> Q 25:74.

specifically stated by Prophet Muhammad in one of his Traditions<sup>478</sup> and this accommodates the right to be registered after birth. From the context of the Qur'an and the Prophet's Traditions, Omran has identified that children have at least "ten cardinal rights" under Islamic law, which he listed as:

1. The right (of the child) to genetic purity.
2. The right (of the child) to life.
3. The right (of the child) to legitimacy and good name.
4. The right (of the child) to breast-feeding, shelter, maintenance and support, including health care and nutrition.
5. The right (of the child) to separate sleeping arrangements for children.
6. The right (of the child) to future security.
7. The right (of the child) to religious training and good upbringing.
8. The right (of the child) to education, and training in sports and self-defence.
9. The right (of the child) to equitable treatment regardless of gender or other factors.
10. The right (of the child) that all funds used in their support come only from legitimate sources.<sup>479</sup>

Although all Muslim States have ratified the UN Convention on the Rights of the Child (CRC) many of them have however entered reservations on grounds of Islamic law or *Sharī'ah*.<sup>480</sup> Many of the reservations are in respect of the issue of adoption.<sup>481</sup> Instead of adoption, Islamic law provides for a guardianship system (*kafālah*) to provide alternative family-care for children deprived of natural parental care.<sup>482</sup> Another area of possible conflict is the position of Islamic law on the status of children conceived out of wedlock, which has been raised by the HRC in its concluding observations on many Muslim States.<sup>483</sup>

Nevertheless, Muslim States generally believe that "the provisions set forth in (the Children's) Convention are in conformity with the teachings of Islamic law concerning the need to fully respect the human rights of the child".<sup>484</sup> Thus Article 7 of the OIC Cairo Declaration provides that:

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<sup>478</sup> See Karim, F., (1994) *supra*, note 197 above, Vol.2, p.620, Hadith No. 379w.

<sup>479</sup> Omran, A.R., (1992) *supra*, note 140 above, p. 32.

<sup>480</sup> See UN Human Rights Treaty Website at: [http://www.unhchr.ch/html/menu3/b/treaty15\\_asp.htm](http://www.unhchr.ch/html/menu3/b/treaty15_asp.htm) [17/2/2001].

<sup>481</sup> See also Leblanc, L.J., "Reservations to the Convention on the Rights of the Child: A Macroscopic View of State Practice" (1996) 4 *International Journal of Children's Rights* 357-381.

<sup>482</sup> See e.g. The Initial Report of the Kingdom of Saudi Arabia on the CRC, UN Doc CRC/C/Add.2, (29/3/2000) Par.60. *Kafalah* is recognised under Art. 20(3) and Art. 21 of the CRC, *supra*, note 476 above.

<sup>483</sup> This issue is addressed in the next chapter under Article 10(3) of the ICESCR, pp.235-38 below.

<sup>484</sup> See Initial Report of Saudi Arabia to the CRC, *supra* note 482 above, Par. 27. See also the General Statement of the United Arab Emirates during the drafting of the CRC that: "The provisions of the draft Convention contradict neither the

- (a) As of the moment of birth, every child has rights due from the parents, society and the state to be accorded proper nursing, education and material, hygienic and moral care. Both the fetus and the mother must be protected and accorded special care.
- (b) Parents and those in such like capacity have the right to choose the type of education they desire for their children provided they take into consideration the interest and future of the children in accordance with ethical values of the principles of Shari'ah.

## POLITICAL RIGHTS

### *Article 25*

Every citizen shall have the right and the opportunity, without any of the restrictions mentioned in article 2 and without unreasonable restrictions;

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- (c) To have access, on general terms of equality, to public service in his country.

The only provisions of the ICCPR on political rights in the strict sense of the word are those contained in Article 25. The provisions reflect a democratic process that calls for the right and opportunity of every citizen to participate directly or indirectly in the conduct of public affairs of State. Thus autocratic regimes “which offer no opportunities for political participation by citizens” are incompatible with Article 25.<sup>485</sup> The HRC has indicated that: “The conduct of public affairs, referred to in paragraph (a), is a broad concept which relates to the exercise of political power, in particular the exercise of legislative, executive and administrative powers. It covers all aspects of public administration, and the formulation and implementation of policy at international, national, regional and local levels. The allocation of powers and the means by which individual citizens exercise the right to participate in the conduct of public affairs protected by article 25 should be established by the constitution and other laws”.<sup>486</sup> It is important to note that the political rights, unlike the civil rights, do not apply to every individual but only to citizens of particular States. The Covenant does not prescribe the criteria for citizenship of State Parties but the HRC has indicated that “State

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principles of Islamic law nor the provisions of the Provisional constitution of the United Arab Emirates.” Detrick, S. (ed.) *The United Nations Convention on the Rights of the Child: A Guide to the “Travaux Préparatoires”* (1992) 50.

<sup>485</sup> Joseph, Schultz and Castan, (2000) *supra*, note 23 above p.498. See also Steiner, H., “Political Power as a Human Right” (1988) 1 *Harvard Human Rights Yearbook*, 77.

reports should outline the legal provisions which define citizenship in the context of the rights protected by Article 25”, and that “(n)o distinctions are permitted between citizens in the enjoyment of these rights on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status”<sup>487</sup>

The discussion of political principles is often very topical from an Islamic perspective. This is due to the fact that the Qur’an and *Sunnah* has not laid down any specific political ideology for the Islamic State. The *Shari’ah* only emphasises good governance based on justice, equity and responsibility but leaves its actual administration in the hands of the community. There is evidence within the *Shari’ah* however that the community has the right to elect its leaders either directly or indirectly.<sup>488</sup> The Qur’an states in many verses that sovereignty of the heavens and earth belongs to God<sup>489</sup> but also mentions in other verses that God has made human beings agents and representatives on Earth.<sup>490</sup> Islamic scholars and jurists agree that this representative capacity of human beings is conferred upon all human beings alike. Based on these Qur’anic provisions and with reference to the practices of election of Caliphs after the demise of Prophet Muhammad, almost all contemporary Islamic legalists concur that every Muslim has the right and the opportunity to participate, either directly or indirectly in the public affairs and electoral processes of the State. For example Maududi, writing on the right of Muslims to participate in the public affairs of the Islamic State, stated as follows:

“According to Islam, governments are representatives (*khalifa*) of the Creator of the universe: this responsibility is not entrusted to any individual or family or to any particular class or group of people, but to the entire Muslim community. The Holy Qur’an says: “God has promised to appoint those of you who believe and do good deeds as (His) representatives on earth” (24:55). This clearly indicates that *khilâfa* (representation) is a collective gift of God in which the right of every individual Muslim is neither more nor less than the right of any other person.

The method recommended by the Holy Qur’an for running the affairs of the state is as follows: “And their business is (conducted) through consultation among themselves” (Q43:38). According to this principle it is the right of every Muslim either to have a direct say in the affairs of the state or to have a representative chosen by him and other Muslims to participate in the running of the state.

Under no circumstances does Islam permit an individual or a group or party of individuals to deprive the common Muslims of their rights or usurp powers of the state. Nor does Islam regard it as right and proper for an individual to put on a false show of setting up a legislative assembly and by means of such tactics as fraud, persecution, bribery and so on, get himself and men of his choice elected to the

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<sup>486</sup> General Comment 25, Par. 5.

<sup>487</sup> General Comment 25, Par. 3.

<sup>488</sup> See e.g. Zaidan, A.K., *Individual and the State in Islamic Law* (1982) pp16-26.

<sup>489</sup> See e.g. Q3:189.

<sup>490</sup> See e.g. Q 24:55.



assembly. This is not only treachery against the people whose rights are illegally usurped, but also against the Creator who has entrusted Muslims to rule on earth on His behalf, and has prescribed the procedure of an assembly for exercising these powers.

The *shûrâ* or legislative assembly should embrace the following principles:

1. The executive head of the government and the members of the assembly should be elected by free and independent choice of the people.
2. The people and their representatives should have the right to criticize and freely express their opinions.
3. The real conditions of the country should be brought before the people without suppression of fact so that they are in a position to judge whether the government is working properly or not.
4. There should be adequate guarantee that only those people who have the support of the masses should rule over the country and those who fail to win this support should be removed from their position of authority.”<sup>491</sup>

The Qur’anic principle of consultation (*shûrâ*) to which Maududi referred above, has been interpreted by most contemporary Islamic legalists to accommodate the process of democratic free and fair elections for the selection of leaders. In fact some Islamic scholars consider free and fair elections as the best way to reflect the principle of *shûrâ*, because this involves the participation of all citizens in selecting their ruler and giving him the contract to govern them known as *bay’ah* (allegiance) under Islamic law.<sup>492</sup> This clearly indicates that the democratic process of societal participation in governance and state affairs envisaged under Article 25 is compatible with Islamic principles of justice, equity and good governance. Thus Article 23(b) of the OIC Cairo Declaration provides that:

“Everyone shall have the right to participate directly or indirectly in the administration of his country’s public affairs. He shall also have the right to assume public office in accordance with the provisions of Shari’ah.”

Two issues remain to be examined here. It is often assumed that the political rights of non-Muslims and women are totally constrained under Islamic law and thus inconsistent with the opening clause of Article 25 which provides that every citizen shall have the right and the opportunity to exercise the political rights “without any of the restrictions mentioned in article 2 and without unreasonable restrictions”. With respect to voting and taking part in the conduct of public affairs of the State, there is nothing under Islamic law that prohibits women or non-Muslim citizens of the Islamic State from voting and participating in the

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<sup>491</sup> Maududi, A.A., (1993), *supra*, note 179 above, p. 33-34.

<sup>492</sup> See e.g. Hussein, G.M., “The *Shura* and Human Rights in Islamic Law”, *Paper delivered at the Cairo Conference on Democracy and the Rule of Law*, (Dec. 7<sup>th</sup> - 9<sup>th</sup> 1997) p.5-6; and also, Chaudhry, M.S., (1995) *supra*, note 82 above, pp.56-60.

public affairs of the State. The contemporary problem with the status of non-Muslims under Islamic law is principally due to the traditional interpretation of Islam as both a religion and a nationality. Thus a Muslim subject was traditionally considered as possessing full religious and political nationality in the Islamic State while the non-Muslim subject was considered as possessing only the political nationality but not the religious nationality.<sup>493</sup> Doi has therefore pointed out that the distinction between Muslims and non-Muslims was and remains merely that of political administration and not of human rights, and concluded that: "It is wrong presumption that since an Islamic State is based on a definite ideology, the State will annihilate the non-Islamic elements within its fold".<sup>494</sup> The lack of religious nationality by non-Muslims in the Islamic State only exempted them from both duties and rights that involved the religious aspects of the State and "not due to a tendency of imposing on them an inferior social position nor minimising the humane treatment they are entitled to."<sup>495</sup> The situation is comparable to the issue of citizenship and the prohibition of all forms of racial discrimination in international human rights law. Although the International Convention on the Elimination of all Forms of Racial Discrimination<sup>496</sup> prohibits "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life," it exempted "distinctions, exclusions, restrictions or preferences made ...between citizens and non-citizens."<sup>497</sup> The distinction, that traditional Islamic law made between Muslims and non-Muslims in aspiring to leadership of the Islamic State was therefore in the nature of the distinction made between citizens and non-citizens in a secular State. al-Ghunaimi thus contended that:

"The conditions of acquiring the nationality of a particular state is a matter of its own discretion. It is not to be construed as an indication of contempt of those who could not acquire the necessary qualifications. ... Consequently, in a modern state, we often come across restrictions imposed on non-nationals, in one way or another, for a better organization of the society. This is likewise with the rights of the *dhimmi* in the Islamic state."<sup>498</sup>

Under traditional Islamic law, the theory was that of totality of religious citizenship whereby "as soon as a Muslim migrates from his non-Muslim home and comes to Islamic

<sup>493</sup> See generally al-Qardâwî, Y., *Non Muslims in the Islamic Society*, Hamad, K.M., and Shah, M.A., (Trans.) (1985).

<sup>494</sup> Doi, A.R., (1984) *supra*, note 82 above, p.427.

<sup>495</sup> See Al-Ghunaimi, M.T., *The Muslim Conception of International Law and the Western Approach* (1968) p.189.

<sup>496</sup> 660 UNTS 195.

<sup>497</sup> *ibid.* Art.1(1)(2).

territory with the intention of residing there, he at once becomes a full-fledged Muslim citizen of the Muslim state; he has the same rights as the other Muslim citizens and the same obligations as they”<sup>499</sup>. However, all modern Muslim States of today seem to have departed from the traditional theory of totality of religious citizenship to the extent that a foreign Muslim does not today acquire citizenship of any modern Muslim State for merely being a Muslim. Citizenship is generally based on national and geographical grounds in the Muslim countries of today. Conversely, neither the religious nationality nor the political nationality is enough on its own for the enjoyment of certain political rights within many Muslim States today. Only through the combination of both religious and political nationality in an individual may he, for instance, have a right to the highest political office in many Muslim States of today. It is noteworthy that, all the Qur’anic verses on leadership and authority do not merely emphasise religiosity but equally emphasise righteousness to all and upholding justice for all. Thus while for ideological reasons the ideal is to have a Muslim as the Head of State in an Islamic State, there are otherwise many instances right from the time of Prophet Muhammad of non-Muslims being appointed to very important public offices.<sup>500</sup>

Next is the question of the political rights of women under Islamic law. The question whether Islamic law prohibits women from voting, having a say or participating in the public affairs of the State is often misrepresented by the practice in some Muslim States. At its ratification of CEDAW, Kuwait for instance entered a reservation “regarding article 7(a), inasmuch as the provision contained in that paragraph conflicts with the Kuwaiti Electoral Act, under which the right to be eligible for election and to vote is restricted to males”.<sup>501</sup> That reservation, as it clearly stated, is on grounds of Kuwaiti Electoral Act and not Islamic law. On the rights of women under the *Sharī’ah* to vote and to participate in the *shūrā* and generally in the public affairs of the State, Hussein has summarised the position as follows:

“Nowhere in the *Qur’an* or *Sunna* does exist any verse or rule which prevents or can be construed to prevent women from participating in the *Shura* process. Women did do participate in the *Shura* and participated and continue to participate in the running of the affairs of various Islamic states through the holding of various governmental top positions and through the *Shura* process.

Those who do not support women’s participation in the *Shura* process and in running the affairs of the state base their views not on the principles and rules of the Islamic religion and the Islamic *Sharī’a* but on mere social concerns and fears which do not rest on any Islamic principle or rule. Of course, social concerns and fears do

<sup>498</sup> Al-Ghunaimi, (1968) *supra*, note 495 above, p.189.

<sup>499</sup> Hamidullah, M., (7<sup>th</sup> Revised Ed. 1977) *supra*, note 190 above, p.110-111, Par.199.

<sup>500</sup> See e.g. Ramadan, S., *Islamic Law, Its Scope and Equity*, (1970) p.144-145. See also al-Qardāwī, Y., (1985) *supra*, note 493 above, pp. 12-14.

<sup>501</sup> See UN Human Rights Treaty Website at: [http://www.unhchr.ch/html/menu3/b/treaty9\\_asp.htm](http://www.unhchr.ch/html/menu3/b/treaty9_asp.htm) [17/2/2001].

change from state to state, and from time to time within the same state. It should be stressed that most recent writers on the topic support the right of women to participate in the *Shura* process and in running the affairs of their own countries. It is therefore, an Islamic principle that women do indeed have the right to participate in the *Shura* process and in running the public and governmental affairs of their states.”<sup>502</sup>

However with respect to the right of being elected to the highest public office, Islamic jurists differ on whether a woman can be elected to head an Islamic State. The differences of opinion arise from the interpretation of a Tradition in which it is reported that when the Prophet heard that the Persians had enthroned a daughter of the Chosroe as their Queen he said: “Any nation that leaves its affairs in the hands of a woman would not prosper”.<sup>503</sup> Although the wording of the Tradition does not specifically contain a prohibition on a woman being elected as a head or leader in an Islamic State, one school of thought construes from it such a prohibition on the argument that consideration of the nation’s prosperity is an important determinant of who is elected to its leadership. Some scholars however considered it to be an isolated Tradition (*ahâd*) and some others have expressed doubts about its authenticity on the grounds, *inter alia*, that the Tradition was reported by Abû Bakratah during the “Battle of the Camel” in which Ai’sshah, the widow of Prophet Muhammad led and commanded an army against Ali ibn Abî Tâlib, the fourth Caliph. Usmani argues that despite its report on the said occasion many of the illustrious companions of the Prophet still participated in the battle under the leadership of Ai’sshah without anyone disclaiming her leadership. He thus concluded that the Tradition did not connote a prohibition of the appointment of a woman as Head of State but it is generally advice indicating that it may not be advisable to appoint a woman as Head of State.<sup>504</sup>

On the basis of that Tradition, a petition was brought before the Federal Shariat Court of Pakistan in 1982 challenging the appointment of women judges as being violative of Islamic law. In his judgement, the Chief Judge of the Court, Aftab Hussain, CJ, extensively examined the different opinions of Islamic jurists on the Tradition. The learned judge cited a list of classical and contemporary Islamic legal works<sup>505</sup> to establish that Imam Ibn Jarîr al-Tabarî, for instance, favoured the appointment of a woman both as a judge and as a Head of State and that a similar view was attributed to Imam Mâlik, which was favoured by the *Mâlîkî* jurists as well. In dismissing the petition the learned judge observed, *inter alia*, that:

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<sup>502</sup> Hussein, G.M., (1997) *supra*, note 492 above, at 5.

<sup>503</sup> Reported By al-Bukhârî. See e.g. Karim, F., (1994) *supra*, note 197 above, Vol.2., p.570, Hadith No.7.

<sup>504</sup> Usmani, U.A., *Fiqh al-Qur’an*, Vol.III, pp.286-287 and Usmani, U.A., *I’lâ al-Sunan*, Vol.15, p.28 cited in the judgement of Aftab Hussain, CJ, in *Ansar Burney v. Federation of Pakistan*, PLD 1983 Federal Shariat Court, 73 at 86.

“It is on account of this Hadis (Tradition) that in the 22 points of the Ulema (learned jurists) of Pakistan which were presented to the Government as necessary preliminaries to the framing of a Constitution, point No. 12 specifically said that the Head of the State will be a Muslim male. This point was re-examined during the course of campaign (sic) for the Presidential Elections of 1964 in which Miss Fatima Jinnah was nominated by the opposition parties to fight the election to the office of the President of Pakistan against Field Marshal (sic) Muhammad Ayub Khan. After a research the view as about a woman being qualified for the office of the Head of the State was changed on the basis of opinions of two of the most renowned Ulema of the 20th Century in Indo Pakistan, namely Maulana Ashraf Ali Thanvi and Allama Syed Sulaiman Nadvi. The Jamait-e-Islamia Pakistan endorsed this view after retracting its earlier stand on the matter which was reflected in the above-mentioned point No. 12. Maulana Maudoodi was severely criticised for this by Kalim Bahadur in his book “Jamait-i-Islami of Pakistan”. But this criticism was not justified since it is duty of a Muslim to accept the truth and to change and retract his earlier view. In technical parlance this is known as the doctrine of (Raju’ or retreat).”<sup>506</sup>

There is no verse of the Qur’an that specifically prohibits a woman from being elected to any public office under Islamic law. The wording of the Tradition itself leaves room for the different opinions that have been expressed by Islamic jurists concerning its interpretation. This provides flexibility on the matter as was demonstrated by the change of the initial view of the Pakistani religious scholars in 1964 as expressed in Justice Hussain’s judgement above.

The controversy surrounding the election of women to the highest political office of the State is not unique to Islam. The problem exists in almost all societies of today in different forms. The provisions of Article 25 however only demands that their right and opportunity to be elected be not denied, which the Tradition of the Prophet quoted above does not specifically deny as rightly opined by some of the Islamic jurists.

## THE RIGHT TO EQUALITY BEFORE THE LAW

### *Article 26*

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

<sup>505</sup> e.g., *Durr al-Muhtâr, Sharh al-Waqâyah, Fath al-Bârî, Hedaya, al-Muhallâ* and *Ahkâm al-Sultiyyah*.

<sup>506</sup> *Ansar Burney v. Federation of Pakistan*, PLD 1983 Federal Shariat Court, 73 at 85.

Reference has earlier been made to Article 26 together with Articles 2(1) and 3 on right to equality and non-discrimination.<sup>507</sup> Article 26 is more general and extends further than Articles 2(1) and 3. The HRC has observed that Article 26 is not limited to the rights provided under the Covenant but “prohibits discrimination in law or in fact in any field regulated and protected by public authorities”.<sup>508</sup> It prohibits discrimination in both the legislation and application of laws by State parties. Article 26 fortifies the right to recognition as a person before the law guaranteed under Article 16. While Article 16 guarantees a standing in law for every individual, Article 26 goes further to guarantee an *equal standing* before the law for every individual. Judges and public administrators must thus apply the law without discrimination.

The Committee has however observed also that “not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant”.<sup>509</sup> The HRC has addressed the question of reasonable and objective differentiation on a case-by-case basis.<sup>510</sup> The onus however lies on a State Party to prove the reasonableness and objectivity of any differentiation under the Covenant.

A State Party may also need to take affirmative action to redress existing discrimination against some members of society. The HRC has observed in that regard that:

“... the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. For example, in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions. Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population. However, as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant”.<sup>511</sup>

The general notion of equality and non-discrimination is also quite fundamental in Islamic law. The *Sharî'ah* recognises that all human beings are created equal. The Prophet Muhammad had declared in his farewell sermon as follows:

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<sup>507</sup> See p. 109 above.

<sup>508</sup> General Comment 18, Par. 12. See also *Zwaan-de Vries .v. The Netherlands, and Broeks .v. The Netherlands*, Communication No. 172/1984, 42 U.N. GAOR Supp. (No. 40) at 139, U.N. Doc. A/42/40 (1987), Par.12.3.

<sup>509</sup> General Comment 18, Par.13. See also the Dissenting Opinion of Judge Tanaka in the ICJ *South West Africa Cases* (1966) ICJ Report of Judgements p.305 and McKean, W., *Equality and Discrimination Under International Law* (1983) p.260.

<sup>510</sup> See Joseph, Scultz and Castan (2000) *supra*, note 23 above, pp540-556.

<sup>511</sup> General Comment 18, Par.10. See also Art. 2(2) of the International Convention on the Elimination of all Forms of Racial Discrimination (1966), 660 UNTS 195.

“O People! be aware: your God is One..., No Arab has any superiority over a non-Arab and no non-Arab any superiority over an Arab, and no white one has any superiority over a black one nor any black one over a white one, except on the basis of piety. The most honourable among you in the Sight of God is the most pious and righteous.”

The *Shari'ah* does accord additional honour (in the sight of God) to the most pious and righteous. As observed in Chapter 4, this is a special right conferred by God on those who worship Him.<sup>512</sup> This additional honour is “in the sight of God” because the determination of the “most pious and righteous” lies exclusively with Him. Article 19(a) of the OIC Cairo Declaration provides that “All individuals are equal before the law, without distinction between the ruler and the ruled”.

The right to equality before the law for every individual under Islamic law has been discussed extensively under the right to fair hearing and due process in Article 14 above. We have also examined the differences between Islamic law and international human rights law regarding equality and non-discrimination on grounds of sex and religion under other relevant articles in this chapter.<sup>513</sup>

## THE RIGHTS OF ETHNIC, RELIGIOUS OR LINGUISTIC MINORITIES

### *Article 27*

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

Unfortunately there is today in every part of the world some minority group that is being denied some right for the mere fact of being in minority. While the general prohibition of distinction on grounds of race, religion, language and other status aims also at guaranteeing that individuals belonging to minority groups enjoy all the rights under the Covenant in the same manner as every other human being, Article 27 additionally guarantees the right of individuals belonging to ethnic, religious or linguistic minorities to enjoy their own culture, profession and practice of their own religion and/or the use of their own language.<sup>514</sup> Notwithstanding the vagueness and non-definition of the term “minority” in the Covenant,

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<sup>512</sup> See pp. 50 above.

<sup>513</sup> See e.g. pp. 172-93 above

<sup>514</sup> For a full discussion on Article 27 see e.g. Sohn, L.B., *The Rights of Minorities*, in Henkin, L., (1981) *supra*, note 6 above, pp.270ff.

the provision in Article 27 reflects an appreciation of the diversity in human nature and culture, which must be respected.

The HRC has observed that “this article establishes and recognizes a right which is conferred on individuals belonging to minority groups and which is distinct from, and additional to, all the other rights which, as individuals in common with everyone else, they are already entitled to enjoy under the Covenant”, and that “the persons designed to be protected are those who belong to a group and who share in common a culture, religion and/or a language.” The Committee also pointed out that “the individuals designed to be protected need not be citizens of the State party”.<sup>515</sup>

From an Islamic perspective, the Qur’an specifically recognises this diversity in human nature and culture and also prohibits the employment of this diversity as basis for discrimination amongst human beings. Rather human diversity is indicated as basis for identification and appreciation of the powers and divine wisdom of God, the Creator of humanity.

In respect of ethnic differences the Qur’an states that:

“O Mankind! We created you from a single (pair) of a male and female, and made you into nations and tribes that you may know each other (not that you may despise [or discriminate against] each other). The most honoured of you in the sight of God is he who is most righteous amongst you. And God has full knowledge and is well-acquainted with all things.”<sup>516</sup>

In respect of religious differences the Qur’an states that:

“Say: (O Muhammad to the non-believers): “O you that reject faith! I worship not that which you worship. Nor will you worship that which I worship. And I shall not worship that which you are worshipping. Nor will you worship that which I worship. To you be your religion, and to me my religion.”<sup>517</sup>

And in respect of linguistic differences the Qur’an states that:

“And among His (God’s) signs is the creation of the heavens and earth, and the difference of your language and colours. Verily in that are indeed signs for men of sound knowledge”<sup>518</sup>

Apart from the above verses that clearly point towards appreciation of differences among humans, there are also many Traditions of the Prophet Muhammad that enjoin the protection of the rights of minorities under Islamic law.<sup>519</sup>

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<sup>515</sup> General Comment 23, Par. 1 and 5.1. See further Joseph, Schultz and Castan (2000) *supra*, note 23 above, pp.572-595.

<sup>516</sup> Q49:13.

<sup>517</sup> Q109:1-6.



## CONCLUDING REMARKS

We have endeavoured in this chapter to elaborately examine the substantive guarantees of the ICCPR in the light of Islamic law, and have shown that the Covenant is for the most part not inconsistent with Islamic law. The myth that the *Shari'ah* is an antithesis to civil and political rights has been sustained for so long mainly due to the confrontational approach often adopted in comparisons between Islamic law and international human rights law. The investigative approach adopted here opens the door for a better understanding of the socio-legal problems and how to handle them in a manner that promotes the noble objective of enhancing human dignity and fostering an ideal human community, which are common objectives of both the *Shari'ah* and international human rights law.

The analyses reveal that the *Shari'ah* does not oppose or prohibit the guarantee of civil and political rights, liberal and democratic principles or the liberty and freedom of individuals in relation to the State. The areas of conflict identified, particularly concerning the scope of equality of rights between men and women, prohibition of inhuman and degrading punishments, freedom of religion and some death penalty cases are also shown to be not insurmountable where addressed open-mindedly and in a well-informed manner. With a better understanding of the socio-legal problems as expounded herein, Islamic law, being the domestic law of many Muslim States, can serve as a vehicle for the full realisation of the civil and political rights guaranteed under the ICCPR with the result that Muslim States would not only consider themselves under international legal duty but also under a religious obligation to respect and ensure the civil and political rights guaranteed under the Covenant.

The most practical approach, as will be fully argued in the concluding chapter of this thesis, is that the HRC should, in appreciation of the varied social values and ideological varieties of its Member States, adopt the margin of appreciation doctrine in its interpretation of the Covenant. The doctrine has been vindicated in practice within the European Human Rights regime. It will enable the Committee to maintain a reasonable universal standard of the rights guaranteed under the Covenant and at the same time respect reasonable and justifiable social and moral values of all its State Parties. Correlatively, Muslim States that apply Islamic law also have a duty to demonstrate the highest humanitarian and political will

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<sup>518</sup> Q30:22.

<sup>519</sup> See e.g. Ramadan, S., (1970) *supra*, note 500 above, pp.146-148. See also Article 25 above for the discussion of the recognition of the political rights of non-Muslim minorities. The right to the enjoyment of cultural life under Islamic law is further addressed under Article 15 of the ICESCR in the next Chapter.

in respect of their obligations under the Covenant through a constructive interpretation and implementation of the *Shari'ah*.

## CHAPTER 7

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# The International Covenant on Economic, Social and Cultural Rights (ICESCR) in the Light of Islamic Law

### INTRODUCTORY REMARKS

As the ICCPR does for civil and political rights, so does the International Covenant on Economic, Social and Cultural Rights (ICESCR) constitute the positive law on economic, social and cultural rights within the international human rights objective of the UN. It entered into force on 3 January 1976 and has up to date been ratified by 143 States, including 39 of the 56 Member States of the Organisation of Islamic Conference (OIC).<sup>1</sup> Of the six Muslim States selected for case study in this research, three (Iran, Tunisia and Sudan) have ratified the ICESCR while the other three (Saudi Arabia, Pakistan and Turkey) have not.<sup>2</sup>

The UN Charter had provided the basic foundation for economic, social and cultural rights in its Article 55 which provided, *inter alia*, that the UN shall promote:

- (a) higher standards of living, full employment, and conditions of economic and social progress and development
- (b) solutions of international economic, social, health, and related problems; and international cultural and educational co-operation.

Articles 22-27 of the UDHR also followed with some general provisions on economic, social and cultural rights. The adoption of the ICESCR as part of the UN International Bill of Rights legally put to rest, at least for the States parties thereto, the old opposing argument that economic, social and cultural rights were not human rights *per se*.<sup>3</sup> Although economic, social and cultural rights are still often termed “second generation” rights this does not suggest that they are in any way “second class” rights to the civil and political rights. Many human rights scholars argue strongly that economic, social and cultural rights are very

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<sup>1</sup> See the Status of Ratification of the ICESCR at the UN Human Rights Treaty Website at: [http://www.unhchr.ch/html/menu3/b/a\\_ceschr.htm](http://www.unhchr.ch/html/menu3/b/a_ceschr.htm) [15/2/ 2001].

<sup>2</sup> Turkey signed the ICESCR on 15 August 2000 but is yet to ratify it.

<sup>3</sup> e.g. See Arambulo, K., *Strengthening the Supervision of the International Covenant on Economic, Social and Cultural Rights, Theoretical and Procedural Aspects* (1999) Especially Chapters III and IV, for an analyses of the arguments against and in support of the human rights character of Economic, Social and Cultural Rights.

essential for the full realisation and enjoyment of civil and political rights. In his State of Union address in 1944 the US President Roosevelt had observed that:

“... true individual freedom cannot exist without economic security and independence. ‘Necessitous men are not free men.’ People who are out of a job are the stuff of which dictatorships are made.”<sup>4</sup>

Given the choice, most individuals in developing nations would practically choose a genuine guarantee of economic, social and cultural rights before thinking of civil and political rights. Shue thus considered economic, social and cultural rights as basic rights and argued that “(n)o one can fully, if at all, enjoy any right that is supposedly protected by society if he or she lacks the essentials for a reasonably healthy life.”<sup>5</sup> Craven has submitted similarly that “freedom of expression, for example, has little importance to the starving or homeless.”<sup>6</sup> Realistically, no human right or dignity can still be said to be inherent in a hungry, sick, homeless, jobless, illiterate, and impoverished human being, except perhaps only the right to the life that still flows in him, which under those circumstances can hardly be a life of dignity. The relevance and importance of the ICESCR in developing nations cannot therefore be over-emphasised.

All the countries of the Muslim world today fall within the category of developing nations. The promotion of the ICESCR in the Muslim world is thus very important if the dignity of the individual must be enhanced and even if the civil and political rights must be ensured.

Following the approach of the last chapter, this chapter will equally examine the ICESCR in the light of Islamic law. We will endeavour to determine whether the *Shari‘ah* contradicts the provisions of the ICESCR or whether it can serve as a vehicle for the full realisation of the rights recognised under the Covenant in Muslim States that apply Islamic law fully or as part of domestic law. Reference shall be made to the General Comments and practice of the Committee on Economic, Social and Cultural Rights (ESCR Committee) and to other scholarly expositions on the Covenant. The reporting guidelines formulated by the ESCR Committee will also be used as an interpretational guide for relevant Articles of the

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<sup>4</sup> See Eleventh Annual Message of Congress (Jan. 11 1944) in Israel. J., (ed.) *The State of the Union Messages of the Presidents* (1966), Vol. 3, pp. 2875, and 2881.

<sup>5</sup> Shue, H., *Basic Rights, Subsistence, Affluence, and U.S. Foreign Policy* (1979) p.24-25.

<sup>6</sup> Craven, M.C.R., *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (1995) p.13.

Covenant.<sup>7</sup> We will analyse each of the substantive rights from an international law perspective followed by an Islamic law perspective as was done in the last chapter. Reference will also be made to the OIC Cairo Declaration on Human Rights in Islam and reports of Muslim States parties to the Covenant where relevant.

### THE RIGHTS “RECOGNIZED” UNDER THE ICESCR

Apart from the right of self-determination in Article 1 and the equality of rights between men and women in Article 3, the ICESCR “recognizes” nine substantive economic, social and cultural rights. They are:

|           |  |
|-----------|--|
| Article 6 | The right to work.   |
| 7         | The right to enjoy just and favourable conditions of work.                   |
| 8         | Trade Union rights.  |
| 9         | The right to social security and social insurance.                           |
| 10        | Family rights.   |
| 11        | The right to adequate standard of living.                                    |
| 12        | The right to the highest attainable standard of physical and mental health.  |
| 13-14     | The right to education.  |
| 15        | The right to cultural life and benefits of scientific progress. <sup>8</sup> |

The provisions in Article 1 on the right of self-determination and Article 3 on equality of rights between men and women are identical with that of the ICCPR already examined in the last chapter.<sup>9</sup> Those two articles will thus not be re-addressed in this chapter, rather their analysis in the last chapter will be applicable here *mutatis mutandis*. Again we will first identify the fundamental purpose of the ICESCR and also analyse the obligation of State Parties under Article 2 before proceeding to examine the substantive rights.

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<sup>7</sup> See Revised General Guidelines Regarding The Form and Contents Of Reports To Be Submitted By States parties Under Articles 16 And 17 Of The International Covenant On Economic, Social and Cultural Rights. (Basic Reference Document) UN Doc E/C.12/1991/1 of 17 June 1991 (Hereinafter referred to as *Revised Guidelines*).

<sup>8</sup> All these rights are contained in Part III of the ICESCR.

<sup>9</sup> See pp. 105 and 109 above.

## THE OBJECT AND PURPOSE OF THE COVENANT

The object and purpose of the ICESCR is similar to that of the ICCPR in the sense that it guarantees the recognised economic, social and cultural rights of the individual from the States parties to it. The preamble of the ICESCR refers to the fact that the rights recognised in it derive from the inherent dignity of the human person and that enjoyment of economic, social and cultural rights will lead to the realisation of “the ideal of free human beings enjoying freedom from fear and want.”<sup>10</sup> Economic, social and cultural rights deal essentially with subsistence and basic needs of human beings, thus the principal purpose of this group of rights is the realisation of an adequate and dignified standard of living for every human being. The purpose and ethical basis of the ICESCR are thus very laudable and commensurate with the overall objectives of the *Sharî‘ah* and the purpose of Islamic law. They are ideals which any Muslim State that purports to pursue the noble objectives of the *Sharî‘ah* has both a moral and legal obligation to uphold under its application of Islamic law. The Qur’an states that all the good things and rich resources of the universe are created for the basic needs of humanity<sup>11</sup> and it specifically alluded to the significance of freedom from hunger and from fear to human existence as follows:

“(It is) He Who provided them with food against hunger, and with security against fear.”<sup>12</sup>

## OBLIGATIONS OF STATES PARTIES UNDER THE ICESCR

### *Article 2*

1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.
2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
3. Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.

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<sup>10</sup> See generally the Preamble of the ICESCR.

<sup>11</sup> See e.g. Q2:29 and Q31:20.

<sup>12</sup> Q106:4.

The description of the obligations of States parties to the ICESCR differs significantly from that of the ICCPR. The obligations of States Parties are recognised under the ICESCR as being subject to the availability of resources and require only the “progressive realisation” of the recognised rights.<sup>13</sup> This tends to remove the steam from the speedy realisation of the economic, social and cultural rights, especially in developing nations. The ESCR Committee has endeavoured through its General Comment 3 to impress the point that these differences must not be seen as watering down the obligations of States under the Covenant.<sup>14</sup> It noted that “while the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes various obligations which are of immediate effect”.<sup>15</sup> For example, the obligation to ensure the right of everyone to form and join a trade union (Article 8) is of immediate effect. The obligations of States under the Covenant are thus a combination of “obligations of conduct” and “obligations of result”.<sup>16</sup> While the undertaking of State Parties “to take steps” under Article 2(1) to realise the rights protected in the Covenant is an “obligation of conduct” and has immediate application, the realization of the relevant rights, in most cases, is an “obligation of result” that may be achieved progressively.<sup>17</sup> The ESCR Committee has interpreted the obligations of States Parties under Article 2(1) by first stressing the “obligations of conduct” as follows:

“...while the full realization of the relevant rights may be achieved progressively, steps towards the goal must be taken within a reasonably short time after the Covenant’s entry into force for the States concerned. Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant. The means which should be used in order to satisfy the obligation to take steps are stated in article 2(1) to be “all appropriate means, including particularly the adoption of legislative measures”.<sup>18</sup>

The Committee then went on to explain the “obligation of results” and the progressive realisation of the rights as follows:

“...the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the

<sup>13</sup> See Steiner, H.J., and Alston, P., *International Human Rights in Context: Law Politics Morals* (2<sup>nd</sup> Ed. 2000) p.246.

<sup>14</sup> Committee on Economic, Social and Cultural Rights, General Comment 3; UN Doc. HRI\GEN\I\Rev.1 at 45 (1994) in E/1991/23. (*The Committee’s General Comments will hereinafter be referred to as General Comment followed by its number*). All the Committee’s General Comments are available Online at: <http://www.unhchr.ch/tbs/doc.nsf> [18/2/2001].

<sup>15</sup> General Comment 3, Par. 1.

<sup>16</sup> See e.g. Report of the International Law Commission (1977) 2 *Yearbook of the International Law Commission* 20, Par. 8. See also Alston, P., and Quinn, G., “The Nature and Scope of States Parties’ Obligations under the International Covenant on Economic, Social and Cultural Rights” (1987) 9 *Human Rights Quarterly*, 156 at 165-166; and Craven, M.C.R., (1995) *supra*, note 6 above, pp.107-109.

<sup>17</sup> See Alston, P., and Quinn, G., (1987), *ibid*.

<sup>18</sup> See General Comment 3, Par. 2 and 3.

realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the *raison d'être*, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.”<sup>19</sup>

Although the Committee also confers upon itself “the ultimate determination as to whether all appropriate measures have been taken” in respect of the above obligations,<sup>20</sup> there is no doubt that in respect of both “obligations of conduct” and “obligations of result” much will still depend on the humane volition and good faith of the States Parties to take the appropriate steps towards the realisation of the economic, social and cultural rights. In appreciation of the onerous and resource-demanding nature of economic, social and cultural rights, Article 2(1) states the obligation of contracting parties to “take steps individually and through *international assistance and co-operation, especially economic and technical*” to realise the rights guaranteed. Developing nations would certainly favour the argument that this places some level of obligation on the international community, especially on the developed and wealthy nations to assist and co-operate with the poor and developing nations in the realisation of the economic, social and cultural rights.<sup>21</sup> The ESCR Committee also seemed to have suggested this when it emphasised in its General Comment 3 that:

“...in accordance with Articles 55 and 56 of the Charter of the United Nations, with well-established principles of international law, and with the provisions of the Covenant itself, international cooperation for development and thus for the realization of economic, social and cultural rights is an obligation of all States. *It is particularly incumbent upon those States which are in a position to assist others in this regard.* The Committee notes in particular the importance of the Declaration on the Right to Development adopted by the General Assembly in its resolution 41/128 of 4 December 1986 and the need for States parties to take full account of all of the principles recognized therein. *It emphasizes that, in the absence of an active programme of international assistance and cooperation on the part of all those States that are in a position to undertake one, the full realization of economic, social and cultural rights will remain an unfulfilled aspiration in many countries* (emphasis added).<sup>22</sup>

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<sup>19</sup> *ibid.*, Par. 9.

<sup>20</sup> *ibid.*, Par. 4.

<sup>21</sup> See e.g. Chile's argument during the drafting of the Covenant that “international assistance to under-developed countries had in a sense become mandatory as a result of commitments assumed by States in the United Nations”. E/CN.4/SR.1203, at 342, Par. 10 (1962) cited in Craven, M.C.R., (1995), *ibid.*, at 148.

<sup>22</sup> General Comment 3, Par. 14. See also the Committee's G C 2 on International Technical Assistance Measures; UN Doc. HRI/GEN/1/Rev.1 at 45 in E/1990/23.



Developed nations do not however seem to accept that they are under a legal obligation under the ICESCR to provide international assistance to developing nations or co-operate with them for the realisation of economic, social and cultural rights. In their view, while developing nations may seek the assistance or co-operation of developed nations, they can not claim it as a legal right in the strict sense of the word. They make reference, for example, to the wording of Article 11 of the ICESCR which, in recognising the right of everyone to an adequate standard of living, also recognises that international co-operation in that regard is “based on free consent” of States.<sup>23</sup> The full realisation of economic, social and cultural rights in developing States tends therefore to depend on an ethical duty and the humane volition of developed States rather than any international legal obligation on their part. Ethical and religious values can therefore give the legal obligations under the Covenant a human face that will contribute to the effective realisation of those rights, especially in developing nations.

From an Islamic legal perspective, the *Sharî'ah* places both a moral and legal obligation on the State to ensure the economic, social and cultural welfare of individuals. Limitation of resources should not be an excuse for the neglect of the welfare of the people by the State. Under Islamic law, the State must always sincerely strive to ensure the people's welfare within its available resources. The general Qur'anic principle here is for the wealthy State to provide according to its means and the poor State according to its means,<sup>24</sup> performed expeditiously, with prudence and the intention to do what is best. This is consistent with the principle of “minimum core obligation” established by the ESCR Committee, which is to the effect that:

“...a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, or essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant.”<sup>25</sup>

There is nothing under the *Sharî'ah* that contradicts the above eagerness to oblige States Parties to ensure the minimum possible enjoyment of economic, social and cultural rights even in the face of resource constraints. As will become evident below, the sensitivity to the injunctions of the *Sharî'ah* had spurred the early Caliphs to fulfil the economic, social and

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<sup>23</sup> See Craven, M.C.R. (1995), *supra*, note 6 above, at 148-150.

<sup>24</sup> See e.g. Q 2:236.

<sup>25</sup> General Comment 3, Par. 10.

cultural rights of individuals in the early Islamic State even in very difficult periods of its history. Also, the notion of international assistance and co-operation under Article 2(1) of the ICESCR is equally tenable under the Qur'anic principle of co-operation for the realisation of human well being.<sup>26</sup> Islamic law thus generally accommodates the obligations undertaken by States Parties under Article 2 for the realisation of the rights recognised under the ICESCR. More so when the rights, as will become evident from their analyses below, are well substantiable within the provisions of the *Shari'ah*. The legislative obligation of State Parties reflected in Article 2(1) and the obligation of non-discrimination in Article 2(2) have already been addressed in the last chapter.

## THE RIGHT TO WORK

### *Article 6*

1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.
2. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.

Work is traditionally recognised as the legitimate means of earning a livelihood in every human society. Sieghart has thus rightly pointed out that work is “an essential part of the human condition”.<sup>27</sup> It is through work that a dignified source of income is often guaranteed and the material well being of an individual and a harmonious development of his personality may be realised. The popular saying that “there is dignity in labour” substantiates the fact that the right to work is fundamental to the maintenance of the dignity of the individual. Article 6 therefore recognises the value of work as “an element integral to the maintenance of the dignity and self-respect of the individual”.<sup>28</sup>

While the intendment of Article 6 may not be to guarantee full employment and total elimination of unemployment (as States may argue), it places an obligation on the States Parties to at least provide the opportunity of work for everyone who wants to work and

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<sup>26</sup> See Q 5:2.

<sup>27</sup> Sieghart, P., *The Lawful Rights of Mankind: An Introduction to the International Legal Code of Human Rights* (1986) p.123.

<sup>28</sup> Craven, M.C.R., (1995) *supra*, note 6 above, at 194.

narrow the channels of unemployment.<sup>29</sup> Also, while the right to work under Article 6(1) may be subject to progressive realisation, as is the case with most of the rights recognised under the ICESCR, Article 6(2), as read with Article 2(1), provides that certain steps must be taken by the States Parties to achieve the full realisation of the right. Such steps, which include “technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual”, are very demanding for many developing nations and are obligations of result that may take some time to be achieved, depending on available resources.

The wording of Article 6(1) indicates that the recognition of the right to work includes freedom of choice of employment by everyone. This excludes forced labour or forced employment upon any individual.<sup>30</sup> Article 6 would however not accommodate a choice by an individual of “work” or “trade” legally prohibited by the State. Drzewicki has also pointed out that the freedom of choice in the right to work may be limited by “provisions designed to prevent vulnerable persons, such as women, children and young persons, from working in certain conditions.”<sup>31</sup> Conversely, Articles 2(2) and Article 3 of the ICESCR would prohibit any discriminatory legislation or practice that inhibits certain groups such as women, the elderly or the disabled from employment.<sup>32</sup> Other aspects of this right include right not to be arbitrarily dismissed from work.<sup>33</sup>

The right to work and dignity of labour is fully recognised under Islamic law. This is evidenced by many verses of the Qur’an and by the *Sunnah* of the Prophet Muhammad that extol the value of labour and work.<sup>34</sup> For example the Qur’an states categorically that God has ordained the daytime for seeking sustenance (through work) by humans,<sup>35</sup> and has also

<sup>29</sup> See Art. 23(1) of the UDHR which provides that “Everyone has the right to work ...and protection against unemployment”.

<sup>30</sup> Art. 8(3)(a) of the ICCPR provides that “No one shall be required to perform forced or compulsory labour”. See also Art. 1 of the ILO Abolition of Forced Labour Convention No. 105 of 1957. See ILO Treaty Website at: <http://ilolex.ilo.ch:1567/public/english/docs/convdisp.htm> [18/2/2001].

<sup>31</sup> e.g. ILO Convention No. 45 prohibiting underground work for women and ILO Conventions Nos 5, 10, 33, 59, 60, 123 concerning minimum age for admission to employment. See Drzewicki, K., “The Right to Work and Rights in Work”, in Eide, A., Krause, C., and Rosas, A., (ed.) *Economic, Social and Cultural Rights: A Textbook* (1995) p.169 at 179.

<sup>32</sup> For example, agitation about the discriminatory effects of the ILO Convention No. 89 of 1948, which excluded women from night work, led the ILO to adopt a Protocol in 1990 amending the earlier provisions of Convention No. 89. See Drzewicki, K., (1995) *ibid*.

<sup>33</sup> See generally Craven, M.C.R., (1995) *supra*, note 6 above, pp.194-225 for a detailed discussion of the right to work in the context of the ICESCR.

<sup>34</sup> See e.g. al-Ghazâlî, M., *Huqûq al-Insân Bayn T’âlîm al-Islâm Wa I’lân al-Umam al-Mutahidah* (Arabic)(1993) pp.177-203; Al-Zuhayli, W., (1997) *supra*, note 34 above, Vol. 7, pp.4986-4989 and Uthman, M.F., *Huqûq al-Insân Bayn al-Sharî’ah al-Islâmiyyah Wa al-Fikr al-Qânûniyy al-Garbiyy* (Arabic) (1982) pp.151-155; where the authors discuss many Qur’anic verses and Prophetic Traditions on dignity of labour and work in Islamic law.

<sup>35</sup> See Q 78: 11.

made trading lawful.<sup>36</sup> The Prophet himself set many examples on the dignity of labour both in deeds and words. In one Tradition he is reported to have said: “There is no better way of sustenance than through the labour of one’s own hands, because even the Prophet David used to feed from the labour of his own hands.”<sup>37</sup> And in answer to a question put to him as to which was the best means of sustenance the Prophet gave a similar answer that: “...the best means of sustenance is through the labour of your own hands or through lawful trade.”<sup>38</sup> He also stated in another Tradition that it is better and dignifying for an individual to earn a living by cutting and selling fire-wood than through begging.<sup>39</sup> The Prophet himself is recorded to have worked for his livelihood.

It is clear from the above Traditions that Islam discourages begging and dependence upon others but rather encourages labour and working for one’s sustenance. The State therefore has a duty under Islamic law to respect the right of every individual to work, and in fact encourage them to do so. The duty of the State to recognise the right to work and to take steps to ensure the provision of opportunity for work and the protection of individuals from unemployment is often inferred by Muslim scholars from a precedent laid by Prophet Muhammad when a man came to him begging for alms. The Prophet asked the man to bring two items from his house, which he sold for two silver coins. He then gave the coins to the man instructing him to feed his family with one of the coins and to buy an axe with the other coin. The Prophet fixed a handle to the axe and gave it to the man saying: “Go, cut wood and sell it, and do not come back to me for fifteen days.” The man did as he was told and returned thereafter to the Prophet having earned up to ten silver coins from few days’ work, and was able to fulfil his needs conveniently from his own labour. The Prophet then advised him that this was better and more dignifying for him than begging. Based on this precedent of the Prophet of Islam, as an embodiment of the State during his time, Chaudhry concluded that the “Islamic State is, thus, responsible to provide employment to its citizens if they have no employment or occupation to earn their livelihood”.<sup>40</sup> Al-Zuhayli reached the same conclusion by reference both to this Tradition<sup>41</sup> and also through another Tradition in which

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<sup>36</sup> See Q 2:275.

<sup>37</sup> Reported by al-Bukhârî, See e.g. Karim, F., *Al-Hadis, An English Translation and Commentary of Mishkat-ul-Masabih With Arabic Text*, 3<sup>rd</sup> Ed. (1994) Vol.1, p.403, Hadith No. 109.

<sup>38</sup> Reported by Ahmad, See Karim, F., *ibid*, p.406, Hadith No. 131w.

<sup>39</sup> Reported by al-Bukhârî, See e.g. Karim, F., (1994) *ibid*, Hadith No.108.

<sup>40</sup> Chaudhry, M.S., *Islam’s Charter of Fundamental Rights and Civil Liberties* (1995) 41. See also Uthmân, F., (1982) *supra*, note 34 above, p.153. and Karim, F., *supra*, note 37 above, p.401, Hadith No. 107.

<sup>41</sup> See Al-Zuhayli, W.,(1997) *supra*, note 34 above, Vol.7 p.5010.

the Prophet stated that the ruler (i.e. State) is like a shepherd over the people and is thus responsible for the affairs of the people.<sup>42</sup>

Scholars also argue from the facts of the above precedent of the Prophet that there is a corresponding duty to work on every individual who has the capacity to do so under Islamic law. As is the case under Article 6 of the ICESCR this corresponding duty to work would not accommodate forced labour, the prohibition of which is evidenced by the verse of the Qur'an that says: "God does not burden a person beyond his scope..."<sup>43</sup> Tabandeh has also cited a precedent of the fourth Caliph, Ali ibn Abî Tâlib to show that forced labour has no place under Islamic law. One of the governors under the Caliph was reported to have requested the Caliph's permission to force people to work for the repair of a canal to improve the flow of water in the province for agricultural purposes. The Caliph was reported to have replied: "I would never compel a single person to do any work he has not a mind to do. If the stream and its canal are in the condition you describe, invite the people to do the work needed voluntarily, and give them every encouragement, promising that the water of the stream shall afterwards be the property of anyone who worked on it, but that such people as did not work shall have neither lot nor portion in its water."<sup>44</sup>

Under Islamic law, the rights of the individual to do any work which he freely chooses and accepts will not include the right to choose any "work" prohibited by the *Sharî'ah* such as prostitution, gambling, usury and alcohol business. These are all prohibited "work" under Islamic law and are considered as detrimental to both the ultimate well being of the individual and that of society at large. It is on that basis for example, that Article 14 of the OIC Cairo Declaration while providing that "Everyone shall have the right to legitimate gains without monopolization, deceit or harm to oneself or to others", added also that "Usury (*riba*) is absolutely prohibited". As earlier argued above, Article 6 of the ICESCR does not seem to restrain a State from prohibiting certain types of work considered to be against public interest as long as such prohibition is not discriminatory and does not inhibit certain groups from legitimate work.

Regarding non-discrimination in the right to work, the right of women under Islamic law to freely choose or accept work of their own choice becomes relevant. For instance, the ESCR Committee expressed concern in its concluding observations on the initial report of

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<sup>42</sup> See *ibid*, p.4989. The Tradition in reference here is further discussed more elaborately below under the right to social security, p. 229 below.

<sup>43</sup> Q 2: 286.

<sup>44</sup> Tabandeh, S., *A Muslim Commentary on the Universal Declaration of Human Rights* (1970) 77. See also Chapter 4, pp. 59-61 and 142-143 above on the prohibition of slavery.

the Islamic Republic of Iran in 1993 at the prohibition of women from magisterial appointments in Iran.<sup>45</sup> The 2000 report of the Special Representative on the situation of human rights in the Islamic Republic of Iran also questioned the requirement in the Iranian Civil Code for “women to obtain the permission of their husbands to take jobs.”<sup>46</sup> The report however acknowledged that “the provision is widely disregarded and can... be circumscribed by a suitable provision in a marriage contract”. The Representative of the Islamic Republic of Iran had in his answer to questions on the issue at the 8<sup>th</sup> Session of the ESCR Committee stated that the situation was being corrected and “a text had been submitted to the Government” in that regard.<sup>47</sup>

Under traditional Islamic jurisprudence, jurists hold different opinions on the question of appointing women as judges. While a majority of the traditional jurists excluded women from the bench, Imâm Abû Hanîfah, held the view that a woman can be appointed as a judge in civil matters. Other jurists like Ibn Jarîr al-Tabarî and Ibn Hazm however held the view that a woman can be appointed as a judge in all cases as her male counterpart. al-Tabarî’s argument was that since a woman could be appointed as a jurisconsult (*mufti*) then she can equally be appointed as a judge. We have earlier pointed out in the last chapter that there is neither a verse of the Qur’an nor a Tradition of the Prophet that specifically prohibits the appointment of women as judges. On that basis, the Federal Shariat Court of Pakistan when faced with this question in the case of *Ansar Burney v Federation of Pakistan*<sup>48</sup> in 1982, held that women could be appointed as judges under Islamic law. The court preferred the views of al-Tabarî and Ibn Hazm to that of other jurists who exclude women from being appointed as judges.

Generally, one finds nothing within the Qur’an and *Sunnah* that specifically excludes women from doing any work of their choice provided they possess the required skills and expertise and are not exposed to any hazards therefrom. As stated in the last chapter,<sup>49</sup> the *Sharî’ah* recognises the independence of women within basic moral and ethical rules that equally apply to men. Most contemporary Muslim scholars support the view that women may not be legally discriminated against in the right to work and choice of profession. For instance, Hamidullah has observed that:

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<sup>45</sup> See Concluding Observations on Islamic Republic of Iran, (1993), UN. Doc. E/C.12/1993/7. Par. 6.

<sup>46</sup> UN Doc. E/CN.4/2000/35 of 18<sup>th</sup> January 2000, Par. 22.

<sup>47</sup> See Summary Record of 8<sup>th</sup> Meeting: Iran (Islamic Republic of) E/C.12/1993/SR.8 of 20/12/93 Par. 36 and 40. See further Chapter 8 below.

<sup>48</sup> (1983) 65 PLD (FSC) 73.

<sup>49</sup> See pp. 115-6 above.

“In every epoch of Islamic history, including the time of the Prophet, one sees Muslim women engaged in every profession that suited them. They worked as nurses, teachers, and even as combatants by the side of men when necessary, in addition to being singers, hair-dressers, cooks, etc. Caliph ‘Umar employed a lady, Shifa’ bint ‘Abdullah as inspector in the market at the capital (Madinah) as Ibn Hajar (*Isabah*) records. The same lady had taught Hafsa, wife of the Prophet, how to write and read. The jurists admit the possibility of women being appointed as judges of tribunals, and there are several examples of the kind. In brief, far from becoming a parasite, a woman could collaborate with men, in Muslim society, to earn her livelihood and to develop her talents”.<sup>50</sup>

Similarly Abdulati, has also stated that:

“Historical records, show that women participated in public life with the early Muslims, especially in times of emergencies. Women used to accompany the Muslim armies engaged in battles to nurse the wounded, prepare supplies, serve the warrior, and so on. They were not shut behind iron bars or considered worthless creatures and deprived of souls. Islam grants woman equal rights to contract, to enterprise, to earn and possess independently.”<sup>51</sup>

Badawi, while also subscribing to the legal view that there is no decree in Islam which forbids women from seeking employment, added that:

“with regard to the woman's right to seek employment it should be stated first that Islam regards her role in society as a mother and a wife as the most sacred and essential one. Neither maids nor baby-sitters can possibly take the mother's place as the educator of an upright, complex free, and carefully-reared children (sic). Such a noble and vital role, which largely shapes the future of nations, cannot be regarded as “idleness”.”<sup>52</sup>

Badawi's observation above expresses a moral consideration upon which Muslim scholars discourage women from choosing any work capable of preventing them from fulfilling their important role as mothers and wives. Reciprocally, the man is also prevented from choosing any work capable of preventing him from fulfilling his role as a father or husband. It is upon the same basis that both spouses may confer not only on choice of work but on all aspects of the family relationship. Ideally it is not a question of consent or permission but mutual agreement between the couple in the best interest of the family. In a strict Islamic legal sense, the right to work and to freely choose or accept work of one's choice is very much sustainable within the provisions of the *Shari'ah* and general principles

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<sup>50</sup> Hamidullah, M., *Introduction to Islam* (1982)p.139.

<sup>51</sup> Abdulati, H., *Islam in Focus* (1997) 364-5; See also generally Badawi, J., “The Status of Woman In Islam” (1971) 8 *Al-Ittihad*, No. 2, September, p.33.

<sup>52</sup> Badawi, J. A., *ibid.*

of Islamic law, and is applicable both to the male and female gender without discrimination.

Article 12 of the OIC Cairo Declaration thus provides that:

“Work is a right guaranteed by the State and society for each person able to work. Everyone shall be free to choose the work that suits him best and which serves his interests and those of society. The employee shall have the right to safety and security as well as to all other social guarantees. He may neither be assigned work beyond his capacity nor be subjected to compulsion or exploited or harmed in any way.”<sup>53</sup>

In that regard most Muslim States need to redress the misconception about the right of women to work and also ensure their safety and security in that respect both in the private and public sectors of society.

## THE RIGHT TO JUST AND FAVOURABLE CONDITIONS OF WORK

### *Article 7*

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

(a) Remuneration which provides all workers, as a minimum, with:

(i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;

(ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;

(b) Safe and healthy working conditions;

(c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;

(d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays

If the individual is not to be exploited in the enjoyment of his right to work, and if work is to fulfil its role as a crucial source of income upon which the material well being and the harmonious development of the individual's personality depends, then the right to work must be enjoyable under some minimum favourable and just conditions. As stated earlier, labour is not to be considered merely as a commodity but must be linked with human dignity. Thus while Article 6 provides for the *right to work*, Articles 7 and 8 provide for *rights in work*.<sup>54</sup>

<sup>53</sup> Note that the pronouns “he”, “his” and “him” are generically used for both male and female throughout the Declaration.

<sup>54</sup> See e.g. Craven, M.C.R., (1995) *supra*, note 6 above, pp.226-247 for elaborate analysis of these provisions.



The reporting guidelines formulated by the ESCR Committee in respect of Article 7 make reference to some Conventions of the International Labour Organisation (ILO).<sup>55</sup> That is because the precedent of recognising the right to just and favourable conditions of work had been laid earlier by the ILO through the adoption of many Conventions and Recommendations such as: Hours of Work (Industry) Convention (No.1) of 1919; Weekly Rest (Industry) Convention (No.14) of 1921; Minimum Wage-Fixing Machinery Convention (No. 26) of 1928 and (No.131) of 1970; Weekly Rest (Commerce and Offices) Convention (No. 106) of 1957; Equal Remuneration Convention (No.100) of 1951; Safety Provisions (Building) Convention of 1937; Holidays With Pay Convention (No.52) of 1936 and (No.132) of 1970.<sup>56</sup> This early formal recognition of rights in work by the ILO arose from revolutionary unrest that swept across Europe after the First World War and the appreciation of the “interdependence between labour conditions, social justice and universal peace.”<sup>57</sup> By the establishment of these rights in work as full-fledged human rights, the individual worker is depicted as a subject and not an object of labour under the Covenant. As clearly stated under the provision of Article 7, the rights in work mainly aims at ensuring fair wages, decent living, safety at work, equal treatment and adequate rest and leisure for every worker, which all contribute to enhance the dignity of the working human being.

Although the right to just and favourable conditions of work has not been specifically codified and itemised as such under traditional Islamic law, it is very much sustainable and recognised within the provisions of the *Sharî'ah*. The *Sharî'ah* injunctions on non-exploitation, equity, humane treatment of peers and underlings e.t.c., provide the basis in Islamic law for, in the words of Qadri, “social controls and administrative techniques for the general welfare, social security, wages of labour and hours of work together with the rules on the relations of the employees and the employers”.<sup>58</sup> For example the Qur'an provides that:

“Woe to those who give less in measure and weight. Those who, when they receive from Men demand full measure; But when they have to give by measure or weight, give less than due.”<sup>59</sup>

<sup>55</sup> See Revised Guidelines, *supra*, note 7 above, Art. 7(1).

<sup>56</sup> Many of the modern Muslim States have ratified these and other ILO Conventions. Of the 6 countries used for case studies in this research, only Iran has not yet ratified any of the ILO Conventions cited as example here. See the ILO Treaty Website for these and similar Conventions and their status of ratification at: <http://ilolex.ilo.ch:1567/public/english/docs/convdisp.htm> [visited 18/2/2001].

<sup>57</sup> Drzewicki, K., (1995) *supra*, note 31 above, p. 169. For e.g. the 2<sup>nd</sup> preambular paragraph of the ILO Constitution recognised the capability of “conditions of labour involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled.” See ILO Treaty Website: <http://www.ilo.org/public/english/about/iloconst.htm> for the ILO Constitution [18/2/2001].

<sup>58</sup> Qadri, A.A., *Islamic Jurisprudence in the Modern World* (1986) p.306.

<sup>59</sup> Q 83:1-3.

“... Give just measure and weight, and do not withhold from people things that are their due and do not do mischief on earth after its perfection, that is best for you if you had faith.”<sup>60</sup>

The above verses serve as basis for fair trade, fair and equitable wages for workers as well as equal remuneration for work of equal value under Islamic law. The injunctions here are for equity and fairness in labour transactions generally. There are also many Prophetic Traditions that specifically encourage equity and fairness in wages of workers. In one Tradition the Prophet is reported to have enjoined that: “When anyone of you hires a worker he should inform him of his wages”<sup>61</sup>, and in another he enjoined that the employee should be paid his or her wages before the sweat of his labour dries out.<sup>62</sup> The Prophet also warned that in the hereafter God would be displeased with an employer who engaged an employee and enjoyed his full labour but failed to pay him his fair wages.<sup>63</sup> Another Tradition which says: “Good treatment of persons under one’s control brings fortunes while their bad treatment brings misfortune”<sup>64</sup> reflects the wisdom that ensuring just and favourable conditions of work increases the well being of workers which in return improves productivity and brings fortunes to the employer and society at large. The Prophet thus generally enjoined the good and humane treatment of servants, employees and workers. Correlative to the right of the worker to a fair wage and favourable working conditions is his duty to also discharge his contract properly and justly. The Qur’anic rule in employer/employee and human relationships generally is that “Deal not unjustly and you shall not be dealt with unjustly”.<sup>65</sup> The Prophet is also reported to have stated that: “God loves to see that when someone does some work he does it perfectly”.<sup>66</sup> From the above provisions and principles, Weeramantry has correctly identified that under Islamic law “work (is) looked upon more as a partnership between employer and employee than as a relationship of superiority and subordination” and that the “right to a fair wage and of the employer’s obligation to implement the contract justly are deeply ingrained in Islamic doctrine.”<sup>67</sup>

The recognition of rest and leisure in relation to work under Islamic law is evidenced in the Quranic verses which states that “We have made your sleep for rest ... And made the day

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<sup>60</sup> Q 7:85.

<sup>61</sup> Reported by al-Bayhaqî, See al-Shawkânî, M., *Nayl al-Awtâr* (Arabic) (n.d.)Vol.5-6, p.292-3.

<sup>62</sup> Reported by Ibn Majah, See e.g. Karim, F., (1994) *supra*, note 37 above, Vol.2, p.301, Hadith No. 6.

<sup>63</sup> Reported by al-Bukhârî, See e.g. Karim, F., (1994) *ibid*, p.299, Hadith No. 3.

<sup>64</sup> Reported by Abû Dâwud, See e.g. Karim, F., *ibid*, Vol 1, p.228, Hadith No. 96.

<sup>65</sup> Q2:279.

<sup>66</sup> Reported By al-Bayhâqî. See e.g. Al-Zuhayli, W., (1997) *supra*, note 34 above, Vol. 7., p.5011.

<sup>67</sup> Weeramantry, C.G., *Islamic Jurisprudence: An International Perspective* (1988) pp.63 and 64.

as a means of (seeking) subsistence”.<sup>68</sup> Over-working without rest and lack of leisure certainly results in stress and weakness, which is detrimental to workers. This is prohibited within the provision of the Qur’anic verse which says: “...let there be transactions (between you) by mutual good will, and do not kill (or destroy) yourselves...”<sup>69</sup> The Prophet had also admonished that the human body has a right of rest and leisure that must be respected.<sup>70</sup> Tabandeh has, in that regard, referred to an Islamic Tradition which recommends the division of the 24 hours of a day into three periods “viz: 8 hours for work; 8 hours for worship, food and recreation; 8 hours for sleep and repose” as a demonstration of Islam’s recognition of the right to rest, leisure and reasonable limitation of working hours.<sup>71</sup>

Islamic law thus fully recognises and strongly encourages the right of everyone to enjoy just and favourable conditions of work as provided under Article 7 without discrimination of any kind. This is acknowledged in Article 13 of the OIC Cairo Declaration that:

“...The employee shall have the right to safety and security as well as to all other social guarantees. He may neither be assigned work beyond his capacity nor be subjected to compulsion or exploited or harmed in any way. He shall be entitled – without any discrimination between males and females – to fair wages for his work without delay, as well as to the holidays allowances and promotions which he deserves. For his part, he shall be required to be dedicated and meticulous in his work.”

The provisions on the rights and duties of the employee apply to both the private and public sectors of labour. Based on the Tradition in which the Prophet described the ruler (i.e. the State) as being the “shepherd” that is responsible for the affairs of the “flock” (i.e. the people), the State has the duty under Islamic law to ensure that the right of everyone to enjoy just and favourable conditions of work are ensured both in the private and public sectors of labour. The State may enact legislation and create institutions through which the rights of workers can be ensured. For example, the public institution called *al-hisbah* is an important organ in Islamic law under which the *muhtasib* (i.e. officer for public order) is conferred with a broad jurisdiction to, *inter alia*, monitor and control trade and labour standards, investigate trade and labour disputes and generally ensure fair practices in trade, the welfare and rights of consumers and labourers under Islamic law.<sup>72</sup> This strongly complements the obligation of

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<sup>68</sup> Q 78:9-11.

<sup>69</sup> Q 4:29.

<sup>70</sup> Reported By al-Bukhari and Muslim, See Karim, F., (1994) *supra*, note 37 above, Vol.1, p.431-432, Hadith No. 146.

<sup>71</sup> See Tabandeh, S., *A Muslim Commentary on the Universal Declaration of Human Rights*, (1970) p.78.

<sup>72</sup> See e.g. al-Mâwardî, A., *al-Ahkam as-Sultaniyyah, The Laws of Islamic Governance*, Trans. Yate, A., (1996) p.337ff.

Muslim States under the Covenant to ensure that the rights of employees are fully guaranteed both in the private and public sector.

## TRADE UNION RIGHTS

### *Article 8*

1. The States Parties to the present Covenant undertake to ensure:
  - (a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;
  - (b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations;
  - (c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;
  - (d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.
2. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.
3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.

The recognition of the right of all workers to just and favourable conditions of work under Article 7 does not often come easy and must sometimes be negotiated and pressed for collectively. Sieghart has observed that although “work continues to be an essential part of the human condition” it also “continues to be one of the most persistent occasions for the exploitation of human beings by their own kind.”<sup>73</sup> Trade unions are thus essentially meant for the promotion and protection of the economic and social interests of workers. During the drafting of the Covenant, the Lebanese and Pakistani representatives emphasised that trade union rights were a “necessary instrument for implementing economic, social and cultural rights” and “satisfactory working conditions in particular”.<sup>74</sup> It is important to note that the

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<sup>73</sup> Sieghart, P., (1986) *supra*, note 27 above.

<sup>74</sup> See Malik (Lebanon) E/CN.4/SR.298, at 8 (1952); and Chaudhury (Pakistan), A/C.3/SR.719 at 199, par. 19 (1956) cited in Craven, M.C.R., (1995) *supra*, note 6 above, p.250.

States Parties do not merely recognise the right to form and join trade unions but undertake in Article 8 to *ensure* this right. The obligation here is therefore seen to require positive action, is immediate and not progressive.<sup>75</sup> The ESCR Committee has observed that this Article was capable of immediate application and that any suggestion to the contrary would be difficult to sustain.<sup>76</sup>

While, like the general right to freedom of association guaranteed under Article 22 of the ICCPR, everyone is free under Article 8 of the ICESCR “to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned”, the inclusion that trade unions are “for the promotion and protection of (workers) economic and social interests” tends to restrict trade unions from being used as political instruments.<sup>77</sup> Article 8(2) also allows the State to impose lawful restrictions on the trade union rights of members of the armed forces, the police and members of the administration of State.

There are no direct provisions on trade unionism within the *Shari’ah*. The Qur’an however enjoins co-operation (*ta’awun*) - and thus organisation – for good purposes (*al-birr*) and common causes.<sup>78</sup> There is also no provision for the right to form or join trade unions or the right to freedom of association in the OIC Cairo Declaration. That leaves a big gap to be filled in respect of those rights. Article 13 of the Declaration only provides that:

“...Should workers and employers disagree on any matter, the State shall intervene to settle the dispute and have the grievances redressed, the rights confirmed and justice enforced without bias.”

While the above provision appreciates the possibility of disagreement between workers and employers, it fails to provide a legal basis for the formation of trade unions that can formally represent workers to promote and protect their economic and social interests. If the argument is that the State has a duty under Islamic law to intervene and protect the confirmed rights of workers in such instances, the problem with that is, this can hardly be guaranteed where the employer is the State itself. Where there is no opportunity of unionism, workers would then have to pursue their rights in work on an individual basis, which then denies them the benefit and strength in collectivity.

Nevertheless nothing in the *Shari’ah* prohibits trade unionism for the promotion and protection of the economic and social interests of workers as specifically indicated in Article 8(1)(a) of the ICESCR. Kamali has argued that both the Qur’an and Sunnah “enjoin co-

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<sup>75</sup> See e.g. Craven, M.C.R., (1995) *supra*, note 6 above, p.251.

<sup>76</sup> See General Comment 3 Par. 5.

<sup>77</sup> See Craven, M.C.R., (1995) *supra*, note 6 above, p.254.

operation (*ta'âwun*) in good and beneficial work”, and stressed that “co-operation in good work (*al-birr*)...is a broad concept which can apply to all forms of beneficial co-operation, whether in the form of a political party, a professional association, or a workers’ union which aims at ensuring fair practices in trade and the equitable treatment of workers.”<sup>79</sup> Considering the tendency of exploitation that often exists in the employer-employee relationships all over the world today, the right of trade unionism for the purpose of promoting and protecting the economic and social interests of workers is very legitimate under Islamic law. As earlier indicated above, the Prophet of Islam has in many ways enjoined the welfare of workers. It is a fact that the individual worker is always the weaker party in every employer-employee relationship. It is only through trade unionism that the welfare of workers may truly be realised and the interest of employees adequately protected, especially within the capitalist oriented economy that exists in most parts of the modern world. Since modern Muslim States participate in the capitalist oriented economy, it will be inconsistent with the Islamic injunction of fair-dealing not to allow the formation of trade unions to protect the interest of workers against any exploitative tendencies of employers. Apart from the confrontational trait often associated with trade unions, they also are necessary vehicles for the social, cultural and professional interaction of workers both nationally and internationally, which goes a long way in improving their productivity.

Many Muslim States have ratified the ILO Convention No. 87 on Freedom of Association and Protection of the Right to Organise (1948)<sup>80</sup> and Convention No. 98 Right to Organise and Collective Bargaining Convention (1949),<sup>81</sup> which are the two key trade union Conventions. It is important to note in this regard that the States have an important obligation to ensure that the rights of workers to form trade unions and join trade unions of their choice are ensured within both the public and private sectors of the State.

## THE RIGHT TO SOCIAL SECURITY AND SOCIAL INSURANCE

### *Article 9*

The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.

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<sup>78</sup> See also under Art. 22 of the ICCPR in the last Chapter, p. 171 above.

<sup>79</sup> Kamali, M.H., *Freedom of Expression in Islam* (1997) p.79.

<sup>80</sup> 34 of the 56 Member States of the OIC have ratified this ILO Convention. See ILO Treaty Website at: <http://ilolex.ilo.ch:1567/scripts/convde.pl?query=C87&query0=87&submit=Display> [visited 4/2/2001].

<sup>81</sup> 41 of the 56 Member States of the OIC have ratified this ILO Convention. See *ibid.*

Apart from the general statement that social security includes social insurance, the scope and nature of social security is not defined under the Covenant. Article 22 of the UDHR also provides that: “Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality”, but fails to define the scope of social and economic rights indispensable for the dignity and free development of the individual. The reporting guidelines for Article 9 of the ICESCR however refer to the ILO Social Security (Minimum Standards) Convention (No.102) of 1952<sup>82</sup> and also request each State Party to indicate which of the following branches of social security existed in their country, viz: Medical care; Cash sickness benefits; Maternity benefits; Old-age benefits; Invalidity benefits; Survivors’ benefits; Employment injury benefits; Unemployment benefits; and Family benefits.<sup>83</sup> This list clearly indicates that the social security system is meant to be an alleviative arrangement for ensuring a guaranteed income and basic sustenance from the State to “labour inactive” members of society who may for obvious reasons not be able to earn income or sustenance through work. This in essence is aimed at protecting the dignity of the individual in such situations and prevent him from having to engage in the undignified act of begging or resorting to other degrading and unacceptable means of sustenance.

Scheinin has noted that “(i)n developing countries, the economic protection of other, ‘inactive’, persons may be seen more as a moral duty of the family than as a legal right of the individual in relation to public authorities.” He however argued that “(t)he place of the right to life in the international code of human rights certainly puts limits on leaving the responsibility of the basic well-being of the members of society to families.”<sup>84</sup> While Scheinin’s observation in respect of the concept of social security in developing countries describes what one finds as well today in all modern Muslim States, there are precedents in early Islamic State practice where responsibility for the basic well-being of everyone and especially the economic protection of labour inactive persons was taken as an obligation of the State.

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<sup>82</sup> See ILO Website at: <http://ilolex.ilo.ch:1567/scripts/convde.pl?query=C102&query0=102&submit=Display> [02/02/2001].

<sup>83</sup> These are exactly the nine specific branches of Social Security covered by the ILO Social Security (Minimum Standard) Convention (No. 102) of 1952. See *Revised Guidelines, supra*, note 7 above.

<sup>84</sup> Scheinin, M., “The Right to Social Security”, in Eide, A., Krause, C., and Rosas, A., (ed.) (1995) *supra*, note 31 above, p.59 at 161.

The *Sharî'ah* in fact enjoins the concept of social security as a State policy rather than purely a family responsibility. The *Zakât* tax is, for example, an obligatory State institution basically for ensuring the social security of indigent individuals within the Islamic State. The State has the legal responsibility of collecting the *Zakât* which must only be expended for the specific category of indigent persons to ensure their social security within the State. Apart from that, the State itself has a primary responsibility under the *Sharî'ah*, to provide members of the society with the economic and material welfare "necessary for the maintenance of human happiness and dignity".<sup>85</sup> This is evidenced by the oft-quoted Tradition of Prophet Muhammad in which he says:

"Behold, every one of you is a shepherd; and everyone of you is responsible for his flock. The ruler (i.e. the State) that governs over a people is a shepherd, and is responsible for his flock (i.e. the people); The man is a shepherd over his family and is responsible for his flock; The woman is a shepherdess over her husband's household and children, and is responsible for them; The servant is a shepherd over his master's property, and is responsible for it. Behold, everyone of you is a shepherd, and everyone of you is responsible for his flock."<sup>86</sup>

Analysing the above Tradition, Muhammad Asad has pointed out the need to note that the ruler's (i.e. the State's) responsibility to the people "has been put at par with a father's or a mother's responsibility toward their children". Just as the father and mother are "shepherds" and are morally and legally responsible for the well being of their family, the State is also morally and legally responsible for the economic and social well-being of its people. "It follows, therefore," Asad concluded, "that a state, in order to be truly Islamic, must arrange the affairs of the community in such a way that every individual, man and woman shall enjoy that minimum of material well-being without which there can be no human dignity, no freedom and, in the last resort, no spiritual progress."<sup>87</sup>

There are numerous recorded precedents of social security arrangements for the welfare of the labour inactive members in the history of the early Islamic State. For example, Hamidullah (quoting the great 8<sup>th</sup> century *Hanafi* Jurist, Imam Abû Yûsuf), has documented the position in his well-known work, *The Muslim Conduct of State*, first published in 1941, as follows:

"Social security in favour of non-Muslim subjects, at the expense of the Central Exchequer, was introduced as early as the time of Abû Bakr. In a State document, the commander, Khâlid ibn al-Walîd informs the Caliph of the conquest of the city of

<sup>85</sup> See Asad, M., *The Principles of State and Government in Islam* (1980) p.87.

<sup>86</sup> Reported by al-Bukhârî and Muslim, See e.g. Karim, F., (1994), *supra*, note 37 above, Vol.2, p.567, Hadith No. 1.

<sup>87</sup> Asad, M., (1980) *supra*, note 85 above, at 88.



al-Hîrah, and says: "I counted the male population. They were seven thousand. On further examination, I found that one thousand of them were permanently sick and invalid. So I excluded them from the imposition of the *jizyah* (tax); and those susceptible of the tax thus remained six thousand... I have accorded them that any old man who could no more earn his livelihood for his weakness, or who should otherwise be afflicted by a calamity, or one who was rich but became poor to the extent that he requires the charity of his co-religionists, I shall exonerate him from the *jizyah* (tax) and he and his family will be supported by the Muslim treasury so long as he lives in the Islamic territory..."<sup>88</sup>

The second Caliph, 'Umar ibn al-Khatâb, also laid a formal precedent in that respect by demonstrating clearly during his rule that the State has an obligation under the *Sharî'ah* to ensure the social security and welfare of every member of the society, especially that of the "labour inactive" along the lines envisaged under Article 9 of the ICESCR. 'Umar is recorded to have issued formal instructions during his Caliphate that grants must be provided from the State treasury (*bayt al-mâl*) to the elderly and to the sick in the State without discrimination. Abû Yûsuf has documented in his *Kitâb Kharâj* that the Caliph Umar once "passed along a street where somebody was asking for charity. He was old and blind. 'Umar tapped his shoulder from behind and said: From which community art thou? He replied: A Jew. He said: And what hath constrained thee to what I see thee in? He replied; I have to pay the capitation tax: I am poor; and I am old. At this 'Umar took him by the hand and led him to his own house and gave him something from his private coffers. Then he sent word to the cashier of the *baytu'l mâl* (State Treasury): Look at him and his like. By God! We should never be doing justice if we eat out of his youth and leave him deserted in the old age. 'The government taxes are meant for the poor and the indigent.'"<sup>89</sup> Al-Balâdhurî is also quoted to have recorded that when Umar came to a city called al-Jâbiyah "he passed en route by some Christians suffering from leprosy, so he gave order that they should be aided out of *sadaqât*, i.e. *zakât*, and that they should be given a life pension."<sup>90</sup>

Describing the precedent of Caliph Umar in respect of the formal inauguration of the concept of social security in the early Islamic State, Muhammad Asad observed exhaustively as follows:

"If some readers suppose that the idea of...a social insurance scheme is an invention of the twentieth century, I would remind them of the fact that it was in full swing many centuries before its present name was coined, and even before the need for it became apparent under the impact of modern industrial civilization: namely, in the

<sup>88</sup> Hamidullah, M., *The Muslim Conduct of State*, (7<sup>th</sup> Revised Ed., 1977) p.117, Par. 211. See also Abû Yûsuf's *Kitâb al-Kharaj*, Trans. Ali, A.A., (1979) pp.289-90.

<sup>89</sup> *ibid*, pp.113-114.

<sup>90</sup> al-Balâdhurî, *Futûh al-Buldân*, (Arabic) p.129, cited in Hamidullah, M., (1977) *supra*, note 88 above, p.114.

Islamic Commonwealth, at the time of the Right-Guided Caliphs. It was 'Umar the Great who, in the year 20A.H.,(643CE) inaugurated a special government department, called *dîwân*, for the purpose of holding a census of the population at regular intervals. On the basis of this census, annual state pensions were fixed for (a) widows and orphans, (b) all persons who had been in the forefront of the struggle for Islam during the lifetime of the Prophet, beginning with his widows, the survivors of the Battle of Badr, the early *muhâjirs*, and so forth, and (c) all disabled, sick and old persons. The minimum pension payable under this scheme amounted to two hundred and fifty *dirhams* annually. In time, a regular allowance, payable to their parents or guardians, was settled even on children (on the principle that they were unable to fend for themselves) from the moment of their birth to the time when they would reach maturity; and during the last year of his life, 'Umar said more than once: "If God grants me life, I shall see to it that even the lonely shepherd in the mountains of San'â' shall have his share in the wealth of the community." With his characteristic grasp of the practical issues, 'Umar even went so far as to make experiments with a group of thirty people with a view to finding out the minimum amount of food an average person needed to maintain full health and vigor; and on the conclusion of these experiments he ordained that every man and woman in the country should receive from the government storehouses (in addition to the monetary pension of which he or she might be a recipient) a monthly allowance of wheat sufficient for two square meals a day."<sup>91</sup>

Most Muslim States today hardly operate a full social security scheme in the manner contemplated under Article 9 of the ICESCR. Asad has thus posed a question to Muslim States, based on the precedent of 'Umar narrated above, that: "Is it not our duty (i.e. the Muslim States), with thirteen centuries (now fourteen) of historical experience at our disposal, to rectify that shameful negligence and to bring 'Umar's work to completion?"<sup>92</sup> This clearly indicates that the social security scheme is very much accommodated under Islamic law and in fact a strong obligation upon the Islamic State within available economic resources. The obligatory *zakât* fund is specifically meant for that purpose as specifically enjoined by the Qur'an. Thus if Muslim States can properly organise and utilise this important public institution, the social security system in the Muslim world would be greatly reformed and enhanced. Notably, the challenges of international human rights seem to spur some Muslim States into action in that respect. For instance, Libya in its initial report on the ICESCR, reiterated the importance of social security in promoting human welfare especially of labour inactive persons and further stated that an important distinguishing feature of the country's social security scheme was that:

"It is an Islamic scheme founded on the modern scientific and organizational experience of the developed countries. The underlying principles of the scheme were inspired by the magnanimous Islamic Shari'a, which ensures social solidarity and

<sup>91</sup> Asad, M., (1980), *supra*, note 85 above, p.92.

<sup>92</sup> *ibid.*

communal concern and promotes reform of the individual and the community based on justice, mercy and fellowship.”<sup>93</sup>

In a similar vein Morocco also stated in its second periodic report on the ICESCR that it intends a thorough reform of its social strategy to benefit the most deprived members of society and that the country’s “social strategy will be reinforced by a social development fund and the establishment of a transparent mechanism for mobilizing the *zakat*.”<sup>94</sup>

As stated during examination of the right to work above, the able-bodied individual has a correlative duty to work under Islamic law. The individual is urged to work to earn a living whenever he can rather than depend totally on benefits from the State. Islam discourages any form of parasitical or indolent way of life for the fit and able. The upper hand, (i.e. the giving hand) according to the Prophet, is always better than the lower hand (i.e. the receiving hand). The OIC Cairo Declaration contains no specific provision on right to social security and social insurance.

## FAMILY RIGHTS

### *Article 10*

The States Parties to the present Covenant recognize that:

1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.
2. Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.
3. Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.

The recognition of the family as an important natural unit of society and its role in the positive development of the individual can be found in most human rights instruments. For example, the African Charter identifies the family as “the custodian of morals and traditional

<sup>93</sup> See Initial Report: Libyan Arab Jamahiriya (1996), UN Doc. E/1990/5/Add.26, Par. 55(a).

<sup>94</sup> See Par. 210 of Second Periodic Report: Morocco, UN Doc. E/1990/6/Add.20 of 9 January 1999.

values recognized by the community”<sup>95</sup> and the European Social Charter identifies the family as “a fundamental unit of society”<sup>96</sup>. Also Article 17 (1) of the American Convention on Human Rights, Article 16(3) of the UDHR and Article 23(1) of the ICCPR all recognise that “(t)he family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”

It is in the same vein that Article 10(1) of the ICESCR not only recognises the family as “the natural and fundamental group unit of society”, but also recognises it as “responsible for the care and education of dependent children.”

There is however no treaty definition for the term “family” in international human rights law. This raises the problem of identifying which model or family structure would be entitled to the above protections by society and the State. Lagoutte and Arnason have argued that reference to the family in almost all human rights instruments as a “natural” unit also refers to natural law, which they further argued, “is a direct translation of the anthropological theorization of kinship”.<sup>97</sup> Apart from the traditional classification of family into the nuclear and extended types, new notions of family have today emerged in many societies other than those based on natural and traditional heterosexual biological relations. There are today new reproductive means like artificial insemination, surrogacy and, more controversially, same-sex relationships through which “families” are formed. The ESCR Committee has not adopted any specific definition of family under the ICESCR, but seems to appreciate the possibility of differences in the concept of family under its reporting guidelines for Article 10. It requires States Parties to indicate in their report “what meaning is given in your society to the term ‘family’.”<sup>98</sup> The HRC had also noted in its General Comment 19 issued in 1990 on Article 23 of the ICCPR that:

“the concept of the family may differ in some respects from State to State, and even from region to region within a State, and that it is therefore not possible to give the concept a standard definition. However, the Committee emphasizes that, when a group of persons is regarded as a family under the legislation and practice of a State, it must be given the protection referred to in article 23. Consequently, States parties should report on how the concept and scope of the family is construed or defined in their own society and legal system.”<sup>99</sup>

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<sup>95</sup> Art. 18(2) African Charter of Human and Peoples’ Rights (1981).

<sup>96</sup> Art. 16 European Social Charter (1961).

<sup>97</sup> Lagoutte, A., and Arnason, A.T., “Article 16” in Alfredsson, G., and Eide, A., (ed.) *The Universal Declaration of Human Rights: A Common Standard of Achievement* (1999) 324 at 338.

<sup>98</sup> See *Revised Guidelines, supra*, note 7 above, Par. 2.

<sup>99</sup> General Comment 19, Par. 2.

Also in the case of *Shirin Aumeeruddy-Cziffra and 19 Other Mauritian Women v. Mauritius*<sup>100</sup> the HRC had earlier observed *inter alia* that the “legal protection or measures that a society can afford to the family may vary from country to country and depend on different social, economic or cultural conditions and traditions.”<sup>101</sup> That view placed the scope of definition of family under both the ICCPR and ICESCR upon each State and legal system concerned. The HRC has however moved further from that view by observing in its General Comment 28 issued in 2000 on Article 3 of the ICCPR that:

“...in giving effect to the recognition of the family in the context of article 23 (of the ICCPR), it is important to accept the concept of the various forms of family, including unmarried couples and their children and single parents and their children and to ensure the equal treatment of women in these contexts...”<sup>102</sup>

Although this current broad interpretation of “family” by the HRC is said to be “in the context of article 23” of the ICCPR, it can be equally relative to Article 10 of the ICESCR due to the similarity in wording of both Articles on family. This broad interpretation is however contrary to the concept of family under Islamic law as will emerge below.

Generally, the importance of the family and its protection is very well established under Islamic law. It is an important institution within Islamic society that is closely guarded, and family rights and duties are specifically defined under Islamic family law and jurisprudence for its establishment and protection.<sup>103</sup> Every Muslim individual is encouraged to be family-oriented and to assist in the realisation of a socially stable society through the establishment of a stable family. The *Shari’ah* also places responsibility on both the society and State in respect of protecting the family institution. There should therefore be no problem in reconciling the general protection and assistance of the family recognised under the ICESCR with Islamic law principles. The Prophet is reported to have stated in one Tradition that: “The best of you are those who are best to their families and I am best to my family.”<sup>104</sup> The Tradition earlier cited under Article 9 above in which the Prophet described the ruler, the father and mother as shepherds in respect of the people and family respectively, also illustrates the recognition of the duty to protect and assist the family under Islamic law. There are also precedents of practical demonstration by the Prophet and the early Caliphs after him of the State’s duty to protect and support the family, especially its vulnerable

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<sup>100</sup> Communication No.35/1978 (9 April 1981), UN Doc. CCPR/C/OP/1 at 67 (1984).

<sup>101</sup> *ibid.*, Par. 9.2(b)2(ii)1.

<sup>102</sup> HRC General Comment 28, Par. 27.

<sup>103</sup> See generally e.g. Pearl, D., and Menski, W., *Muslim Family Law* (1998) and generally Abd al ‘Ati, H., *The Family Structure in Islam* (1977).

<sup>104</sup> Reported by Tirmidhī and Ibn Mājah, See Karim, F., (1994), *supra*, note 37 above, Vol.1, p.200, Hadith No. 35.

members such as children, the elderly, the handicapped, the widowed and divorced.<sup>105</sup> Article 10(1) of the ICESCR recognises the institution of marriage and provides that marriage “must be entered into with the free consent of the intending spouses”. The requirement of free consent of intending spouses is also an important condition of marriage under Islamic law. It is reported that a lady called Khansâ’a bint Khidhâm was given in marriage by her father, she disliked it and so complained to the Prophet Muhammad. The Prophet annulled the marriage.<sup>106</sup> Also in another Tradition it was reported that a girl came to the Prophet to complain that her father had given her in marriage against her will. The Prophet gave her the option of annulment.<sup>107</sup> On the basis of this Tradition, a girl forced into marriage before maturity has the option to revoke such marriage on reaching maturity under Islamic law. This is what is termed “option of puberty” (*khiyâr al-bulûg*) under Islamic family law.<sup>108</sup>

In Islamic societies the definition of family is based on principles prescribed by the religion, reinforced by law and observed by individuals as a religious obligation. For example the Egyptian Constitution provides that “The family is the basis of the society founded on religion, morality and patriotism.”<sup>109</sup> Article 5 of the OIC Cairo Declaration also provides that:

- (a) The family is the foundation of society, and marriage is the basis of its formation. Men and women have the right to marriage, and no restrictions stemming from race, colour or nationality shall prevent them from enjoying this right.
- (b) Society and the State shall remove all obstacles to marriage and shall facilitate marital procedure. They shall ensure family protection and welfare.

This clearly states the Islamic law position that “marriage is the basis of its (family) formation”. The concept of family is thus strictly limited within the confines of legitimate marriage under Islamic law. There are defined rules for legitimate marriage through which a legitimate family may be formed.<sup>110</sup> The husband/father and wife/mother constitute the primary actors, and only the consequential natural blood-ties of such relationship can create a legitimate family under Islamic law.<sup>111</sup> Same-sex relationships and sexual relationships

<sup>105</sup> See e.g. Uthmân, M.F., (1982), *supra*, note 34 above, pp.137-140.

<sup>106</sup> Reported by al-Bukhari. See e.g. Karim, F., (1994) *supra*, note 37 above, Vol. 2., p.635, Hadith No. 37.

<sup>107</sup> Reported by Abu Dawud. See Karim, F., *ibid*, Hadith No 36.

<sup>108</sup> See *ibid.*, p.635.

<sup>109</sup> See Art. 9 The Constitution of the Arab Republic Of Egypt (1971).

<sup>110</sup> See e.g. Abd al ‘Ati, H., (1977) *supra*, note 103 above, pp.50-145.

<sup>111</sup> See e.g. 3<sup>rd</sup> Periodic Report on Implementation of the ICESCR by Syrian Arab Republic. UN Doc. E/1994/104/Add.23 of 17/11/99, Par. 111.

outside marriage are prohibited and not tolerated as basis for family.<sup>112</sup> Interpreted within an appreciation of the different concepts of family from State to State, this Islamic conception of family would generally raise no problem under the provisions of Article 10 of the ICESCR.

The current broader view of the HRC in its General Comment 28 would however raise questions about recognising unmarried couples and their children as a family. Article 10(3) of the ICESCR also provides that all children and young persons should enjoy special protection and assistance “without any discrimination for reasons of parentage or other conditions”. This also raises the issue of the right of children conceived out of wedlock to enjoy such protection and assistance under Islamic law. For example, the Committee on the Rights of the Child observed in its concluding observation on Kuwait’s initial report on the Convention on the Right of the Child that:

“The Committee is concerned at the potential for stigmatization of a woman or couple who decide to keep a child born out of wedlock, and at the impact of this stigmatization on the enjoyment by such children of their rights.”<sup>113</sup>

In response the Kuwait representative indicated that:

“extramarital sex was proscribed by Islamic law, and sex with a minor under 18 years of age was considered a crime, even with the girl’s consent. In cases where it did occur and a child was born as a result, the tendency was for the parents to rid themselves of the child, since they were forbidden under Islamic law to keep a child conceived out of wedlock. In that event, the child was initially provided for by the Ministry of Public Health, and subsequently by the Ministry of Social Affairs and Labour.”<sup>114</sup>

Islamic law emphasises a child’s right to legitimacy and that a child shall be linked naturally to only one mother and one father. But while maternity is naturally conspicuous, paternity can be subjected to doubt. Apparently, Islamic law considers maternal legitimacy as an inalienable right of legitimacy because a child can naturally have only one mother, conspicuous by the fact of birth.<sup>115</sup> Islamic law also emphasises that every child shall have one natural father only, and in order to shut out any iota of doubt about paternity, the father’s legitimacy is restricted within the confines of marriage, excluding any other man. Thus any

<sup>112</sup> See e.g. Abd al ‘Ati, H., (1977) *supra*, note 103 above pp.50-145.

<sup>113</sup> See Concluding Observations of the Committee on the Rights of the Child: Kuwait (1998) UN. Doc. CRC/C/15/Add.96, Par. 23; See also Concluding Observations of the ESCR Committee: Morocco (2000) UN. Doc. E/C.12/1/Add.55, Par. 23.

<sup>114</sup> See Par. 2 of Summary Record of 489<sup>th</sup> Meeting: Kuwait. CRC/C/SR.489 of 2 October 1998.

<sup>115</sup> Thus although Islamic law prohibits conception outside wedlock, it does not legally forbid the mother from keeping a child conceived outside wedlock as stated in the Kuwait Report above. In one Tradition the Prophet Muhammad was reported to have instructed a woman who conceived and delivered a baby outside wedlock to keep and look after the child and postponed her punishment for *zinâ* till after the child had fully weaned. It is the societal stigmatisation, as observed by

conception that begins within marriage is presumed paternally legitimate until the contrary is proved. Once the father's legitimacy is established within marriage, an inalienable right of paternal legitimacy is created also in respect of father and child. Consequently, fornication/adultery is correlatively prohibited to, *inter alia*, promote and ensure an active sense of moral and familial responsibility within Islamic society. To protect the institution of marriage and the concept of legitimacy within marriage, a child conceived outside wedlock is considered under Islamic jurisprudence as a "child of fornication/adultery" and its "descent will derive from the mother only, while the adulterer, the father, will be denied paternity as a punitive measure for his misconduct".<sup>116</sup> The main consequence of this under Islamic jurisprudence is that, while the child sustains its maternal legal inheritance rights to the mother, it is deprived of legal paternity and barred from paternal inheritance rights to the adulterous father.<sup>117</sup>

While the Qur'an does specifically prohibit fornication/adultery and prescribes punishment for the direct offenders, it does not contain any direct provision on the status of a child conceived outside wedlock. However, the Prophet is reported to have stated in one Tradition that: "Any man who commits fornication/adultery with either a free woman or a slave-girl, the child (of such relationship) is a child of fornication/adultery who has no right of inheritance."<sup>118</sup> 'Abd al 'Ati has thus raised the tangible question of "why should the child be deprived of a legal father or denied a father's name? The child has committed no offence, and it is unjust to "penalize" an innocent party."<sup>119</sup>

It is apparent from the juristic views on this question that the denial of legal paternity in this case is intended only as a punitive measure against the adulterous father and not against the child, and to deter against fornication/adultery in the Muslim society. In finding answers to this question, 'Abd al 'Ati has argued *inter alia* that since children were highly valued and eagerly sought after, the need to minimise disputes and confusion about their paternity justifies the Islamic rule that children "were to be conceived in wedlock, placed with, and entrusted to, devoted parents of unsuspected characters." Bearing in mind that fornication/adultery is a crime under Islamic law and naturally abhorrent in most societies, he

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the Committee, that often prevents a mother from wanting to keep a child conceived out of wedlock. See arguments by Abd al 'Ati against such stigmatisation against the child further below.

<sup>116</sup> See Abd al 'Ati, H., (1977) *supra*, note 103 above, p.191.

<sup>117</sup> According to *Shi'ah* (Twelvers) jurisprudence, the child loses both maternal and paternal rights of inheritance. See e.g. Al-Zuhayli, W., (1997) *supra*, note 34 above, Vol.10, p.7905-6. See also for e.g. Article 43 of the Egyptian Inheritance Act, which provides that: "A child born out of wedlock inherits from his or her mother and maternal kin, who likewise inherit from the child", See Replies to List of Issues: Egypt, UN Doc. HR/CESCR/NONE/2000/6 of 28/03/2000. Article 18(2) of the Constitution of Kuwait also provides that: "Inheritance is a right governed by the Islamic Shari'ah".

<sup>118</sup> Reported by al-Tirmidhi, See e.g. Karim, F., (1994) *supra*, note 37 above, Vol.2, p.333, Hadith No. 50.

<sup>119</sup> Abd al 'Ati, H., (1982) *supra*, note 103 above, p.192.



contended that those were conditions which “adulterers could hardly qualify for”.<sup>120</sup> While he thus concluded on one hand that it may be in the child’s interest to deny it to a father of such questionable integrity and character, he argued on the other hand that:

“This denial, however, does not affect the child’s basic rights to security and full community membership. In fact, such a position may be a testimony to the child’s own credit, to the society’s openness, to the social response of the community, and to the degree of social integration. It would seem to reaffirm the basic principle that every Muslim individual has equal access to whatever is of value for Muslim society, hindered neither by a family name nor by the lack thereof. The chief criterion of excellence in the value system of Islam is personal piety and religio-moral achievement. No one may claim the credit of another nor is any one responsible for or penalized by the actions of anyone else. Whenever an offence is committed against God, e.g., adultery or fornication, it is only God Who exempts or forgives the offender. Thus, if there is any stigma of illegitimacy, it would cling not so much to the innocent child as to the guilty parents, and its effects shall not be allowed to hurt the innocent. ...The stigma need not arise in the first place for an innocent party; but if it does, reparations obtain by way of giving the child complete access to equal life chances and the right to grow up free from prejudice or stigmas of any kind.”<sup>121</sup>

While the prohibition of fornication/adultery falls within the State’s duty of protecting the family institution and public morality under Islamic law, the recognition and protection of the best interest of the child is also very well recognised. Coupled with the Quranic principle that “No bearer of burdens shall bear the burden of another” ,<sup>122</sup> the argument that the innocent child should not be vicariously imperilled as a consequence of the illegitimate act of its *de facto* parents is therefore a valid and strong argument that compels States to guarantee the special protection and assistance of every child without any discrimination for reasons of parentage or other conditions. Answering questions on the status of children conceived out of wedlock in Saudi Arabia, the country’s representative, Dr. Bayari, informed the Committee on the Rights of the Child that:

“Pregnancies outside wedlock were carried to term and a decision was taken on whether the family would keep the child or place it in an institution. Most families accepted to keep the child, who had the same right to name and nationality as children born in wedlock”.<sup>123</sup>

Marriage is thus an important institution on the basis of which family rights are determined under Islamic law. While unmarried persons or children conceived out of wedlock may, as individuals, be entitled to other guaranteed individual rights they will not

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<sup>120</sup> *ibid.*, p.195.

<sup>121</sup> *ibid.*, p. 193.

<sup>122</sup> See Q6:164; Q17:15; Q35:18; Q39:7; Q53:38.

<sup>123</sup> See Summary Record of the 688<sup>th</sup> Meeting of CRC: Saudi Arabia, UN Doc. CRC/C/SR.688., Par.52.

qualify for family rights under Islamic law because family rights can only be claimed through the link of an Islamically legitimate marriage. This is a religio-moral principle that is evidently incompatible with the broad interpretation adopted by the HRC on the concept of family in its General Comment 28, and is reflective of the need for the adoption of the margin of appreciation doctrine by the UN human rights treaty bodies in resolving such differences with relevant States Parties to international human rights treaties.

## THE RIGHT TO ADEQUATE STANDARD OF LIVING

### *Article 11*

1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.
2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:
  - (a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;
  - (b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

The importance of Article 11 cannot be overemphasised because it restates in general terms the overall purpose of economic, social and cultural rights, which is the realisation of an adequate standard of living for every human being. A specific definition is not given of what constitutes “adequate standard of living” but it is stated to include “adequate food, clothing and housing and ... continuous improvement of living conditions.”<sup>124</sup> This will essentially be interpreted to mean a standard of living that ensures the dignity of the human person. That is, the ability, *inter alia*, for every person to enjoy the basic necessities of life without resort to any degrading or dehumanising means in that regard.<sup>125</sup>

Food, clothing and housing are, without doubt, important basic necessities of life. The physical well being of an individual essentially depends, *inter alia*, on whether he has (i) adequate food to not only free him from hunger but also nourish and provide him with energy required for a healthy life; (ii) adequate clothing to cover and protect his body and

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<sup>124</sup> See also Art 25 of the UDHR which provides that adequate standard of living includes “food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or lack of livelihood in circumstances beyond his control”.

<sup>125</sup> See e.g. Eide, A., “The Right to an Adequate Standard of Living Including the Right to Food” in Eide, A., *et al.*, (1995) *supra*, note 31 above, p.89 at 90.

(iii) adequate shelter that provides him with security, peace of mind and dignity. Without the guarantee of these three rights the inherent dignity of the human person will be greatly imperilled and hardly can any other human right make sense to anyone denied of those three. They are basic subsistence rights that are absolutely necessary for human survival.<sup>126</sup>

In furtherance of the right to food, the States Parties recognise also in Article 11(2) the “*fundamental* right of everyone to be free from hunger” and they undertake to individually and through international cooperation, pursue measures and specific programmes to “improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources”. States shall also take into account “the problems of both food-importing and food-producing countries, to ensure an equitable distribution of world food supplies in relation to need.” It is noteworthy that the right of everyone to be free from hunger is recognised here as a *fundamental* right, which places an obligation on the State to recognise this right under all circumstances.<sup>127</sup> In its General Comment 12 the ESCR Committee affirmed that

“... the right to adequate food is indivisibly linked to the inherent dignity of the human person and is indispensable for the fulfilment of other human rights enshrined in the International Bill of Human Rights. It is also inseparable from social justice, requiring the adoption of appropriate economic, environmental and social policies, at both the national and international levels, oriented to the eradication of poverty and the fulfilment of all human rights for all”.<sup>128</sup>

The States Parties undertake “to take appropriate steps to ensure the realization” of the rights under Article 11. Eide has notably observed that “(t)he individual is also expected to use his/her own property or working capacity, to the best of his/her judgement,” to realise his/her right to an adequate standard of living.<sup>129</sup> Thus adopting Shue’s typology of duties correlating to subsistence rights, the duties of the State in this regard are namely: (i) the duty to avoid deprivation, which places a duty on the State not to eliminate any individual’s legitimate means of subsistence (ii) the duty to protect from deprivation, which places a duty on the State to protect individuals against deprivation of their available legitimate means of subsistence, and (iii) the duty to aid the deprived, which places a duty on the State to provide

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<sup>126</sup> See generally Shue, H., (1979) *supra*, note 5 above.

<sup>127</sup> See Craven, M., (1995) *supra*, note 6 above, p.307ff.

<sup>128</sup> General Comment 12, Par. 4.

<sup>129</sup> Eide, A., (1995) *supra* note 125 above, p. 100.

for the subsistence of those unable to provide for themselves.<sup>130</sup> Starting with General Comment 12 on right to food the ESCR Committee has adopted this tripartite view of States Parties obligations under the Covenant consisting of the obligations to *respect*, *protect* and *fulfil*, thus observing that:

“The right to adequate food, like any other human right, imposes three types or levels of obligations on States parties: the obligations to *respect*, to *protect* and to *fulfil*. In turn, the obligation to *fulfil* incorporates both an obligation to *facilitate* and an obligation to *provide*. The obligation to *respect* existing access to adequate food requires States parties not to take any measures that result in preventing such access. The obligation to *protect* requires measures by the State to ensure that enterprises or individuals do not deprive individuals of their access to adequate food. The obligation to *fulfil (facilitate)* means the State must pro-actively engage in activities intended to strengthen people's access to and utilization of resources and means to ensure their livelihood, including food security. Finally, whenever an individual or group is unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their disposal, States have the obligation to *fulfil (provide)* that right directly. This obligation also applies for persons who are victims of natural or other disasters”.<sup>131</sup>

Regarding international co-operation in respect of right to food, the ESCR Committee has also emphasised the duty of States not only to individually and collectively take positive steps to ensure the realisation of adequate right to food for every individual but also to “refrain at all times from food embargoes or similar measures which endanger conditions for food production and access to food in other countries. Food should never be used as an instrument of political and economic pressure”.<sup>132</sup>

The duty in respect of right to housing seems much more bearing upon the State than the right to food and clothing. This is due to the resource-demanding nature of that right and the obvious fact that, unlike food and clothing, most individuals in developing States would not be able to afford to build or buy houses on their own. The ESCR has issued two General Comments (GC4 and GC7) on the right to adequate housing.<sup>133</sup> In its General Comment 4 the Committee noted that “(t)he human right to adequate housing, which is...derived from the right to an adequate standard of living, is of central importance for the enjoyment of all economic, social and cultural rights.”<sup>134</sup> The Committee then indicated that “the right to housing should not be interpreted in a narrow or restrictive sense which equates it with, for

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<sup>130</sup> Shue, H., (1979) *supra*, note 5 above, pp.52-53. See also UN Centre for Human Rights, *Right to Adequate Food as a Human Right* (1989) pp.21-50.

<sup>131</sup> General Comment 12, Par. 15.

<sup>132</sup> *ibid*, Par. 36-41.

<sup>133</sup> General Comment 4 issued in 1991 covers the right to adequate housing generally, and General Comment 7, issue in 1997 addresses the problem of forced evictions.

<sup>134</sup> General Comment 4, Par.1.

example, the shelter provided by merely having a roof over one's head or views shelter exclusively as a commodity" but "should be seen as the right to live somewhere in security, peace and dignity."<sup>135</sup> The UN "Global Shelter Strategy to the Year 2000" adopted by the UN General Assembly in 1988 defines adequate shelter to mean "adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities – all at a reasonable cost."<sup>136</sup> In guaranteeing the right to adequate housing, the ESCR Committee has therefore identified that the following seven aspects must be taken into consideration by States, namely: (i) legal security of tenure, (ii) availability of tenure, (iii) affordability; (iv) habitability, (v) accessibility, (vi) location, and (vii) cultural adequacy.<sup>137</sup> Another important observation of the Committee is that "the right to housing should be ensured to all persons irrespective of income or access to economic resources." This obviously places a duty on the State to formulate national housing policies and strategies to alleviate homelessness. Where any steps being taken by a State to realise this right is considered to be beyond the maximum resources available to the State, the Committee has reiterated that "it is appropriate that a request be made as soon as possible for international cooperation in accordance with articles 11(1), 22 and 23 of the Covenant, and that the Committee be informed thereof."<sup>138</sup>

In its General Comment 7 the Committee addressed extensively the problem of forced evictions, emphasising its incompatibility with the provisions of the Covenant. It identified this to include forced eviction of communities that occur during developmental projects such as construction of dams or other large-scale energy projects.<sup>139</sup> The Committee then pointed out the duty of the State to ensure, where eviction is considered justified, that such evictions "are carried out in a manner warranted by a law which is compatible with the Covenant and that all the legal recourses and remedies are available to those affected."<sup>140</sup> The Committee has also listed a set of procedural protections that must be guaranteed to the individual in case of any forced eviction.<sup>141</sup>

Apart from the specific mention of right to food, clothing and housing, Article 11(1) also recognises the right of everyone to "the continuous improvement of living conditions".

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<sup>135</sup> *ibid.*, Par. 7.

<sup>136</sup> Global Strategy for Shelter to the Year 2000, UN Doc A/43/8/Add.1. *See also* G.A. Res. 42/191 of 9 March 1988 and UN Doc. A/RES/43/181 of 20/12/1988.

<sup>137</sup> *See* General Comment 4, Par.8, for the explanation of these elements by the Committee. *See also* Craven, M., (1995) *supra*, note 6 above, p335ff.

<sup>138</sup> General Comment 4, Par.10.

<sup>139</sup> General Comment 7, Par. 8.

<sup>140</sup> *ibid.*, Par. 12.

<sup>141</sup> *ibid.*, Par. 16.

This notably indicates that the right to adequate standard of living under the Covenant is generally not static but places a continuous dynamic obligation upon the State in line with economic and social developments.

From the perspective of Islamic law, both the substantive provisions of Article 11 and the Committee's interpretations of the right to an adequate standard of living are commensurate with *Sharī'ah* provisions and with the principles of Islamic law. The Qur'an confirms that the good things of life are created for the benefit and good living of human beings,<sup>142</sup> and it expresses disapproval at any attempt to deprive humanity of the good things of life that ensure an adequate standard of living for them.<sup>143</sup> Under Islamic law, the State must endeavour to prevent hardship and has a specific duty to ensure that everyone, especially the poor, enjoys an adequate standard of living. This is evident from the Quranic verse which states that: "And in their wealth there is a right for the indigent who ask and for him who does not ask."<sup>144</sup> The Prophet is also reported to have prayed as follows: "Oh God, give hardship to anyone who rules over my people and gives them hardship, and show mercy to anyone who rules over my people and shows them mercy."<sup>145</sup> The enjoyment of an adequate standard of living was ensured in the early Islamic State through a proper implementation and application of the *zakat* (Compulsory Tax) and *bayt al-mâl* (State Treasury) institutions.

There is ample provisions in both the Qur'an and *Sunnah* to support that everyone has a right to adequate food, clothing and housing within an Islamic State. For instance the Qur'anic verse which provides that: "And they feed, for the love of God, the indigent, the orphan and the captive. (Saying) We feed you for the sake of God alone; no reward do we desire from you nor thanks"<sup>146</sup> indicates clearly that no one is expected to go hungry in the Islamic State. The principle of freedom from hunger, from fear and from want stands established under Islamic law through the Qur'anic verse which stipulates that God has provided mankind "with food against hunger and with security against fear".<sup>147</sup> Thus under Islamic law, feeding the poor and indigent is not considered as a favour to them, rather the Qur'an stipulates it as a right which the poor and indigent have in the wealth of the affluent

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<sup>142</sup> See e.g. Q2:29 which says "It is He Who created for you all things that are on earth" and Q28:77 which says: "...And forget not your portion of lawful enjoyment in this world".

<sup>143</sup> Q7:32 which says: "Who has forbidden the beautiful gifts of God which He has produced for His servants and the things clean and pure which He has produced for sustenance?"

<sup>144</sup> Q51:19.

<sup>145</sup> Reported by Muslim, See e.g. Karim, F., (1994), *supra*, note 37 above, Vol.2. p.569, Hadith No. 5.

<sup>146</sup> Q76:8-9.

<sup>147</sup> Q106:4.

and in the resources of the State.<sup>148</sup> The Prophet corroborated this with his saying that no true Muslim goes to bed with a full stomach while his neighbour goes hungry. From an Islamic perspective, it is obnoxious that millions of people do starve and die of starvation in a world where there is naturally no food shortage. There is already an in-built institution under Islamic law for ensuring freedom from hunger for everyone, if well implemented. It is the obligatory agricultural tax whereby a fixed percentage of all agricultural produce and that of cattle is deductible every year for the maintenance of the poor and indigent as of right. This could be emulated both as a national and international humanitarian policy for promoting freedom from hunger and ensuring the right to food for even the most indigent persons of the world. Not only is the right to food substantiated within Islamic law, one finds that the Qur'an also often emphasises on wholesomeness whenever it makes reference to food or drink. For instance the Qur'an 2:168 says: "Oh Mankind, eat of what is on earth, lawful and good..." and Qur'an 5:88 says: "Eat of the things which God has provided for you, lawful and good...". Lawful and good food, in the context of right to food, would include adequate, nutritious and wholesome food that ensures a healthy and dignified life for everyone.

The second Caliph Umar is recorded to have demonstrated during his rule in the early Islamic State that the State has a duty to ensure the right of everyone to food. He went to great lengths to ensure that the populace was free from hunger. He would go round disguised on night patrol listening to comments and to find out about the welfare of the populace. On one of such patrols the Caliph was reported to have come to a house from wherein he heard the crying of children. He knocked the door to find out what was the cause and found a woman cooking something on fire with her children milling hungrily around her and crying in anticipation of the "meal" being cooked. Upon enquiry, the woman informed Umar that, having nothing to feed her children that night, she had only placed some stones in the pot on the fire to hoodwink the children that something was being cooked for them, hoping that they would eventually fall asleep while waiting for the "meal" to cook. The Caliph felt highly aggrieved and rushed to his palace and brought back a sack of wheat and some local butter from the State storage for the woman and her children. The Caliph was reported to have insisted on carrying the food personally to the indigent family, lamenting that he feared being questioned in the hereafter concerning anyone who was left to wallow in hunger during his rule as Caliph.<sup>149</sup> The Caliph was alluding to the Tradition of the Prophet earlier quoted

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<sup>148</sup> See Q51:19.

<sup>149</sup> This is a very well known incident during the Caliphate of Umar, which has been narrated in slightly different versions by most Islamic historians and traditionists.

which stated, *inter alia*, that the ruler (i.e. the State) is like a shepherd that would be held responsible for the welfare of his flock. He did not consider his action as a favour to that family but rather as a duty that correlatively ensured the right of the old woman and her children to food in the Islamic State as provided by the *Sharî'ah*.

The Prophet Muhammad also demonstrated refrain from using food embargoes as a weapon of political or economic pressure even against enemies. The Chief of Yamamah, Thumamah ibn Uthal had embraced Islam during the early period when Mecca was still very hostile to the Muslims. Yamamah was then the main source of grain supplies to Mecca. The Chief, after his embrace of Islam, decreed an embargo on grains from Yamamah to Mecca. The Prophet Muhammad however intervened and ordered the lifting of the embargo.<sup>150</sup>

In respect of right to clothing, evidence is found for example in the Qur'anic verse which says: "Oh Children of Adam, We have bestowed garments upon you to cover yourselves (screen your private parts) and also to serve as adornment..."<sup>151</sup> and also in another verse which says: "...He (God) has provided you with garments to protect you from heat (and cold)..."<sup>152</sup>. The stated purposes of clothing here, *i.e.* cover, adornment and protection, does certainly also depict the enhancement of human dignity. The Prophet also greatly encouraged the provision of clothing to those in need as a most rewarding religious obligation. Evidence for right to housing is equally found, for example, in the verse of the Qur'an which states that: "And God has made for you your homes as habitations of rest and quiet; and made for you out of the hides of cattle (tents) for dwelling, which you find so light (and handy) when you travel and when you stop in (your travels)..."<sup>153</sup> It is clear from the last verse that the right to habitation is not limited to the domiciled but extended even to those constantly on the move, like Nomads and Gypsies.

In line with the above provisions, Article 17(c) of the OIC Cairo Declaration thus also recognises the right of everyone to an adequate standard of living by providing that:

"The State shall ensure the right of the individual to a decent living which will enable him to meet all his requirements and those of his dependants, including food, clothing, housing, education, medical care and all other basic needs."

The Cairo Declaration also provides in Article 18(c) that neither shall a private residence be demolished, confiscated nor its dwellers evicted.

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<sup>150</sup> See Hamidullah, M, *The Muslim Conduct of State* (Rev. 7<sup>th</sup> Ed. 1977) p.196, Par.392.

<sup>151</sup> Q 7:26.

<sup>152</sup> Q16:81.

<sup>153</sup> Q16:80.



## RIGHT TO HIGHEST ATTAINABLE STANDARD OF PHYSICAL AND MENTAL HEALTH

### *Article 12*

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:
  - (a) the provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
  - (b) the improvement of all aspects of environmental and industrial hygiene;
  - (c) the prevention, treatment and control of epidemic, endemic, occupational and other diseases;
  - (d) the creation of conditions which would assure to all medical service and medical attention in the event of sickness.

The adage that “health is wealth” explains the importance of health to the well being of the human person. Apart from the right to food, clothing and housing, the right to health and medical care are also specifically mentioned in the UDHR as elements of an adequate standard of living for the individual and his family.<sup>154</sup> The ESCR Committee has also observed that health is a “fundamental human right indispensable for the exercise of other human rights” and that every human being “is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity”.<sup>155</sup> Article 12(1) thus recognises “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health” and the States Parties undertake to take necessary steps for the full realization of this right.

Article 12 creates two broad sets of norms in respect of health rights. The first is the guarantee of the rights of the individual to the enjoyment of the highest attainable standard of health, while the second is the protection of public health as a necessary step for the realisation of the first. Sometimes, the protection of public health may however tend to restrict the liberty and freedom of movement of individuals.<sup>156</sup> This could occur during the control of epidemic or endemic diseases by the State under Article 12(2)(c). Such restrictions would then have to be strictly for the protection of public health and in accordance with law.

The maintenance of both individual and public health depends on a lot of other factors, such as waste disposal, environmental sanitation, nutrition and even housing provisions, which thus makes the right to the enjoyment of the highest attainable standard of physical and mental health quite complex. Apart from its demand for a great level of economic and

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<sup>154</sup> See Art.25 (1)UDHR (1948).

<sup>155</sup> General Comment 14, Par. 1 and Par. 3.

human resources, it also depends a lot on the developmental level of each State. In defining the normative content of this right the ESCR Committee has observed that the right to health in all its forms and at all levels will include elements of Availability, Accessibility, Acceptability and Quality,<sup>157</sup> and using its tripartite interpretation of States Parties obligations, the Committee has observed that:

“The right to health, like all human rights, imposes three types or levels of obligations on States parties: the obligations to *respect*, *protect* and *fulfil*. In turn, the obligation to fulfil contains obligations to facilitate, provide and promote. The obligation to *respect* requires States to refrain from interfering directly or indirectly with the enjoyment of the right to health. The obligation to *protect* requires States to take measures that prevent third parties from interfering with article 12 guarantees. Finally, the obligation to *fulfil* requires States to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realization of the right to health.”<sup>158</sup>

It is manifest that the realisation of right to health in the above terms remains one of the greatest problems confronting developing nations. Although international co-operation is not specifically mentioned under Article 12, as it was mentioned under Article 11, such co-operation is very pertinent to the realisation of a reasonable standard of health care in developing nations. The international obligations in the realisation of the right to health is also emphasised by the ESCR Committee as follows:

“To comply with their international obligations in relation to article 12, States parties have to respect the enjoyment of the right to health in other countries, and to prevent third parties from violating the right in other countries, if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law. Depending on the availability of resources, States should facilitate access to essential health facilities, goods and services in other countries, wherever possible and provide the necessary aid when required. States parties should ensure that the right to health is given due attention in international agreements and, to that end, should consider the development of further legal instruments. In relation to the conclusion of other international agreements, States parties should take steps to ensure that these instruments do not adversely impact upon the right to health. Similarly, States parties have an obligation to ensure that their actions as members of international organizations take due account of the right to health. Accordingly, States parties which are members of international financial institutions, notably the International Monetary Fund, the World Bank, and regional development banks, should pay greater attention to the protection of the right to health in influencing the lending policies, credit agreements and international measures of these institutions”.<sup>159</sup>

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<sup>156</sup> See e.g. Art.12(3) of the ICCPR (1966).

<sup>157</sup> General Comment 14, Par. 12.

<sup>158</sup> General Comment 14, Par. 33.

<sup>159</sup> *ibid.*, Par. 39.

The Committee's comprehensive General Comment 12 broadens the perspective of the right to health in a manner that greatly envisages the enhancement of the quality of human life in relation to the enjoyment of good health.

Islam also emphasises the importance of both mental and physical health. Great importance is attached to medical and health sciences as it is to religious sciences because without good health neither religious nor secular activities can be performed by anyone. The training of medical personal and establishment of hospitals was considered as an important duty of the State and was greatly encouraged very early in Islamic history. Isaacs has pointed out that:

“Islam not only put medicine on a high level but also conferred the title of *hakim* (wise) on medical practitioners, a term used by Muslims up to the present day in many areas. The association of medicine with religious learning is noteworthy, and is a pleasing feature of Muslim life: for according to a Tradition of the Prophet: “science is twofold, theological science for religion and medical science for the body”.<sup>160</sup>

Saud has also recorded that:

“From the time of the Banû Umayyah rule the Muslims developed the institution of hospitals. During the reign of the ‘Abbâsî Caliph Hârûn al-Rashîd, a hospital was built in Baghdad, which was the first in the history of this city. Many new hospitals were established shortly afterwards. Some of them had their own gardens in which the medicinal plants were cultivated. The large hospitals had medical schools attached to them. Beside such hospitals there were a large number of travelling hospitals in the Muslim world.”<sup>161</sup>

These were all in recognition of the importance of health and medical assistance within human society. The duty of ensuring the highest attainable standard of health in society through the adequate training of medical personnel and provision of necessary medical and health facilities remains binding upon modern Muslim States of today under Islamic law.

Islamic law advocates both the preventive and curative approaches to health and encourages cleanliness as the best preventive approach to both mental and physical health. Both individuals and the State are thus encouraged to maintain personal and societal cleanliness as the natural and first step towards ensuring the highest attainable standard of both physical and mental health in society. The Prophet emphasised this by declaring that: “Cleanliness is half of faith”.<sup>162</sup> This will include all aspects of personal, environmental and

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<sup>160</sup> See Young M.J.L., et al (ed.) *Religion, Learning and Science in the 'Abbasid Period* (1990) p.342.

<sup>161</sup> Saud, M., *Islam and Evolution of Science* (1994) p.95.

<sup>162</sup> Reported by Muslim, See e.g. Karim, F., (1994), *supra*, note 37 above, Vol.1, p.663, Hadith No.1.

industrial hygiene. There are Islamic instructions on the removal of dirt and prohibition of urination and defecation in open places or in stagnant waters. The prevention and control of epidemic and endemic diseases under Islamic law is also evidenced by a Tradition in which the Prophet is reported to have instructed that: "...When there is plague in any city don't enter it and when it breaks out in any city while you are there don't go out fleeing from it".<sup>163</sup> The State thus has a duty to control and protect public health to ensure the ultimate enjoyment of the right to health by individuals.

The curative aspect of health is also stressed under Islamic law through the belief that there is a cure prescribed by God for every disease. The nursing, caring and treatment of both the physically and mentally ill is also considered as a very rewarding duty under Islamic law. It is thus an important duty of the State to ensure the availability of medical services and medical attention in the event of illness. In recognition of the above ideals Article 17 of the OIC Cairo Declaration provides that:

- (a) Everyone shall have the right to live in a clean environment, away from vice and moral corruption, an environment that would foster his self-development, and it is incumbent upon the State and society in general to afford that right.
- (b) Everyone shall have the right to medical and social care, and to all public amenities provided by society and the State within the limits of their available resources.

## **THE RIGHT TO EDUCATION**

### *Articles 13 and 14*

- 13** (1) The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.
- (2) The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:
- (a) Primary education shall be compulsory and available free to all;
  - (b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;
  - (c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;

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<sup>163</sup> Reported al-Bukhari and Muslim, *See e.g.* Karim, F., *ibid*, Vol.1, p.284 Hadith No.44.

- (d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;
  - (e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.
- (3) The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.
- (4) No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph I of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.
- 14 Each State Party to the present Covenant which, at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge, undertakes, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all.

Education is the key to mental liberation which helps the individual not only to develop his own personality but also to be useful to his society. The right to education is thus comprehensively covered under Articles 13 and 14 of the ICESCR. Apart from recognising the right of everyone to education, the States Parties also *agree* under Article 13(1) that “education shall be directed to the full development of the human personality and the sense of dignity, and shall strengthen the respect for human rights and fundamental freedoms” and “that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups and further the activities of the United Nations for the maintenance of peace.”<sup>164</sup> There is therefore a form of consensus among States Parties to the ICESCR on the fact that education is an important tool of individual and societal development.

Apart from being a right in itself, education is also an essential tool for the exercise and full enjoyment of human rights. It has been described as an empowerment right.<sup>165</sup> Without some minimum level of education and literacy, an individual’s awareness about his human rights would be greatly impaired. Article 13(1) states that education “shall strengthen the respect for human rights and fundamental freedoms”. This is achieved through both general

<sup>164</sup> See also Art. 26(2) of the UDHR (1948).

<sup>165</sup> See General Comment 13, Par. 1.

education and provision of specific human rights education in the educational curriculum. The Vienna Declaration and Programme of Action after the 1993 World Conference on Human Rights called on all States and institutions “to include human rights, humanitarian law, democracy and rule of law as subjects in the curricula of all learning institutions in formal and non-formal settings.”<sup>166</sup>

The ESCR Committee has observed that the right to education in all its forms and at all levels shall exhibit the essential features of Availability, Accessibility, Acceptability and Adaptability.<sup>167</sup> Based on its tripartite interpretation of States Parties obligations, the Committee also observed that:

“The right to education, like all human rights, imposes three types or levels of obligations on States parties: the obligations to *respect*, *protect* and *fulfil*. In turn, the obligation to fulfil incorporates both an obligation to facilitate and an obligation to provide. The obligation to respect requires States parties to avoid measures that hinder or prevent the enjoyment of the right to education. The obligation to protect requires States parties to take measures that prevent third parties from interfering with the enjoyment of the right to education. The obligation to fulfil (facilitate) requires States to take positive measures that enable and assist individuals and communities to enjoy the right to education. Finally, States parties have an obligation to fulfil (provide) the right to education. As a general rule, States parties are obliged to fulfil (provide) a specific right in the Covenant when an individual or group is unable, for reasons beyond their control, to realize the right themselves by the means at their disposal. However, the extent of this obligation is always subject to the text of the Covenant”.<sup>168</sup>

Under Article 13 every State shall provide at least free compulsory primary education for all, and under Article 14 each State Party that has not yet attained the provision of free compulsory primary education for all, undertakes to work out and adopt a detailed plan of action for the progressive implementation of the principle of compulsory free primary education for all within a reasonable number of years.<sup>169</sup> Secondary and higher education shall also be made available and accessible to all with progressive introduction of free education at those levels as well. Article 13 covers both formal and informal education as well as fundamental education for those who for one reason or another misses out of primary education. It also recognises the need to improve the conditions of teaching staff to ensure the full achievement of the right to education.

Although the State has an obligation to provide free and compulsory primary education, they undertake to respect the liberty of parents and legal guardians to enrol their children, in

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<sup>166</sup> UN Doc A/CONF.157/23. Part II Par. 79.

<sup>167</sup> General Comment 13, Par. 6.

<sup>168</sup> *ibid*, Par. 46-47.

conformity with their religious or moral convictions, in private institutions other than those established by the State, provided those private institutions conform with minimum educational standards approved by the State. The parents and guardians would be under obligation here to act in the best interest of the child.<sup>170</sup> The State shall also not interfere with the establishment of private institutions subject to their observance of required minimum standards and their pursuance of the principles of individual and societal development set out in Article 13(1).<sup>171</sup>

The Covenant does not contain a provision on academic freedom but the Committee has observed that academic freedom and institutional autonomy constitutes an important aspect of right to education and stated in that regard that:

“Members of the academic community, individually or collectively, are free to pursue, develop and transmit knowledge and ideas, through research, teaching, study, discussion, documentation, production, creation or writing. Academic freedom includes the liberty of individuals to express freely opinions about the institution or system in which they work, to fulfil their functions without discrimination or fear of repression by the State or any other actor, to participate in professional or representative academic bodies, and to enjoy all the internationally recognized human rights applicable to other individuals in the same jurisdiction. The enjoyment of academic freedom carries with it obligations, such as the duty to respect the academic freedom of others, to ensure the fair discussion of contrary views, and to treat all without discrimination on any of the prohibited grounds”.<sup>172</sup>

These ideals and aspirations concerning the right to education under the ICESCR are very much in consonance with the Islamic ideals on education as well. There is consensus among all Islamic schools of thought that education is absolutely important and compulsory under Islamic law. Right from its inception Islam had laid great emphasis on the importance of education and its role in the development of the human person. The very first five revealed verses of the Qur’an were related to education and learning. The verses were as follows:

“Read! In the name of your Lord Who created (everything). He created Man from a clot of congealed blood. Read! And your Lord is Most Generous. He has taught (writing) by the Pen. He has taught Man that which he knew not.”<sup>173</sup>

These five verses continue to be the basic reference point for advocating the right to education under Islamic law. There are also many other references in both the Qur’an and *Sunnah* on the importance of education, the obligation of seeking knowledge, and the

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<sup>169</sup> See also General Comment 11.

<sup>170</sup> See Art. 3(1) of the Convention on the Rights of the Child (1989) which provides that: “In all actions concerning children ... the best interest of the child shall be a primary consideration.”

<sup>171</sup> See Art. 13(3-4).

<sup>172</sup> General Comment 13, Par. 39.

<sup>173</sup> Q96:1-5.

superiority of scholarship. The Qur'an summarises the importance of education and scholarship with an affirmatory interrogative statement that: "...Can those who are learned be compared with those who are unlearned? It is those who are endowed with understanding that receive admonition".<sup>174</sup> The Prophet had also stressed the paramount value of education in many Traditions, a few of which are quoted below:

"Whoever goes out seeking knowledge is on the path of God till he returns."<sup>175</sup>

"Whoever follows a path seeking knowledge, God will thereby make it an easy way for him to Paradise".<sup>176</sup>

"The superiority of the scholar over the (mere) worshipper is like the superiority of the full moon over the stars."<sup>177</sup>

The Prophet had emphatically stated in one Tradition that seeking of knowledge (i.e. education) is compulsory for both the Muslim male and female.<sup>178</sup> Asad thus concluded that from an Islamic perspective "it is the citizens' right and the government's duty to have a system of education which would make knowledge freely accessible (and compulsory) to every man and woman in the state".<sup>179</sup> This recognition and emphasis on the importance of education under Islamic law thus fully accommodates the duty of the State under the Covenant to provide at least free and compulsory primary school education to everyone. In appreciation of the importance of right to education, Article 9 of the OIC Cairo Declaration provides that:

- (a) The quest for knowledge is an obligation and the provision of education is a duty for society and the State. The State shall ensure the availability of ways and means to acquire education and shall guarantee educational diversity in the interest of society so as to enable man to be acquainted with the religion of Islam and the facts of the Universe for the benefit of mankind.
- (b) Every human being has the right to receive both religious and worldly education from the various institutions of education and guidance, including the family, the school, the university, the media, etc., and in such an integrated and balanced manner as to develop his personality, strengthen his faith in God and promote his respect for the defence of both rights and obligations.

The need for human rights education under Islamic law, is also buttressed by the common saying that: "A person will often oppose concepts that he knows nothing about".

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<sup>174</sup> Q39:9.

<sup>175</sup> Reported by Tirmidhî, See e.g. Karim, F., (1994), *supra*, note 37 above, Vol.1, p.351, Hadith No. 38.

<sup>176</sup> Reported by Tirmidhî, Abû Dâwud, See Karim, F, *ibid*, p.348-349, Hadith No. 32.

<sup>177</sup> *ibid*.

<sup>178</sup> Reported by Ibn Mâjah, See Karim, F, *ibid*., Vol.1, p.351, Hadith No., 37.

<sup>179</sup> Asad, (1980) *supra*, note 85 above p.86.



Lack of human rights education can (and do) create misconceptions about the international human rights objective and actually deny individuals the right to know their rights as human beings under both domestic and international law. Human rights education would certainly increase the awareness and the understanding necessary for the realisation of the rights that everyone is entitled to as human beings. This thus makes human rights education as important as the enjoyment of human rights itself.

## THE RIGHT TO CULTURAL LIFE AND BENEFITS OF SCIENTIFIC PROGRESS

### *Article 15*

1. The States Parties to the present Covenant recognize the right of everyone:
  - (a) To take part in cultural life;
  - (b) To enjoy the benefits of scientific progress and its applications;
  - (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.
3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.
4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.

Cultural life has been described as “everything which makes life worth living” and “that which separates human society from its animal counterpart” and thus “closely related to human dignity”.<sup>180</sup> Its enabling factors would thus include a host of other rights such as freedom of association, freedom of thought, conscience and religion, freedom of expression, right of self-determination, right to be different, and right to education. Culture is however one of the distinguishing factors of human society, the scope of which is sometimes very difficult to determine. It may be perceived from different dimensions. It is often used to describe the way of life of a particular community referring to their customs, civilisation, spiritual and material heritage. For instance Article 27 of the ICCPR provides for the right of members of minorities “to enjoy their own culture” “in community with the other members of their group”. Also Article 27 of the UDHR provides for “the right to freely participate in cultural life of the community”. If this is understood to mean the cultural life of the community to which the individual belongs, then the group or community is the cultural

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<sup>180</sup> See Adalsteinsson, R., and Thorhallson, P., “Article 27”, in Alfredsson, G., and Eide, A., (ed) (1999) *supra*, note 97 above, p.575.

creator, and the right to cultural life would mean the right of individuals to lead their own way of life as members of that community in distinction from others. It in that sense signifies the right to be different. That is often the basis for cultural identity and cultural relativism, and is sometimes criticised as capable of jeopardising the universal concept of human rights.<sup>181</sup> As a matter of reality, it is impossible to deny the natural diversity of cultures among the human population of the world. Stavenhagen has pointed out that: "In some instances, all or most of a country's population share a common culture; in others, a State is made up of a variety of different cultures."<sup>182</sup> The recognition of cultural identity or cultural relativism should however not jeopardise the universality of human rights but rather enhance it. Article 1 of the UNESCO Declaration of the Principles of International Cultural Co-operation of 1966,<sup>183</sup> had identified that:

1. Each culture has a dignity and value which must be respected and preserved.
2. Every people has the right and the duty to develop its culture.
3. In their rich variety and diversity, and in the reciprocal influences they exert on one another, all cultures form part of the common heritage belonging to all mankind.

The universality of human rights is actually better projected through the recognition of the right to cultural life, because it signifies that individuals can still maintain their diverse cultural inclinations within the universal atmosphere of human rights. This is subject only to the proviso that discriminatory or other invidious elements of any traditional culture may have to be rejected in order to fit into the universal atmosphere of international human rights. The challenge that the right to cultural life poses in the context of cultural identity or cultural relativism is the need to adequately understand the different cultures and interpret them as instruments of universalism in human rights. In that respect and from an Islamic legal perspective, the Quranic verse which states that mankind has been created from a single pair of male and female and "made into nations and tribes that (they) may know each other" is very instructive.<sup>184</sup>

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<sup>181</sup> See e.g. Donnelly, J., *Universal Human Rights in Theory and Practice* (1989) pp.109-124; and UN Dept. of Public Information, *Is Human Rights in Jeopardy?* (1987).

<sup>182</sup> See Stavenhagen, R., "Cultural Rights and Universal Human Rights", in Eide, A., *et al.*,(ed.) (1995) *supra*, note 31 above, p.63 at 66.

<sup>183</sup> Adopted on 4 November 1966. See UNESCO's Standard-Setting Instruments, Incorporating Supplement 1, (1982) IV.C.1.

<sup>184</sup> Q 49:13; See also generally Anyaoku, E., *Managing Diversity in Our Contemporary World* (1997); Mandela, N., *Renewal and Renaissance: Towards a New World Order* (1997); Annan, K., *Dialogue of Civilizations And The Need For A World Ethic* (1999).

It is important to note that the wording of Article 15 (1)(a) of the ICESCR is however not qualified with “community”, it provides simply for the right of everyone to “take part in cultural life”. This tends to amplify the recognition of the right to cultural life as an individual right. The right to take part in cultural life can certainly also be perceived as “the process of artistic and scientific creation”, in which case the individual is the cultural creator (as an artist, writer or performer) and has the right “to freely create (his own) cultural ‘oeuvres’, with no restrictions, and the right of all persons to enjoy free access to these creations”.<sup>185</sup> This is further expressed in Article 15(1)(c) through the recognition of the right of everyone “to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author”.<sup>186</sup> It is also very much related to freedom of expression of the individual.

The non-association, in Article 15, of the right to take part in cultural life with “the community” does not however de-emphasise the fact that cultural life will often be defined in relation to a particular social group or community. Stavenhagen has thus observed that cultural rights “can only be enjoyed in community with others and that community must have the possibility to preserve, protect and develop what it has in common.” He further stated that while the beneficiaries of cultural rights may be individuals, “their content evaporates without the preservation and the collective rights of groups.”<sup>187</sup> The enjoyment of the right to take part in cultural life may thus be fully realised in relation to the identification of a particular community, (even if in minority) which preserves such culture and to which the individual associates.<sup>188</sup> The general nature of Article 15(1)(a) also has the potential of allowing a cross-border participation in cultural life. This would however raise the question of whether an individual in a particular State may have the right to practice within it a cultural life considered “alien” to that community. Due to their presumed vulnerability in the area of right to cultural life, attention is often emphasised on the protection of cultural rights of minorities and indigenous peoples.

The right to cultural life can also be perceived in the universal sense of the accumulated material heritage and the universal civilisation of humanity as a whole, and the right of every individual to that heritage and civilisation. An extension of this perception would be the right of everyone to enjoy the benefits of scientific progress and its application as recognised under Article 15 (1)(b). This is an interpretation of cultural life in developmental terms.

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<sup>185</sup> See Stavenhagen, R., (1995), *supra*, note 182 above, pp. 65-66.

<sup>186</sup> Art. 15(1)(c) ICESCR.

<sup>187</sup> See Stavenhagen, R., (1995), *supra*, note 182 above, p.68.

<sup>188</sup> *c.f.* Eide, A., “Cultural Rights as Individual Rights” in Eide, A., *et al.*,(ed.) (1995), *supra*, note 31 above, p.229-240.

UNESCO adopted a “Recommendation on Participation by the People at Large in Cultural Life and Their Contribution to It” in 1976, in which it defined participation in cultural life as “the concrete opportunities guaranteed for all – groups or individuals – to express themselves freely, to communicate, act and engage in creative activities with a view to the full development of their personalities, a harmonious life and cultural progress of society”.<sup>189</sup> It has been observed that “(t)his aspect of cultural rights has enormous potential for further development in law and society”<sup>190</sup> because it would afford the opportunity for everyone to have access to and benefit from international scientific progress and thereby contribute to the overall enrichment of each individual culture and consequently narrow down the gap of diversity between the different cultures of the world. The guidelines for reports under the ICESCR suggests a comprehensive perspective by the ESCR Committee, which accommodates all the aspects of culture stated above. States Parties are required to provide information, *inter alia*, on: “Promotion of cultural identity as a factor of mutual appreciation among individuals, groups, nations and regions”; “Promotion of awareness and enjoyment of the cultural heritage of national ethnic groups and minorities and of indigenous peoples” and “Preservation and presentation of mankind’s cultural heritage”.<sup>191</sup>

There is scope within Islamic law for the recognition of the right to cultural life in all the contexts analysed above. Defined in terms of community, Islam identifies itself as a religio-cultural community (*ummah*) for every individual that professes to belong or attach to that community. It is a universal community that accommodates different tribes and peoples and thus transcends geographical and jurisdictional boundaries of the modern nation-state. The right to take part in cultural life with other members of the Islamic community could therefore often mean with a community beyond the jurisdiction of a State. Although there are general religio-cultural norms prescribed by the *Shari’ah* for the Islamic community, Islamic law also recognises the possibility of differences in some cultural practices of the community due to the diversity of its members. That was the basis for the recognition of ‘urf, (known practices) and ‘adât (Customs) of the different tribes and nations that make up the community as a subsidiary source of law by all Islamic schools of jurisprudence, and especially by the *Mâlikî* school, provided that such practices and customs are not contradictory to the norms of the Qur’an or the *Sunnah*.<sup>192</sup> Muslims are thus still able to

<sup>189</sup> November 26, 1976. See UNESCO Standard-Setting Instruments, Incorporating Supplement 1 (1982), IV.B.7, Sec.1(2)(b).

<sup>190</sup> Adalsteinsson, R., and Thorhallson, P., (1999) *supra* note 180 above, p.593.

<sup>191</sup> See Art.15 (1)(c) (d) (f) *Revised Guidelines, supra*, note 7 above.

<sup>192</sup> See e.g. Doi, A.R., *Shari’ah: The Islamic Law* (1984) p.84.

maintain their local customs within the scope of the universal Islamic culture.<sup>193</sup> Islamic law also recognises the presence of other cultures apart from the Islamic culture. Thus non-Muslims are free and entitled to follow their own culture and way of life within the Islamic State, subject only to the protection of public order and morality, and in accordance with due process of law. Hamidullah has even argued that the traditional rule which prohibited non-Muslims from imitating Muslims in dress or other similar social manifestations within the Islamic State, was a rule that bolstered the communal culture of non-Muslims within the Islamic State, because it enabled them to maintain their own cultural and social manifestations within the Islamic State.<sup>194</sup>

The right of the individual to enjoy the benefit resulting from any scientific, literary or artistic production of which he is the author is also recognised under Islamic law. So also is the right of everyone individually or as part of a group to participate and benefit from the accumulated material heritage and the universal civilisation of humanity as a whole. In respect of cultural rights, the OIC Cairo Declaration only provides for the right of the individual to “enjoy the fruits of his scientific, literary, artistic or technical production and the right to protect the moral and material interests stemming therefrom, provided that such production is not contrary to the principles of Shari’ah”.<sup>195</sup> This does not however necessarily exclude the right to the other aspects of cultural life analysed above under Islamic law. What Islamic law would obviously prohibit in respect of cultural rights is any cultural practice that promotes obscenity and nudity in violation of the moral code of the *Shari’ah*, because the Qur’an has specifically prohibited the spread of lewdness within the Islamic society.

### CONCLUDING REMARKS

It is deductible from the above expositions that the economic, social and cultural rights recognised under the ICESCR are generally compatible with the *Shari’ah* and realisable within the principles of Islamic law. Thus, Islamic law can actually serve as a vehicle for the promotion and realisation of economic, social and cultural rights in Muslim States. The problem areas concern mainly the issues of women in employment and the concepts of the family and of children out of wedlock. While the issue of women in employment in most

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<sup>193</sup> See e.g. Second Periodic Report of Jordan (1998), UN Doc. E/1990/6/Add.17, Par.126, where it is stated, *inter alia*, that: “Cultured Jordanians feel that their cultural identity...is open to Arab and Islamic culture...”.

<sup>194</sup> Hamidullah, M, (1977) *supra*, note 88 above, p.117-8.

<sup>195</sup> See Art. 16 of the OIC Cairo Declaration on Human Right in Islam (1990).

Muslim States has been circumscribed by custom rather than Islamic law *per se*, the issue of the family and children out of wedlock is strictly dictated by the Islamic religion and regulated by Islamic law. As has been shown, there is ample room within Islamic law for Muslim States to remedy the problem of women in employment and enhance their societal roles. However, the question of the family and children out of wedlock involves an Islamic religio-moral principle<sup>196</sup> and requires the recognition of some margin of appreciation for Muslim States as is recommended in the concluding chapter of this thesis.

For those Muslim States that have ratified the ICESCR, this chapter shows that they have an obligation under Islamic law as they do have under international law to respect and ensure the economic, social and cultural rights recognised under the Covenant. For those Muslim States that have not yet ratified the ICESCR, the foregoing exposition shows that their non-ratification does not absolve them from ensuring those rights under Islamic law. The analysis can also be of motivational value towards their ratification of the Covenant to participate in the international co-operation to ensure the universal guarantee of economic, social and cultural rights.

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<sup>196</sup> See p. 238 above.

PART THREE:

**Case Studies**

## CHAPTER 8

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### Case Studies of International Human Rights Policy and Practice in Modern Muslim States

#### INTRODUCTORY REMARK

A theoretical comparative between international human rights law and Islamic law is of limited value without an examination of the actual practice and policy of Muslim States in that regard. This chapter will thus examine the State practice of selected Muslim States as case studies on international human rights in modern Muslim States.

In their practical application of Islamic law, the modern Muslim States may be roughly categorised into: (i) countries that fully apply Islamic law as State law, (ii) countries where the *Sharî'ah* is the underlying principle for the interpretation of statutory laws and codified legislation, (iii) countries that apply only Islamic personal law as part of State law, and (iv) countries that have adopted complete secularism and do not apply Islamic law as State law at all.<sup>1</sup>

As it is impossible within the limits of this thesis to examine the State practice of all the Muslim States, six countries have been selected within the categories identified above for case studies. They are the Kingdom of Saudi Arabia, the Islamic Republic of Iran, the Republic of the Sudan, the Islamic Republic of Pakistan, the Republic of Tunisia and the Republic of Turkey. These countries reflect almost all the phases of Islamic law application by modern Muslim States.<sup>2</sup> As observed by Esposito, the vast majority of the modern Muslim States fall between the two poles of "secular" Turkey and "purist" Saudi Arabia.<sup>3</sup> Saudi Arabia from its inception has been applying full Islamic law based on the traditional *Sunnî* (mostly *Hanbalî*) jurisprudence as State law. The Islamic Republic of Iran has also been applying full Islamic law based on the *Shî'ah* (*Twelver Ja'fari*) jurisprudence since

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<sup>1</sup> *c.f.* Hill E., "Comparative and Historical Study of Modern Middle Eastern Law" (1978) 26 *The American Journal of Comparative Law*, p. 279 at 294. See also Arzt, D.E., "The Application of International Human Rights Law in Islamic States" (1990) 12 *Human Rights Quarterly*, 202 at 204; and Kamali, M.H., "Law and Society" in Esposito, J.L., *The Oxford History of Islam* (1999) p.107 at 151.

<sup>2</sup> The choice of these countries is also informed by the fact that the application of Islamic law has been directly or indirectly brought in question in their reports and arguments before the international human rights treaty bodies.

<sup>3</sup> See Esposito, J.L., "Contemporary Islam: Reformation Or Revolution?" in Esposito, J.L., *The Oxford History of Islam* (1999) p.643 at 651-652.



1979. The Sudan re-introduced the full application of Islamic law as State law in 1983 along with its previous pluralistic legal system. Pakistan has also adopted the *Shari'ah* as its supreme law and tends to lean towards a moderate interpretation of Islamic law. Tunisia applies only Islamic personal law with many reforms as part of its State law. Turkey has formally adopted total secularism and does not apply Islamic law at all as State law, but the Muslim population still follow Islamic norms in their personal and private lives. This chapter will examine the State policy and practice of international human rights within the Islamic law dispensation of these Muslim States. The aim here is neither to compare the selected States in respect of violations or enforcement of international human rights, nor to research into the extent of human rights abuse in any of them.<sup>4</sup> Rather the focus here shall be on legislation, State policies and judicial interpretations in the selected countries as general case studies of how Muslim States have responded to international human rights law within their application of Islamic law. Reference will be made to UN human rights treaty bodies' practice and comments on the States where available. In monitoring the guarantee of international human rights in Muslim States that apply Islamic law, the specific areas of concern has often been constitutional rights, equality and non-discrimination, women's rights, and criminal justice.<sup>5</sup> These would thus be the main focus of the case studies followed by the general representations on human rights by each of the selected States.

### KINGDOM OF SAUDI ARABIA

The Kingdom of Saudi Arabia occupies a very significant position in the Muslim world, being the site for the two most important holy mosques of Islam. It thus claims the status of a complete Islamic State that must protect Islamic traditional norms,<sup>6</sup> and has been described as being "closest to maintaining a 'pure' Islamic legal system."<sup>7</sup> Being the cradle of Islam and coupled with its wealth, the kingdom has great influence in the Muslim world. Since its founding, it has generally retained adherence to the traditional juristic treatises of the four

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<sup>4</sup> There are already many constantly updated reports by different Human Rights Organisations on human rights violations of States.

<sup>5</sup> See e.g. HRC, Comments on Iran, UN Doc. CCPR/C/79/Add.23 (1993) and the December 1998 Report on the Situation of Human Rights in the Islamic Republic of Iran, submitted by the Special Representative of the Commission on Human Rights, Mr. Maurice Danby Copithorne, pursuant to Commission Resolution 1998/80, UN Doc. E/CN.4/1999/32.

<sup>6</sup> See Part 1, Par. 2 of Saudi Arabia's Initial Report to the Convention on the Rights of the Child, UN Doc. CRC/C/61/Add.2 of 29 March 2000, which states that: "The Kingdom of Saudi Arabia is the cradle of Islam to which Muslims throughout the world turn in prayer. It occupies a special place in Muslims' hearts as the guardian of Islam's sacred places". See also Saudi Arabian Ministry of Information Internet Website at: <http://www.saudinf.com/main/c4.htm> [25/2/2001] where the Islamic status of Saudi Arabia is reiterated.

<sup>7</sup> See Hill. E., (1978) *supra*, note 1 above, at 295. See also Walker, J.K., "The Rights of the Accused in Saudi Criminal Procedure", (1993) 15 *Loyola L.A. International and Comparative Law Journal*, p. 863.

*Sunni* schools of Islamic jurisprudence particularly that of the *Hanbali* school in almost all aspects of its State law.<sup>8</sup> The courts however now issue judgements based on the Qur'an and *Sunnah* guided by and not limited to the opinion of any of the four *Sunni* schools.<sup>9</sup> The Kingdom has generally followed a traditional and conservative approach in its interpretation and application of Islamic law.<sup>10</sup> That approach had reflected in its State practice right from the inception of its participation in the human rights evolution of the UN. It was the only Muslim State that abstained in the voting at the UN General Assembly for the adoption of the UDHR in 1948 on Islamic grounds. Its representative at the Committee discussions on the draft UDHR had objected, *inter alia*, to the provision on religious liberty (Article 18) and the provision on equal rights in marriage (Article 16). The first was on the ground that Islamic law does not recognise the right of a Muslim to change his religion and the second on the ground that Islamic law prohibits a Muslim woman from marrying a non-Muslim man.<sup>11</sup>

Saudi Arabia's abstention from the adoption of the UDHR was however not to mean a total apathy towards the human rights regime of the UN. To date Saudi Arabia has become a party to at least 17 international treaties relating to human rights.<sup>12</sup> It has however not yet ratified either the ICCPR or the ICESCR. The kingdom follows a cultural relativist approach to international human rights and has consistently argued for "a need to develop current human rights concepts with reference to humanitarian values enshrined in the various religions, civilizations and cultures of the world", and that Islam could play a leading role in that regard by enriching "the concept of human rights through its noble moral values and principles and its comprehensive way of life, in which rights and obligations were defined in a just and equitable manner."<sup>13</sup> While it believes in a universal vision of human rights, the

<sup>8</sup> The Saudi Arabian Judicial Council decided in 1928 (1347A.H) that the jurisprudence of the other schools may also be adopted where public interest so demanded. See Qadri, A.A., *Islamic Jurisprudence in the Modern World* (1986) p.464.

<sup>9</sup> See Saudi Arabian Information Website at: <http://www.saudinf.com/main/c2.htm> [25/2/2001].

<sup>10</sup> See e.g. Dudley, J., "Human Rights Practices in the Arab States: The Modern Impact of Shari'a Values" 12 (1982) *GA Journal of International and Comparative Law*, 55.

<sup>11</sup> The Pakistani representative had disagreed with the Saudi Arabian representative on the first point relating to religious freedom. See UN Official Records, 3rd Committee, 3rd Session, 1948-49, Pt. 120; cited in Little, D., Kelsay, J., and Sachedina, A., *Human Rights and the Conflict of Cultures* (1988) pp.33-52.

<sup>12</sup> Slavery Convention (1926); Supplementary Convention on the Abolition of Slavery, The Slave Trade and Institutions and Practices Similar to Slavery (1956); Genocide Convention (1948); Convention on Elimination of Racial Discrimination (1965); Convention on the Rights of the Child (1989); The 1949 Geneva Convention I; The 1949 Geneva Convention II; The 1949 Geneva Convention III; The 1949 Geneva Convention IV; The 1977 Geneva Protocol I Additional to the 1949 Geneva Conventions; ILO Convention (No 29) Concerning forced Labour (1930); ILO Convention (No 100) Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value (1951); ILO Convention (No 105) Concerning the Abolition of Forced Labour (1957); ILO Convention (No 111) Concerning Discrimination in Respect of Employment and Occupation (1958). UNESCO Convention Against Discrimination In Education (1960); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) Convention on the Elimination of All Forms of Discrimination against Women (1979). See UN Human Rights Treaty Website at: <http://www.unhchr.ch/html/intlinst.htm> [25/2/2001] and ILO Conventions Website at: <http://ilolex.ilo.ch:1567/public/english/docs/convdsp.htm> [25/2/2001] and International Humanitarian Law Treaties Website at: <http://www.icrc.org/ihl> [25/2/2001].

<sup>13</sup> See Summary Record of 30<sup>th</sup> Meeting (56<sup>th</sup> Session) of the UN Commission on Human Rights, UN Doc. E/CN.4/2000/SR.30 of 26 April 2000, Par. 2.

kingdom has argued that it “feels no compulsion to adopt” a Western perspective of it, and has thus called for a distinction between “legitimate universal rights” and “rights that are demanded by those espousing a permissive philosophy in a largely secular society”.<sup>14</sup>

### *Constitutional Rights*

Saudi Arabia affirms the Qur'an as its constitution,<sup>15</sup> and did not have any separate statutory constitution or bill of rights prior to 1992. Generally formal laws are quite few in the kingdom. While this can actually make it easy for a flexible interpretation of law and tradition,<sup>16</sup> it can conversely make it difficult to determine the actual position of laws, especially in a system not based on judicial precedents. The previous absence of a formal constitution was apparently based on the traditional view that the act of legislation (*tashrî'*) was that of God and thus the enactment of a separate constitution was considered as inconsistent with the *Sharî'ah*.<sup>17</sup> A change of position occurred in 1992 with the enactment of the Saudi Arabian Laws of Government consisting of three statutes passed by royal decree.<sup>18</sup> Of the three statutes, The Basic Law of Government is the main constitutional document, which contains a chapter on rights and duties. This was not considered as new legislation (*tashri'*) but rather a codification (*taqnîn*) of what already existed within the Islamic *Sharî'ah* applied in the kingdom. In his speech introducing the statutes, the kingdom's monarch, King Fahd, stated that the constitutional reform was necessitated by the development of modern life and was “to strengthen something which (was) already in operation.” He asserted that despite the absence of a formal constitutional document before 1992, the Kingdom had never known a “constitutional vacuum” and that “throughout its march it has been ruled according to guiding principles and bases and clear fundamentals to which judges, ulema and all those employed by the state refer.”<sup>19</sup> Whatever way one looks at it, the enactment of the laws represents a new approach to the kingdom's interpretation of the limitation on legislative powers under Islamic law. This new approach seem to have now

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<sup>14</sup> See Saudi Arabian Information Website at: <http://www.saudinf.com/main/x004.htm> and also

<http://www.saudiArabiahumanrights.org/index.html> [25/2/2001] for Saudi Arabia's position on Human Rights.

<sup>15</sup> See Art. 1 of the Saudi Arabian Basic Law of Government (1992). See also note 6 above, Part 1, Par. 1(2)(ii).

<sup>16</sup> See Wynn, L., “Marriage Contracts and Women's Rights in Saudi Arabia” in WLUML, *Special Dossier: Shifting Boundaries in Marriage and Divorce in Muslim Communities* (1996) p.106.

<sup>17</sup> See Aba-Namay, R., “The Recent Constitutional Reforms in Saudi Arabia” (1993) 42 *International and Comparative Law Quarterly* p. 295.

<sup>18</sup>(1) The Basic Law of Government; (2)The Consultative Council Establishment Decree; and (3) The Regional Authorities Establishment Decree.

<sup>19</sup> See King Fahd's speech introducing the New Statutes reproduced in Bulloch, J., *Reforms of the Saudi Arabian Constitution* (1992) pp.30-37.

recognised the possibility of legislating under Islamic law “(w)ithout in any way trespassing upon the function reserved exclusively for God of making law”.<sup>20</sup>

Chapter 5 of the Basic Law<sup>21</sup> (Art. 23-43) defines rights and duties within the kingdom and can be considered as the country’s first and formal attempt of enacting a “bill of rights” in modern constitutional terms. The inclusion of a “bill of rights” in the Basic Law demonstrates a formal and definite recognition of the concept of constitutional rights within the kingdom’s Islamic polity. Article 26 of the Basic Law however makes it clear that “The State shall protect human rights in accordance with Islamic Shari‘ah.”<sup>22</sup> This was reiterated in the introductory speech of King Fahd, that “(t)he pillar and source of the basic statute is the Islamic Shari‘ah, as the statute has been guided by the Islamic Shari‘ah in defining the nature, the objectives and the responsibilities of the state, and in defining other relationship between the ruler and the ruled”.<sup>23</sup> This was to emphasise that the *Sharī‘ah* was still the *grundnorm* of the nation. A major importance of the Basic Law in modern constitutional terms is that it makes a definite statement on the obligations of the State and the rights of the individuals for which the State may be indicted for any violations.

The Basic Law contains a list of only a few clear but important rights. Those related to civil and political rights are: right to private property<sup>24</sup>; the right to security for all citizens and residents; freedom from arrest, imprisonment and restrictions “except under the provisions of the law”<sup>25</sup>; the right to privacy- the home is declared inviolable and “shall not be entered without the permission of their owners, nor shall they be searched except in cases specified by the law”,<sup>26</sup> and “(a)ll forms of correspondence, whether conveyed by telegraph, post, or any other means of communication shall be considered sacrosanct, (t)hey may not be confiscated, delayed or read, and telephones may not be tapped except as laid down in the law”.<sup>27</sup>; freedom from criminal responsibility or penalty except in accordance with the law<sup>28</sup>; the right to political asylum<sup>29</sup>; the right to complain<sup>30</sup> and the equal right to litigation.<sup>31</sup> Rights relating to economic, social and cultural rights that appear to be guaranteed by the

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<sup>20</sup> See Faruki, K.A., *Evolution of Islamic Constitutional Theory and Practice* (1971) p.4.

<sup>21</sup> The English version of the Saudi Basic Law of Government used in this research is the translation available on the Saudi Arabian Information Website at: <http://www.saudinf.com/main/c541f.htm> [25/02/2001].

<sup>22</sup> Article 1 had preceded with the provision that the Kingdom of Saudi Arabia is a sovereign Arab Islamic State with Islam as its religion and the Holy Qur’an and the Prophet’s Sunnah as its Constitution.

<sup>23</sup> See Bulloch, J., (1992) *supra*, note 19 above, p.33.

<sup>24</sup> Art.18 and 19 of the Basic Law.

<sup>25</sup> Art.36 *ibid.*

<sup>26</sup> Art.37 *ibid.*

<sup>27</sup> Art.40 *ibid.*

<sup>28</sup> Art.38 *ibid.*

<sup>29</sup> Art.42 *ibid.*

<sup>30</sup> Art.43 *ibid.*

<sup>31</sup> Art.47 *ibid.*

Basic Law are: the right to social security (rights of the citizen and his family in cases of emergency, disease, disability, and old age);<sup>32</sup> the right to work (job opportunities to all able-bodied people);<sup>33</sup> the right to public education<sup>34</sup> and the right to health care<sup>35</sup>. From both Islamic law and international human rights perspectives, the rights contained in the Basic Law are quite limited and incomplete.

Many important human rights such as right to life; prohibition of torture, cruel, inhuman or degrading treatment; freedom of expression; freedom of association and assembly; freedom of thought, conscience and religion and women's rights are excluded from the Basic Law. The Kingdom may wish to contend that these are rights that are already covered and provided for within the Islamic *Shari'ah* which has been declared as the pillar and basis for the Basic Law. For instance, in 1990 before the enactment of the Basic Law, King Fahd in response to a question on human rights in the kingdom answered that "the freedom of the individual in this country is secured by the Islamic faith in practice. Expression, rights and duties, as long as they do not harm others, and not violate Islamic teachings or existing rules, are permitted".<sup>36</sup> However, since the kingdom had taken the bold step towards constitutionalism and adopted a bill of rights, which provide a definite codification of constitutional rights and duties, it would have greatly enhanced the Basic Law and the State practice of the kingdom in respect of international human rights to have included all possible rights available under the *Shari'ah* and which the kingdom guarantees. An important aspect of human rights guarantees is to be able to determine what the rights themselves are. It would be very contentious for the kingdom to claim either that those few rights listed in the Basic Law are the most important rights under the *Shari'ah* or that those are the only specific rights that the *Shari'ah* guarantees. During conferences on the *Shari'ah* and human rights held in Riyadh, Paris, Vatican City, Geneva and Strasbourg between 1972 and 1974 under the auspices of the Saudi Arabian Ministry of Justice, the Council of Europe in Strasbourg and the World Council of Churches in Geneva, eminent Saudi Arabian Islamic jurists and scholars had confirmed that the *Shari'ah* guaranteed comprehensive human rights that obviously exceeds the present list of rights contained in the Basic law.<sup>37</sup>

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<sup>32</sup> Art.27 *ibid.*

<sup>33</sup> Art.28 *ibid.*

<sup>34</sup> Art.30 *ibid.*

<sup>35</sup> Art.31 *ibid.*

<sup>36</sup> See BBC, *Summary of World Broadcasting*, 10 Nov., 1990 ME/0918 A/1 cited in Aba-Namey (1993) note 17 above, p. 325.

<sup>37</sup> For a report of the proceedings of the Conferences See Al-Dawalibi, M.M., *Nadâwât 'Ilmiyyah Hawl al-Shari'ah al-Islâmiyyah Wa Huqûq al-Insân fî al-Islâm* (Arabic) (n.d). See also *Conference of Riyad on Moslem Doctrine And Human Rights In Islam [March 23, 1972]* at Saudi Embassy News Website: [http://www.saudiembassy.net/press\\_release/hr-72.html](http://www.saudiembassy.net/press_release/hr-72.html) [7/03/2001].

The codification of all the possible rights guaranteed by the *Shari'ah* in the Saudi Basic Law would certainly have produced a more complete bill of rights. Such an approach would have provided a positive guarantee by the State assuring that individuals could actually seek remedy for violation of any of all their rights guaranteed under the *Shari'ah*. From an international human rights perspective the need for the inclusion of all possible rights guaranteed by the *Shari'ah* in the Saudi Arabian Basic Law is further demanded by the fact that the kingdom has not yet ratified either of the two major international human rights covenants. Such codification of the full *Shari'ah* rights would have provided a constitutional guarantee and definite statutory point of reference in the event of any violations of the rights.

With regard to enforcement, the Basic Law does not provide for any independent enforcement mechanism for the stated rights, but provides in Article 43 that:

“The “Majlis” of the King and the “Majlis” of the Crown Prince shall be open to all citizens and to anyone who may have a complaint or a grievance. Every individual shall have the right to communicate with public authorities regarding any topic he may wish to discuss.”

Bulloch has observed that this provision is “plainly a codification of the old tradition of the tribal meeting, but it does give any citizen a right to redress if he feels himself wronged, or if he wants to seek help.”<sup>38</sup> The adequacy of this provision may be questionable in complex cases of human rights violations, especially where such violations arise from direct acts of State. That is, would the King or Crown Prince be gracious enough to find human rights violations against itself? Under traditional Islamic law, a Board of Grievances or Complaints Tribunal (*mazâlim*) existed before the enactment of the Basic Law, with jurisdiction to hear and investigate grievances and complaints of individuals against government agencies and officials.<sup>39</sup> It was however divested of the jurisdiction to entertain grievances against any act of State in 1982.<sup>40</sup> That restriction can be said to have deviated from the classical *mazâlim* rules, which gave wider powers that covered even the acts of the rulers.<sup>41</sup> Article 53 of the Basic Law however provides that: “The law defines the structure and jurisdiction of the Court of Grievances”. This provision is exploitable to re-assert the

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<sup>38</sup> Bulloch, J., (1992) *supra*, note 19 above, p.6.

<sup>39</sup> The Board was established by Decree No.2/13/9759 in 1955. See Long, D.E., “The Board of Grievances in Saudi Arabia” (1973) 27 *Middle East Journal*, p.72.

<sup>40</sup> See Art. 9 Revised Regulations of the Board of Grievances. Decree M/51 of 1982. See also Aba-Namay, R., “ (1993) *supra*, note 17 above, p.321.

<sup>41</sup> See Chapter 4, pp. 66-68 above on *Mazalim*. See also Long, D.E., (1973) *supra*, note 39 above.

wide traditional prerogatives of the Court of Grievances (*mazâlim*) as defined under traditional Islamic law.<sup>42</sup>

Despite obvious procedural difficulties and vagueness, it is deducible from a combination of Articles 43 and 47 of the Basic Law, as observed by Bulloch, that “any transgression (at least upon the rights contained in the Basic Law) can be taken up in the Courts”.<sup>43</sup> This apparently provides a framework upon which the enforcement of human rights can be established. That would however require sincere political and humanitarian will from the State and courage on the part of the courts in redressing the violation of rights. The practical questions that arise here are: (i) whether the victims of violations would be courageous enough to test the provisions of the Basic law in the Courts, and (ii) what type of interpretations would the Courts place on the provisions even if they do.<sup>44</sup> The above analysis imagines positive interpretations of the provisions of the Basic Law. However, going by the fact that human rights advocacy is not common in the kingdom and coupled with the conservative approach of the courts, the adoption of hard-line interpretations of the *Sharî‘ah* could certainly claw back any rights that may be apparent in the Basic Law. For instance, the religious volunteers known as the *mutaw‘ah* responsible for maintaining religious morals and norms within the society are reported to sometimes infringe upon the civil rights of people “in order to impose their own strict interpretation of Islam.”<sup>45</sup> They are reported to raid private homes, incarcerate people for partying, and harass people in public for improper dressing and behaviour, e.t.c.<sup>46</sup> Complaints against such violations could certainly be brought under Articles 36 and 37 of the Basic Law to test the ability of the Courts in the enforcement of the constitutional rights guaranteed under the Basic Law.<sup>47</sup>

### *Equality and Non-discrimination*

The Saudi Arabian Basic Law of Governance does not contain a specific provision on equality and non-discrimination. However its initial report on the Convention on the Rights of the Child stated its policy on equality and non-discrimination as follows:

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<sup>42</sup> See *ibid.* on the classical jurisdiction of the Court of Grievances (*mazâlim*).

<sup>43</sup> Bulloch, J., (1992) *supra*, note 19 above p. 7. Article 47 of the Saudi Basic Law provides that: “Both citizens and foreign residents have an equal right to litigation. The necessary procedures are set forth by the law.”

<sup>44</sup> No such case has so far been recorded since the enactment of the Basic Laws in 1992.

<sup>45</sup> Aba-Namay, R., (1993) *supra*, note 17 above p.326.

<sup>46</sup> *ibid.*

<sup>47</sup> Art.36 provides that: “The State shall ensure the security of all its citizens and expatriates living within its domains. No individual shall be detained, imprisoned or have his actions restricted except under the provisions of the law.” and Art. 37 provides that: “Houses are inviolable. They shall not be entered without permission of their owners, nor shall they be searched except in cases specified by the law.”

“In this context, (i.e. non-discrimination) it should be noted that the System of Government in the Kingdom of Saudi Arabia adopts two important principles:

- (i) Justice, equality and non-discrimination between kin and strangers, and non-bias towards the strong at the expense of the weak (‘God commands justice, the doing of good...’). In the words of the Prophet: “By God, if my daughter Fatima were to steal, I would cut off her hand.”
- (ii) The application of Islamic law to all persons. Rights are guaranteed equally to all individuals irrespective of their race, sex or other considerations. The law is applicable to all without partiality and all the judicial, social and cultural systems are based on this principle. Moreover, the Kingdom shows due concern for children deprived of a family environment or afflicted with a disability with a view to ensuring their enjoyment of all their rights on an equal footing with other children.”<sup>48</sup>

It then concluded that Saudi society is based on justice and equity and “strongly rejects all forms of discrimination. It never discriminates between the strong and the weak, man, woman or child. All of them enjoy the rights and freedoms guaranteed by the regulations, based on Islamic law, which are applicable in the Kingdom without discrimination of any kind, irrespective of their colour, sex, ethnic origin, age or religion.”<sup>49</sup> The country’s policy of non-discrimination was reiterated at the 56<sup>th</sup> Session of the UN Commission on Human Rights by the Saudi Arabian deputy minister for foreign affairs, who stated inter alia that in Saudi Arabia, “equal rights were granted to citizens and foreign residents”, “exercise of freedom of expression and assembly was not prohibited, providing it was neither prejudicial to public order nor detrimental to public morals”; “Non-Muslims enjoyed all the basic rights and freedoms guaranteed to Muslim residents (and) they had full freedom to engage in their religious observances in private”; “No non-Muslim had ever been subjected to prosecution or punishment on religious grounds; indeed, it was a punishable offence to subject them to any interference or harassment”.<sup>50</sup> While these assertions may be controvertible in practice, they no doubt demonstrate the country’s recognition as State policy the obligation of equality and non-discrimination and can serve, at least as a moral basis, for challenging violations of the principle by the State.

### *Women’s Rights*

The Basic Law is also silent on the rights of women. It is obvious however that Saudi Arabia implements a hard-line and conservative interpretation of Islamic principles regarding

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<sup>48</sup> See note 6 above, at Par. 40.

<sup>49</sup> *ibid.*, Par. 45.



the role and participation of women in society. It is the only Muslim State where women are prohibited from driving cars based on extended interpretations of protecting public morality and the dignity of women. Before 1990 the prohibition of women from driving was not backed by any specific legislation but was a well-known practice in the kingdom. In 1990 some professional women demonstrated by driving their cars in the capital city, Riyadh, in violation of the ban.<sup>51</sup> The women were arrested. The protest led to the issuance of a legal opinion (*fatwâ*) by the kingdom's Grand Council of *Ulamâ* stating that women should not be allowed to drive because the *Sharî'ah* provides for the protection of women's dignity and that driving exposes the dignity of women to harm and was therefore un-Islamic.<sup>52</sup> Subsequent thereof, the Ministry of Interior issued a formal directive prohibiting women from driving and stating that any woman who did so would be punished appropriately to deter others.<sup>53</sup>

Before the driving demonstration, the women had in a letter sent to the governor of the capital city, Riyadh, challenged the moral excuse of protecting women's dignity as basis to prohibit them from driving. They sought for a more moderate interpretation of the *Sharî'ah* and also cited the Prophet's Tradition, the practice of the Four Rightly Guided Caliphs and that of the "early believers" to support their own claim that driving by women is not "something ruled out by our religion and its tolerant teachings".<sup>54</sup> The argument of the women (which would stand valid in other Muslim States) against that of the authority in Saudi Arabia, demonstrated the differences that could arise between a hard-line and a moderate interpretation of the *Sharî'ah* in modern Muslim States. Answering questions from Committee members during the consideration of its initial report on the Convention on the Rights of the Child, Saudi Arabia's representative, Mr. Al-Nasser, confirmed that "there was no religious text prohibiting a woman from driving a car" but that "the scholars (in Saudi Arabia) had established general principles designed to protect the stability of society and to preserve its norms and traditions". He further stated that: "When the majority were in favour of a change in existing traditions, the rules would be amended to reflect that change".<sup>55</sup>

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<sup>50</sup> See UN Doc E/CN.4/2000/SR.30 of 26 April 2000, Par. 6 and 7.

<sup>51</sup> See Aba-Namay, (1993) *supra*, note 17 above, p.300.

<sup>52</sup> See e.g. Zaraboso, M.A. (Trans) *Islamic Fatawa Regarding Women*, (1996) p.310.

<sup>53</sup> See e.g. Aba-Namay, (1993) *supra*, note 17 above, p.300, n.20 See also Doumato, E.A., "The Ambiguity of Shari'a and the Politics of 'Rights' in Saudi Arabia" in Afkhami, M., (ed.) *Faith and Freedom, Women's Human Rights in the Muslim World* (1995)p.135 at 139-140.

<sup>54</sup> See Doumato, E.A., (1995) *ibid*, pp. 139-140.

<sup>55</sup> See Summary Record of the 688<sup>th</sup> Meeting of the CRC: Saudi Arabia, UN Doc. CRC/C/SR.688 of 24/10/2001, Par.2.

In the sphere of personal status law, the traditional jurisprudence is still the applicable law in Saudi Arabia.<sup>56</sup> A conservative application of the traditional interpretations of the law does, from international human rights standards, suppress the rights of women in many ways.<sup>57</sup> Wynn, in her research on women's rights in Saudi Arabia, identified that unlike other Muslim States Saudi Arabia "has not had a significant legal or political debate over personal status law affecting women." She observed that most of the rules that impinge on the rights of women are informal and traditional. She however established that Saudi women, especially the urban middle class women, are now more aware of their Islamic rights and subtly adopt different strategies to improve their lot within the *Sharī'ah* in matters of education, marriage, and labour market participation.<sup>58</sup> This is not unconnected with the increased level of female education in the kingdom, and their exposure to the views of many Muslim women's rights advocates who propose a moderate alternative to hard-line interpretations of the *Sharī'ah* to enhance women's rights in the Muslim world. It is interesting to observe however that statements have begun to emerge from within the Saudi ruling authority expressing what seem to indicate a move towards a public dialogue on the role of women in Saudi society. In a recent speech, the Crown Prince Abdullah Ibn Abdul-Aziz, who is a Deputy Premier and Commander of the National Guards, fired what has been described as "the first trigger for the dialogue on the Saudi woman and forward moving of her role (sic)". The Crown Prince was quoted to have expressed the need to re-examine the role of Saudi women towards their religion and country. He said: "We will not allow anything to be said that we, in Saudi Arabia diminish the status of our mothers, sisters and daughters," and concluded that "we need a dialogue that takes the social relations into consideration" a dialogue, according to him, that "will lead to defining the role of women and to changing the attitudes towards her and to consider her related to the man and therefore participates with him in the formation of society".<sup>59</sup> With respect to women driving cars, another Saudi official was reported to have indicated that the obstacles were more technical than social or religious, such as the present non-availability of female police officers to deal with female drivers.<sup>60</sup>

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<sup>56</sup> e.g. in marriage, divorce, inheritance, property rights, e.t.c.

<sup>57</sup> See Chapter 6 pp. 109-16 above.

<sup>58</sup> See generally Wynn, L., (1996) *supra*, note 16 above, p.106.

<sup>59</sup> See "Saudi Women Have a Role in Society and the Western Model is not Applicable" *Ain al- Yaqeen, Weekly Arab Political Magazine*, April 30, 1999, Online Edition at: <http://www.ain-al-yaqeen.com/issues/19990430/feat8en.htm> [25/2/2001]

<sup>60</sup> *ibid.* In Saudi Arabia public intermingling between men and women is very restricted, except during the pilgrimage seasons when the rules are relaxed due to the presence of large numbers of foreign pilgrims in the country.

In his submission before the 56<sup>th</sup> Session of UN Commission on Human Rights, the Saudi Arabian deputy foreign minister stated in respect of women rights that:

“All legislation applied equally to both sexes. Indeed, the Islamic shariah did not discriminate between men and women with regard to their duties and obligations. His Government was endeavouring to ensure that women enjoyed all their legally recognized rights and was pleased to report that educational enrolment among girls amounted to 95 percent and female illiteracy had declined sharply to 15 per cent. The state also provided grants and appropriate accommodation for female students... Education – especially female education- constituted the cornerstone for the advancement and development of society.”<sup>61</sup>

To further demonstrate its recognition of women’s right under international human rights law Saudi Arabia ratified the Convention Against All Forms of Discrimination Against Women on 7 September 2000 with the following reservations: “(1). In case of contradiction between any term of the Convention and the norms of Islamic law, the Kingdom is not under obligation to observe the contradictory terms of the Convention. (2). The Kingdom does not consider itself bound by paragraph 2 of article 9 of the Convention and paragraph 1 of article 29 of the Convention.”<sup>62</sup>

### *Islamic Criminal Justice*

Criminal justice is conducted in Saudi Arabia according to strict Islamic law. All the *hudûd* punishments are enforced.<sup>63</sup> As analysed earlier, one of the safeguards against the severe criminal punishments under Islamic law is that the highest degree of fairness and due process of law must be ensured. This includes that the trials must be public, the innocence of an accused person must be presumed until guilt is proved, the accused must be given every opportunity of defence, guilt must be proved beyond every iota of doubt and the rule of law must be generally respected.<sup>64</sup> International human rights watchers have however questioned the level of fairness in the Saudi Arabian criminal justice in these respects. Particular reference has been made to closed-door trials in the kingdom, which makes the violation of other principles of fair trial possible.<sup>65</sup> As earlier identified in Chapter 6, Islamic law

<sup>61</sup> UN Doc. E/CN.4/2000/SR.30 of 26 April 2000, Par. 9.

<sup>62</sup> See UN Human Rights Treaty Website at:

<http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty9.asp> [26/2/2001].

<sup>63</sup> See Chapter 4 pp. 72-80 above.

<sup>64</sup> See Chapter 6 pp. 114-51 above.

<sup>65</sup> See e.g. Amnesty International, *Saudi Arabia, Behind Closed Doors: Unfair Trials in Saudi Arabia* (MDE 23/08/97) and Human Rights Watch, “Saudi Arabia” in *World Report 1999*. See also Walker, J.K., (1993), *supra*, note 7 above, at 874; and Moore, R.H., “Courts, Law, Justice and Criminal Trials in Saudi Arabia” (1987) 11 *International Journal of Comparative and Applied Criminal Justice*, No.1., p.61 at 66.

requires that all trials must be in public except for reasons of state security or protection of public order and morality. Thus a complete resort to closed criminal trials not only violates international human rights rules of fair trial, but is also a departure from the ordinary fair trial rules of Islamic criminal justice.<sup>66</sup> Although Article 36 of the Saudi Basic Law provides that “No individual shall be detained, imprisoned or have their actions restricted except under the provisions of the law”, there is no specific provision for *habeas corpus*, which in effect can allow for unlimited detention periods while criminal cases are investigated or prepared.<sup>67</sup> For the above reasons it has been argued that the Saudi Arabian criminal justice system caters “primarily for the might of the state at the expense of the rights of the individual”.<sup>68</sup>

To demonstrate human rights consciousness in its criminal justice system Saudi Arabia has issued a document titled “Protection of Human Rights in Criminal Procedure and in the Organization of the Judicial System (2000)”<sup>69</sup> giving a “description of criminal and judicial procedure in the Kingdom of Saudi Arabia and provisions for the protection of human rights during the three well-known stages of criminal proceedings: the pre-trial stage; the trial; and the post trial stage”.<sup>70</sup> The document states, *inter alia*, in its introduction that the Kingdom is conscious of the need to respect human rights in its criminal justice system. It points out that many of the old regulations “are being amended in a manner consistent with its development in all fields” and that “the draft codes of criminal and civil procedure and the draft code regulating exercise of the legal profession, which, God willing, will soon enter into force following their approval, constitute a highly significant development in criminal procedure in the Kingdom of Saudi Arabia and clearly express the attentive concern that the Kingdom is showing for internationally recognized principles of human rights which are consistent with the Islamic Shariah.”<sup>71</sup> (emphasis added)

The document gives a detail of the Kingdom’s rules and regulations designed to ensure the protection of human rights in respect of criminal investigation, criminal examination, trials, judicial structure, judicial safeguards, penalties and special safeguards. It states in respect of criminal investigation and examination that evidence “obtained by unlawful means

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<sup>66</sup> See note 64 above.

<sup>67</sup> See e.g. Human Rights Watch, *Empty Reforms, Saudi Arabia’s New basic Laws* (1992) p.26; Walker, J.K., (1993) *supra*, note 7 above, p.872; and Dudley, J., (1982) *supra*, note 10 above, p.76. Under the Principles of Arrest, Temporary Confinement and Preventive Detention Regulations issued in 1983 by the Ministry of Interior, detainees could be held for a period of fifty-one days upon which their detention may be reviewed by the regional governor or minister of interior, otherwise detainees could be held indefinitely. See Human Rights Watch, “Saudi Arabia” in *World Report* 1999.

<sup>68</sup> See Amnesty International, *Behind Closed Doors*, *supra*, note 65 above, p.1.

<sup>69</sup> KSA Ministry of Foreign Affairs, *Protection of Human Rights in Criminal Procedure and in the Organization of the Judicial System (2000)*. For an Official English Translation of this document See Saudi Embassy News Website at: [http://www.saudiembassy.net/press\\_release/hr-judicial-1-menu.html](http://www.saudiembassy.net/press_release/hr-judicial-1-menu.html) [7/03/2001].

<sup>70</sup> *ibid.* 3<sup>rd</sup> Preambular Paragraph.

<sup>71</sup> *ibid.* Introduction, Last 3 Paragraphs thereof.

constituting a violation of human rights of (the) accused person” is inadmissible and that necessary measures are taken “to ensure that the person responsible for such violation is brought to justice since the Kingdom has issued strict instructions prohibiting the ill-treatment or harassment of accused persons and stipulating that investigations must be conducted in a meticulous and proper manner”.<sup>72</sup> The State acknowledges that: “Society’s right to punish the guilty must be reconciled with the need to safeguard the freedom and dignity of the accused and their right to defend themselves” and that the accused person has the right to “avail himself of the services of a lawyer or legal representative.” Articles 14, 48 and 50(1) of Regulatory Schedule appended to the Statute of the Public Investigation and Prosecution Department, recognises the accused person’s right not to be separated from his lawyer or legal representative during interrogation and the right to contact his lawyer or legal representative.<sup>73</sup> Article 59 of the Administrative Rules of Procedure of Judicial Bodies also provide that: “Every person has an unrestricted right to appoint a legal counsel”.

Regarding public trials, the document refers to Article 33 of the Statute of the Judiciary which provides that “Court-hearings shall be held in public unless the court decides to hold them in camera in order to safeguard morality, family privacy or public order. In all cases, the judgement shall be handed down at a public hearing”. Also Article 70 of the Administrative Rules of Procedure of Judicial Bodies provides that: “Pleadings shall be made in public except in circumstances in which the court believes that confidentiality is required in the interests of morality” and Article 15 of the Rules of Procedure of the Board of Grievances provides that: “Hearings shall be held in public unless the Division believes that confidentiality is required in the interests of morality or in order to safeguard public order. However, in all cases, the judgement must be handed down at a public hearing”.<sup>74</sup> Public hearing is stated to mean that “everyone can attend and observe the trial proceedings without any restriction other than the need to safeguard public morality or maintain order in the courtroom”.<sup>75</sup> The document also states that “litigants are not required to pay fees or costs in respect of the legal hearing, even if they lose their case.” This strengthens the principle of equality before the law as it prevents “justice being monopolized by those able to afford it”.<sup>76</sup> The importance of the practical implementation of the rules is acknowledged in the conclusion of the document which states that:

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<sup>72</sup> *ibid.* I. The Pre-Trial Stage: (2) Criminal Examination in the Kingdom of Saudi Arabia, Par. 8.

<sup>73</sup> *ibid.* (a) The Characteristics of Criminal Examination, Par. 2 and 6; *and* (b) Remand in Custody, Par.4.

<sup>74</sup> *ibid.* II. The Trial Stage, Par. 6(c) The Public Nature of Hearings.

<sup>75</sup> *ibid.*

<sup>76</sup> *ibid.* II. The Trial Stage, Par. (6)(b) Exemption from Fees.

“The Kingdom guided by the provisions of the *Shariah*, has established bodies for the administration of criminal justice and has promulgated rules and directives that regulate all stages of criminal procedure and constitute the cornerstone for the legislative protection of human rights in the Kingdom. In order to ensure that these texts do not provide only theoretical protection, lacking in essence and devoid of substance, the judicial authority in the Kingdom acts as the natural guardian of rights and freedoms and ensures strict compliance with those rules and directives by monitoring the legality of all stages of criminal procedure, thereby ensuring that those texts, far from being regarded as mere provisions on paper, are actually put into practice”.<sup>77</sup>

Saudi Arabia ratified the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on 23 September 1997. It however entered reservations not to be bound by Article 3(1)<sup>78</sup> and also denied the jurisdiction of the Committee Against Torture under Article 20 of the Convention.<sup>79</sup> These reservations are obviously instigated by the positions of UN treaty bodies and most Western nations that some Islamic criminal punishments violate the international law prohibition of torture, cruel, inhuman and degrading treatment and punishment. The reservation to Article 20 thus saves the kingdom from being called before the Committee Against Torture to defend the enforcement of Islamic criminal punishments which are applicable in Saudi Arabia. The reservation to Article 3(1) is also apparently aimed at inhibiting reliance on that Article to prevent return of offenders on grounds that they “would be in danger of being subjected to torture” through the application of Islamic criminal punishments.<sup>80</sup> Saudi Arabia strongly opposes the view that Islamic criminal punishments violate the prohibition of torture, or are inhuman or degrading. It has been claimed for instance that: “(m)any Saudi Arabians would tell you that forty lashes are far more humane than a year or two in jail”.<sup>81</sup> The low rate of crime and violence in the Kingdom has also been strongly advocated as justification.<sup>82</sup>

Saudi Arabia occupies a position in the Muslim world that is comparable to that of the Holy See in Christendom.<sup>83</sup> Its conservative approach should therefore be understood as an attempt to conserve the traditional and orthodox practices of the Islamic faith. The

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<sup>77</sup> *ibid.* Conclusion, Par. 2.

<sup>78</sup> Art. 3(1) provides that “No state party shall expel, return (*‘refouler’*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture”

<sup>79</sup> See UN., *Multilateral Treaties Deposited with the Secretary General, Status as at 31/12/99*, Vol.1, Part 1, Chapter I to XI, p. 214.

<sup>80</sup> See e.g. the case of *Jabari .v. Turkey* under the European Convention. (2000) 9 Butterworths Human Rights Cases, Part 1., p.1.

<sup>81</sup> This claim is quoted from the Website on Saudi Arabia’s position on Human rights at: <http://www.saudiArabiaHumanRights.org/qhumanr.htm> [visited 25/2/2001].

<sup>82</sup> *ibid.*

<sup>83</sup> See e.g. the similarity in tone of the Statements of the Delegation of Saudi Arabia and the Delegation of the Holy See at the Vienna World Conference on Human Rights at Website: <http://www.unhchr.ch/html/menu5/d/statemnt/saoudi.htm> and <http://www.unhchr.ch/html/menu5/d/statemnt/holysee.htm> respectively [25/2/2001].

preservation of Islamic culture and identity was, and continues to be a powerful instrument of legitimacy for the Saudi ruling authority. While the political authority endeavours to demonstrate that it is committed to the international human rights objective of the UN, it is also very conscious of the censorship of the traditional *Ulamâ'* who are considered by society as the actual custodians and preservers of Islamic traditions and norms. The *Ulamâ'* consider themselves as the conscience of the society and in a position to reproach the political authority of transgressing the *Sharî'ah* in case of any wholesale adoption of international norms that completely overrides traditional Islamic practices. The State thus as a matter of practice usually enters reservations on grounds of Islamic law in its ratification of international human rights treaties to the effect that the government of the kingdom will implement international conventions in a manner that does not conflict with the *Sharî'ah* or Islamic law. Reservations are generally permissible under international law where not specifically prohibited by a treaty and subject also to the rule that it must not be incompatible with the object and purpose of the treaty.<sup>84</sup> But considering Islamic law as Saudi Arabia's domestic law, the question would arise as to whether such general reservations are not conflictive of the international law rule that a party to an international treaty "may not invoke the provisions of its internal law as justification for its failure to perform a treaty".<sup>85</sup>

### ***General Representations on Human Rights***

Recent representations on human rights by the Kingdom of Saudi Arabia reiterate its cultural relativist stance to the international human rights regime. In October 1998, the kingdom submitted its first report to any international human rights treaty committee, i.e. its initial report on the Convention on the Rights of the Child.<sup>86</sup> The very comprehensive report refers extensively to the fact that Islamic law "considers the observance of human rights to be an act of worship that entails ordained duties"<sup>87</sup> and that "Saudi Arabia abides by the teachings of Islam in the field of human rights."<sup>88</sup> It further buttressed "its deep-rooted faith in human rights and dignity as prescribed in Islam",<sup>89</sup> by reference *inter alia*, to the rights provisions under its Basic Laws of Government and its ratification of the OIC Cairo

<sup>84</sup> See Art. 19 Vienna Convention on the Law of Treaties (1969), 1155 UNTS 331. See also General Comment 24 of the HRC on Issues Relating to Reservations, UN Doc. CCPR/C/21/Rev.1/Add.6 of 2 November, 1994.

<sup>85</sup> See Art. 27 Vienna Convention on the Law of Treaties (1969), 1155 UNTS 331. See also e.g. Lijnzaad, L., *Reservations to UN-Human Rights Treaties, Ratify and Ruin?* (1995) p.320-324.

<sup>86</sup> UN Doc. CRC/C/61/Add.2 of 26 March 2000.

<sup>87</sup> *ibid.*, Par. 9.

<sup>88</sup> *ibid.*, Par. 13.

<sup>89</sup> *ibid.*, Par. 14.

Declaration of Human Rights in Islam. With respect to its judiciary, the report contended also that “the judiciary in the Kingdom shows due regard for human rights since it is important, in the interests of security, peace of mind and personal dignity, that everyone should feel that he is fully protected from injustice, that there are regulations to protect him and society and that any accusation made against him or others will not be taken at face value but will be duly investigated and verified.”<sup>90</sup> The Chairperson observed after the session on the consideration of the report that: “While the Committee had not always been in agreement with aspects of Saudi Arabia’s interpretation of the Convention, she expressed appreciation for the delegation’s co-operative approach”.<sup>91</sup> In its Concluding Observations, the Committee stated notably that: “Noting the universal values of equality and tolerance inherent in Islam, the Committee observes that narrow interpretations of Islamic texts by State authorities are impeding the enjoyment of many human rights protected under the Convention”.<sup>92</sup>

At the fifty-sixth session of the Commission of Human Rights in April 2000, the Saudi Arabian deputy minister for foreign affairs, Prince Turki ben Saud al-Kabeer, had stated, *inter alia*, that Saudi Arabia “could boast outstanding human rights achievements and looked forward to making ongoing improvement”.<sup>93</sup> In that respect he observed that the country has established a mechanism for investigating allegations of torture and other individual abuses in fulfilment of its obligations under the Torture Convention, and had invited the UN Special Rapporteur on the independence of judges and lawyers to conduct an *in situ* mission to Saudi Arabia. The Saudi Arabian public was, according to him, also “being sensitized to human rights, the emphasis being placed on the application of humanitarian principles.”<sup>94</sup> He also referred to the fact that Saudi Arabia had submitted its candidacy for membership of the UN Commission on Human Rights and that this demonstrated “the importance it attached to international cooperation on human rights issues.”<sup>95</sup>

As is the case with every State Party report to international human rights treaties the practical veracity of the assertions are not be taken for granted and are contestable and subject to verification. The important point established from these representations however is that there is demonstration of a State policy by Saudi Arabia that it recognises an obligation in respect of international human rights. The country however also continues to emphasise its commitment to Islamic law and in that regard pursues a cultural relativist

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<sup>90</sup> *ibid.*, Par. 16.

<sup>91</sup> See note 55 above Par. 90.

<sup>92</sup> CRC Concluding Observations on Saudi Arabia (2001), UN Doc. CRC/C/15/Add.148 of 26/1/2001, Par. 6.

<sup>93</sup> UN Doc. E/CN.4/2000/SR.30 of 26 April 2000, *supra*, Par. 3.

<sup>94</sup> *ibid.*, Par. 3 and 4.

<sup>95</sup> *ibid.*, Par. 4.



argument in its international human rights policy. It has expressed concern that “some members of the international community appeared to have difficulty in understanding human rights within the context of Islam” and has thus declared “a need for constructive dialogue among the various civilizations and cultures, with a view to ensuring protection of the human person and human rights.”<sup>96</sup> Such a constructive dialogue would certainly also demand a more moderate Islamic law approach on the part of Saudi Arabia for substantive reconciliation especially in respect of women’s rights and roles in society. As demonstrated by the representations of the ruling authority, the country’s recent practice tends to move slowly and cautiously in that direction.

### THE ISLAMIC REPUBLIC OF IRAN

Iran was declared an Islamic Republic in 1979 after the revolution that ousted the Shah monarchy.<sup>97</sup> Since then Islamic law based on the *Shî’ah (Twelver Ja’fari)* school of jurisprudence has been applied as State law in Iran. A study of the resolutions of UN General Assembly and the reports of the HRC puts Iran on the list of States that has attracted many resolutions and reports questioning their human rights practice. While there may be political reasons for this,<sup>98</sup> the application of Islamic law has been either expressly or implicitly referred to as a factor that has contributed to violations of human rights in Iran from 1979 when it became an Islamic Republic.

From its inception, the ideological stand of the Islamic Republic of Iran revealed an intention to challenge the hegemony of the Western nations in the existing international system. The first leader of the Republic, Imam Ayatollah Khomeini, criticised the existing international order, which he argued, was controlled by the West and East under the domination of the United States of America (USA) and the Soviet Union respectively. The two blocks, according to him, were sources of the world’s contemporary problems. Iran thus adopted the non-aligned slogan of “Neither West nor East, only Islam” (*lâ garbiyyah wa lâ sharqiyyah, jamhûriyyah Islâmiyyah*) indicating its intention to strictly follow an Islamic policy opposed to the dominating ideologies of both the West and the East.<sup>99</sup> The bitterness was however greater against the West, particularly the USA because it opposed the Iran

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<sup>96</sup> *ibid.*, Par. 10.

<sup>97</sup> For a background on the Islamic Revolution See e.g. Monshipouri, M., *Islamism, Secularism, and Human Rights in the Middle East* (1998) pp.171-174, and Keddie, N. R., *Iran and the Muslim World: Resistance and Revolution* (1995).

<sup>98</sup> See e.g. Statement of Iran representative, Mr. Hossein Rezvani, at the 51<sup>st</sup> Session of the 3<sup>rd</sup> Committee of the UN General Assembly on 29, Nov. 1996, Permanent Mission of the Islamic Rep. of Iran to the UN Website at: <http://www.un.int/iran/statements/3ga/3ga51001.html>[25/2/2001].

revolution. This affected Iran's attitude towards the policies of the UN, especially its international human rights objective, which were seen as representing ideologies of the Western nations headed by the USA. Thus for instance, Imam Khomeini was quoted as describing human rights as "nothing but a collection of corrupt (sic) rules worked out by Zionists to destroy all true religions."<sup>100</sup> Imam Khomeini was very cynical about the "champions" of international human rights, particularly the USA and Britain. In one of his speeches at the wake of the Iranian revolution he had declared to the Iranian people as follows:

"All the miseries that we have suffered, still suffer, and are about to suffer soon are caused by the heads of those countries that have signed the Declaration of Human Rights...The U.S. is one of the signatories to this document.... But see what crimes America has committed against man... What we have said is true not only of America but also of Britain, another power that signed and ratified the Declaration of Human Rights...". He concluded that: "The Declaration of Human rights exists only to deceive nations; it is the opium of the masses."<sup>101</sup>

As noted in Chapter three, these responses were not practically translated into a total rejection of the principles of international law or international human rights *per se*, but only represented a protest against the policies of the "big powers" who were seen as enemies of the revolution and of Islam. This is evidenced by the fact that despite those criticisms, Iran continued to appeal to and rely on international law principles in its foreign relations even with other Muslim States. In the words of Sarvenaz Bahar, Imam Khomeini's ideology did not practically translate "into an absolute rejection of all international principles and organizations, but rather have premised any reliance on such international instruments on a conformity with *Shari'a* law".<sup>102</sup> The position of Iran was therefore that international human rights would be complied with only within the scope of the *Shari'ah*.

After the revolution in 1979, the religious scholars of Iran differed with respect to the interpretative approach of Islamic law to be adopted by the State. Bourojerdi has observed that the clerics "were split into two major camps: those who sanctioned traditional jurisprudence (*feqh-e-sonnati*) and those who advocated the need for a more dynamic jurisprudence (*feqh-e puya*) capable of dealing with the contemporary, public, and non-esoteric challenges facing the Islamic umma".<sup>103</sup> Although *Shi'ah* jurisprudence favours the

<sup>99</sup> See Rajae, F., *Islamic Values and World View: Khomeyni on Man, the State and International Politics* (1983) pp.75-77.

<sup>100</sup> See Mortimer, E., "Islam and Human Rights" (1983)12 *Index on Censorship*, No.5 (Oct.), p.5.

<sup>101</sup> See Algar, H., (Trans.) *Islam and Revolution: Writings and Declarations of Imam Khomeini* (1981) p.213-214.

<sup>102</sup> Bahar, S., "Khomeinism, the Islamic Republic of Iran, and International Law: the Relevance of Islamic Political Ideology" (1992) 33 *Harvard International Law Journal*, No.1, 145 at 177.

<sup>103</sup> Boroujerdi, M., *Iranian Intellectuals and the West* (1996) p.166.

application of *ijtihad* (juridical reasoning) greatly, the ruling theologians under the leadership of Imam Khomeini relied mostly on traditional jurisprudence and adopted a hard-line interpretative approach to Islamic law. Moderation and dynamism were deemed synonymous with Western culture, which the regime was advocating against, while traditionalism was considered as the road to the re-establishment of the proper Islamic norm and culture in the Republic. This may be interpreted as a consequence of the initial zeal of the revolution and the many internal and external pressures that threatened the sustenance of the Islamic Republic. This led to some harsh implementation of Islamic law, especially as a tool against the opposition within the Republic, presumably to instil fear and deter the opposition. This attracted a wave of criticism from international human rights watchers in respect of the country's application of Islamic law.<sup>104</sup> A section of the Iranian clergy was also critical of the harsh application of Islamic law. Ayatollah Taleghani was quoted to have warned that:

“The most dangerous of all forms of oppression are laws and restrictions forcibly imposed on people in the name of religion. This is what the Monks, through collaboration with the ruling classes, did with all the people in the name of religion. This is the most dangerous of all impositions, because that which is not from God is thrust upon the people to enslave and suppress them and prevent them from evolving, depriving them of the right to protest, criticise and be free. These very chains and shackles are the ones which the Prophet (Muhammad) came to destroy.... Any group that wants to restrict people's freedom ... to criticise, protest, discuss and debate, does not comprehend Islam”.<sup>105</sup>

Due to their opposing views, some liberal clerics of the State were considered as saboteurs of the new Republic and they fell out with the then leadership due to its hard-line interpretation and application of Islamic law.<sup>106</sup> In recent years however, there has been a gradual shift in the State policy of the Islamic Republic of Iran, regarding international law generally and international human rights in particular, from what it used to be during the first decade of the revolution.

Although the position of Iran has remained unchanged with regards to its commitment to the *Shari'ah* as an instrument of State policy, it has shifted from its former hard-line position to that of co-operation with the UN and international law principles, especially under President Muhammad Khatami elected in 1997.<sup>107</sup>

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<sup>104</sup> See e.g. Amnesty International, *IRAN Briefing* (1987) (MDE 13/08/87) and *IRAN: Violations of Human Rights* (1987).

<sup>105</sup> See Irfani, S., *Revolutionary Islam in Iran: Popular Liberation or Religious Dictatorship?* (1983) on page preceding dedication page. cited in Mayer, A.E., *Islam and Human Rights*, (1999) 2<sup>nd</sup> Ed., p.25.

<sup>106</sup> See e.g. Mayer, E.A., *ibid*, p.74. See also Amnesty International, *Iran: Human Rights Violations Against Shi'i Religious Leaders and Their Followers* (1997) MDE/13/018/1997.

<sup>107</sup> See e.g. Monshipouri, M., (1998) note 97 above, p.181-183. President Khatami was re-elected for a 2<sup>nd</sup> term in office in June 2001.

The State's resentment to the international human rights regime has declined greatly over the years with Iran submitting periodic reports to the UN human rights treaty organs and cooperating with UN representatives investigating the position of human rights in the country. While this has still been subject to Iran's policy of enforcing international human rights within the principles of Islamic law,<sup>108</sup> it has been through a co-operative and moderate approach rather than a hostile and hard-line one. The Deputy Permanent Representative of Iran to the UN, Mr. Ziaran, before the Third Committee of the 53<sup>rd</sup> Session of the General Assembly in November 1998, commenting on the 50<sup>th</sup> anniversary of the UDHR, declared that "(t)he government of the Islamic Republic of Iran is fully committed to the promotion of human rights". This commitment, he pointed out "is not out of political expediency rather it stems from the supreme teachings of Islam". He also avowed that "the government of the Islamic Republic of Iran would extend its full cooperation to the human rights mechanisms" of the UN.<sup>109</sup>

Iran is a State Party to both the ICCPR and ICESCR and to at least 20 other international treaties relating to human rights.<sup>110</sup> Only the Convention on the Rights of the Child was ratified after the declaration of the country as an Islamic Republic<sup>111</sup>. Despite the criticisms against the existing international order at the outset of the revolution, Iran did not however withdraw its ratification to any of the earlier Conventions ratified. Rather, the State policy in recent times, as earlier observed, indicates an intention to fulfil its international human rights obligations within its application of Islamic law.

<sup>108</sup> See e.g. Core Document Forming Part of the Reports of States Parties submitted by Iran to the UN, UN Doc. HRI/CORE/1/Add.93.

<sup>109</sup> See Statement by H.E. Mr. Bozorgmehr Ziaran at , Permanent Mission of the Islamic Rep. of Iran to the UN (Online): <http://www.un.int/iran/statements/3ga/3ga53008.html> [12/12/2000].

<sup>110</sup> Genocide Convention (1948); Convention on the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1950); Slavery Convention (1953); Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery (1956); International Convention on the Elimination of all Forms of Racial Discrimination (1965); International Convention on the Suppression and Punishment of the Crime of Apartheid (1973); International Convention Against Apartheid in Sports (1985); Convention on the Rights of the Child (1989); 1949 Geneva Convention I; 1949 Geneva Convention II; 1949 Geneva Convention III; 1949 Geneva Convention IV; ILO Convention (No. 29) Concerning Forced Labour (1930); ILO Convention (No. 98) Concerning Application of the Principles of the Right to Organise and Bargain Collectively (1949); ILO Convention (No. 100) concerning Equal Remuneration for Men and Women for Work of Equal Value (1951); ILO Convention (No. 105) Concerning the Abolition of Forced Labour (1957); ILO Convention (No. 111) Concerning Discrimination in Respect of Employment and Occupation (1958); ILO Convention (No. 122) Concerning Employment Policy (1964); ILO Convention (No.135) Concerning Protections and Facilities to be Afforded to Workers' Representatives in the Undertaking (1971); UNESCO Convention Against Discrimination in Education (1960). See UN Human Rights Treaty Website at: <http://www.unhchr.ch/html/intlinst.htm> [25/2/2001] and ILO Conventions Website at: <http://ilolex.ilo.ch:1567/public/english/docs/convdisp.htm> [25/2/2001] and International Humanitarian Law Treaties Website at: <http://www.icrc.org/ihl> [25/2/2001].

<sup>111</sup> The Islamic Republic of Iran entered a reservation upon ratification of the Child Convention reserving the right not to apply any provision of the Convention it considers incompatible with Islamic law.

## *Constitutional Rights*

Chapter 3 of Iranian constitution provides for the “Rights of the People”, which includes civil, political, economic, social, cultural and welfare rights.<sup>112</sup> Some of the basic constitutional rights apply only to “citizens” and “people of Iran”.<sup>113</sup> In pursuance of Article 4 of the constitution, the constitutional rights are guaranteed either “in conformity with Islamic criteria”<sup>114</sup>, “not detrimental to the fundamental principles of Islam”<sup>115</sup> or as “sanctioned” or “provided” by law”.<sup>116</sup> Rights may also not be exercised “in a way injurious to others or detrimental to public interest”.<sup>117</sup> Mayer has observed that these “Islamic qualifications of rights have stripped rights of their substance” in the Islamic Republic of Iran.<sup>118</sup>

Ideally, the subjection of rights to the principles of Islamic law should not constitute a threshold for their denial or abuse. It could simply aim at ensuring compliance with Islamic norms of public morality and social cohesion within the enjoyment of the guaranteed rights. This depends of course on the interpretative approach to Islamic law adopted by the regime in power. While subjection of rights to Islamic law can have adverse claw-back effects under a hard-line Islamic regime, the same may not be true under a liberal Islamic regime. Mayer thus concluded that “one must be careful to avoid creating the impression that somehow the Islamic qualifications on rights ... created the human rights violations that ensued in Iran, but one should also not underplay... that rights could be restricted or denied in the name of Islam”.<sup>119</sup> The present shift in State policy of Iran on international human rights guarantees corroborates the conclusion that it is not Islamic law *per se* that impedes human rights in Muslim States but it is the regimes in power that may employ the law to restrict human rights for their own purposes.

## *Equality and Non-discrimination*

The Iranian constitution provides that all “citizens of the country, both men and women, equally enjoy the protection of the law and enjoy all human, political, economic, social, and

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<sup>112</sup> Articles 19 – 42 of Constitution of the Islamic Republic of Iran.

<sup>113</sup> e.g. Art. 19 (Non-discrimination); Art. 20 (Equality before the law); Article 29 (Welfare rights); Article 30 (Education); Article 31 (Housing); Article 34 (Recourse to the courts).

<sup>114</sup> e.g. Art. 20 (Equality before the law); Art. 21 (Women’s rights); Art. 26 (Freedom of association); Article 28 (Work).

<sup>115</sup> e.g. Art. 24 (Freedom of the press); Art. 26 (Freedom of assembly).

<sup>116</sup> e.g. Art. 22 (Human dignity and rights); Article 25 (Secrecy of communication); Art. 32 (Arrest); Art. 33 (Residence).

<sup>117</sup> Art. 40.

<sup>118</sup> Mayer, E.A., (1999) *supra*, note 105 above p.75.

<sup>119</sup> *ibid*, p.76.

cultural rights, in conformity with Islamic criteria".<sup>120</sup> This constitutional provision on equality is restrictive to citizens and thus raises the question of whether or not the equality of non-citizens is also assured. It has also been observed that there are provisions in both the penal and civil codes that discriminate against non-Muslims from international human rights perspectives.<sup>121</sup> On the rights of minorities, the Iranian constitution provides that:

"All people of Iran, whatever the ethnic group or tribe to which they belong, enjoy equal rights; and color, race, language, and the like do not bestow any privilege".<sup>122</sup>

The omission of religion in the proviso on non-privileges is related to the fact that the State is based on an Islamic ideology and thus certain positions would only be occupied by Muslims.<sup>123</sup> On the rights of non-Muslims Article 14 of the Iranian constitution provides that:

"In accordance with the sacred verse *"God does not forbid you to deal kindly and justly with those who have not fought against you because of your religion and who have not expelled you from your homes"* [60:8], the government of the Islamic Republic of Iran and all Muslims are duty-bound to treat non-Muslims in conformity with ethical norms and the principles of Islamic justice and equity, and to respect their human rights. This principle applies to all who refrain from engaging in conspiracy or activity against Islam and the Islamic Republic of Iran".

The proviso exempting those who engage in "conspiracy or activity against Islam and the Islamic Republic of Iran" from enjoying the rights guaranteed to non-Muslims under Article 14 obviously aims at protecting the Islamic ideology of the State. It is however susceptible to abuse as is the case with all laws aimed at protecting State ideologies. While Article 23 also provides that the "investigation of individuals' beliefs is forbidden, and no one may be molested or taken to task simply for holding a certain belief", Article 13 recognises only Zoroastrian, Jewish and Christian Iranians as the "only religious minorities who, within the limits of the law, are free to perform their religious rites and ceremonies and to act according to their own canon in matters of personal affairs and religious education". This follows the traditional conception of recognising the religious practices of "the people of the book" under Islamic law. However, in Iran's second ICCPR periodic report submitted

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<sup>120</sup> Art. 20.

<sup>121</sup> See e.g. UN Doc. E/CN.4/1999/32, Annex IV, See also Human Rights Watch, *Iran: Religious and Ethnic Minorities, Discrimination in Law and Practice* (1997), pp.8-10.

<sup>122</sup> Art. 19 Constitution of the Islamic Republic of Iran.

<sup>123</sup> See e.g. Art. 115 of the Constitution of the Islamic Republic of Iran which provides that qualifications for Presidency shall include "convinced belief in the fundamental principles of the Islamic Republic of Iran and the official *madhhab* (School of Thought) of the country". This can obviously be fulfilled only by a *Shi'ah* (*Twelver Ja'fari*) Muslim.

in 1992 to the HRC it was indicated that the term “non-Muslims” in Article 14 of the constitution also referred to those who do not believe in monotheistic religions.<sup>124</sup>

One religious minority in Iran to whom the proviso on conspiracy has been applied are the Bahais. Rather than religious minorities *per se*, the Islamic Republic of Iran considers the Bahais as Islamic heretics. The Bahais hold their founder, Bahauallah, as a prophet but do not however claim to be Muslims. Apart from being declared as heretics the Bahais are also suspected and often accused by the State of espionage for Israel, bringing them within the proviso of Article 14 of the Iranian Constitution as “engaging in conspiracy or activity against Islam and the Islamic Republic of Iran” and thus exempting them from the rights of non-Muslims guaranteed under the constitution. The conspiracy factor puts the Bahais in a difficult position within the Islamic Republic of Iran.<sup>125</sup> This has attracted a lot of attention and criticism of Iran in international human rights circles and from the Baha’i International Community.<sup>126</sup>

### *Women’s Rights*

A section of the Preamble in the Iranian Constitution is titled “Women and the Constitution” and it provides that:

“Through the creation of Islamic social infrastructures, all the elements of humanity that served the multifaceted foreign exploitation shall regain their true identity and human rights. *As a part of this process, it is only natural that women should benefit from a particularly large augmentation of their rights, because of the greater oppression that they suffered under the old regime.*” (emphasis added).

Article 21 of the Constitution also contains a substantive provision on women’s right providing that:

“The government must ensure the rights of women in all respect, in conformity with Islamic criteria, and accomplish the following goals:

1. create a favourable environment for the growth of woman’s personality and the restoration of her rights, both the material and intellectual;

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<sup>124</sup> See UN Doc. CCPR/C/28/Add.15 of 22/5/1992, Par. 5.

<sup>125</sup> See Human Rights Watch, *Iran: Religious and Ethnic Minorities, Discrimination in Law And Practice* (1997) p.11; and Monshipouri, M, (1998) *supra*, note 97 above, p.192-3.

<sup>126</sup> See UN Doc. E/CN.4/1999/32, Par. 40-45. See also HRW, *ibid*, pp. 10-15. See also Mayer, E. A., (1999) *supra*, note 105 above, pp.141-144. See also Baha’i International Community, *Iran’s Secret Blueprint for the Destruction of a Religious Community* (1999).

2. the protection of mothers, particularly during pregnancy and child-rearing, and the protection of children without guardians;
3. establishing competent courts to protect and preserve the family;
4. the provision of special insurance for widows, aged women, and women without support;
5. the awarding of guardianship of children to worthy mothers, in order to protect the interests of the children, in the absence of a legal guardian.

While the rights of women must be ensured in conformity with Islamic criteria, this should ideally be in a positive manner to accomplish the stated goals and not to restrict them. Despite the above constitutional provisions however, the status of women in Iran has been greatly criticised by advocates of women's rights on grounds that both the Iranian Penal and Civil codes contain, on the basis of Islamic law, provisions that discriminate against women in employment, education and family rights, which prevent the accomplishment of the above goals set out in the constitution for women.<sup>127</sup>

In line with the shift in the human rights policy of Iran, there have however been official statements declaring improved policy positions by Iran on women's rights generally.<sup>128</sup> The Iranian policy of wanting to cautiously blend the woman's motherhood role with her role in social affairs of the State was summarised by President Khatami as follows:

"If you deprive a woman of the opportunity to participate in social activities, she is denied a balanced growth. Likewise, if you deprive a man of social activities, his development will also be stunted. On the other hand, we all agree that one of the greatest problems of the modern world is the way the foundation of family is undermined, and the ensuing emotional desolation of the children. What can we do, then, both to provide our women with to play their part in social affairs so that they can enjoy full natural growth as men do. (sic) And at the same time, safeguard the foundations of the family? Whether we like it or not, women play the pivotal role in the life of the family, and her absence may very well lead to the total collapse of the family. To prevent this, the Islamic Republic of Iran is trying to find a way of resolving this paradox in order to ensure women's participation in society while, at the same time, preventing the breakdown of the family...<sup>129</sup>

In October 1997, the country's representative, Ms. F. Vadiati, stated, *inter alia*, before the Third Committee of the UN during discussions of the agenda items "Advancement of

<sup>127</sup> See e.g. Afshar, H., "Women, State and Ideology in Iran", in *Women Living Under Muslim Laws* (ed), *Dossier 3* (1988) pp42-48; Kar, M., and Hoodfar, H., "Personal Status Law as Defined by the Islamic Republic of Iran: An Appraisal", in *Women Living Under Muslim Laws*, (ed.) *Shifting Boundaries in Marriage and Divorce in Muslim Communities: Special Dossier* (1996) pp.7-36; Mehrdad, A., "Women in Iranian Civil Law: 1905-1995", in *Women Living Under Muslim Laws*,(ed.) *Dossier 14/15* (1991) pp.86-95.

<sup>128</sup> See e.g. Mayer, E.A., (1999) *supra*, note 105 above, p.117; and Monshipouri, M., (1998) *supra* note 97 above, p.190-192.



Women” and “Implementation of the Outcome of the Forth World Conference on Women”, that:

“In recent years, Iran has greatly embarked on promoting the status of women in different areas such as education, economy and decision-making”. ... In the aftermath of the recent Presidential elections in Iran, (that was in 1997) we expect to see a higher degree of attention and emphasis on the advancement of women, ... the President has recently designated “a high advisor for women affairs whose chief duty includes to act as the main government coordinator (sic) on all activities pertaining to contribution of women in various dimensions of social life. The president has also included for the first time, a woman in the Cabinet as the Vice-President and the Head of Environment Organization.”<sup>130</sup>

Ms. Vadiati then enumerated the country’s approach and policy towards ensuring women’s rights as follows:

1. Raising public awareness towards women’s rights by organizing seminars and workshops with contribution and cooperation of NGOs;
2. Developing national infrastructures and machineries for the advancement of women, particularly creation of special commissions or offices in government agencies, and special commissions for the youth, family and women in the Parliament.
3. Incorporating of gender perspective into laws and regulations and government programs and policies including in (sic) the draft of National Plan of Action for Women.<sup>131</sup>

The above policies express a wider interpretation of the provision on women’s rights contained in Article 21 of the Iranian constitution. Ms. Vadiati also spoke of Iran’s condemnation of the discriminatory practices against women in Afghanistan which, the Iranian representative observed, “are sadly carried out in the name of Islam, but in fact have tarnished the true face of this divine religion”.<sup>132</sup> The present Iranian supreme leader, Ayatollah Khamenei, was also quoted to have criticised the hard-line interpretation of Islamic law by the Taliban of Afghanistan saying, “(t)he world does not accept what the Taliban are doing in the name of Islam”.<sup>133</sup> This reference by Iran to conservative customs

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<sup>129</sup> President Khatami’s speech to heads of diplomatic missions to Tehran, on February 10, 1998, See the Presidency of Islamic Republic of Iran Website at: <http://web.president.gov.ir/outlooks/Women.htm> [25/2/2001].

<sup>130</sup> See Statement by Ms. F. Vadiati, before the 3<sup>rd</sup> Committee on October 23, 1997, Permanent Mission of the Islamic Republic of Iran Website at: <http://www.un.int/iran/statements/3ga/3ga52002.html> [25/2/2001]

<sup>131</sup> *ibid.*

<sup>132</sup> *ibid.*

<sup>133</sup> See Sciolino, E., “The Many Faces of Islamic Law”, *The New York Times*, October 13, 1996 (Editorial) 2. Also Ayatollah Jannati, Secretary of the Iranian Council of Guardians, was also quoted to have publicly denounced the Taliban policy on women in 1996 saying: “What could be worse than committing violence, narrow-mindedness and limiting women’s rights [thereby] defaming Islam?” See Mayer, E.A., (1999) *supra* note 105 above, p.117.

and traditions adopted by a neighbouring Muslim State in the name of Islam, tends to demonstrate its own move towards a moderate approach to the interpretation of the *Shari'ah*. It is important to note that the above are not isolated statements. Iran has consistently made policy statements in recent times that indicate a will to improve upon women's rights in the country.

In his address before the 53<sup>rd</sup> Session of the UN General Assembly in September 1998, President Khatami of Iran emphasised the need for a reassessment of the status of women. He declared as follows:

“Efforts at the global level geared to the promotion and strengthening of respect for women and their rights require a critical reassessment of the traditional and inappropriate views about women. The traditional outlook, based on the erroneous notion of superiority of men over women, does injustice to men, women and humanity as a whole; equally nefarious is the view that disregards the differences between men and women. We should recognize that both men and women are valuable components of humanity that equally possess the potential for intellectual, social, cultural and political development, and that comprehensive and sustainable development is only possible through the active participation of both men and women in social life.”<sup>134</sup>

It is apparent that the words of the above statement by the Iranian president on the status of women were well chosen and frank. The status of the President and the platform at which the statement was delivered are both significant and lend weight to the conclusion that the statement represents a reiteration of a genuine Iranian State policy for the promotion of women's rights. Again at the 1998 meeting of the Third Committee of the UN, Ms. Vadiati of Iran, indicated during the continued discussions on the “Advancement of Women” and “Implementation of the Outcome of the Fourth World Conference on Women” that Iran had taken further steps in the practical implementation of its national plans for the advancement of women indicated in the previous year. The representative indicated the appointment of more women judges, admission of more women into the legal practice, granting of licences to more women as media practitioners and an increase in the admission of female students into institutions of higher learning. Legislation recognising women's pension and women's right to guardianship of children had also been passed.<sup>135</sup>

The Special Representative of UN Commission on Human Rights to Iran confirmed the above efforts in his December 1998 report on the human rights situation in Iran, but went on

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<sup>134</sup> See Statement of H.E. Mohammad Khatami, President of the Islamic Republic of Iran before the 53<sup>rd</sup> Session of the UN General Assembly, New York, September 21, 1998, Permanent Mission of the Islamic Republic of Iran Website at: <http://www.un.int/iran/statements/ga/ga53001.html> [25/2/2001].

to indicate that “there needs to be a clearer focus on the legal and practical discrimination” faced by women.<sup>136</sup> The deputy speaker of the Iranian Parliament was reported to have also acknowledged that there was still much to be done, especially the amendment of laws, to ensure the full enjoyment of rights by women in the country.<sup>137</sup> With respect to the implementation and amendment of laws generally, President Khatami established a “Committee for Inspection and Supervision on the Implementation of the Constitution” in 1997 empowered to, *inter alia*, “regulate policy for the implementation of the Constitution, with particular preference which should be given to articles that contain individual and social rights of the Nation, and to submit amendatory and supplementary proposals as to laws and regulations for better and comprehensive implementation of the Constitution; and to regulate and suggest educational and research programmes; in order to familiarize the Nation of their legal rights, and to adopt appropriate approaches for discharging these rights”.<sup>138</sup> In a resolution adopted at its 51<sup>st</sup> meeting in April 1999 the UN Commission on Human Rights noted with interest, the “positive statements by the Government of the Islamic Republic of Iran about the need to review laws and attitudes which discriminate against women, and the gradual increase of the presence of women in the public life of Iran”.<sup>139</sup>

It becomes evident from the Islamic Republic of Iran’s policy towards the promotion of women’s rights within its Islamic socio-legal setting, that there is not necessarily an inherent suppression of women’s rights under Islamic law. The status of women under the application of Islamic law in any particular country depends on the political and humanitarian will of the ruling authority and the approach adopted by it in its interpretation of the *Shar’iah*. The *Shar’iah*, as has already been analysed in previous chapters of this thesis, is able to accommodate the full enhancement of women’s rights within the scope of the rules of Islamic morality, which applies both to the male and female.

### *Islamic Criminal Justice*

Iran’s Penal Code is based strictly on the *Shi’ah* Islamic criminal jurisprudence. Accordingly, the country implements the traditional Islamic criminal punishments,<sup>140</sup> which

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<sup>135</sup> See Statement of Ms. F. Vadiati before the 3<sup>rd</sup> Committee on October 19, 1998, Permanent Mission of the Islamic Republic of Iran Website at: <http://www.un.int/iran/statements/3ga/3ga53004.html> [25/2/2001].

<sup>136</sup> UN Doc. E/CN.4/1999/32, Par. 86.

<sup>137</sup> See *ibid.*, Par.30.

<sup>138</sup> See UN Doc. E/CN.4/1999/32, Annex V, par.12.

<sup>139</sup> Commission on Human Rights Resolution 1999/13.

<sup>140</sup> See Chapter 4, pp.72-80 above.

the HRC considers as incompatible with the provisions of Article 7 of the ICCPR.<sup>141</sup> For instance the Committee has expressed concern about the punishments of stoning, amputation and crucifixion imposed by the State. In his report to the 56<sup>th</sup> Session of the UN General Assembly on the situation of human rights in the Islamic Republic of Iran for the year 2000, the UN Secretary General noted that the punishment of stoning was declining in Iran but that amputations and executions were still at a high rate.<sup>142</sup> The report however quoted opinions from Iranian Ministry of Justice spokespersons to the effect that “some of the hangings envisaged in Iranian laws were not necessary from a religious point of view and the system could replace them with other sentences”<sup>143</sup> and also that the punishment of stoning may not be in the country’s interest and the head of the judiciary believes that it could be avoided.<sup>144</sup> The Iranian Constitution prohibits all forms of torture “for the purpose of extracting confession or acquiring information” and provides that violation of the prohibition of torture will be punishable in accordance with the law.<sup>145</sup>

### ***General Representations on Human Rights***

President Khatami has recently expressed the importance of freedom in a manner that calls for a moderate interpretation of the *Shari’ah* as well as the guarantee of individual rights in Iran. In an address to students at Tehran University in 1998, to commemorate the first anniversary of his election, the president declared his belief in freedom as follows:

“Let me declare my belief clearly. The destiny of the religion's social prestige today and tomorrow will depend on our interpretation of the religion in a manner which would not contradict freedom, whenever in history a religion has faced freedom, it has been the religion which has sustained damage ...when we speak of freedom we mean the freedom of the opposition. It is no freedom if only the people who agree with those in power and with their ways and means are free.”<sup>146</sup>

Also in his speech at the 53<sup>rd</sup> Session of the UN General Assembly the Iranian leader indicated that the history of humankind is that of liberty and expressed his belief in the fact that “humanity, despite all calamities and hardship, is heading towards emancipation and liberty”. He called for co-operation of the international community “against genocide, aggression and the humiliation of mankind in various corners of the world”, and finally

<sup>141</sup> See e.g. HRC Concluding Observations on Iran (1993) UN Doc. CCPR/C/79/Add.25., Par. 11. See also Human Rights Watch, *Iran, Religious and Ethnic Minorities, Discrimination in Law and Practice* (1997), Vol. 9, No.7(E), pp. 8-10.

<sup>142</sup> See UN Doc. A/55/363 of 8 September, 2000. Par. 49-58.

<sup>143</sup> *ibid.* Par. 49.

<sup>144</sup> *ibid.* Par. 57.

<sup>145</sup> Art. 38. Constitution of the Islamic Republic of Iran .

<sup>146</sup> See President Khatami’s Homepage Online at: <http://www.persia.org/khatami/index.html> [13/12/2000].

proposed in the name of the Islamic Republic of Iran that the UN should designate the year 2001 as the “Year of Dialogue among Civilizations”.<sup>147</sup> In response of which the UN General Assembly adopted a Resolution proclaiming the year 2001 as the United Nations Year of Dialogue among Civilizations”.<sup>148</sup> The present trend in Iranian State policy therefore indicates a big transition from the hostile and non-compromising phase of the first decade of the Iranian revolution. The present phase is more of reconstruction and moderation, which has shown accommodation for the freedom and rights of individuals and thereby demonstrates the possibility of establishing common grounds between Islamic law and international human rights principles. The conservative and hard-line sector within both the Iranian leadership and society however remain cynical of Khatami’s moderate tendencies.

### REPUBLIC OF THE SUDAN

While Islamic culture in the Sudan dates back to as early as the 9<sup>th</sup> century, the formal application of the *Sharî’ah* as the full legal system dates back at least to the Mahdist State established in Sudan between 1884-1898. With the British colonisation of Sudan in 1898 the legal system was pluralised by the introduction of the principles of English Common Law and later the recognition of native law and custom as part of the legal system. The pluralised legal system consisting of English common law, Islamic personal law and native law and custom continued into the independence and post independence period of 1956-83.<sup>149</sup>

In 1983 President Numeiri introduced an Islamisation policy which principally involved the re-introduction of the full implementation of Islamic law in Sudan. A series of legislation that came to be known as the September (1983) Laws were enacted to bring the whole legal system into conformity with Islamic law.<sup>150</sup> The political manipulation of and the harsh implementation of the September (1983) laws met with both internal and external criticism with regards to the country’s human rights practice. The question may be raised whether the fault is with Islamic law *per se* or with the manner it was enforced through the September (1983) laws in Sudan. An-Na’im has submitted that while “some of the defects of what came to be known as the September (1983) laws can be attributed to the haste and ambivalence

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<sup>147</sup> See President Khatami’s Speech at UN General Assembly on Sept. 21, 1998, Permanent Mission of the Islamic Republic of Iran Website at: <http://www.un.int/iran/statements/ga/ga53001.html> [25/2/2001].

<sup>148</sup> UN GA Resolution A/RES/53/22 of 16 November 1998.

<sup>149</sup> See Khalil, M.I., “The Legal System of Sudan” (1971) 20 *International and Comparative Law Quarterly* 626; Thompson, C.F., “A Case Study from the Republic of the Sudan” (1966) *Wisconsin Law Review* 1149-51. See also generally, Lauro, L.J., and Swamuelson, P.A., “Toward Pluralism in Sudan: A Traditionalist Approach” (1996) 37 *Harvard International Law Journal*, No.1, pp.65-138.

with which the policy of Islamization was imposed by former President Ja'far Numeyry, other defects reflect the basic problems of the modern application of the criminal law of the Shari'a..."<sup>151</sup>. He pointed out that the full application of Islamic criminal law was re-introduced in the Sudan when "the country was suffering from severe economic difficulties" and the "vast majority of the population (lived) under conditions of extreme poverty and need" - circumstances that forced many people to theft and other property crimes.<sup>152</sup> The situation was also complicated with the intermittent civil war in the country between Northern and Southern Sudan since 1983.<sup>153</sup> It is important to reiterate here, as earlier observed in this thesis,<sup>154</sup> that Islamic jurists agree that the existence of certain adverse human and social conditions that contribute to the escalation of crimes may demand the enforcement of less severe punishments other than the *hudûd* punishments. On the application of Islamic penal system in contemporary Muslim societies, El-Awa has pointed out the need to always take cognisance of necessary social framework and factors that would prevent its nonsensical application.<sup>155</sup> There is judicial precedent in the practice of the early Islamic State of restricted application of *hudûd* punishments in periods of severe economic and social difficulties.<sup>156</sup>

Sudan is a State party to both the ICCPR and the ICESCR and to at least twenty other international instruments relating to human rights.<sup>157</sup> It also signed the Torture Convention in

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<sup>150</sup> See Gordon, C.N., "Islamic Legal Revolution: The Case of Sudan" (1985) 19 *International Lawyer* 793; An-Na'im, A.A., *Towards an Islamic Reformation* (1990), pp.125-133.

<sup>151</sup> An-Na'im, A.A (1990) *ibid.*, p.127.

<sup>152</sup> *ibid.*, 131.

<sup>153</sup> The Sudan Representative during the consideration of the 2<sup>nd</sup> ICCPR Periodic Report of Sudan by the HRC in 1998 argued that: "most of the allegations of human rights violations related to the armed conflict in southern Sudan, which had been going on since the early 1950s." See Summary Record of the 1628<sup>th</sup> Meeting of the HRC on Sudan, UN Doc. CCPR/C/SR.1628 of 2 February 1998, Par.5.

<sup>154</sup> See Chapter 4, pp. 77-78 above.

<sup>155</sup> El-Awa, M.S., *Punishment under Islamic Law* (1982) p.136. See also Mawdudi, A.A., *Islamic Law and Constitution* (1967) pp.53-59.

<sup>156</sup> See e.g. Abû Zahrah, M., *Usûl al-Fiqh* (Arabic) (1958) p.222-228; Ibn Qayyim, *I'lâm al-Muwaqqqi 'in* (Arabic) (1996) Vol.1. p.185. See also Kamali, M.H., *Principles of Islamic Jurisprudence* (1991), pp.247 and 270.

<sup>157</sup> Slavery Convention (1926); Supplementary Convention on the Abolition of Slavery, The Slave Trade and Institutions and Practices Similar to Slavery (1956); Convention Relating to the Status of Refugees (1951); Protocol Relating to the Status of Refugees (1967); Convention on the Elimination of all Forms of Racial Discrimination (1965); African Charter on Human and Peoples Rights (1981); Convention on the Rights of the Child (1989); Convention on the Suppression and Punishment of the Crime of Apartheid (1973); The 1949 Geneva Convention I; The 1949 Geneva Convention II; The 1949 Geneva Convention III; The 1949 Geneva Convention IV; ILO Convention (No. 29) Concerning Forced Labour (1930); ILO Convention (No. 98) Concerning the Application of the Principles of the Right to Organize and Bargain Collectively (1949); ILO Convention (No. 100) Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value (1951); ILO Convention (No. 105) Concerning the Abolition of Forced Labour (1957); ILO Convention (No. 111) Concerning Discrimination in Respect of Employment and Occupation (1958); ILO Convention (No. 122) Concerning Employment Policy (1964); OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (1969); International Convention Against Apartheid in Sports (1985). See UN Human rights Treaty Website at: <http://www.unhchr.ch/html/intlinst.htm> [25/2/2001] and ILO Conventions Website at: <http://ilolex.ilo.ch:1567/public/english/docs/convdisp.htm> [25/2/2001] and International Humanitarian Law Treaties Website at: <http://www.icrc.org/ihl> [25/2/2001].

1986 but is yet to ratify it. We shall now examine its policy and practice towards fulfilling its international human rights obligations within its dispensation of Islamic law.

### *Constitutional Rights*

Sudan adopted a new constitution in 1998 containing a section on “Freedoms, Sanctities, Rights and Duties”.<sup>158</sup> The rights guaranteed are: Freedom and Sanctity of Life<sup>159</sup>; Right to Equality<sup>160</sup>; Sanctity of Nationality<sup>161</sup>; Freedom and right of Movement<sup>162</sup>; Freedom of Creed and Worship<sup>163</sup>; Freedom of Thought and Expression<sup>164</sup>; Freedom of Association and Organisation<sup>165</sup>; Sanctity of Cultural Communities<sup>166</sup>; Sanctity of Earning and Property<sup>167</sup>; Inviolability of Communication and Privacy<sup>168</sup>; Immunity against Detention<sup>169</sup>; Right and Sanctity in Litigation<sup>170</sup>; Right of Innocence and Defence<sup>171</sup>; Sanctity from Death save in Justice.<sup>172</sup> Article 34 also provides for the right of access by every aggrieved person to the Constitutional court for the protection of the freedoms, sanctities and rights guaranteed in the constitution, including the right to compensation for damages sustained as a result of violation of the constitutional rights.

While some of the rights under the constitution are apparently absolute<sup>173</sup>, most are only enforceable “as may be regulated by law”. This certainly includes Islamic law because Article 65 of the Constitution provides for the country’s sources of legislation as follows:

“Islamic law<sup>174</sup> and the consensus of the nation, by referendum, Constitution and custom shall be the sources of legislation; and no legislation in contravention with these fundamentals shall be made; however, the legislation shall be guided by the nation’s public opinion, the learned opinion of scholars and thinkers, and then by the decision of those in charge of public affairs.”

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<sup>158</sup> See Part II (Articles 20 – 35) Constitution of the Republic of Sudan (1998). Republic of Sudan Gazette Special Supplement No: 1.

<sup>159</sup> Art. 20. *ibid.*

<sup>160</sup> Art. 21. *ibid.*

<sup>161</sup> Art. 22. *ibid.*

<sup>162</sup> Art. 23. *ibid.*

<sup>163</sup> Art. 24. *ibid.*

<sup>164</sup> Art. 25. *ibid.*

<sup>165</sup> Art. 26. *ibid.*

<sup>166</sup> Art. 27. *ibid.*

<sup>167</sup> Art. 28. *ibid.*

<sup>168</sup> Art. 29. *ibid.*

<sup>169</sup> Art. 30. *ibid.*

<sup>170</sup> Art. 31. *ibid.*

<sup>171</sup> Art. 32. *ibid.*

<sup>172</sup> Art. 33. *ibid.*

<sup>173</sup> e.g. Freedom from slavery, forced labour, humiliation or torture (Art. 20) and Right to Equality (Art. 21)

<sup>174</sup> The Arabic term used is (“*al-Shari’ah al-Islamiyyah*”).

Thus where Islamic law applies, at least to Muslims, some of the constitutional rights would be interpreted as regulated by Islamic law. From an international law perspective, this amounts to creating claw-back avenues on some of the apparent constitutional rights. This can be practically so in the face of hard-line interpretations of Islamic law. However, the proviso of that article, which takes the learned opinion of scholars and thinkers into consideration in legislation does encourage dialogue, which if positively utilised, should accommodate dynamic and moderate views of Islamic scholars and thinkers in the interpretation of the law in a manner that ensures the positive realisation of the rights guaranteed.

The Islamic concept of public order (*hisbah*) is also constitutionalised in Article 16 of the constitution empowering the State to promote morals and unity of the society as follows:

“The State shall, endeavour by law and directive policies to purge society from corruption, crime, delinquency, liquor among muslims, and to promote the society as a whole towards good norms, noble customs and virtuous morals, and towards such as may encourage the individual to actively and effectively participate in the life of society and guide the same towards rallying those around him for good collective gain, solidarity and fraternity by the firm divine cord in a way that preserves the unity of the country, stability of governance and progress towards civilized renaissance and higher ideals.”

The Sudanese constitution thus attempts to blend the guarantee of human rights with the State obligation of protecting public morals under Islamic law.<sup>175</sup> How the State succeeds in achieving a balance between the two without unnecessarily encroaching upon individual rights will depend on two constitutional factors; (i) the influence that learned opinion of scholars and thinkers, as stated in Article 65 have on law making and enforcement, and (ii) the approach of the constitutional court in the interpretation of the scope of the constitutional rights of individuals in relation to the morality role of the State under the constitution.

### ***Equality and Non-discrimination***

Article 21 of the Sudanese constitution provides that:

“All people are equal before the courts of law. Sudanese are equal in rights and duties as regards to functions of public life; and there shall be no discrimination only by reason of race, sex or religious creed. They are equal in eligibility for public posts and offices not being discriminated on the basis of wealth.”

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<sup>175</sup> See Chapter 4, pp. 65-67 above.



Despite the constitutional provision above, the ESCR Committee confronted Sudan, during the consideration of its initial report on the ICESCR, with allegations and questions on religious and gender discrimination.<sup>176</sup> Sudan in its reply denied the allegations of religious discrimination contending that freedom of belief, thought and expression are guaranteed in the Sudan, that “all citizens in the Sudan are able freely to practice religious rites and ceremonies throughout the whole of the country”.<sup>177</sup> Responding to a similar question raised by the Human Rights Committee during the consideration of Sudan’s second Periodic Report on the ICCPR in 1997 that the application of Islamic law in Sudan was discriminatory to non-Muslims, the Sudanese representative contended that Islamic law applied only to Muslims, and since majority of the population were Muslims, “the use of Shariah as a source of law for Muslims and customary law as a source for non-Muslims was the best option available (and that) any attempt to impose the will of the minority would simply lead to further conflict.”<sup>178</sup> The ESCR Committee also raised questions on the Islamic law rules of inheritance, marriage, and divorce applicable in the Sudan as being discriminatory against women, which are examined below.

### *Women’s Rights*

The Sudanese constitution has a general provision on women in conjunction with the institution of family. This is also perhaps to portray the important role of women in protecting the institution of family within Islamic law and culture. Article 15 provides that:

“The State shall care for the institution of the family, facilitate marriage and adopt policies to purvey progeny, child upbringing, pregnant women and mothers. The State shall emancipate women from injustice in all aspects and pursuits of life and encourage the role (the Arabic version says “her role”) thereof in family and public life.”

Although this provision is quite general and non-specific on the rights of women, the second sentence that the State “shall emancipate women from injustice in all aspects and pursuits of life and encourage (her) role thereof in family and public life” is so wide and absolute that it can be used as a constitutional provision to guarantee the general rights of women in Sudan. Article 21 also prohibits sexual discrimination. The extent of the rights that women may enjoy under these provisions will however depend greatly on the liberality or

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<sup>176</sup> See the Committee’s List of issues on Sudan, UN Doc. E/C.12/Q/SUD/1 of 13 December 1999, Par. 11-18.

<sup>177</sup> See Reply to List of Issues by Sudan, UN Doc. HR/CESCR/NONE/2000/10 of 24/06/2000, Par.11-15

<sup>178</sup> See HRC Summary Record of 1629<sup>th</sup> Meeting: Sudan, UN Doc. CCPR/C/SR.1629 of 31/10/97 Par. 26.

otherwise of the interpreting organs of that provision, especially when considered against the morality powers of the State under the constitution. Women's rights advocates have generally criticised the effect of Sudan's Islamisation policy on women's rights in the country. Sudan regulates public morality through the provision of public morality offences in the Penal Code<sup>179</sup> and also through the Public Order Act of 1996. The provisions prescribe *inter alia*, the punishment of whipping for anyone who conducts him/herself in an indecent manner or in a manner contrary to public morality. The morality laws are enforceable mainly by the "Morality and General Discipline Police" or the "Popular Police" (*Muhtasibûn*). Women are reported to be the most vulnerable groups to the excesses and abuses of the zealous enforcement of these provisions.<sup>180</sup>

In its concluding observations on Sudan's second periodic ICCPR report, the HRC had expressed concern at the "official enforcement of strict dress requirements for women in public places, under the guise of public order and morality, and at inhuman punishment imposed for breaches of such requirements."<sup>181</sup> We identified earlier in Chapter 4 of this study that in enforcing the doctrine of *hisbah* under Islamic law adequate care must be taken to ensure a proper balance between upholding societal values and ensuring the rights of individuals. The scope of *hisbah* should therefore be specifically defined and its implementation properly monitored by the State. Its interpretation and enforcement should not be left to the discretion of individuals to act as both prosecutors and judges enforcing their own interpretations of whatever they consider as violating public morality.

In its second periodic report on the ICCPR submitted to the HRC in March 1997, Sudan enumerated its efforts in enhancing women's rights and declared the existence of a "*de jure* and *de facto* equality of sexes" in the country.<sup>182</sup> On the question of gender discrimination in respect of Islamic rules regarding marriage, divorce and inheritance, Sudan had responded that "Islamic law and the Inheritances Act apply to all Muslims in accordance with their religious conviction, as guaranteed by the Universal Declaration of Human Rights in connection with matters of their creed and religion (and that) Islamic law is not imposed on non-Muslims in matters of personal status."<sup>183</sup> It had also contended in its report on the ICCPR that "the claim that females are entitled to half the share of males in inheritance is not

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<sup>179</sup> See Part 15 of the Sudan Penal Code 1991.

<sup>180</sup> See Lawyers Committee on Human Rights, *Beset by Contradictions*, (1996), pp.80-82 and Report of the Special Rapporteur, Mr. Gaspar Biro on Situation of Human rights in Sudan, UN Doc. E/CN.4/1998/66 (Part VII).

<sup>181</sup> See UN Doc. CCPR/C/79/Add.85 of 19/11/97, Par. 22.

<sup>182</sup> See Second Periodic Report of States Parties: Sudan, UN Doc. CCPR/C/75/Add.2 of 13/03/97, Par.35.

<sup>183</sup> See UN Doc. HR/CESCR/NONE/2000/10, Par 17 (a).

accurate, since in many instances, a female would be entitled to more than the share of a male.”<sup>184</sup> Women, it argued, are also not prohibited from travelling abroad by any law.<sup>185</sup>

On the question of female representation in government and politics, Sudan has reported to the ESCR Committee that “Sudanese women are more widely represented in the public service than their counterparts in countries which are in similar circumstances” and that a “quota is allocated for women in parliament”.<sup>186</sup> The country had also established an office for women development and claimed to be “one of three countries, worldwide, which have responded positively to the international efforts to eradicate harmful traditional practices”.<sup>187</sup>

In 1995 the country drew a 10-year plan to achieve, *inter alia*:

- (a) Removal of obstacles to women’s development and their integration into development projects;
- (b) Granting women all legal and political rights;
- (c) Strengthening capabilities of women to participate in policy-making, project planning, implementing and follow-up;
- (d) Promotion of the economic capabilities of women by increasing their access to production inputs;
- (e) Encouragement of women to start small projects in the industrial fields;
- (f) Promotion of infant health care services and family planning and reducing mother/child mortality rates, through intensive vaccination programmes;
- (g) Training of women in general health, environment and hygiene, as well as raising health awareness in general;
- (h) Education to decrease illiteracy and eventually eradicate it altogether;
- (i) Eradication of all harmful traditional practices, and in this connection a seminar has already been held in Khartoum (1995) to discuss female circumcision.<sup>188</sup>

In response to the demand by the HRC that Sudan should promulgate a law prohibiting female genital mutilation, the Sudanese representative, Mr. El-Mufti, stated that the practice was already an offence in Sudan but it was difficult to halt such traditional practices due to the reluctance of the victims to file complaints. The government has thus embarked on social and educational programmes to persuade people to abandon the practice. The second representative, Mr. El-Radi, added that the practice was “unfortunately an entrenched

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<sup>184</sup> See UN Doc. CCPR/C/75/Add.2 of 13/03/97, Par. 55.

<sup>185</sup> See UN Doc. HR/CESCR/NONE/2000/10, Par 17 (e); See also UN Doc. CCPR/C/SR.1629 of 31/10/97 Par. 20.

<sup>186</sup> See UN Doc. HR/CESCR/NONE/2000/10 *ibid.*, Par. 17(f).

<sup>187</sup> See UN Doc. CCPR/C/75/Add.2 of 13/03/97, Par. 51.

<sup>188</sup> *ibid.*, Par. 52.

custom, particularly in isolated areas where people are ignorant and illiterate” which makes the enforcement of the law difficult. He stated that “trained midwives...knew that they were liable to prosecution for involvement in such practices.”<sup>189</sup>

It is instructive to observe here that there is a disputed traditional belief in Muslim societies that there is a *Sunnah* type of female clitoridectomy in Islam. This belief is quite contentious. For instance in December 1997 the High Administrative Court of Egypt overturned the decision of a lower court that had nullified a ban of female circumcision in Egypt. Earlier in 1995 the State jurisconsult (*muftî*) of Egypt and later head of the famous Azhar University of Cairo, Sheikh Muhammad Tantâwî, had stated that the practice had no legal basis in Islamic law, which led to the banning of the practice by the State. Some other Egyptian clerics however argued against the opinion of the *muftî*, claiming that there was a Tradition of the Prophet that allowed female circumcision. It was on that argument that a lower court granted the prayer of one of the clerics who had contested that the ban of the practice was irreligious, a decision which the highest Egyptian administrative court subsequently overturned.<sup>190</sup>

In its concluding observations on Sudan’s second periodic ICCPR report, the HRC demanded Sudan to repeal “all legal provisions hindering women’s free choice of spouse, as well as other rules differentiating between men’s and women’s rights to marry and within marriage” in Sudan<sup>191</sup>. As a general rule under Islamic law consent of the couple is a necessary condition for the validity of marriages. But according to *Mâlikî* jurisprudence in Islamic law, the consent of a virgin girl is subject to her guardian’s overriding power of restraint (*ijbâr*). This is considered as “a safety measure in the interest of the girl herself” and thus a protective right for the girl.<sup>192</sup> Where the guardian uses this power of restraint against the interest of the girl, recourse can be made to the courts to override such restraint. The Committee however noted that such restraint is incompatible with Articles 3, 16, 23 and 26 of the ICCPR.<sup>193</sup> The Sudanese representatives submitted that Sudan respected the ICCPR and gave it the highest priority. They admitted that mistakes could occur, and where they do the government tries to address the problem from the roots. The government thus considered

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<sup>189</sup> See UN Doc. CCPR/C/SR.1629 of 31/10/97, Par. 19 and 34.

<sup>190</sup> See Middle East Times, Egypt Edition, 4<sup>th</sup> January 1998. See also Egypt’s reply to list of Issues on its ICESCR Report, UN Doc., HR/CESCR/NONE/2000/6 of 28/03/2000, Par. 34.

<sup>191</sup> See Concluding Observations of the HRC: Sudan, UN Doc. CCPR/C/79/Add.85 of 19 November 1997, Par. 11.

<sup>192</sup> See Doi, A.R.I., *Shari’ah: The Islamic Law* (1984) p.123.

<sup>193</sup> See UN Doc. CCPR/C/79/Add.85, Par. 11.

education as top priority in the effort to ensure gender or minority equality and had taken necessary steps towards ensuring access to education by all.<sup>194</sup>

### *Islamic Criminal Justice*

Sudan adopted a new penal code in March 1991 based upon Islamic law. The code applies only in the northern part of Sudan, which is predominantly Muslim, including the capital Khartoum. It does not apply to non-Muslims in the south. All the traditional Islamic law criminal punishments are applicable under the code.<sup>195</sup> The application of the *hudûd* punishment by Sudan was immediately criticised by the HRC at the consideration of its initial ICCPR report in 1991. The Sudan Representative rebutted the HRC's criticism of the *hudûd* punishment and argued that countries must be free to choose their laws based on their convictions, traditions and customs.<sup>196</sup> He however also stated conversely that the ICCPR formed an integral part of Sudan's domestic laws and could be invoked before all tribunals in the country. What the representative seemed to be saying was that although it was bound by the ICCPR as a State Party to it, his country's obligation under it, as a Muslim State, were implementable only within the parameters of the convictions, traditions and customs of Sudan.<sup>197</sup> Bearing in mind however that Sudan has some percentage of citizens who do not share the Islamic conviction and customs, this raises questions about the general application of Islamic law in modern Muslim States comprising also of non-Muslim citizens. The status and treatment of non-Muslim citizens under the Islamisation policy in Sudan has been under serious criticism by international human rights monitors.<sup>198</sup> Hamidullah has however elaborated in his *Muslim Conduct of State*, the ideal status that non-Muslims should enjoy as citizens of a Muslim State.<sup>199</sup>

Christian leaders and other non-Muslim Sudanese had protested the application of Islamic law to non-Muslim Sudanese citizens under the September Laws of 1983.<sup>200</sup> The new Penal Code enacted in 1991 attempted to address this issue by exempting the application of its provisions on Islamic offences and punishments in the non-Muslim southern part of Sudan, except the legislative authority of the region decides otherwise or the accused person

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<sup>194</sup> See UN Doc. CCPR/C/SR.1629, Par. 61.

<sup>195</sup> See Chapter 4, pp.72-80 above.

<sup>196</sup> See UN Doc. A/46/40 Supplement No.40 at 126, also LCHR, *Beset by Contradictions*, (1996) p.63.

<sup>197</sup> It is important to note that Sudan did not enter any reservations at its adoption of the ICCPR.

<sup>198</sup> See e.g. Human Rights Watch, *Sudan: "In the Name of God"* (1994) p. 39.

<sup>199</sup> Hamidullah, M., *Muslim Conduct of State*, (7<sup>th</sup> Ed. 1977) pp.111ff.

<sup>200</sup> See An-Na'im, A.A., (1990) *supra*, note 150 above, p.132.

himself requests for its application.<sup>201</sup> There were reports however that this did not prevent the continued application of Islamic criminal punishments to non-Muslims, especially for alcohol offences.<sup>202</sup> In Communications brought against Sudan under the African Charter of Human and People's Rights, the African Commission on Human and Peoples' Rights has held that "it is fundamentally unjust that religious laws should be applied against non-adherents of the religion. Tribunals that apply only Shari'a are thus not competent to judge non-Muslims, and everyone should have the right to be tried by a secular court if they wish."<sup>203</sup> Doi has analysed the position of non-Muslims under Islamic law, stating *inter alia*, that:

"...non-Muslims will not be forced to be governed by the *Shari'ah* law. All their cases will be decided in accordance with the personal law of their own choice. ... If eating pork, drinking of wine or marriages regardless of consanguinity e.t.c. are permitted by their religious or customary law, they will not be prohibited from them by the *Shari'ah*."<sup>204</sup>

Sudan stated in its second periodic ICCPR report that the exemption of the southern States from the application of Islamic penal law in 1991 was a practical demonstration of Sudan's adherence and respect for the right to freedom of thought, conscience and religion.<sup>205</sup> The report further stated that Sudan operates on the policy of "there is no compulsion in Religion" as enshrined in the Qur'an and that the Sudanese Penal Code "does not make conversion from Islam an offence, but only the manifestation of such conversion if such manifestation adversely affects public safety".<sup>206</sup> Article 126 of the 1991 Sudanese Penal Code makes apostasy from Islam a criminal offence punishable with death if proclaimed or made public expressly or by action. The explanation that it is an offence only "if such manifestation adversely affects public safety" is perhaps an attempt by Sudan to depart from the traditional interpretation which considers private conversion *simpliciter* as apostasy punishable with death under Islamic law. In which case there would be the need to clearly spell out what type of manifestation would be deemed to "adversely affect public safety". This is necessary to prevent abuse of the provisions. Sudan's report also indicated the country's commitment to the prohibition of torture, cruel, inhuman or degrading

<sup>201</sup> See Section 5(3) of the Sudan Penal Code 1991.

<sup>202</sup> See Lawyers Committee on Human Rights, *Beset by Contradictions*, (1996) pp.74-78.

<sup>203</sup> See *Amnesty International .v. Sudan*, Communication No.48/90; *Comite Loosli Bachelard .v. Sudan*, Communication No, 52/91; *Lawyers Committee for Human Rights .v. Sudan*, Communication No. 52/91; and *Association of Members of the Episcopal Conference of East Africa .v. Sudan*, Communication No. 89/93. See (2001) 8 *International Human Rights Reports*, No.1, 256 at 266 Par.73.

<sup>204</sup> Doi, A.R., *Non-Muslims Under Shari'ah (Islamic Law)* (1979) p.51.

<sup>205</sup> See UN Doc. CCPR/C/75/Add.2. Par. 14 and 125.

treatment, stating that the Penal Code and Criminal Procedure Act provided penalties for torture.<sup>207</sup> The Sudanese representative, Mr. El-Mufti, also stated in his answers to the HRC's questions that, in fact some police officers had been tried and convicted for acts of torture.<sup>208</sup>

The HRC commended Sudan's effort in the above respects but expressed concern that the imposition of the death penalty for the Islamic offences such as apostasy, committing a third homosexual act and adultery as provided in the country's Penal Code were incompatible with Article 6 of the ICCPR. The Committee also noted that the Islamic punishments of whipping, amputation and stoning are not compatible with Articles 7 and 10 of the ICCPR.<sup>209</sup> The Sudanese Representative, Mr. El-Mufti, responded that:

“Those three punishments formed part of the Islamic faith, but were (also) accompanied by many guarantees. First of all, no stoning had occurred in the history of the Sudan, and in the entire history of Islam stoning had been ordered only once, in the time of the prophet, because the accused had confessed. For stoning to take place, there had to be four eyewitnesses to the acts with which the accused person was charged. An accused who had confessed could retract the confession. No one had ever been punished by stoning in the Sudan.”<sup>210</sup>

In response to the question of amputation, Mr. El-Mufti argued that the punishment was enforced for convictions in armed robbery cases that resulted in the victim's death. In case of theft where the theft has been committed to buy food or medication the punishment would not be enforced. He also pointed out that the punishment of whipping was accompanied by the guarantees that “it must not result in the slightest injury, not even a scratch.”<sup>211</sup> Authority for this is found in the practice of the second Caliph, Umar, who used to instruct the whipper saying: “Strike in such a manner that your armpit is not revealed.”<sup>212</sup> It must be noted however that this rule is seldom followed in practice in some Muslim countries where the punishment of whipping is enforced.<sup>213</sup> Maududi had also stated in his interpretation of the verse on whipping that: “Flogging should not be entrusted to rough executioners. It should rather be entrusted to persons of knowledge and understanding who are well aware as to what kind of beating accords with the requirements of the *Sharî'ah*”.<sup>214</sup> He indicated that in case

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<sup>206</sup> *ibid.*, Par.127 and 133..

<sup>207</sup> *ibid.*, Par. 85 and 86 .

<sup>208</sup> See UN Doc. CCPR/C/SR.1628. of 02/02/98, Par. 13.

<sup>209</sup> See UN Doc. CCPR/C/79/Add.85 of 19/11/97 Par. 8 and 9.

<sup>210</sup> See UN Doc. CCPR/C/SR.1628, Par. 15.

<sup>211</sup> *ibid.*, Par. 16.

<sup>212</sup> See Ibn al-'Arabî, A., *Ahkâm al-Qur'ân* (Arabic) (1330 AH)Vol. 2., p.84.

<sup>213</sup> For instance Mehdi notes the practice in Pakistan that “The flogging of male convicts...takes place in public... and... in some cases, a loud speaker has been used so that people can hear the screams of the convict from a long distance.” See Mehdi, R., *The Islamization of the Law in Pakistan* (1994) p.146.

<sup>214</sup> See Maududi, A.A., *Towards Understanding the Qur'ân: English version of Tashîm al-Qur'ân* (1998) Vol. VII, p. 177.

of a weak or an aged person convicted of fornication, for example, touching him once with a broom consisting of a hundred straws will suffice to meet the formal legal requirements of a hundred lashes.<sup>215</sup>

In response to the argument of the HRC that “other countries which used Koranic law had eliminated such punishments, which was cruel and inhuman, from their legislation”,<sup>216</sup> Mr. El-Mufti stated that the *hudûd* punishments “had not been invented by the Sudanese government but were mandatory under a true interpretation of Islam, even if some Islamic countries were not applying them. In his view they constituted a manifestation of freedom of religion.” He further stated that the “(a)pplication of the punishments was well organized and there were many safeguards to prevent invalid judgements”.<sup>217</sup> This response suggests that the claim by Sudan that the ICCPR prevails “over all national laws”<sup>218</sup> is not taken to include provisions of the *Sharî‘ah* which is considered as the mandatory law of God. Apart from the *hudûd* punishments the 1991 Sudan Penal Code however also prescribes the death penalty and whipping for *ta‘zîr* offences for which such punishments are not specifically prescribed by the *Sharî‘ah* as in the case of *hudûd*.<sup>219</sup> As earlier pointed out in Chapter four, the State has discretion under Islamic law to prescribe less harsh punishments than the *hudûd* punishments in the case of *ta‘zîr* offences.<sup>220</sup>

The second representative of Sudan, Mr. El-Radi, observed with respect to the HRC’s comments on Islamic criminal justice that the issue “seemed to loom very large in the mind of the Committee.” He pointed out that his researches on Islamic criminal justice indicates that the Islamic sanctions were mostly “hedged by legal impediments” due to the stringent evidential requirements that are almost impossible to fulfil. He stated that the indiscriminate enforcement of the punishments under the Numeiri regime were, in fact, a demonstration of how Islamic law should not be applied. Sudan, he said, had since then embarked on remarkable departure from that misapplication of the law, and the courts “were now on a right track”. Mr. El-Radi further stated that:

“(f)rom his own studies of Islamic law, he had concluded that apostasy, for example, was not a *hadd* offence. A person could change his religion, provided he did so without causing a danger to the State or to the public welfare. If that line was crossed, he could be prosecuted. Thus the offence became more like high treason,

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<sup>215</sup> *ibid.*

<sup>216</sup> See UN Doc. CCPR/C/SR.1628 of 02/02/98, Par. 57.

<sup>217</sup> See UN Doc. CCPR/C/SR.1629 of 31/10/97, Par. 14.

<sup>218</sup> See UN Doc. CCPR/C/75/Add.2, Par. 61.

<sup>219</sup> e.g. Criminal breach of trust in case of a public servant or entrusted employee may be punishable with death under Sec.177(2) Sudan Penal Code 1991.

<sup>220</sup> See p. 78 above.



which was recognized as punishable all over the world.” He had also concluded as “an Islamic academician, that the drinking of intoxicating liquor was not a *hadd* offence either”.<sup>221</sup>

The above representation of the Sudanese delegation at the HRC seems to indicate recourse to a more moderate interpretation of the *Sharî‘ah* by Sudan, different from the hard-line approach of the past. The delegation finally assured the HRC that majority of the Sudanese people shared the government’s commitment to international human rights.<sup>222</sup>

### *General Representations on Human Rights*

Despite the extremely negative criticisms against Sudan by international human rights monitors since its Islamisation policy began in 1983,<sup>223</sup> it has continued to reiterate in its representations a determination to discharge its international human rights obligations without the abandonment of Islamic law. It has however also demonstrated its appreciation of the fact that this will demand a moderate rather than a hard-line approach in its interpretation and application of the law in many respects. The above statement of one of its representatives, Mr. El-Radi, before the HRC is quite explicit of that appreciation. Its second periodic ICCPR report referred to many aspects of the State’s policy and legislation through which it has endeavoured to improve upon its international human rights obligations.

For instance the report mentioned the establishment of an Advisory Council for Human Rights chaired by the country’s Minister of Justice with powers to familiarise the authorities concerned and the public with the contents of the ICCPR. Committees for Human Rights Education have also been established in all the 26 states of the Sudan on the advice of the Advisory Council.<sup>224</sup> It was also stated that human rights had been introduced as a subject in the syllabus of the Police College from the 1993/94 academic session.<sup>225</sup> Sudan also submitted a core document for use by the treaty bodies to the UN in 1998 in which it stated measures being taken at eliminating the obstacles to human rights awareness pursuant to the resolution of the UN General Assembly on raising awareness of human rights.<sup>226</sup>

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<sup>221</sup> See UN Doc. CCPR/C/SR.1629 of 31/10/97 Par.39.

<sup>222</sup> *ibid.* Par. 63.

<sup>223</sup> See e.g. Lawyers Committee on Human Rights, *Beset by Contradictions*, (1996); and Human Rights Watch, *New Islamic Penal Code Violates Basic Human rights* (1991). See also the 1994 report by Special Rapporteur to Sudan, UN Doc. E/CN.4/1994/48.

<sup>224</sup> See UN Doc. CCPR/C/75/Add.2., Par. 39 and 87.

<sup>225</sup> *ibid.*, Par. 40.

<sup>226</sup> UN Doc. HRI/CORE/1/Add.99 of 8/10/98.

Based on this moderate approach and combined with sincerity of purpose, it appears that the gap between the application of Islamic law and international human rights law in Sudan will become more narrowed with time.

### ISLAMIC REPUBLIC OF PAKISTAN

Since Islam was the *raison d'être* for the creation of Pakistan, reference to the State's adherence to Islamic law has featured in all its constitutions since 1956.<sup>227</sup> The "Objectives Resolution" adopted by the Pakistan Constituent Assembly in 1949 declared it a "sacred trust" to run the State "*within the limits prescribed by God*". Pakistan was considered as a State "(w)herein the principles of democracy, freedom, equality, tolerance and social justice, *as enunciated by Islam* shall be fully observed; (and) (w)herein the Muslims shall be enabled to order their lives in the individual and collective spheres *in accord with the teaching and requirements of Islam as set out in the Holy Quran and the Sunna.*"<sup>228</sup> The "Objectives Resolution" became the country's constitutional preamble,<sup>229</sup> and its provisions were later, through the 1985 constitutional amendment, absorbed as an operative part of the constitution. It has remained a reference point, since its adoption in 1949, for the application of Islamic law as State law in Pakistan.<sup>230</sup>

The first constitution of 1956 provided that "No law shall be enacted which is repugnant to the injunctions of Islam as laid down in the Holy Quran and Sunna... and existing law shall be brought into conformity with such injunctions."<sup>231</sup> Article 1 of the 1962 Constitution also provided that "no law should be repugnant to Islam" and was later amended to the wordings of the 1956 provision. The 1973 constitution contained the same provision in its Article 227. It also provided in its Article 2 that Islam shall be the religion of State. In 1979 four Ordinances were introduced for the enforcement of Islamic criminal law under the Islamization policy began by President Zia ul Haqq in 1977.<sup>232</sup> The enforcement of Islamic

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<sup>227</sup> See e.g. Justice Shah, N.H., *Islamization of Law in Pakistan* (1992). See also generally Bokhari, A. H., *The Protection of Human Rights in Islamic Republic of Pakistan with Special Reference to Islamic Shari'ah under 1973 Constitution* (1998). PhD Dissertation, University of Nottingham.

<sup>228</sup> See Constituent Assembly of Pakistan Debates, Vol. V, No.1 (7 March 1949) p.1 for the full text of the Objectives Resolution. (All Emphasis added).

<sup>229</sup> See e.g. the Preamble of the 1973 Constitution of the Islamic Republic of Pakistan.

<sup>230</sup> See Mehdi, R., (1994) *supra*, note 213 above, p.72; Justice Tanzilur-Rahman, *Objective Resolution and its Impact on Pakistan Constitutional Law* (1996); and Justice Shah, N.H., *The Objective Resolution and its Impact on the Administration of Justice in Pakistan* (1992).

<sup>231</sup> Art. 198.

<sup>232</sup> Prohibition (Enforcement of Hadd) Order IV of 1979; Offences Against Property (Enforcement of Hudood) Ordinance VI of 1979; Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979; and Offence of Qazf (Enforcement of Hadd) Ordinance VIII of 1979. See Justice Shah, N.H. *Islamization of Law in Pakistan* (1992) pp.3-4; and generally, Waqar-ul-Haq, M., *Islamic Criminal Laws (Hudood Laws & Rules) with up-to-date Commentary* (1994).

law was further consolidated in 1991 when the Pakistan National Assembly passed the Enforcement of Shari'ah Act, 1991. Article 3 (1) of the Shari'ah Act provided that: "The Shari'ah, that is to say the Injunctions of Islam as laid down in the Holy Qur'an and Sunnah, shall be the supreme law of Pakistan". Its Article 4(a) also provided that the courts "while interpreting the statute-law, if more than one interpretation is possible, the one consistent with the Islamic principles and jurisprudence shall be adopted by the Court". It will thus be correct to say that the *Shari'ah* (Qur'an and *Sunnah*) stands as the *grundnorm* of the State since the interpretation of the constitution itself will have to be consistent with Islamic principles. There is a Federal Shariat Court (FSC) established under Chapter 3A of the 1973 Constitution which shall "either on its own motion or on the petition of a citizen of Pakistan or the Federal Government or a Provincial Government, examine and decide the question whether or not any law or provision of law is repugnant to the injunctions of Islam".<sup>233</sup> An appeal lies from it to the Shariat Appellate Bench of the Supreme Court.

The prevalence of Islamic law in Pakistan even in emergency periods was demonstrated in the Provisional Constitution Order No. 1 of 1999 promulgated by the military regime of General Pervez Musharraf that took over power in October 1999. While the regime declared a state of emergency putting the substantive constitution in abeyance, Section 2(4) of the Order provided that:

"Notwithstanding anything contained in the Proclamation of the 14th day of October, 1999 or this Order or any other law for the time being in force, all provisions of the Constitution of the Islamic Republic of Pakistan embodying Islamic injunctions including Article 2, 2A, 31, 203A to 203J, 227 to 231 and 260 (3) (a) and (b) shall continue to be in force and no provision as aforesaid shall remain in abeyance or be deemed to have remained in abeyance at any time."<sup>234</sup>

The exemption was deemed necessary "for removal of doubts," and to ensure "the continuity and enforcement of the Islamic injunctions in the Constitution of the Islamic Republic of Pakistan".<sup>235</sup>

Pakistan is a State party to at least eighteen international instruments relating to international human rights law including the Women's Convention.<sup>236</sup> It has however not

<sup>233</sup> See Art. 203 of the Constitution of the Islamic Republic of Pakistan (1973).

<sup>234</sup> Sec. 2(4) Provisional Constitution Order No. 1 of October 15, 1999.

<sup>235</sup> *ibid.*

<sup>236</sup> Genocide Convention (1948); Slavery Convention (1926); Supplementary on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery (1956); Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1950); Convention on the Political Rights of Women (1952); International Convention on the Elimination of all Forms of Racial Discrimination (1965); International Convention on the Suppression and Punishment of the Crime of Apartheid (1973); Convention on the Elimination of all Forms of Discrimination Against Women (1979); Convention on the Rights of the Child (1989) 1949 Geneva Convention I; 1949 Geneva Convention II;

ratified either the ICCPR or the ICESCR. Pakistan voted for the adoption of the UDHR in 1948 and its representative at the UN General Assembly expressed a different view on the question of freedom of thought, conscience and religion in contrast to the position of Saudi Arabia on the matter which led to the latter's abstention during the adoption of the UDHR. With the Islamisation of laws in Pakistan the courts came under the full obligation of implementing Islamic law and their decisions as it relates to international human rights issues have varied in respect of constitutional rights, women's rights and criminal justice as analysed below.

### *Constitutional Rights*

The 1973 Constitution of Pakistan has a fundamental rights section that provides for the basic civil and political rights. Most of the rights are however subjected to law, public order or morality.<sup>237</sup> Although Pakistan has ratified neither the ICCPR nor the ICESCR, both its Federal Shariat Court and its Supreme Court have pronounced on questions relating to the scope of the fundamental rights provisions of its constitution in relation to Islamic law. We shall examine some of the decisions in the light of international human rights law.

A recent decision of the Pakistan Supreme Court that has been quite controversial in the sphere of international human rights is *Zaheer-ud-din and Others .v. The State and Others*,<sup>238</sup> which litigated on the fundamental right to freedom of religion. In that case the minority Ahmadi group relying on Article 20 of the Pakistan Constitution, challenged the constitutionality of the Ordinance 20 promulgated in 1984, which prohibited and criminalised the religious activities of the Ahmadis in Pakistan.<sup>239</sup> The Ahmadis were considered to be non-Muslims due mainly to their belief that the founder of the group, Ghulam Ahmed, was a prophet of God. The enactment of Ordinance 20 was thus aimed at prohibiting them from "posing" as Muslims or using any of the traditional Islamic epithets. Section 298 of the Ordinance provided that:

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1949 Geneva Convention III; 1949 Geneva Convention IV; ILO Convention (No. 29) Concerning Forced Labour (1930); ILO Convention (No. 87) Concerning Freedom of Association and Protection of the Right to Organize (1948); ILO convention (No. 98) Concerning the Application of the Principles of the Right to Organize and Bargain Collectively (1949); ILO Convention (No. 105) Concerning the Abolition of Forced Labour (1957); ILO Convention (No. 111) Concerning Discrimination in Respect of Employment and Occupation (1958). See UN Human Rights Treaty Website at: <http://www.unhchr.ch/html/intlinst.htm> and ILO Conventions Treaty Website at: <http://ilolex.ilo.ch:1567/public/english/docs/convdisp.htm>; and International Humanitarian Law Treaties Website at: <http://www.icrc.org/ihl> [25/2/2001].

<sup>237</sup> See Arts.8-28 of the Constitution of the Islamic Republic of Pakistan (1973).

<sup>238</sup> (1993) SCMR (S.Ct)1718.

<sup>239</sup> See The Anti-Islamic Activities of the Qadiani Group, Lahori Group, and Ahmadis (Prohibition and Punishment) Ordinance XX of 1984.

“298(B) 1. Any person of the Qadiani group or the Lahori group (who call themselves “Ahmadis” or by any other name) who by words, either spoken or written or by visible representation:

- (a) refers to, or addresses, any person, other than a Caliph or companion of the Holy Prophet Muhammad (Peace be upon him) as “Ameer-ul-Mumineen”, “Khalifa-tul-Mumineen”, “Khalifa-tul- Muslimeen”, “Sahabii” or “Razi Allah Anho”;
- (b) refers to, or addresses, any person, other than a wife of the Holy Prophet Muhammad (Peace be upon him), as the “ummul-Mumineen”;
- (c) refers to, or addresses, any person, other than a member of the family (ahle-bait) of the Holy Prophet Muhammad (Peace be upon him), as Ahle-bait; or
- (d) refers to, or names, or calls, his place of worship as “Masjid”; shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

2. Any person of the Qadiani group or the Lahori group (who call themselves “Ahmadis” or by any other name) who by words, either spoken or written, or by visible representation, refers to the mode or form of call to prayers followed by his faith as “Azan” or, recites “Azan” as used by the Muslims, shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine.

298(C) Any person of the Qadiani group or the Lahori group (who call themselves “Ahmadis” or by any other name), who, directly or indirectly, poses himself as a Muslim, or calls or refers to, his faith as Islam, or preaches or propagates his faith, or invites others to accept his faith, by words, either spoken or written, or by visible representations, or in any manner whatsoever outrages the religious feelings of Muslims, shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine.

The Ordinance was first challenged in the case of *Mujibur Rahman .v. The Federal Government of Pakistan*,<sup>240</sup> before the Federal Shariat Court (FSC) as being repugnant to Islamic injunctions. The FSC held that the Ahmadis were not Muslims according to Islamic tenets, so the Ordinance prohibiting them from “posing” as Muslims was considered proper and not repugnant to Islamic law.<sup>241</sup> *Zaheeru-ud-deen* thus challenged the Ordinance in the Supreme Court as violating the Ahmadis fundamental right to freedom of religion as guaranteed by Article 20 of the Pakistan Constitution. Article 20 of the Pakistan Constitution provides that:

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<sup>240</sup> (1985) PLD (FSC) 8.

<sup>241</sup> Other scholars do contest whether the Ahmadis’ position about their founder makes them non-Muslims since they still believed in the Oneness of God and in the prophethood of the Prophet Muhammad. See Mahmud, T., “Freedom of Religion and Religious Minorities in Pakistan: A Study of Judicial Practice” (1995) 19 *Fordham International Law Journal* 40 at 43. See materials cited in footnote 7 thereof.

“Subject to law, public order and morality:-

- (a) every citizen shall have the right to profess, practise and propagate his religion; and
- (b) every religious denomination and every sect thereof shall have the right to establish, maintain, and manage its religious institutions.”

The Supreme Court held by a majority decision of four to one that the Ordinance was not violative of the constitution because the State has a constitutional duty to protect the purity of Islam. The Court said it was clear that Pakistan had constitutionally adopted Islamic injunctions as contained in the Qur’an and *Sunnah* as its positive law, thus “even the Fundamental Rights as given in the Constitution must not violate the norms of Islam”.<sup>242</sup>

A critical perusal of the judgement would indicate that the court’s reasoning was against the background of the finding that the Ahmadis were not Muslims and thus do not have a right to “pose” as Muslims or represent their religious activities as that of Islam. The Court did not strictly address the issues involved as a straight constitutional question of the right to freedom of religion. It saw the matter as an issue of “religious misrepresentation” by the Ahmadis, rather than that of freedom of religion *simpliciter*. The Court thus relied, *inter alia*, on the “subject to law, public order and morality” proviso of Article 20, pointing out that the misrepresentation by the Ahmadis about their leader and their position concerning Prophet Muhammad as the final prophet was injurious and provocative to the feelings of the main body of Muslims, which may lead to the breach of public peace.<sup>243</sup> The Court gave priority to the constitutional duty of the State “to protect the purity of Islam”, which the Constitution had declared as the State religion (i.e. the ideology of the State), above the right to freedom of conscience and worship of the individual.

In the concluding part of its judgement, the Court however stated that the injunctions of Islam, which were the supreme law of Pakistan still guarantees the rights of the minorities “in such a satisfactory way that no other legal order can offer anything equal.” Perhaps the court was trying to make it clear that it considered *Zaheer-ud-din* as a case of religious misrepresentation by the Ahmadis rather than strictly a case of the right to religious freedom of a minority group.<sup>244</sup> In other words, the Ahmadis had a right to profess the faith of their choice, but this did not include the right to misrepresent a fundamental tenet of Islam as

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<sup>242</sup> See *Zaheer-ud-din .v. The State* (1993)SCMR 1718 at 1774.

<sup>243</sup> *ibid* at p.1777.

<sup>244</sup> The court had brought in the analogy of trademark infringement and deceptive trade practices in its consideration of the case, probably to distinguish it. This has been criticised by Mayer, A.E., “Judicial Dismantling of Constitutional protections

professed by the majority of Muslims.<sup>245</sup> There is no doubt however that on the facts of *Zaheer-ud-din*, the Human Rights Committee will find a breach of the right to freedom of thought, conscience and religion under Article 18 of the ICCPR.

A less controversial area where the courts have made a “conscious attempt to combine and harmonise Islamic law and secular fundamental rights”<sup>246</sup> is that of Public Interest Litigation. This was first manifested in 1988 in the case of *Benazir Bhutto .v. The Federation of Pakistan*<sup>247</sup> where the Supreme Court side-tracked the stringent traditional rules on *locus standi* and stated that a combination of the secular and Islamic elements of the Constitution inspired the court to adopt a more relaxed interpretative approach in the procedural requirements of its prerogative writ jurisdiction for the enforcement of the fundamental rights provisions of the Constitution. The maintenance of substantive justice as enjoined under Islamic law has since then been greatly emphasised to enhance the enforcement of fundamental rights in public interest litigation. Thus in *Akbar Ali .v. Secretary, Ministry of Defence, Rawalpindi and Ano*<sup>248</sup> the Supreme Court noted that:

“Since the introduction of Islamic law and jurisprudence in our Constitutional setup (sic) including the Objectives Resolution enacted by the first Constituent Assembly in 1949, the emphasis on real substantial justice has increased manifold. So much so that although it is not enshrined in the Constitution as a fundamental right, in the entire constitutional setup (sic) the right to obtain justice as is ordained by Islam, has become inviolable right of citizens of Pakistan”.

Lau has observed that this incorporation of an additional right to obtain justice as derived from Islamic jurisprudence has not only widened the concept of public interest litigation and relaxed the procedure governing the writ jurisdiction of the Supreme court, but has also widened the range of rights protected and guaranteed under the constitution.<sup>249</sup> It was on that basis that the Supreme Court also held in *Darshan Masih .v. The State*<sup>250</sup> that “(fundamental rights) might cover all aspects of human dignity, deprivations and misery,

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for Religious Freedom: The Grim Legacy of *Zaheeruddin v. State*”, *Conference Paper at the Cairo Conference on Democracy and the Rule of Law*, 7<sup>th</sup>-9<sup>th</sup> Dec. 1997.

<sup>245</sup> The recognition of the rights of the Ahmadis as a minority group is inferable from an amendment to Article 106(3) of the Constitution allocating to them, along with other minority groups, additional seats in the Provincial Assemblies. See Zafar, E., *The Constitution of the Islamic Republic of Pakistan 1973 with Commentary* (n.d.) p.437.

<sup>246</sup> See Lau, M., “Islamisation of Laws in Pakistan and its Impact on the Independence of the Judiciary in Pakistan”, *Conference Paper at The Cairo Conference on Democracy and the Rule of Law*, 7<sup>th</sup> – 9<sup>th</sup> Dec. 1997, p.5. See also Khan, M.H., *Public Interest Litigation: Growth of the Concept and its Meaning in Pakistan* (1993) pp.48-53.

<sup>247</sup> (1988) 40 PLD (S.Ct)416.

<sup>248</sup> (1991) 3 SCMR, 2114.

<sup>249</sup> See Lau, M., (1997) *supra*, note 246 above, p. 7. See also Lau, M., “Islam And Judicial Activism: Public Interest Litigation And Environmental Protection In The Islamic Republic Of Pakistan” in Boyle, A.E., and Anderson, M.R., *Human Rights Approaches to Environmental Protection* (1996) p. 285 at 295.

<sup>250</sup> (1990) 42 PLD (S.Ct) 513.

including those rights in this behalf which are ensured, in addition, as basic human rights in Islam.”<sup>251</sup>

The Federal Shariat Court (FSC) has also considered petitions relating to human rights issues in which it rejected suggestions to restrict the rights of women on the basis of Islamic law. In *Ansar Burney .v. Federation of Pakistan and Others*<sup>252</sup> the petitioner challenged the appointment of women as judges or magistrates arguing that such appointments violated Islamic law. The court disagreed with all the grounds of the petition and disallowed it. Also in *Mussarat Uzma Usmani and Ano .v. Government of the Punjab and Ano.*,<sup>253</sup> the petitioner had complained of girl candidates being denied admission into medical colleges on grounds of gender discrimination. The Islamic law principle of “*Ehsan*” (i.e. *Istihsan* [juristic preference]) was invoked by the Court to circumvent the technical difficulty of “non-impleadment” to sustain the petition. The FSC then went on to find a violation of the petitioner’s right to equality before the law as guaranteed by the constitution.

One observes therefore that apart from the *Zaheer-ud-din* case the courts in Pakistan have adopted a broad interpretation of Islamic law to ensure, in combination with the fundamental rights provisions of the constitution, the maximum guarantee of constitutional and international human rights. According to Chief Justice Afzal Zullah (as he then was) rights conferred by the Pakistan Constitution

“are by and large comprehensive and no internationally recognized Human rights would ordinarily remain out of them. In any case if at all any Human Rights which are not *prima facie* conferred by (the) Chapters of the Constitutions (sic), the necessary aid comes via Art 2A which enunciates rights and obligations under Islam and which is a substantive part of our constitutional set-up and which the courts are also trying to give effect to. Talking about rights under Islam, some of them definitely stand on a higher pedestal as compared to the internationally recognized Human Rights. For example, the right to obtain justice and the right to dignity of the man are so pronounced in Islam that they are made more comprehensive than similar rights provided in other systems”.<sup>254</sup>

This no doubt expresses a very generous legal interpretation that facilitates the employment of Islamic law to achieve the ideals of human rights in Muslim States. It also demonstrates the important role of the judiciary, as interpreters of law, towards the enhancement of international human rights guarantees.

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<sup>251</sup> *ibid.* at 545.

<sup>252</sup> (1983) 35 PLD (FSC) 73.

<sup>253</sup> (1987) 39 PLD (Lah.)178.

<sup>254</sup> Zullah, A., “Human Rights in Pakistan” (1992) 18 *Commonwealth Law Bulletin*, No.3, p.1343 at p.1346



### *Equality and Non-discrimination*

Pakistan has often emphasised its commitment to the principle of equality and non-discrimination at UN human rights forums.<sup>255</sup> Article 25(1) of its Constitution provides that: “All citizens are equal before the law and are entitled to equal protection of law” and Article 25(2) provides that: “There shall be no discrimination on the basis of sex alone”. In the case of *Fazal Jan .v. Roshan Din*<sup>256</sup> the Pakistan Supreme Court held that the provision for equality under the Constitution “read in the light of Islam imposes a positive obligation on all organs of the state, including the judiciary, to take active measures to safeguard the interest of women and children”.<sup>257</sup> Article 36 of the Constitution also provides that: “The State shall safeguard the legitimate rights and interest of minorities, including their due representation in the Federal and Provincial services”. The *Zaheer-ud-din* case earlier examined above has however been criticised as a decision violative of religious non-discrimination within international human rights circles.<sup>258</sup>

### *Women’s Rights*

Pakistan ratified the Women’s Convention in 1996 with a declaration that: “The accession by [the] Government of the Islamic Republic of Pakistan to the [said Convention] is subject to the provisions of the Constitution of the Islamic Republic of Pakistan” and a reservation that “it does not consider itself bound by paragraph 1 of article 29 of the Convention”.<sup>259</sup> Since the interpretation of the constitution of Pakistan is itself subjected to Islamic law as earlier identified above, its declaration subjecting the Women’s Convention to the Constitution will indirectly also subject it to Islamic law. Sweden, Denmark and Portugal have however submitted objections opposing the declaration as inadmissible under international law.<sup>260</sup> Pakistan has not submitted any report yet to the Committee on the Women’s Convention.

The Pakistan Enforcement of Shari’ah Act, 1991 provides that the rights of women as guaranteed by the Constitution shall not be affected by the enforcement of the *Shari’ah*.<sup>261</sup> However, some aspects of the Pakistan criminal ordinances have been very controversial in relation to women’s rights. The *Zina* Ordinance of 1979, the *Qanune-e-Shahadat* (Law of

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<sup>255</sup> See p. 316 below.

<sup>256</sup> (1990) 42 PLD (S.Ct) 661.

<sup>257</sup> See Lau, M., (1997) *supra*, note 246 above, p.8.

<sup>258</sup> See e.g. Mayer, E.A., (1997) *supra* note 244 above.

<sup>259</sup> See UN Human Rights Treaty Website at: <http://www.unhchr.ch/html/intlinst.htm> [25/2/2001].

<sup>260</sup> See *ibid*.

Evidence) Order of 1984 and the *Qisas* and *Diyat* Ordinance have all been criticised mostly by women as being gender discriminatory.<sup>262</sup>

In a line of cases, men accused of rape under the *Zina* Ordinance have been released for want of evidence while their female victims have earned convictions of *ta'zîr* punishment for *zina* based on their own rape allegation, (which is considered as confession for *zinâ* due to failure to establish the alleged rape) or based on pregnancy resulting from the rape.<sup>263</sup> The most celebrated case in that respect has been *Safia Bibi .v. The State*<sup>264</sup> in which a girl was reported to have been raped by her employers. The trial court acquitted the two accused men for want of evidence and sentenced the girl for *zinâ* based on her pregnancy. This attracted a lot of demonstrations and protest by women groups in Pakistan because the girl was blind. Eventually the Federal Shariat Court reversed the judgement and acquitted the girl by holding that the self-exculpatory statement of an accused should be considered sufficient for her acquittal if there was no other evidence to prove her guilt. The evidence of the rape victim does not still seem to have much value except it is substantiated by evidence of "real resistance" on the part of the victim as indicated in the case of *Bahadur Shah .v. The State*<sup>265</sup> where the court held that there was no evidence that the victim had offered any "real resistance" because the doctors report found no injury to her thighs, legs, elbows, arms, knees, face, back and buttocks. It has been observed that women are thus reluctant to report rape cases for fear of being convicted for *zinâ* on their own allegation of rape where not successfully proved.<sup>266</sup>

It looks strange that a rape victim could be convicted for *zinâ* on the basis of her own allegation when in fact the Ordinance defines *zinâ* as "wilful sexual intercourse between a man and a woman without being married to each other".<sup>267</sup> Perhaps the argument would be that *zinâ* offenders might use the allegation of rape to escape the law, knowing fully well that it is difficult to prove rape. In that case there should be a further burden of proof upon the prosecution (which must in this case be very heavy) to establish the consent of the victim to the sexual intercourse in alleged rape cases before *zinâ* may be established. Nevertheless, the possibility of *zinâ* offenders exploiting the allegation of rape to escape punishment must not

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<sup>261</sup> Art. 20.

<sup>262</sup> See generally Section on Pakistan in Women Living Under Muslim Laws (ed.), *Dossier 3*, (1988), particularly pp.33-38.

<sup>263</sup> See Jahangir, A., "How far are Penal Laws Effective in Protecting Women", in Women Living Under Muslim Laws (ed), *Dossier 3*, (1988) p.33 and n. 5. See also Chowdhury, N., "What Pakistani Women Face" in Women Living Under Muslim Laws (ed), *Dossier 1* (1986) p.70.

<sup>264</sup> (1985) 37 PLD (FSC) 120.

<sup>265</sup> (1987) 39 PLD (FSC) 11.

<sup>266</sup> See Mehdi, R., (1994) *supra*, note 213 above, p.126.

<sup>267</sup> *c.f.* Justice Hussain's observation on this point in *Safia Bibi, supra*, at 123, Par.14.

be used to close the door of justice against real victims of rape. Advocates of women's rights have argued that the requirement of four Muslim male adult eyewitnesses for the maximum conviction for rape protects the rapist and makes women especially vulnerable to violence.<sup>268</sup> It must be noted however that the *ta'zîr* punishment for rape under the *Zina* Ordinance does not require such difficult evidence. The judge may convict a rapist for *ta'zîr* punishment on compelling circumstantial evidence, and the punishment in that case is also higher than that of adultery or fornication.<sup>269</sup> It is a fact that rape cases are normally difficult cases, the risk of the victim ending up being punished for *zinâ* makes it more difficult under the *Zina* Ordinance.

Another area of law touching on women's rights is that of evidence. Section 17 of the *Qanune-e-Shahadah* (Evidence Law) Order, 1984 provides that:

“The competence of a person to testify and the number of witnesses required in any case shall be determined in accordance with the injunctions of Islam as laid down in the Holy *Quran* and *Sunna*. Unless otherwise provided in any law relating to the Enforcement of *Hudood* or any other special law – (a) in matters pertaining to financial or future obligations, if reduced to writing, the instrument shall be attested by two men, or one man and two women, so that one may remind the other, if necessary and evidence shall be led accordingly; and (b) in all other matters the court may accept, or act on, the testimony of one man or one woman, or such other evidence as the circumstances of the case may warrant.

This provision is a codification of both the Qur'anic provision on evidence which requires the testimony of two women in the place of one man (in commercial transactions) and also the rules of traditional Islamic law which extends the provision of two male witnesses to *hudûd* cases other than *zina*. The question may be raised whether the inclusion of the clause “so that one may remind the other, if necessary” has any significance here. The actual Qur'anic provision indicate that this clause refers to the requirement of two women witnesses.<sup>270</sup> What if it is shown that there is no necessity for one woman to remind the other due to the experience and knowledge of the one? Would the testimony of a single woman then suffice? If this is answered in the negative then it shuts out the possibility of considering the experience of women in modern commercial transactions as a basis of validity for the evidence of a single female in such transactions even if that will assist in doing substantive justice. From that perspective it has been argued that this belittles “the status of several

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<sup>268</sup> “Women Struggle Against Zia's Version of Islam” in Women Living Under Muslim Laws (ed), *Dossier 1* (1986)p.62.

<sup>269</sup> The *ta'zîr* punishment for rape is 25 years imprisonment plus 30 lashes while that of fornication or adultery is 10 years imprisonment plus 30 lashes. See also Carroll, L., “Rejoinder to the Proceedings of the Seminar on Adultery & Fornication in Islamic Jurisprudence: Dimensions & Perspectives” (1983) 3 *Islamic and Comparative Law Quarterly*, 66.

<sup>270</sup> See Q2:228.

women working as administrators, bankers, lawyers and judges, for they often have to request their male clerks and peons to attest documents drawn up by them".<sup>271</sup>

Women have also shown great resentment in respect of the exclusion of female evidence to secure maximum punishment under the *Hudood Ordinances*.<sup>272</sup> Advocates of women's rights see it as a discrimination against women. The wisdom and benefit of excluding female testimony from securing *hadd* punishments may however be viewed from the perspective that such exclusion actually serves as a means of restricting the scope for the application of *hudûd* punishments due to its severity. It is not that the evidence of women is totally inadmissible in Islamic criminal law. Their evidence is only excluded from securing *hadd* but is admissible for securing *ta'zîr* punishments when proved. For instance, while the testimony of a woman in a theft case may not secure the amputation of a limb, it can certainly send the thief to prison under *ta'zîr* punishment where proved. The same applies to all other *hudûd* punishments. The exclusion of the evidence of women to secure *hudûd* punishments may therefore not be seen as discrimination *per se*, but as a procedural limitation upon the application of *hudûd* punishments.

For the proof of murder cases the *Qisas and Diyat Ordinance, 1990* provides for either the voluntary confession by the accused or "by evidence as provided in Article 17 of the *Qanun-e-Shahadat, 1984*".<sup>273</sup> Since *qisâs* is different from *hadd* and the *Qisâs and Diyat Ordinance* does not itself exclude the testimony of women, the court would be right under Article 17 of the *Qanun-e-Shahadat* to admit the testimony of women in murder cases. In fact the initial draft of the *Qanun-e-Shahadat* had specifically provided for the requirement of two male adult witnesses, which was met by a lot of controversy and resentment by women groups in Pakistan. It was argued reasonably then that, if a man was murdered in the presence of his wife and daughter for instance, or if a woman was killed in the presence of her two daughters, then the testimony of the female eyewitnesses would not grant the maximum punishment for murder.<sup>274</sup> The fact that the provision was removed from the final draft supports an interpretation of Article 17 to exclude murder (*qisas*) cases from the strict requirement of two male witnesses. The Federal Shariat Court of Pakistan alluded, *obiter*

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<sup>271</sup> See Patel, R., *Islamization of Laws in Pakistan*. (1986) p.81.

<sup>272</sup> The majority juristic opinion is that female evidence is not admissible for *qisâs* and *hudûd* punishments under Islamic law. The *Zâhirî* school however opines that the evidence of 2 women is acceptable along-side that of one man in *qisâs* and *hudûd* offences other than *zina*. See Al-Zuhayli, W., *Al-Fiqh Al-Islami wa-Adillatuh* (Arabic) (1997), Vol.8, p.6045.

<sup>273</sup> See Art. 304.

<sup>274</sup> See "Women Struggle Against Zia's Version of Islam", (1986) *supra*, note 268 above.

*dicta*, to the above arguments in its judgement in the case of *Ansar Burney .v. Federation of Pakistan*.<sup>275</sup> The Court, citing from the *Muhallâ* of Ibn Hazm,<sup>276</sup> observed that:

“The view that woman cannot appear as a witness in matters of Hudood and Qisas is only a juristic view and is not based on either Qur’an or Hadith. It is not based on any precedent of the Holy Prophet in which he might have refused to accept the evidence of a woman in such matters.”<sup>277</sup>

The above opinion would however be a departure from the general traditional juristic position that only the testimony of two male adult witnesses is generally required also for a *qisâs* conviction.

The traditional rule of four male witnesses in adultery/fornication cases is derived from the interpretation of Qur’an 4:15 which says: “And those of your women who commit lewdness, take the evidence of four witnesses from amongst you against them...”, while the rule of two male witnesses for other offences is derived from the first part of the rule of testimony in Qur’an 2:282 which says: “...And get two witnesses out of your own men, and if there are not two men then a man and two women...”. There have been contentions, as already observed in Chapter 6 of this thesis that the provision in Qur’an 2:282 refers only to commercial transactions.<sup>278</sup> It is this rule that was extended by the classical Islamic jurists to cover almost every other aspect of evidence except in matters where women were considered to possess exclusive knowledge. Apart from “financial or future obligations” and *hudûd* cases, the Evidence Ordinance gives the courts the discretion of accepting the testimony of one man or one woman in any other case. This last proviso tends to give a slight leeway for the courts to extend the rules a little further than the traditional evidence rules of Islamic law.

With respect to the value of compensation for murder (*diyah*) the *Qisas* and *Diyat* Ordinance provides that the court shall fix the value of the *diyah* subject to the injunction of Islam as laid down in the Holy *Qur’an* and the *Sunnah*.<sup>279</sup> Under traditional Islamic law the value of the *diyah* of a woman is half that of a man. The ordinance does not specifically mention this, but subjects the value to “the injunction of Islam as laid down in the Holy *Qur’an* and the *Sunnah*”. The *Qur’an* does not state any difference between the value of the *diyah* for a man or woman. Ibn Qudâmah also states in his *al-Mugnî* that Ibn Ulyah and Asam were of the opinion that the blood money of the female was the same as that of the

<sup>275</sup> (1938) PLD (FSC) 73 at 90 par. 69.

<sup>276</sup> Ibn Hazm, M.A., *al-Muhallâ* (Arabic) (1932), Vol.6. p.430.

<sup>277</sup> See note 272 above.

<sup>278</sup> See pp. 141-43 above.

<sup>279</sup> See Section 323.

male based on a Tradition of the Prophet in which he was reported to have said: "The blood money for the female is equal to 100 camels" (same as that of a male).<sup>280</sup> If the Court chooses to follow "the injunction of Islam as laid down in the Holy *Qur'an* and *Sunnah*" then it could depart from the position established under traditional Islamic law and make no difference between the value of the *diyah* of the male and female. The initial draft of the Ordinance had actually provided that "If the victim was a female, her *diyat* shall be one half of that of a man". The changing of this wording in the final version of the Ordinance to the present provision in Section 323 could thus be construed as an intention to depart from the former position under traditional Islamic law.

### *Islamic Criminal Justice*

The Offences Against Property (Enforcement of Hudood) Ordinance of 1979 provides for the Islamic law punishment of amputation of the hand on conviction for theft liable to *hadd* under the Ordinance.<sup>281</sup> The conviction for *hadd* is however subjected to the strict evidential requirements of Islamic law, failing which the accused would be liable only to *ta'zîr* punishment under the old Pakistan Penal Code of 1860.<sup>282</sup> It is observed that the Pakistan courts have mainly exploited the strict evidential requirements of Islamic law, to avoid the application of the *hudûd* punishments on the basis of lack of proof. The courts have only imposed *ta'zîr* punishments in form of imprisonment, fine or whipping. In the theft case of *The State .v. Ghulam Ali*,<sup>283</sup> Justice Zullah, reversing the *hadd* punishment of amputation on appeal, stated that the two courts below

"fell into error in ignoring a well-established and an uncontroverted principle of Hudood that not only the maximum benefit of every reasonable doubt will be extended to the accused, but also that effort is to be made not to inflict a Hadd so long (as) it can be avoided by all legitimate and established means".<sup>284</sup>

The *Zina* Ordinance also criminalises fornication, adultery and rape. The *hadd* punishment for both adultery and a married rapist is death by stoning (*rajm*), for fornication is one hundred lashes and for an unmarried rapist is one hundred lashes or such other punishments, which may include the death punishment.<sup>285</sup> In 1981 the punishment of stoning

<sup>280</sup> See Ibn Qudâmah, M., *al-Mugnî (Arabic)* (1981), Vol. 7, p.797. Ibn Qudâmah however opines that this Tradition contradicts the consensus of the Companions that the blood money of the female is half that of the male.

<sup>281</sup> See Sec. 5 and 9 the Offences Against Property Ordinance 1979.

<sup>282</sup> See Sec. 7, 13 and 14 *ibid.*

<sup>283</sup> (1986) 38 PLD (S.Ct) 741.

<sup>284</sup> *ibid.*, at 759.

<sup>285</sup> See Sections 5 and 6.

(*rajm*) was challenged as being un-Islamic in the Federal Shariat Court. The court ruled by a decision of four to one that the punishment of stoning was repugnant to Islam.<sup>286</sup> The decision of the majority was based on grounds that the punishment cannot be specifically found in the Qur'an. That decision corresponded with the view of the *Mu'tazilah* and *Khawârij* sects who also oppose the punishment of *rajm* on grounds that it has no existing Quranic evidence. All the orthodox schools of Islamic jurisprudence however base the punishment of stoning on the *Sunnah*.<sup>287</sup>

The traditional '*ulamâ*' strongly condemned the decision of the Federal Shariat Court and the State was forced to appeal against it to the Shariat Bench of the Supreme Court. Before the appeal was heard however, the Federal Shariat Court was reconstituted and the constitution was also amended allowing the Federal Shariat Court to review its own decisions. The reconstituted court reviewed the earlier decision and declared in 1982 that even though the punishment of stoning (*rajm*) cannot be specifically found in the Qur'an, there is authority for it in the *Sunnah* and thus the punishment was lawful under Islamic law.<sup>288</sup> The punishment of stoning has however never been enforced in Pakistan due also to the strict evidential requirements to establish its application. The *hadd* punishment for *zina* requires either a confession of the accused or the evidence of four trustworthy, sane Muslim adult male eyewitnesses to the actual commitment of the unlawful sexual intercourse at the same time and place.<sup>289</sup> Both the confession and evidence are retractable, in which case the *hadd* punishment cannot be enforced. In *Allah Bux and Ano .v. The State*<sup>290</sup> the trial court had sentenced the man (who was married) to *hadd* punishment and the girl (who was a spinster) to one hundred lashes on the basis of confession to the offence. The decision was set aside by the Federal Shariat Court on appeal, on grounds that the accused persons had retracted their confessions pursuant to Section 9(2) of the *Zina* Ordinance. Due to the severity of the punishment, the courts, in the words of Justice Zullah seem to always strive "not to inflict a Hadd so long (as) it can be avoided by all legitimate and established means".<sup>291</sup> The *Zina* Ordinance provides that where there is not enough evidence to convict for the *hadd* punishment, the *ta'zîr* punishment of imprisonment, whipping or a fine may be

<sup>286</sup> *Hazoor Bakhsh .v. Federation of Pakistan* (1981) 38 PLD (FSC) 145.

<sup>287</sup> See e.g. al-Juzayrî, A.R., *Kitâb al-Fiqh 'alâ al-Madhâhib al-'Arba 'ah* (Arabic) (7<sup>th</sup> Ed. 1986), Vol.5, p.69.

<sup>288</sup> See *Federation of Pakistan .v. Hazoor Bukhsh and Others*, (1983)PLD (FSC) 255.

<sup>289</sup> See e.g. Maududi, A.A., (1998) *supra*, note 214 above, pp149-179 for a detailed discourse on the nature and punishment of adultery/fornication under Islamic law.

<sup>290</sup> (1982) 34 PLD (FSC) 101.

<sup>291</sup> See Zullah, A. (1992) *supra*, note 254 above.

imposed.<sup>292</sup> The ordinance does not provide any standard of proof for the application of *ta'zîr* punishments but leaves the determination to the judge's discretion.

The application of the *hudûd* punishments in Pakistan has thus been more symbolic than practical. It seems that they exist in the statute books only as a matter of faith to validate their divine sanction, while every legitimate means is always sought to avoid their application due to their severity. Mehdi has observed that: "The trial of cases under *hadd* (in Pakistan) has been nothing but an intellectual exercise, while the (old) PPC (Pakistan Penal Code) still applies for practical purpose".<sup>293</sup>

One can observe therefore that in the codification of Islamic criminal law in Pakistan, a cautious attempt is made to depart from some traditional Islamic jurisprudence as much as possible through every legitimate means in a manner that promotes a benevolent application of the *Sharî'ah* and encourages the guarantee of international human rights. In doing so, the legislature however tries to satisfy both the hard-line and moderate Islamic pressure groups and thereby sometimes leave the provisions as vague as possible, transferring the task of its interpretation to the courts. The courts as analysed above have in most cases tended towards a moderate interpretation and application of Islamic law which certainly bridges the gap considerably between the application of Islamic law and the demands of international human rights in the State.

### ***General Representations on Human Rights***

Pakistan's representatives to the UN continue to assert a commitment to international human rights objectives of the UN but often with reference to Islamic law and to the need for co-operation in that regard.<sup>294</sup> At the fifty-fifth session of the UN Commission on Human Rights in March 1999, the Pakistan permanent representative to the UN, Ambassador Munir Akram, had reiterated Pakistan's support for "the promotion and protection of human rights through cooperation and not confrontation".<sup>295</sup> Similarly, Pakistan's representative at the fifty-sixth session of the Commission on Human Rights in April 2000 had restated the country's commitment to human rights and had asserted that "the principles of the Charter of the United Nations and the Universal Declaration of Human Rights mirrors the values of a just Islamic society". She then went on also to state, *inter alia*, that Pakistan had declared

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<sup>292</sup> See Sections 9 and 10.

<sup>293</sup> Mehdi, R., (1994) *supra*, note 213 above, p.115.

<sup>294</sup> See e.g. Website of Pakistan Mission to the UN at: <http://www.un.int/pakistan/> [13/12/2000].

<sup>295</sup> See Statement By Ambassador Munir Akram at the 55<sup>th</sup> Session of the Commission on Human Rights, March 23, 1999, Geneva. Par.3. Available Online: <http://www3.itu.int/pakistan/55%20CHR-Item%203.htm> [8/3/2001].



the year 2000 as the Year of Human Rights and Human Dignity and that at least two civil awards would be given yearly in the field of human rights. A Commission on the Status of Women had also been established, and a directive had been issued reaffirming that the practice of "honour killing" was murder and any perpetrator of that practice would be apprehended. The representative also declared the possibility of Pakistan ratifying the ICESCR before the end of the year 2000.<sup>296</sup>

## REPUBLIC OF TUNISIA

The case of Tunisia differs from the first four Muslim States earlier examined above, in the sense that the trace of Islamic law is found only in the area of personal law. The application of Islamic law in Tunisia had been restricted to family law and land ownership matters during French rule in the late nineteenth century. There were then *Shari'ah* courts that exercised jurisdiction on those civil matters, applying traditional Islamic law according to the classical treatises of the *Mâlikî* and *Hanafî* schools of Islamic jurisprudence. French law was applied by secular courts in all other matters including criminal law. Thus at independence in 1956 Islamic criminal law did not apply in Tunisia and this has continued up to the present period.<sup>297</sup>

The discrimination suffered by Tunisians under the colonial French administration had, according to Mayer, "accentuated the people's consciousness of the importance of rights and democratic freedoms".<sup>298</sup> While "Islam provided the moral, cultural, and ideological symbols needed to formulate popular resistance" in Tunisia's struggle against France for independence,<sup>299</sup> a republican form of governance was constitutionally adopted after independence on the belief that it was the best guarantee for the respect of human rights.<sup>300</sup> However, the preamble of the Constitution declared the will of the people "to remain faithful to the teachings of Islam" and Article 1 of the Constitution also stated that Islam is the religion of the State. Although total secularism was not formally proclaimed by the State as was the case, for instance, in Turkey, the outlook of governance since independence has been

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<sup>296</sup> See UN Doc E/CN.4/2000/SR.25, Par. 11-12.

<sup>297</sup> See e.g. Mahmood, T., *Statutes of Personal Law in Islamic Countries, History, Texts and Analysis* (2<sup>nd</sup> Ed., 1995) p.42.

<sup>298</sup> See Mayer, A.E., "Human Rights" in Esposito, J.L. (ed.) *The Oxford Encyclopaedia of the Modern Islamic World* (1995) 143.

<sup>299</sup> See Entelis, J.P., "Tunisia", in Esposito, J.L. (ed.) *The Oxford Encyclopaedia of the Modern Islamic World* (1995) Vol. 4, p.235 at 236; See also Salem, N., *Habib Bourguiba, Islam and the Creation of Tunisia* (1984) pp.132-166.

<sup>300</sup> See Preamble of the Tunisian Constitution (1991).

very secular in nature.<sup>301</sup> Apart from Article 1, the only other substantive constitutional provision referring to Islam is the provision in Article 38 that the religion of the President of the Republic is Islam.

Tunisia is a State party to both the ICCPR and the ICESCR. It has also ratified at least 32 other international treaties relating to human rights.<sup>302</sup> The State has emphasised in its reports to the UN treaty bodies that it had “adopted a dynamic interpretation of Islam” and that the country’s legislation, since its independence “had been modelling a new society within the framework of modern Islam, gradually abandoning the static models of thought inherited from traditional society (and) concerned with following the principles of religion without sacrificing progress”.<sup>303</sup>

### *Constitutional Rights*

The 1991 Tunisian Constitution provides for a combination of political and civil rights and economic, social and cultural rights. The constitutional rights include, right to personal integrity, conscience and belief;<sup>304</sup> right to equality;<sup>305</sup> freedom of expression and assembly;<sup>306</sup> right to privacy;<sup>307</sup> freedom of movement and domicile;<sup>308</sup> freedom from expatriation;<sup>309</sup> right to presumption of innocence;<sup>310</sup> right to property;<sup>311</sup> right to asylum;<sup>312</sup>

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<sup>301</sup> Art.1 of the Tunisian Constitution states that: “Tunisia is a free State, independent and sovereign: its religion is Islam, its language is Arabic and its form is a Republic.”

<sup>302</sup> Slavery Convention (1926); Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery (1956); Genocide Convention (1948); Convention Relating to the Status of Refugees (1951); Protocol Relating to the Status of Refugees (1967); Convention of the Political Rights of Women (1952); Convention Relating to the Status of Stateless Persons (1954); Convention on the Nationality of Married Women (1957); Convention of Consent to Marriage, Minimum Age for Marriage and Registration of Marriage (1962); International Convention on the Elimination of all Forms of Racial Discrimination (1965); Convention on the Non-Application of Statutory Limitation to War Crimes and Crimes against Humanity (1968); OAU Convention Governing the Specific Aspects of Refugee Problem in Africa (1969); International Convention on the Suppression and Punishment of the Crime of Apartheid (1973); Convention on the Elimination of all Forms of Discrimination Against Women (1979); African Charter on Human and Peoples Rights (1981); International Convention Against Apartheid in Sports (1985); Convention on the Rights of the Child (1989); 1949 Geneva Convention I; 1949 Geneva Convention II; 1949 Geneva Convention III; 1949 Geneva Convention IV; Protocol I Additional to the Geneva Conventions (1977); Protocol II Additional to the Geneva Conventions (1977); ILO Convention (No. 29) Concerning Forced Labour (1930); ILO Convention (No. 87) Concerning Freedom of Association and Protection of the Right to Organize (1948); ILO Convention (No. 98) Concerning the Application of the Principles of the Right to Organize and Bargain Collectively (1949); ILO Convention (No. 100) Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value (1951); ILO Convention (No. 105) Concerning the Abolition of Forced Labour; Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1984); ILO Convention (No. 111) Concerning Discrimination in Respect of Employment and Occupation (1958). ILO Convention (No. 122) Concerning Employment Policy (1964); UNESCO Convention Against Discrimination in Education (1960). See UN Human Rights Treaty Website at: <http://www.unhcr.ch/html/intlinst.htm> [25/2/2001]; and ILO Conventions Website at: <http://ilolex.ilo.ch:1567/public/english/docs/convdisp.htm> [25/2/2001]; and International Humanitarian Law Treaties Website at: <http://www.icrc.org/ihl> [25/2/2001].

<sup>303</sup> See UN Doc. A/50/38, of 31/05/95, Par. 219-221.

<sup>304</sup> Art. 5.

<sup>305</sup> Art. 6.

<sup>306</sup> Art. 8.

<sup>307</sup> Art. 9.

<sup>308</sup> Art. 10.

<sup>309</sup> Art. 11.

and right to vote.<sup>313</sup> It is observed that the rights are mostly addressed at citizens and Article 7 also provides that the rights are subject to conditions established by the law.

### *Equality and Non-discrimination*

Article 6 of the Constitution provides that “All citizens have the same rights and the same duties. They are equal before the law”. There is no specific provision on non-discrimination. The HRC has alluded to the provision of Article 38 of the Tunisian constitution, which provides that the religion of the head of State is Islam, as a legal impediment to the equal participation of non-Muslims in presidential elections, and called for its review.<sup>314</sup> It is important to note however that the Core Document forming part of the report submitted by Tunisia to the HRC in 1994 indicated that almost the whole population of Tunisia is Muslim.<sup>315</sup> Ninety-eight per cent of the population is recorded to be Muslim while one per cent each is recorded as Christian and Jewish respectively.<sup>316</sup> It is arguable that since Islam is adopted as the religion of the State, it logically followed that the President must be Muslim for ideological consistency.<sup>317</sup> Despite Tunisia’s secular nature of governance, Islam remains a very strong instrument of legitimacy utilised by the government since its independence. Islamic institutions and language are more often than not, used to further the goals of the State and to acquire authenticity for its social and legal reforms in the Islamic culture of the people. The provisions of Articles 1 and 38 of the Tunisian Constitution may therefore be seen as constitutional expressions of the Islamic identity of the Tunisian people.

### *Women’s Rights*

There has been radical reforms to traditional Islamic personal law in Tunisia to a point of controversy. Immediately after independence, the first head of state, President Bourguiba, embarked on the reform of the traditional Islamic personal laws applied in Tunisia. Amidst a lot of controversy the Tunisian Code of Personal Status was enacted in 1956 to replace the

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<sup>310</sup> Art. 12.

<sup>311</sup> Art. 14.

<sup>312</sup> Art. 17.

<sup>313</sup> Art. 20 & 21.

<sup>314</sup> See UN Doc. CCPR/C/79/Add.43 (1994), Par.18.

<sup>315</sup> See UN Doc. HRI/CORE/1/Add.46, Par. 24 states that: “In 1991 the population of Tunisia was 8.2 million. Tunisians are Sunnite Muslims most of them of the Maliki rite. There are also a few thousand Jews and Christians in Tunisia.”

<sup>316</sup> See CIA World Factbook (2000). Online Edition at: <http://www.cia.gov/cia/publications/factbook/> [10/6/2001].

<sup>317</sup> Pakistan has a similar provision in Arts. 2 and 41 of its Constitution. See also Article 115 of the Constitution of Iran.

traditional Islamic family law applicable in the then *sharî'ah* courts. The Code was declared as a necessary step aimed particularly at ensuring equality of gender in personal status law. The State sought support for its reforms from the views of early advocates of Islamic liberalism such as Jamal al-Din al-Afghani, Muhammad Abduh, Qasim Amin, Khayr al-Din al-Tunisi, and Tahir al-Haddad, all of whom had criticised an unmitigated application of traditional interpretations of the *Sharî'ah* that suppressed the rights of women. These liberal Islamic thinkers had particularly pleaded the humane spirit of the *Sharî'ah* to advocate for equality between the male and the female in both family and societal life. Muhammad Abduh in his Qur'anic exegesis "*Tafsîr al-Manâr*", Qasim Amin in his "*The Liberation of Women*" published in 1899 and his "*The New Woman*" published in 1900, and Tahir al-Haddâd in his "*Our Women in Sharî'ah and Society*" published in 1930 had all advocated more moderate interpretations of the *Sharî'ah* in a manner that enhances the freedoms and rights of Muslim women. The work of Tahir al-Haddâd attracted a lot of criticism from the conservative sector, which subsequently led to his being denounced as a heretic and dismissed from his teaching position at Zaytuna University in Tunisia.<sup>318</sup>

One of the radical reforms in the 1956 Code was the formal prohibition and criminalisation of polygyny.<sup>319</sup> The Code also reformed the law of divorce by divesting the husband of the right of unilateral divorce (*talâq*) and making it possible for either of the couple to initiate a divorce before the Courts.<sup>320</sup> In the same year the *sharî'ah* courts were abolished and their jurisdiction was merged into that of the secular civil courts. Thus apart from reforming the law, the formal interpretation and application of Islamic law was removed completely from the control of the traditional Islamic judges (*Qâdis*) and placed in secular institutions. Moore has observed that President Bourguiba saw himself as an Islamic reformer in the like of Muhammad Abduh<sup>321</sup>, and his approach was to deprive the traditional Islamic scholars (*'ulema*) of any control in the legal and political institutions. He personally, using the tool of State power, embarked fully on radical reforms of traditional Islamic law. The reformatory drive by President Bourguiba however went further than those advocated by Muhammad Abduh and others. It encroached unto the actual areas of Islamic mode of worship (*'ibâdât*). In 1960 an attempt was made by the State to suspend one of the main

<sup>318</sup> See Hourani, A., *Arabic Thought in the Liberal Age: 1798-1939* (1967); and Leites, J., "Modernist Jurisprudence as a Vehicle for Gender Role Reform in the Islamic World" (1991) 22 *Columbia Human Rights Law Review* 251 at 290-313. See also Kelly, P., "Finding Common Ground: Islamic Values and Gender Equity in Tunisia's Reformed Personal Status Law", in *Women Living Under Muslim Laws* (ed), *Special Dossier: Shifting Boundaries in Marriage and Divorce in Muslim Communities* (1996) p.75 at 80.

<sup>319</sup> See Art. 18 of the Tunisian Code of Personal Status (1956).

<sup>320</sup> See Articles 30 and 31 *ibid*.

<sup>321</sup> Moore, C.H., *Tunisia Since Independence: the Dynamics of One Party Government* (1965) pp.48-60.

pillars of the Islamic faith through an interpretation formulated by President Bourguiba that the obligatory one-month fast of Ramadan should be suspended to foster the State's economic development.<sup>322</sup> The President openly defied the Ramadan fast and called upon all Tunisians to do the same. He argued that his interpretation did not contradict Islamic teachings but that it was a "progressive" interpretation, analogising that development of the country's economy was a compelling necessity that demanded the suspension of the Ramadan fast. The Tunisian Muslims protested against that policy and the president's order was strongly criticised. Further attempts were made in following years, which also met with opposition from the Muslim populace. According to Magnuson, the attempted "reform" of every aspect of Islam by Bourguiba was so total that "social observers in the 1960s questioned whether Tunisia might have entered a post-Islamic or de-Islamized age".<sup>323</sup> The Islamists thus saw Bourguiba's reforms as an attempt to undermine Islam. Explaining some of the issues that contributed to the emergence of the Islamist movement in Tunisia against the State's policy of Islamic reforms, Ghannouchi reiterated that:

In 1957, once in power, he (Bourguiba) prohibited the use of the *hijab* and once uncovered a woman and tore her veil in public. Later, in 1981, a law was passed forbidding women employed in government offices or those entering universities and colleges to wear the *hijab*. In 1957, he forbade polygamy...In 1960, Bourguiba prohibited fasting in Ramadan, alleging that it was harmful to the country's economy...In 1974 he stated that the Qur'an was self-contradictory and ridiculed the miracles of the Prophet Moses...<sup>324</sup>

Encroachment by the State upon Islamic acts of worship (*ibâdât*), particularly to a point of strangulating an obligatory aspect of it, contradicts the principles of Islamic law and is not sustainable, no matter how liberal one tries to be. Such interpretations go to the other extreme and can undermine the main core of the Islamic faith and therefore not justifiable. Such action by the State could qualify as a violation of the right of freedom of religion and beliefs. The traditionalists do cite such examples against the arguments for Islamic liberalism stating that it is a dangerous endeavour the limit of which is very difficult if not impossible to delineate. The fact is that there is hardly any need, as pointed out in Chapter three of this thesis, for any change or re-interpretation of the jurisprudence on the acts of Islamic worship (*ibâdât*). Those are settled aspects of Islamic law that are not affected by either change in time or place.

<sup>322</sup> See e.g. Entelis, *supra*, note 299 above, p. 237.

<sup>323</sup> Magnuson, D.K., "Islamic Reform in Contemporary Tunisia", in Zartman, I.W., (Ed.) *The Political Economy of Reform* (1991) pp.169-170.

<sup>324</sup> Ghannouchi, R., Interview in *Arabia: The Islamic World Review*, April 1985.

The Tunisian Personal Status Code has been amended several times to accommodate more reforms in respect of equality of gender.<sup>325</sup> Tunisia has referred to the Code and the subsequent amendments to it as one of the steps taken to fully integrate women into the era of international human rights in the country.<sup>326</sup> Tunisia's commitment to human rights has also been emphasised in almost every public function by the State.<sup>327</sup> The CEDAW Committee thus described Tunisia "as a shining example for other (Muslim) countries, because of its progressive and programmatic interpretation of Islam".<sup>328</sup> The Committee however went on to raise questions on issues such as prostitution, prohibition of night work for women, abortion, inter-faith marriages and non-recognition of free unions. Most of these issues touch on basic and sensitive Islamic religious and cultural values. In ratifying the Women's Convention, Tunisia had entered a general declaration stating that:

"The Tunisian Government declares that it shall not take any organizational or legislative decision in conformity with the requirements of this Convention where such decision would conflict with the provisions of chapter 1 of the Tunisian Constitution."

Bearing in mind that Article 1 which provides that Islam is the religion of the State is part of Chapter 1 of the Tunisian Constitution, perhaps the declaration was, *inter alia*, to express the fact that despite the State's very liberal approach to Islam, there were some social and family values based on the Islamic identity of the people that should still be protected. The country's reservation to Article 16 paragraphs (c), (d), (f), (g) and (h) of the Women's Convention also goes to the same effect. Policies that may promote or encourage practices such as prostitution, abortion, sexual relationships outside marriage and the general undermining of the institutions of marriage and family will certainly conflict with the Islamic culture and identity of the people and might create problems in Muslim societies. While every positive effort to ensure the guarantee of international human rights in Muslim States must be encouraged, Islamic social ideals of preserving the Islamic sense of morality need be respected as well. This is necessary to remove any fear in the Muslim world, of an intended destruction of cherished Islamic moral values through the promotion of international human rights.

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<sup>325</sup> See generally Kelly, (1996) *supra*, note 318 above, and Mahmood, T., (1995) *supra*, note 297 above, pp.42-45.

<sup>326</sup> See UN Doc CEDAW/C/TUN/1-2.

<sup>327</sup> See Amnesty International, *Tunisia: Rhetoric versus Reality, The Failure of a Human Rights Bureaucracy* (1994).

<sup>328</sup> UN Doc. A/50/38, Par. 222.

## *Islamic Criminal Justice*

Islamic criminal law is not applied in Tunisia, thus there is no question of Islamic criminal law provisions affecting the State's international human rights obligations in any way. It is only in the law of personal status that any influence of Islamic law is reflected.

### *General Representations on Human Rights*

Although Tunisia, as eulogised by the CEDAW Committee, appears to "come close to achieving a harmonious relationship between Islam and human rights and becoming a liberal state without being a secular one"<sup>329</sup>, its liberal approach has not been free of criticism and it in fact has been the cause of opposition from both the political Islamists and the traditional '*ulema*' who accused the ruling authority of the secularisation of Islam. This gave rise to Islamist opposition in the State against what was considered as a violation of the fundamental rights of the Tunisian Muslim populace. The exiled leader of the proscribed Tunisian Islamic Movement, Rashid Ghannouchi, stated in his book "*Civil Liberties in the Islamic State*" that:

"The issues of civil liberties in the Islamic State became of greatest interest to me when, due to the dominance of a foreign culture, the Tunisian Islamic Movement changed from mere propagation of basic principles of Islam to address the wider issue of the needs of Tunisian society..., the highest of which was and still is the issue of freedom"<sup>330</sup>

This created many confrontations between the Islamists and the ruling authority leading to the proscription of the main Islamist opposition, the "Islamic Tendency Movement" later the "Renaissance Party" in 1989 and forcing its leaders into exile.<sup>331</sup>

The conflict between the Islamists and the ruling authority has created another dimension between Islamic law and international human rights in Tunisia. According to the Lawyers Committee for Human Rights (LCHR) "(t)he worsening human rights situation in Tunisia since (1989) can be traced directly to the deterioration of relationship" between the ruling government and the Islamist political opposition.<sup>332</sup> The ruling authority considers the Islamist opposition as Islamic extremists and "fundamentalists" who are both a threat to the maintenance of a free State as enshrined in the Tunisian Constitution and inhibitors to the

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<sup>329</sup> Dalacoura, K., *Islam, Liberalism and Human Rights* (1998)p.151.

<sup>330</sup> Ghannouchi, R., *Huriyât al-'âmah fi al-Dawlah al-Islâmiyyah* (1993) p.17.

<sup>331</sup> See generally Hamdi, M.E., *An Analysis of the History and Discourse of the Tunisian Islamic Movement, Al-Nahda* (1996) PhD Dissertation, SOAS, University of London.

enhancement of international human rights in the State. This alleged threat forced the government to retract its plans towards a pluralist political governance when members and allies of the Islamist opposition won some considerable seats in the Tunisian Assembly elections of 1989. The LCHR thus observed that “in the single-minded determination to liquidate the Islamist threat to the governments monopoly on power (the) respect for human rights in Tunisia has declined.”<sup>333</sup>

This confronts us again with the question of whether Islamism is so inherently inimical to international human rights that it must always be excluded from government. From the analyses on the theory and practice of human rights in Islamic law given in Chapter four of this thesis, it is clear that neither Islamic law nor Islamic governance is inherently inimical to human rights values. The problem has two dimensions. On one hand, there are regimes that only utilise Islamism as a vehicle of legitimacy to acquire or remain in power during periods of compelling pressure for change in the political status quo of a Muslim State. Such regimes usually manipulate Islamic law for their own purposes. They cling to power through harsh and hard-line interpretations and application of the law that intimidates the populace and the opposition. On the other hand, the stereotyped opinion about Islamic fundamentalism always puts Islamists on the defensive whether in or out of government in the political dispensation of modern Muslim States. This creates suspicion and distrust that lead to governmental or oppositional activities that inhibit human rights guarantees.

The moderate and co-operative approach to human rights principles that is gradually manifesting in different forms in the State practice of almost all modern Muslim States indicate the possibility of achieving the enforcement of international human rights law within the application of Islamic law through understanding and co-operation rather than confrontation. This however depends further on two important factors, one on the part of the ruling authorities in Muslim States and the other on the part of the international community. The first factor is that the ruling authorities in Muslim States must accept the need to shift from strict and hard-line to more moderate interpretations and application of the *Sharî'ah*, on the basis that the *Sharî'ah* was not revealed to cause distress or hardship but as mercy and ease for humanity.<sup>334</sup> It is interesting to note that in arguing their cause internationally, most Islamist groups do appeal today to the obligation of States to respect their own political and civil liberties. This indicates their belief in international human rights principles, which

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<sup>332</sup> Lawyers Committee on Human Rights, *Promised Unfulfilled: Human Rights in Tunisia Since 1987* (1993)p.4.

<sup>333</sup> *ibid.* at 13.

<sup>334</sup> See e.g. Qur'an 20: 1- “We have not sent down the Qur'an unto you to cause you distress”; and Q21:107- “We sent thee not, but as a mercy to all creatures.”



mirrors back at how far the Islamist groups themselves are prepared to respect those principles. In the case of Tunisia one observes that the ideas of the exiled leader of the Islamist Renaissance Party of Tunisia, as expressed in his *Civil Liberties in the Islamic State*, demonstrate to a large extent, a comparatively liberal and moderate interpretation of Islamic law in a manner that accommodates international human rights principles.<sup>335</sup> He strongly advocates the values of freedom and equality but also emphasises on the need to preserve the Tunisian Islamic identity and religious values, such as not intruding upon the acts of Islamic worship and moral norms. This brings up the second factor which is that the international community must co-operate sincerely with the Muslim States, not expecting that every Islamic traditional value or religious norm would have to be discarded in the liberal approach to Islamic law. There is need to develop a cross-cultural understanding on many aspects in the relationship between international human rights and Islamic law with respect especially to justifiable religious and traditional norms and values.

### REPUBLIC OF TURKEY

Turkey is a predominantly Muslim State with a legendary Islamic heritage. It was the last capital of the Ottoman Empire and seat of the Islamic Caliphate until 3<sup>rd</sup> March 1924 when the Turkish Grand National Assembly formally abolished the institution of the Caliphate.<sup>336</sup> Article 2 of the Turkish independence Constitution, which provided that “The religion of the Turkish State is Islam” was deleted in 1928 and the ideology of “Kemalism” (named after the first Turkish president and leader Kemal Ataturk) was adopted and constitutionalised in 1937 based on the principles of Nationalism and Secularism. Turkey thus became the first fully and formal secular State in the Muslim world. The preamble of its current Constitution also provides that: “as required by the principle of secularism, there shall be no interference whatsoever of the sacred religious feelings in state affairs and politics”.<sup>337</sup> Although the Kemalist ideology advocated a complete separation of religion and the State, yet Islam was not left to exist autonomously as a religion outside the State’s control. The State still controlled Islamic practices through a department of religious affairs established within the general administration to ensure that Islam was practised “in

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<sup>335</sup> See generally, Ghannouchi, R., (1993) *supra*, note 330 above.

<sup>336</sup> See Toynbee, *Survey of International Affairs*, (1938 ) pp. 572-575. See also Berkes, N., *The Development of Secularism in Turkey* (1998) for the history of the evolution of Turkey from an Islamic State to a secular one.

<sup>337</sup> See 5<sup>th</sup> Preambular Paragraph of the 1982 Constitution of Republic of Turkey (As amended).

accordance with the principles of secularism” in the State.<sup>338</sup> As observed by Professor Ozbudun, “(i)t was feared that total non-interference between religion and the state would, in fact, result in the interference of religion in government affairs, since Islam is not only a system of faith but also a system of law, a social and political ideology and a total way of life” and thus had the potential to “inevitably retain its hold over the society” if left uncontrolled by the State.<sup>339</sup>

Between independence in 1923 and 1938 there were enormous secular reforms to the legal, educational and cultural institutions of the State.<sup>340</sup> The *Shari'ah* courts and every aspect of Islamic law that hitherto existed in the State were totally abolished in this period. Thus despite its long Islamic heritage and culture, there is no longer any formal application of Islamic law as State law in Turkey. Islamic law does not therefore in anyway intervene with the country's international human rights obligations. Nicole and Hugh Pope have however observed that:

“(while the urban elite of the early republic quickly adopted Atatürk's brand of secularism, they were relatively few in numbers and secularism was not uniformly applied throughout the country. Rural areas on the whole escaped its strictures. Even in the cities, it was only successfully imposed in the period of the iron-fisted one-party regime. As soon as Turkey converted to a multi-party system, religion became a political tool”.<sup>341</sup>

Due to its total non-application of Islamic law as State law, Turkey does not make reference to Islamic law in its international human rights reports or statements. Conversely however, the enforcement of Kemalist secularism in Turkey has raised human rights questions on right to freedom of thought, conscience and religion in relation to Islamic norms. During the Ataturk era, some principal reform laws were enacted embodying the secular policies of the State. These were laws that, *inter alia*, established secular education and strictly regulated religious education,<sup>342</sup> introduced the wearing of the European top-hat and outlawed the wearing of the Fez and turban,<sup>343</sup> abolished the Religious Brotherhoods,<sup>344</sup> recognised only civil marriages leaving religious marriages without any legal effect,<sup>345</sup>

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<sup>338</sup> See Art. 136, Constitution of the Republic of Turkey.

<sup>339</sup> Quoted in Ansay, T., and Wallace, D., (Eds.) *Introduction to Turkish Law* (1996) p.31.

<sup>340</sup> See e.g. Berkes, N., *supra*, note 336 above, p.461ff.

<sup>341</sup> Pope, N., and Pope, H., *Turkey Unveiled: Ataturk and After* (1997) p.318.

<sup>342</sup> Act No. 430 of 3 March 1340 (1924) on the Unification of the Educational System.

<sup>343</sup> Act No. 671 of 25 November 1341 (1925) on the Wearing of Hats.

<sup>344</sup> Act No. 677 of 30 November 1341 (1925) on the Closure of Dervish Covenants and Tombs, the Abolition of the Office of Keeper of Tombs and the Abolition and Prohibition of Certain Titles.

<sup>345</sup> The Principle of civil marriage adopted with the Turkish Civil Code No. 743 of 17 February 1926 and Article 110 of the Code.

prohibited the use of Arabic script in all public affairs and adopted the Latin script,<sup>346</sup> abolished the use of certain religious titles<sup>347</sup> and prohibited the wearing of certain religious garments.<sup>348</sup> Article 174 of the current Turkish constitution still protects these reform laws by providing that no provision of the Constitution shall be construed or interpreted to render the reform laws unconstitutional. Turkey is yet to ratify either the ICCPR or ICESCR but is a State Party to the European Convention on Human Rights and at least twenty-eight other international treaties relating to human rights.<sup>349</sup>

### *Constitutional Rights*

Part Two of the Turkish Constitution provides for Fundamental Rights and Duties, which cover an extensive range of civil, political, social, economic and cultural rights.<sup>350</sup> Of significance in relation to Islamic law is the right to freedom of religion and conscience,<sup>351</sup> Freedom of Thought and Opinion,<sup>352</sup> Freedom of Expression and Dissemination of Thought,<sup>353</sup> and Freedom of Association.<sup>354</sup> The reform laws earlier stated above are also protected by Article 174 of the Turkish Constitution. In relation to the regulation by Muslims of their personal lives in accordance with Islamic norms, the prohibition of wearing of certain religious garments, the abolition of certain religious titles, and the legal recognition of only

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<sup>346</sup> Act No. 1288 of 20 May 1928 of the Adoption of International Numerals *and* Act No. 1353 of 1 November 1928 on the Adoption and Application of the Turkish Alphabet.

<sup>347</sup> Act No. 2590 of 26 November 1934 on the Abolition of Titles and Appellations such as Efendi, Bey or Pasa.

<sup>348</sup> Act. No. 2596 of 3 December 1934 on the prohibition of the Wearing of Certain Garments.

<sup>349</sup> Slavery Convention (1926); Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery (1956); Genocide Convention (1948); Convention Relating to the Status of Refugees (1951); Protocol Relating to the Status of Refugees (1967); Convention of Political Rights of Women (1952); Convention on the Elimination of All Kinds of Discrimination Against Women (1979); Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1984); Convention of the Rights of the Child (1989); 1949 Geneva Convention I; 1949 Geneva Convention II; 1949 Geneva Convention III; 1949 Geneva Convention IV; European Social Charter (1961); European Code of Social Security (1964); European Convention of Social Security (1972); Supplementary Agreement for the Application of the European Convention on Social Security (1972); European Convention on the Legal Status of Migrant Workers (1977); European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1987); ILO Convention (No. 87) Concerning Freedom of Association and Protection of the Right to Organize (1948); ILO Convention (No. 98) Concerning the Application of the Principles of the Right to Organize and Bargain Collectively (1949); ILO convention (No. 100) Concerning Equal Remuneration for Men and Women workers for Work of Equal Value (1951); ILO Convention (No. 102) Concerning Minimum Standard of Social Security (1952); ILO Convention (No.105) Concerning the Abolition of Forced Labour (1957); ILO Convention (No. 111) Concerning Discrimination in Respect of Employment and Occupation (1958); ILO Convention (No. 122) Concerning Employment Policy (1964); ILO Convention (No. 135) Concerning Protections and Facilities to be Afforded to Workers' Representatives in the Undertaking (1971); ILO Convention (No. 151) Concerning Protection of the Right to Organize and Procedures for Determining Condition of Employment in the Public Service (1987). *See* UN Human Rights Treaty Website at: <http://www.unhchr.ch/html/intlinst.htm> [26/2/2001] *and* ILO Conventions Website at: <http://ilolex.ilo.ch:1567/public/english/docs/convdisp.htm> [26/2/2001] *and* International Humanitarian Law Treaties Website at: <http://www.icrc.org/ihl> [26/2/2001].

<sup>350</sup> *See* Articles 12-74 of the 1982 Turkish Constitution.

<sup>351</sup> Art. 24 of the 1982 Turkish Constitution.

<sup>352</sup> Art. 25 *ibid.*

<sup>353</sup> Art. 26 *ibid.*

<sup>354</sup> Art. 33 *ibid.*

civil marriages under the reform laws can be violative of their religious freedom guaranteed by the Turkish Constitution.

In the sphere of family law only civil marriages performed by authorised marriage officers are legally recognised under the Turkish civil code,<sup>355</sup> thus religious marriages conducted in accordance with Islamic law have no legal effect whatsoever. It is only after the conduct of a civil marriage that a religious marriage may be conducted. Both the religious officer and the couple who contravene that provision are liable to prosecution under the Penal Code.<sup>356</sup> This will be violative of right to religious freedom under international human rights law.

### *Equality and Non-discrimination*

Article 10 of the Turkish Constitution provides that: “All individuals are equal without any discrimination before the law, irrespective of language, race, colour, sex, political opinion, philosophical belief, religion and sect, or any such considerations. No privilege shall be granted to any individual, family, group or class. State organs and administrative authorities shall act in compliance with the principle of equality before the law in all their proceedings”.

In relation to Islamic law, prohibition of the head-veil has been used as an instrument of discrimination against Muslim women in government institutions and establishments in Turkey. Muslim female teachers and students are prohibited from using the veil in public institutions of learning. Also Muslim female government employees and their families cannot attend public functions wearing the veil.<sup>357</sup> Muslim female students are reported to have been expelled or denied admission into colleges and higher institutions of learning for refusing to discard their head veils worn on Islamic religious grounds.<sup>358</sup> There are also “strict rules against lawyers wearing Islamic headgear in court”.<sup>359</sup> The veil is considered by the State as an emotive symbol of Islam that contradicts the secular nature of Turkey. In the 2000 Report on Turkey by the Special Rapporteur on Elimination of all Forms of Intolerance and Discrimination based on Religion or Belief, it is stated that:

“The (Turkish) Council of State, in response to a complaint brought by a medical student against a decision of the university suspending her for one month for wearing

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<sup>355</sup> See Art. 151 of the Civil Code.

<sup>356</sup> See Articles 108 and 237 of the Criminal Code.

<sup>357</sup> See Berkes, N., *supra*, note 336 above, p. 474.

<sup>358</sup> *ibid.*

<sup>359</sup> Pope, N., and Pope, H., (1997) *supra*, note 341 above, p.328.

the veil in class, found that the wearing of the veil symbolised a vision of the world contrary to the freedoms of women and the principles on which the Republic is founded".<sup>360</sup>

The report further stated that a parliamentary attempt in 1988 "to amend the law on higher education to allow wearing of the veil for religious reasons" was aborted.<sup>361</sup> The Constitutional Court is reported to have set aside the amendment at the request of the President on grounds that "to allow female students to cover their heads on university grounds might adversely affect the public security and unity of the nation because the headscarf or turban shows who belongs to which religion (and that it) was contrary to the principle that all beliefs are equal before the law, (and) incompatible with secularism".<sup>362</sup> This has led to institutionalised discrimination against Muslim women who wear the headscarf as is further elaborated under Women's rights below. It also leads indirectly to violation of the fundamental right to education for women denied higher education on that ground.

Also on equality and non-discrimination, the Committee of Independent Experts on the European Social Charter has observed that certain articles of the Turkish Civil Code give greater power to the husband and thus contrary to the principle of equality between spouses under the Charter.<sup>363</sup> The Committee referred to Article 152(1) of the Turkish Civil Code which provides that the husband is the head of the family; Article 152(2) which provides that the husband shall choose the couple's dwelling-place; Article 156 which provides that the husband may deprive the wife of her legal authority to represent the couple if she abuses that authority; and Article 263 which provides that the husband should have sole parental authority if any dispute arose as to its use. Turkey had however noted in its report that "draft legislation had been drawn up with a view to revoking these articles".<sup>364</sup>

### *Women's Rights*

During consideration of Turkey's CEDAW report in 1997, the country's representative reported the "development of a gender-sensitive agenda in Turkey", and that "women had

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<sup>360</sup> See UN. Doc. A/55/280/Add.1 of 11 August 2000, Par.19.

<sup>361</sup> The intended amendment read as follows: "It is obligatory to have contemporary appearance and dress in higher educational institutions, their classrooms, laboratories, clinics and corridors. There is freedom however, for women to cover, due to religious belief, the neck and hair with a headscarf or turban". See UN. Doc. A/55/280/Add.1 of 11 August 2000, Par.20.

<sup>362</sup> *ibid.*

<sup>363</sup> See European Social Charter, Committee of Independent Experts Conclusions, XIII-3, p.384.

<sup>364</sup> *ibid.*

become visible and had been expanding their sphere of action” in society.<sup>365</sup> She also observed that “(t)he most arduous and urgent task facing the Government now was to respond to the demands of women, particularly the enhancement of their basic citizenship rights within a secular social order”.<sup>366</sup>

The question of the veil always comes up in the examination of women’s rights in Muslim States.<sup>367</sup> While in some non-secular Muslim States women are forced to wear it, in Turkey women are forced to discard it because it is seen as contrary to the “secular social order” of the State.<sup>368</sup> From a secular perspective the veil is often seen as a religious symbol of women’s subjugation. This derives from allusions in earlier religious scriptures that the use of the veil by women symbolises their inferiority and subservience to men.<sup>369</sup> On the contrary, there is no reference to it as a symbol of subservience or subjugation in the context of both the Qur’an and the *Sunnah*.<sup>370</sup>

Under Islamic law the veil is an aspect of the rule on Islamic modesty in dressing, which applies to both men and women. Since sexual relationships outside marriage is a criminal offence under Islamic law, the law attempts to close the avenues of temptations to it. In that regard the *Sharī’ah* provides that certain obvious parts of both men’s and women’s bodies must not be exposed in public to prevent invitations to sexual abuse in the Muslim society. While there is legal consensus on the fact that men must not expose any part from their navel to their knee in public, the opinion with regards to women are divided.<sup>371</sup> While the *Sha’fi’i* and the *Hanbali* schools of Islamic jurisprudence hold that women must cover up their whole person without exception from public glare, the *Malikī* and *Hanafi* schools of jurisprudence exempt the face, the hands up to the wrists and the feet up to the ankles.<sup>372</sup> Many contemporary Muslim thinkers and jurists have disagreed with the view on complete veiling of women.<sup>373</sup> Rahman has argued that the Qur’anic provision on lowering of gaze<sup>374</sup> would

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<sup>365</sup> See Concluding Observation of the CEDAW on Turkey (1997) UN Doc. A/52/38/Rev.1, of 23/01/97, Par.154.

<sup>366</sup> *ibid.*

<sup>367</sup> See e.g. Ali, S.S., “Women’s Rights in Islam: Towards a Theoretical Framework”, (1997-98) *Yearbook of Islamic and Middle Eastern Law*, Vol. 4., p.117 at143-146.; and Jansen, J.G., *The Dual Nature of Islamic Fundamentalism* (1997) pp.138-157.

<sup>368</sup> Both of which can amount to violation of international human rights law. See e.g. the Human Right Committee’s GC 28, Par. 13.

<sup>369</sup> See e.g. 1 Corinthians 11: 5-10. See also Durant, W., *Story of Civilization*, (1939), Vol. III. pp.596-597

<sup>370</sup> See Q24:31 and Q33:59.

<sup>371</sup> See e.g. Ali, S.S., *supra*, note 367 above, and references cited therein in respect of the differences of opinion with regards to the veiling of women in Islam.

<sup>372</sup> See e.g. Al-Zuhayli, W., *al-Fiqh al-Islamī wa-Adillatuh* (Arabic) (1997) Vol.1, and pp.743-754. See also Stowasser, B.F., *Women in the Qur’an, Traditions, and Interpretation* (1994) pp.93-94.

<sup>373</sup> See e.g. Rahman, F., *Status of Women in the Qur’an* in Nashat., G., (ed.) *Women and Revolution in Iran* (1983). See also the judgement of the Pakistan Federal Shariat Court in *Ansar Burney .v. Federation of Pakistan* , (1983) PLD (FSC) 73 at 75ff.

<sup>374</sup> See e.g. Q24:30-31.

not have been necessary (at least for men) if women were required to cover up completely.<sup>375</sup> In practice, majority of Muslim women follow the view of the second two schools.<sup>376</sup>

It is in relation to this religious obligation of modesty that Muslim women use the head-veil. This allows an atmosphere whereby men and women are able to perform their societal functions without invoking their sexual tempers. Women who dress modestly and cover their hair are respected and honoured in most Muslim societies. They are considered to be free from contributory negligence to sexual abuses on women. The head-veil does not prevent women from achieving whatever heights they are capable of reaching in many Muslim societies of today. Nicole and Hugh Pope have observed that: "Contrary to perceptions in the West, these women, who often wear a long Islamic coat as well as a headscarf, are not always uneducated peasants submitting to tradition. Some are well educated professional women, who have made a conscious choice to embrace religion".<sup>377</sup> Wearing the veil is more of a religious obligation, which many Muslim women carry out willingly. This is evidenced by the fact that while the State strongly discourages the use of the head-veil in Turkey most women outside government institutions still wear it as a religious obligation in their daily lives. Turkish female students have demonstrated against the prohibition of the head-veil in higher institutions of learning as a violation of their religious rights.<sup>378</sup> Muslim women in Western non-Muslim States also use the head-veil willingly as a religious obligation.

The controversy about the Muslim woman's veil in Turkey reached a summit on May 2, 1999 when an elected Member of the Turkish Parliament, Merve Kavakci (a Muslim lady), entered parliament for the swearing-in ceremony wearing a head-veil. This raised mayhem in the assembly. She was accused of violating the secular principle of the State and ordered to either remove the veil or vacate the assembly. The lady refused to do either, pleading her right to dress in accordance with her religious beliefs. The parliament ended in a row.

While Kavakci was seen by the State as an "agent provocateur working for radical Islamic states", Kavakci saw herself setting a simple test in democracy, tolerance and freedom of expression, which according to her, the State had failed. This quickly led to judicial moves by the country's chief prosecutor to close down the Virtue Party on whose platform Miss Kavakci was elected on grounds that the party was trying to overthrow the secular Constitution of the State by supporting her. The veil saga led to the revocation of

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<sup>375</sup> See Rahman, F., (1983) *supra*, note 373 above, at 40.

<sup>376</sup> See Chapter 6, pp. 115-16.

<sup>377</sup> Pope, N., and Pope, H., (1997) *supra*, note 341 above, p.328.

<sup>378</sup> Media reports indicate that some Muslim female students have been charged in Turkish courts with the crime of intending to overthrow the secular nature of the State for demonstrating against the ban on the use of the veil in higher institutions.

Miss Kavakci's Turkish citizenship within days, on grounds that she had taken USA dual citizenship without informing the Turkish authorities. Kavakci had been earlier forced to abandon her medical course at Ankara University and migrated with her parents to study computer science in the USA because she had also refused to uncover her hair then as a medical student. This revocation of citizenship raises other international human rights issues on the right to citizenship apart from the initial issue of a Muslim's right to wear the head-veil on religious grounds, and perhaps that of a Christian nun as well, in a secular State. The Kavakci veil saga has been described as "a serious breach of human rights, representing an attack on the fundamental right of freedom of religion."<sup>379</sup> Turkey thus represents an example of a Muslim State where principles of international human rights are pleaded against State practices that violates Islamic religious rights. It also dispels any proposition that tends to suggest the application of Islamic law as the major factor for the violation of international human rights in Muslim States.

Of relevance also in the discussion of women's rights in Turkey is the practice of forced "virginity examinations" carried out on women. The examination is conducted to determine that the virginity of a female is intact, often to "defend" the family's honour. It is a traditional practice carried out on the presumption that female virginity is a legitimate interest of the family, the community and, ultimately, the State, and is thus not only deemed justifiable, but also seen as legitimately overriding the individual rights of women to bodily integrity, privacy and equality before the law.<sup>380</sup> The CEDAW Committee has "emphasized that such coercive practices were degrading, discriminatory and unsafe and constituted a violation by state authorities of the bodily integrity, person and dignity of women".<sup>381</sup> Turkey being a State with predominant Muslim population, it must be emphasised that this practice is absolutely cultural and has no support whatsoever under Islamic law. The *Shari'ah* provisions on protection of the female's privacy, modesty and integrity actually makes such practice unlawful under Islamic law. Its non-relation to Islamic law is evidenced by the fact that such practice does not occur in other Muslim States that actually implement Islamic law.

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<sup>379</sup> See UN. Doc. A/55/280/Add.1 of 11 August 2000, Par. 67.

<sup>380</sup> See Human Rights Watch, "Forced Virginity Exams in Turkey" in *The Human Rights Watch Global Report on Women's Human Rights* (1995) pp.418-444 particularly 419. See also Monshipouri, M.,(1998) *supra* note 97 above, pp.128-9.

<sup>381</sup> See CEDAW Concluding Observation on Turkey (1997), UN. Doc. A/52/38/Rev.1, Par.178.



### *Islamic Criminal Justice*

Similar to Tunisia, Islamic criminal law is not also applied in Turkey. Thus there is no question of Islamic criminal law provisions affecting the State's international human rights obligations in any way.

### *General Representations on Human Rights*

Despite criticisms against its human rights practice, Turkey continues to affirm its commitment to the international human rights regime. At the fifty-sixth session of the UN Commission on Human Rights in April 2000, the Turkish Minister in charge of human rights agreed that the nation's "shortcomings in the area of human rights were, regrettably, not negligible". He blamed the situation on what he described as "a wave of ideological terror" and "ethnic terrorism with separatist objectives" faced by the State. He however reiterated the nation's commitment to international human rights, listing out a number of reforms by the government towards the improvement of human rights in the State, which includes that:

"...only civilian judges currently sat on the State Security courts; a repentance law had granted amnesty and reduced sentences of members of terrorist groups; amendments to the Penal Code had redefined and increased the penalties for torture, ill-treatment and abuse of power by public officials – the definition of torture had been brought into line with the United Nations and European conventions; legislation had been passed to postpone sentences and trials relating to crimes committed through the media – to date 22 writers and reporters had been released from prison; new legislation made it easier to prosecute public officials for torture and ill-treatment; stricter guidelines on detention and interrogation had been introduced; human rights education had been intensified, particularly in the context of the United Nations Decade for Human Rights Education; and it had been made easier for civil servants to engage in trade union activity." He further stated that: "Work was continuing on reforms to the Civil Code, the Penal Code, the Code of Penal Procedure, the Code of Execution of Sentences and the Ombudsman Bill."<sup>382</sup>

He concluded that "Turkey would soon be signing the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights",<sup>383</sup> both of which it did sign on 15 August 2000 but is yet to ratify.

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<sup>382</sup> See Summary Record of the 4<sup>th</sup> Meeting at the 56<sup>th</sup> Session of the Commission on Human Rights, UN Doc. E/CN.4/2000/SR.4 of 4 April 2000. Par. 39-49.

<sup>383</sup> *ibid.*, Par. 47.

## CONCLUDING REMARKS

An examination of other Muslim States will reveal, *mutatis mutandis*, State practices in respect of international human rights that fall within the case studies conducted in this chapter. Theoretically, the ideals and humane spirit of the *Shari'ah* as expatiated in the first and second parts of this thesis creates an expectation that human rights should best be respected in the Muslim world. This is regrettably not so, and human rights are violated in Muslim States as much as they are violated in non-Muslim States. International human rights law is seen to be violated both where there is a hard-line traditional application of Islamic law or the enforcement of hard-line secularist agendas against Islamic norms and rights. There is therefore a need to find a balance between these two positions in the relationship between Islamic law and international human rights law in the Muslim world.

It is obvious that there is a common phenomenon of consciousness in Muslim States of the appealing nature of international human rights ideals, especially on the part of those exposed to the modern concepts of freedom, liberty and equality. Muslim States can thus not feign indifference but are rather advancing cautiously and with different degrees of moderation in bridging the gap that exists between their interpretation of the *Shari'ah* and the realisation of their international human rights obligations. While the State practice of Muslim States concedes generally to the universality of human rights, they have persistently advanced the cultural relativist argument to sustain Islamic morals and values within their human rights practice. To achieve greater harmony, the need for Muslim States to depart from hard-line interpretations of the *Shari'ah* has been stressed in this thesis. However, State practice, especially that of the first four Muslim States examined in this chapter, also confirms that, no matter how moderate Muslim States are in their application of Islamic law, there will still remain some areas of cultural differences vis-à-vis current international human rights practice. Those areas of differences that can be reasonably justified on grounds of public order and morality are those for which this thesis proposes the adoption of the margin of appreciation doctrine by the UN treaty bodies in emulation of the European human rights regime. This will allow for an international evaluation and control of the justifications advanced for the cultural differences and promote an inclusive universalism that will enrich international human rights practice universally.

As has been argued in the earlier parts of this thesis, the legitimising effect of the *Shari'ah* and its ultimate objective of ensuring both the temporal and spiritual well being of individuals make it a very important vehicle for realising the ideals of international human

rights law in the Muslim world. Adopting the margin of appreciation doctrine will provide leeway for the healthy interaction between Islamic law and international human rights law in the Muslim world. It must be noted however that there is yet to emerge a unified interpretation or application of Islamic law that facilitates a common Islamic human rights evaluation among Muslim States. Thus with the Islamic resurgence in the Muslim world and the adoption of Islamic law in one form or another by modern Muslim States, an important challenge that also faces them is the establishment of a common Islamic human rights standard and an enforcement mechanism as a reference point towards bridging the gap that presently exists between the application of Islamic law and the enforcement of international human rights law in the Muslim world. The concluding chapter of this thesis will address and recommend possible means for meeting that challenge in co-operation with the international human rights regime of the UN.

## CHAPTER 9

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### Conclusion

This research has examined the question whether or not Islamic law and international human rights are compatible, and whether Muslim States can comply with international human rights law while they still adhere to Islamic law. We have exhaustively analysed and responded to the salient traditional arguments on the subject from both an international human rights and Islamic legal perspective. The substantive rights contained in the ICCPR and ICESCR as well as some aspects of the Women's Convention have also been examined in the light of Islamic law. The State practices of six Muslim States were also examined as case studies. The findings and recommendations of the research are summarised in this concluding chapter.

#### SUMMARY OF FINDINGS AND RECOMMENDATIONS

It has emerged from the analyses and arguments herein that there is certainly a human rights discourse in Islamic law. Although the manifestation of this may have been eclipsed by the traditional emphasis on the differences of scope between the two legal regimes, the expositions in this research impugns the incompatibility theory and reveals the existence of a large positive common ground between Islamic law and international human rights law. This does not however obscure their differences of scope and application, but rather establishes a positive basis for managing the differences through the development of complementary methodologies between the two legal systems. The analysis and argumentation of the theoretical and practical differences reveal that the differences are not totally irreconcilable. The important harmonising elements are demonstration of good faith, appreciation of human dignity, and the abandonment of prejudice between Islamic law and international human rights advocates. The detailed examination of both the ICCPR and the ICESCR in the light of Islamic law demonstrates the possibility of constructive harmonisation of international human rights norms with Islamic law. The contentions between Islamic law and international human rights law arise mainly from points of interpretation, which are largely and mutually reconcilable. Consequently, the eliminative and "end of history" approach to

the interpretation of both Islamic law and international human rights law has been herein challenged. It is only an inclusive, evolutionary and constructive method of interpretation that will bring the best out of the two regimes for the enrichment of human rights in the Muslim world.

Generally, the ideals of international human rights are very lofty and thus no nation can today be indifferent to its challenges. Modern Muslim States are conscious of that and they do demonstrate acknowledgement of the importance of human rights. They also acknowledge the universality of human rights and their reports neither challenge the binding nature of international human rights treaties nor deny their obligations under treaties ratified by them. Their contention has mostly been about interpretation of international human rights norms and that “(t)here was a need to develop current human rights concepts with reference to the humanitarian values enshrined in the various religions, civilizations and cultures of the world”.<sup>1</sup> The question is therefore not simply an argument about Muslim States being bound by the norms of international human rights law,<sup>2</sup> for they do not appear to dispute that. Rather the question is about the evolution of a universally applicable interpretation of the norms. It is ultimately a question of universalism not universality. The Muslim World League reiterated after its international conference on human rights in Rome on February 28, 2000 that “dialogue be encouraged among all cultures and civilizations in a manner that paves the way toward a better understanding of human rights”.<sup>3</sup> The Muslim world thus generally affirms international human rights coupled with varying degrees of persistence upon Islamic legal traditions in interpreting human rights norms. This reflects the strong link of Islamic legal traditions with the Islamic civilisation as a whole. In their examination of the major legal systems of the world, David and Brierly observed the impossibility of rejecting the Islamic legal tradition without rejecting the entire Islamic civilisation.<sup>4</sup> Since a rejection of the Islamic civilisation is not the goal of the international human rights objective, accommodation of the Islamic legal tradition is of utmost importance for realising the ideals of international human rights and for achieving universalism in human rights in the Muslim world. Through mutuality and accommodation the legitimising force of Islamic law in many Muslim States can be positively utilised for the enforcement of international human rights law in the Muslim world.

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<sup>1</sup> See Statement by the Deputy Minister for Foreign Affairs of Saudi Arabia at 56<sup>th</sup> Session of UN Commission on Human Rights. UN Doc. E/CN.4/2000/SR.30 of 26 April 2000. Par. 2.

<sup>2</sup> See e.g. argument along that line in Mayer, E.A., *Islam and Human Rights, Tradition and Politics* (3<sup>rd</sup> Ed. 1999) p.12.

<sup>3</sup> See Rome Declaration on Human Rights in Islam. Saudi Embassy News Website at: [http://www.saudiembassy.net/press\\_release/00\\_spa/02-28-Islam.html](http://www.saudiembassy.net/press_release/00_spa/02-28-Islam.html) [6/03/2001].

<sup>4</sup> See David, R., and Brierley, E.C. *Major Legal Systems in the World Today*, (1985), p.482.

The scope of international human rights can be positively enhanced in the Muslim world through moderate, dynamic and constructive interpretations of the *Sharî'ah* rather than through hard-line and static interpretations of it. This is particularly so in respect of women's rights, minority rights, and the application of Islamic criminal punishments. We have shown by reference to the different schools of Islamic jurisprudence and classical juristic views that even the early Islamic jurists and scholars emphasised the importance of moderation and had adopted constructive views that can today greatly enhance the realisation of international human rights norms within the dispensation of Islamic law. The Muslim *ummah* is actually described as "justly balanced" in the Qur'an, a description signifying moderation.<sup>5</sup> The Islamic legal analysis of the two international human rights Covenants has established the need for reviewing some traditional interpretations of the *Sharî'ah* in the light of equally valid moderate opinions that had existed even from the earliest Islamic jurists as demonstrated in this research, for the full realisation of the rights contained in them. The rules of Islamic jurisprudence do actually encourage interpretations of the *Sharî'ah* that promote the benevolent nature of Islam, especially where the reasoning for such interpretations commensurates with prevalent needs of social justice and human well being.

This conclusion is not unmindful of possible difficulties in that respect. For instance, the representative of Iran, Mr. Nasser, had stated, *inter alia*, before the ESCR Committee in 1993 that "it was not always easy to apply traditional Islamic law without falling short of the commitments undertaken in acceding to the Covenant." He however also added that "(t)he Islamic Republic of Iran...was sincerely endeavouring to reconcile Islamic law and the provisions of the Covenant".<sup>6</sup> This buttresses the fact that even where interpretational difficulties exist, there is often possibility of rapprochement as contended and demonstrated in this research. Likewise, when Egypt ratified both the ICCPR and ICESCR in 1982 it entered a general declaration "taking into consideration the provisions of the Islamic Sharia". In paragraph 3 of its initial report on the ICESCR submitted in 1998, Egypt stated in respect of the said declaration as follows:

"Egypt expressed a general reservation to the effect that account should be taken of the need to ensure that the Covenant was not incompatible with the provisions of the Islamic Shari'a. However, the practical implementation in Egypt of the provisions of the Covenant, as one of the country's laws, from 14 April 1982 to date has not revealed any incompatibility between the provisions of the Islamic Shari'a and the

<sup>5</sup> See Q2: 143. A Tradition of the Prophet also instructs Muslims as follows: "Beware of extremism in religion. People before you have perished as a result of such extremism". See also generally, al-Qaradawi, Y., *Islamic Awakening between Rejection and Extremism* (1990).

<sup>6</sup> See Par. 36 and 37 of Summary Record of the 8<sup>th</sup> Meeting: Iran; E/C.12/1993/SR.8 of 20 December 1993.

*principles and rights set forth in the Covenant and relating to its field of application.*"<sup>7</sup> (emphasis added).

The Egyptian representative before the ESCR Committee, Mr. Salama, had also pointed out that: "Enlightened interpretations of Islamic law were permitted... (in Egypt) and had actually contributed to the positive developments mentioned by the delegation in many fields, such as women's and family issues."<sup>8</sup> This reflects the importance of good faith and humanitarian will on the part of State authorities in endeavouring to realise international human rights within the ample limits of the *Shari'ah* and their application of Islamic law.

Conversely, there is similar need to depart from the exclusionist approach in the interpretations of the provisions of international human rights treaties. To encourage the promotion and realisation of international human rights in the Muslim world, the UN international human rights treaty bodies must develop consideration for Islamic values in their interpretation of international human rights norms in relation to Islamic law. This is possible through the adoption of the margin of appreciation doctrine on moral issues relating especially to Islamic ethical and family norms. Due to the obvious relevance of Islamic law in the quest for universalism in international human rights in the Muslim world, there is a positive need for the inclusion of highly qualified experts in Islamic international law on the membership of international human rights treaty bodies to reflect the "representation of the different forms of civilization and of the principal legal systems" of the world on the Committees.<sup>9</sup> This would boost the confidence of Muslim States and Islamic legalists in the international human rights treaty bodies and lead to more positive inclination towards interpretations and general comments of the relevant Committees of international human rights treaties. It will also encourage the ratification by Muslim States not only of substantive human rights treaties but also Optional Protocols that provide for individual complaints systems within the international human rights regime. With reference to the HRC for instance, McGoldrick has rightly observed that:

"The presence of experts from different legal systems can assist the HRC in its consideration of reports under article 40. For example, during consideration of the report of Morocco it was useful to have members of the HRC who were conversant with Islamic laws. The provision in article 31(2) can give States parties the confidence that their approach will at least be understood even if disagreed with..."<sup>10</sup>

<sup>7</sup> Initial State Party Report: Egypt; E/1990/5/Add.38 of 30 June 1998.

<sup>8</sup> Summary Record of the 13<sup>th</sup> Meeting: Egypt; E/C.12/2000/SR.13 of 9 May 2000 and Par. 64 of Summary Record of the 11<sup>th</sup> Meeting: Egypt; E/C.12/2000/SR.11 of 8 May 2000.

<sup>9</sup> See e.g. Art. 31(2) of the ICCPR and Art. 8 ICERD.

<sup>10</sup> McGoldrick, D., *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (1994) p.55 n.5.

Joseph, Schultz and Castan have however observed that “a Western representative bias can be detected in recent years, with over half of the (HRC) members serving from 1998 to 2000 coming from the United States, Canada, Australia, the United Kingdom, France, Italy, Israel, Finland, Germany and Poland”.<sup>11</sup> Thus the need for the reflection of a more “equitable distribution of membership” not only of the HRC but of all the UN human rights treaty bodies cannot be overemphasised.<sup>12</sup>

Based on the findings herein, this conclusion proposes a mutual approach for the realisation of international human rights within the dispensation of Islamic law in the Muslim world. Both Islamic law and international human rights jurists and scholars need to adopt an accommodative and complementary approach to achieve the noble objective of enhancing human dignity, fostering an ideal human community, ensuring justice, peace and the general well being of all human beings, which are common aims of both the *Shari'ah* and international human rights law. The objective must be towards combining the best in both systems for all humanity. This proposal impugns the unilateral approach, which demands that the harmonisation between Islamic law and international human rights law depends only on reforming the *Shari'ah* to conform totally with current international human rights interpretations, some of which are considered by Muslims as insensitive to Islamic religious and moral viewpoints. For instance one advocate of that unilateral approach, while answering the question “How should international law respond to the incompatibility of claims based on *Shari'a* with international human rights norms?”, submitted that: “international law norms must not be compromised, and that it may be desirable for Muslim scholars to explore alternative interpretations of Islamic sources under which *Shari'a* can be reconciled with developments in international human rights law”.<sup>13</sup> The difficulty of such unilateral demand upon Islamic law is quite obvious. Practically, it is synonymous with an attempt to clap with only one hand.

The mutual and complementary approach proposes that in respect of Islamic law, the necessary means for harmonisation are: (i) adopting an “enlightened interpretations” approach, as observed by the Egyptian representative above, and (ii) a “sincere endeavour to reconcile” as observed by the Iranian representative. We have observed earlier that the

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<sup>11</sup> Joseph, S., Schultz, J., and Castan, M., *The International Covenant on Civil and Political rights, Cases, Materials, and Commentary* (2000) p.10.

<sup>12</sup> For example the balance of State Party membership of the European Court of Human Rights does make easier its search for an “European Consensus” in cases brought before it. Art. 20 of the European Convention provides that: “*The Court shall consist of a number of judges equal to that of the High Contracting Parties*”.

<sup>13</sup> Nanda, V.P., “Islam and International Human Rights Law: Selected Aspects” (1993) *American Society of International Law Proceedings*, p.327 at 331.



Islamic law doctrine of *maslahah* is very relevant for this purpose. And in respect of international human rights law the necessary means are: (i) accommodation of necessary margin of appreciation in respect of Islamic ethical and moral values, (ii) appreciation that human rights are not inherently non-achievable within the scope of Islamic law. We shall now consider some salient practical means of achieving these domestically, regionally and universally.

### ***Domestic Means for Enhancing Human Rights in the Muslim World***

#### ***1. Human Rights Education***

It is submitted that the greatest debilitating factor against the enhancement of human rights in the Muslim world today is ignorance about human rights and lack of human rights education. While, as shown in this thesis, Islamic law substantially recognises the duty of the State to promote and protect the human rights of every human being as guaranteed under international human rights law, most of the populace in Muslim States are ignorant about these rights. They do not often understand what human rights is all about. Some even believe that it is an affront against their religious values. They do not see human rights law as a means of protecting the individual against the abuse of State power. There is an important need therefore for Muslim States to embark on extensive formal and informal human rights education for their populace.

Due to the importance and role of religion and religious institutions in the Muslim world, human rights education should not be limited to the secular institutions but also extended to the religious institutions. The provisions of the Qur'an and *Sunnah* that promote the ideals of human rights must be stressed. The provisions of international human rights instruments need also to be explained and illustrated through the Islamic legal tradition as demonstrated in this research. To practicalise their assertion in the OIC Declaration on Human Rights in Islam that human rights are divine part of the Islamic legal tradition, which no authority can withhold, Muslim States must disseminate what those rights are through a massive human rights education in the Muslim world. Under Islamic law, the populace have a right to know and to be informed of everything of benefit to them, not only for the hereafter but for their well being in this world as well. There are many Qur'anic verses, as referred to in this thesis, that enjoin the promotion of education and condemn the concealment of knowledge, which in this case includes human rights education due to its value for the

ultimate benefit of the individual in every society of today's world. An Islamic and international human rights curriculum for primary, secondary and tertiary institutions would be of great benefit in that regard. Non-Governmental Organisations (NGOs) also have an important role to play in that regard.

## 2. *The Judiciary*

The primacy of domestic enforcement of human rights is acknowledged in both universal and regional human rights instruments.<sup>14</sup> Equally, the importance of the judiciary in the domestic enforcement of human rights guarantees can not be over-emphasised. In respect of the exhaustion of all available domestic remedies by victims of human rights violations, the HRC has stressed that this “clearly refers in the first place to judicial remedies”.<sup>15</sup> Thus the judiciary is the ultimate resort to claiming one's right in case of its denial by the State. However justice is, to a degree, relative to the judge's understanding and values. Thus, for the reflection of a human rights approach to justice in the Muslim world, the courts and the judges must also be specially attuned to be human rights conscious. Judges in Muslim States and courts must be attuned in that regard in their dispensation of justice to adopt a human rights approach based on the humane objective of the *Sharī'ah* (*maqâsid al-sharī'ah*), which is the protection and promotion of human welfare. This will also require the introduction of Islamic judges to international human rights jurisprudence to afford a reflective comparison in their legal thinking.

Judicial human rights training would also be very essential in this respect. This would not necessarily be only in international human rights law but also encourage the development of Islamic human rights training for Islamic court judges in Muslim countries in their application of Islamic law.

## 3. *National Human Rights Commissions*

The establishment of national human rights commissions in the Muslim States would also certainly enhance the realisation of human rights in the Muslim world. The national human rights commissions would be independent bodies conferred with adequate autonomy for the general promotion of human rights ideals in the countries. The commissions would

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<sup>14</sup> See e.g. Art. 8 UDHR, Art. 2(3) ICCPR, Art. 6 ICERD, Art. 14(1) CAT, Art 25 ACHR, Art. 13 ECHR and Art. 7 ACHPR.

also play supplementary roles in realising the first two objectives stated above. The presence of such commissions has contributed to the awareness about human rights in some Muslim countries already.<sup>16</sup>

While the above domestic means, coupled with the good will of the State can go a long way in enhancing the ideals of human rights in individual Muslim States, national apparatus, for obvious reasons, cannot be solely adequate for the full realisation of human rights guarantees. Especially to promote and encourage universalism, there is the need for inter-State co-operation as an important means for further enhancement of international human rights. Regionalism has proved to be a very effective means to achieve that, but which the Muslim States have not adequately exploited.

### *Regionalism as a Vehicle of Universalism*

While the State, as the main object of duties in the guarantee of human rights, is a very important institution for the realisation of human rights, the traditional concept of the modern nation-state is itself absolutist and to a large extent inhibits the realisation of a common universal human rights practice. Community is thus an important vehicle of ensuring the effective universalisation of international human rights.

After the UN General Assembly adopted the UDHR in 1948, the Council of Europe quickly demonstrated the utility of the regional community approach through the adoption of an European regional convention<sup>17</sup> as the first step towards realising a collective enforcement of human rights. An important motivation for that approach is as stated in the preamble of the European Convention that “the governments of European countries...*are likeminded and have a common heritage of political traditions, (and) ideals...*”, which could promote a collective enforcement of human rights amongst European countries.<sup>18</sup> The common heritage of the American people had also contributed to the adoption of the American Declaration on the Rights and Duties of Man in 1948 and the American Convention on Human Rights in 1969. The African nations were also motivated in 1981 to adopt the African

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<sup>15</sup> *R.T. [name deleted] .v. France*, Communication No. 262/1987 (30 March 1989), UN Doc. Supp. No. 40 (A/44/40) at 277 (1989). Par. 7.4. For provisions on the exhaustion of domestic remedies *See e.g.* Art. 5(2)(b) OPI to the ICCPR, Art. 35 ECHR, Art. 46(1)(a) ACHR, and Art. 50 ACHPR.

<sup>16</sup> *e.g.* The Indonesian National Commission on Human Rights. For information on its functions and role in promoting human rights ideals in Indonesia *See* its 1999 Annual Report. Available Online at: <http://www.komnas.go.id/english/report/index.html> [21/3/2001]; *and* The Nigerian Human Rights Commission established under the National Human Rights Commission Decree No.22 of 1995. *See* a commendation of the work of the Nigerian National Human Rights Commission in the Report on the Situation of Human Rights in Nigeria by the Special Rapporteur of the UN Commission on Human Rights, UN Doc. E/CN.4/1999/36 of 14/1/99, Par. 69-72.

<sup>17</sup> European Convention For The Protection of Human Rights and Fundamental Freedoms (1950).

<sup>18</sup> *See the Preamble of the European Convention.* (emphasis added).

Charter on Human and Peoples' Rights, "(t)aking into consideration the *virtues of their historical tradition and the values of African civilization* which should inspire and characterize their reflection on the concept of human and peoples' rights".<sup>19</sup> These regional arrangements do not constitute a deviation from the universal aspiration of international human rights pursued by the UN as it may appear. Rather, they narrow down the diverse cultural differences and difficulties that may confront the universal enforcement of international human rights in practice. The UN has itself welcomed the regional human rights regimes and appealed to States to establish regional institutions for human rights where non already existed.<sup>20</sup> The preambular statements of the regional human rights instruments quoted above indicate that rather than mere geographical proximity, the basis for those regional human rights arrangements and co-operation includes political, social, cultural, economic and moral ideals.

The Islamic culture and civilisation transcends geographical boundaries and creates a stronger heritage between modern Muslim States. According to Hurewitz, "all the countries of North Africa and most of those of the Middle East are Arab and view themselves as belonging to a regional community of states. ... The Arab states, moreover, form part of a bigger yet more deeply fractured Islamic world".<sup>21</sup> Despite their geographical spread, the historical bond of Islam provides the modern Muslim States with a sense of commonality. Islamic law represents a sort of common law of the Muslim world. This was what actually held them together in the past as a single community under the Caliphate. This can be utilised for the achievement of an effective collective supervision and enforcement of human rights in the Muslim world that will greatly enhance the universal practice of international human rights law. The Organisation of Islamic Conference (OIC) is one community organ founded "to consolidate cooperation in the economic, social, cultural, scientific and other vital fields of activities" among Muslim States.<sup>22</sup> It is suggested that the OIC can thus provide a community framework among modern Muslim States within the international order for the practical realisation of international human rights law in the Muslim world.<sup>23</sup>

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<sup>19</sup> See the Preamble to the African Charter. (emphasis added).

<sup>20</sup> See UN Doc. GA Res. 32/127 (1977), which has been reiterated yearly since then. The Vienna Declaration and Programme of Actions (1993) also reiterated this call. See 32 *International Legal Materials* (1993) 1661 at 1672, par. 37.

<sup>21</sup> Hurewitz, J.C., (ed.) *The Middle East and North Africa in World Politics: A Documentary Record*, (1975) Vol. 1., p.xvii.

<sup>22</sup> See Art. II (A) (2) of the OIC Charter.

<sup>23</sup> The definition of Muslim States for this research had in fact been based on Membership of the OIC. See Chapter 1, p. 7 above.

*The Organisation of Islamic Conference (OIC) as a vehicle of Universalism  
in the Muslim World*

The OIC was founded by Muslim Heads of State and Governments in 1969 with the main objective of promoting "Islamic solidarity among member States."<sup>24</sup> The Charter<sup>25</sup> establishing the OIC entered into force on 28 February 1973. By December 2000 it had a total membership of fifty-six Muslim States, all of whom are also members States of the UN.<sup>26</sup> This approximates almost one third of the present membership of the UN, an indication of the viability of the OIC serving as a platform to fulfil the need for a community approach to international human rights within the dispensation of Islamic law in the Muslim world. The preamble of the OIC Charter declares, *inter alia*, that the Member-States are:

"Convinced that their common belief constitutes a strong factor for rapprochement and solidarity between Islamic people;

Resolved to preserve Islamic spiritual, ethical, social and economic values, which will remain one of the important factors of achieving progress for mankind;

Reaffirming their commitment to the UN Charter and fundamental Human Rights, the purposes and principles of which provide the basis for fruitful co-operation amongst all people;

Determined to consolidate the bonds of prevailing brotherly and spiritual friendship among their people, and to protect their freedom and the common legacy of their civilization founded particularly on the principles of justice, toleration and non-discrimination;

In their Endeavour to increase human well-being, progress and freedom everywhere and resolved to unite their efforts in order to secure universal peace which ensures security, freedom and justice for their people and all people throughout the world."

It will be observed that the OIC member States reaffirmed their commitment to the UN Charter as well as to fundamental human rights as purposes and principles towards a fruitful co-operation amongst all people. The OIC Charter was also registered as an international treaty with the UN on February 1, 1974 in conformity with Article 102 of the UN Charter, making the charter invocable before the organs of the UN.<sup>27</sup>

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<sup>24</sup> Article II(A)(1) Charter of the Islamic Conference.

<sup>25</sup> 914 UNTS 111.

<sup>26</sup> This is with the exception of Palestine, which is not a full member of the UN yet but has only an observer status.

<sup>27</sup> Art. 102 of the UN Charter provides that:

"(1) Every Treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it.

(2) No party to any such treaty or international agreement which has not been registered in accordance with the provisions of paragraph 1 of this Article may invoke that treaty or agreement before any organ of the United Nations."

After a conference on "*Liberties and Human Rights in Islam*" in the Republic of Niger in 1979, the Tenth Conference of Foreign Ministers of the OIC agreed, in line with its Charter commitment on fundamental human rights, to set up a consultative commission of Muslim experts to draft an Islamic human rights document for the Organisation.<sup>28</sup> Through that and subsequent efforts the OIC Cairo Declaration on Human Rights emerged and was endorsed by the OIC Foreign Ministers in 1990. In further pursuance of its commitment to the promotion of human rights, the OIC in co-operation with the UN organised a seminar in 1998 on "*Enriching the Universality of Human Rights: Islamic Perspectives on the Universal Declaration of Human Rights*" as part of the activities marking the 50<sup>th</sup> Anniversary of the UDHR at the UN Secretariat in Geneva. The OIC Secretary General, Azzedine Laraki, described the initiative as "a positive step forward among nations and a building block in the edifice of inter-civilizational dialogue (and to which) the Organisation of the Islamic Conference possesses all the potential and desire to contribute actively in furthering and enriching".<sup>29</sup>

Following the UN General Assembly's unanimous adoption of Resolution 53/22 in November 1998<sup>30</sup> declaring the year 2001 as the "Year of Dialogue among Civilizations", the OIC adopted a "Declaration on Dialogue among Civilizations" in May 1999 in which it identified the following eight areas needing international dialogue:

1. Responding to the common longing of humanity for faith and ethics;
2. Enhancement of mutual understanding and knowledge about various civilizations;
3. Cooperation and mutual enrichment in various fields of human endeavor and achievement: scientific, technological, cultural, social, political, economic, security;
4. Promotion of the culture of tolerance and respect for diversity;
5. Cooperation to arrest threats to global peace, security and well being: environmental degradation, conflicts, arms, drugs, terrorism;
6. Confidence-building at regional and global levels;
7. Promotion and protection of human rights and human responsibility, including the rights of minorities and migrants to maintain their cultural identity and observe their values and traditions;

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<sup>28</sup> See al-Ahsan, A., *OIC, The Organization of the Islamic Conference: An Introduction to an Islamic Political Institution* (1988) p. 113

<sup>29</sup> For the OIC Secretary General's Opening Address See UN Human Rights Website at:

[http://www.unhchr.ch/hurricane/hurricane.nsf/\(Symbol\)/OHCHR.981129.B.En?OpenDocument](http://www.unhchr.ch/hurricane/hurricane.nsf/(Symbol)/OHCHR.981129.B.En?OpenDocument) [6/03/2001].

<sup>30</sup> UN Doc A/RES/53/22 of November 16 1988.

8. Promotion and protection of the rights and dignity of women, safeguarding the institution of family, and protection of the vulnerable segments of the human population: the children, the youth and the elderly.<sup>31</sup>

Also in his address at the 56<sup>th</sup> Session of the Commission of Human Rights in March 2000, the Secretary General of the OIC stated inter alia that:

“At the threshold of the 21st Century it is imperative to put an end to all (the) blatant violations of human rights so that all people of the world may enjoy the same rights to education, health, development and welfare in a decent moral environment by eradicating poverty, misery, hunger, illiteracy etc. We can achieve these objectives, especially through a decisive and voluntary international cooperation deriving from an understanding and mutual respect of the cultural idiosyncracies of each people. In this perspective, the Organization of the Islamic Conference is convinced that the dialogue of civilizations which it had called upon vehemently and which the United Nations has announced for the year 2001 will reinforce the basis of such a cooperation. I am pleased to announce to you that the Organization of the Islamic Conference is actively working in this regard.”<sup>32</sup>

The UN has itself demonstrated the desire to co-operate with the OIC in the search for solution to global problems. Such co-operation can be traced back to 1975 when the General Assembly adopted a resolution to invite the OIC to participate in the sessions and work of the General Assembly and of its subsidiary organs in the capacity of observer.<sup>33</sup> From 1982 the General Assembly has also adopted resolutions on co-operation with the OIC and continues to include on its agenda the item entitled “Cooperation between the United Nations and the Organization of the Islamic Conference”.<sup>34</sup>

The above endeavours of co-operation and mutuality are fully accommodated within the founding objectives of the OIC without discarding the Islamic religious ideology of its Member-States. Such co-operation and mutuality are also encouraged by the *Shari'ah* on the basis of equity and good faith. Ensuring the realisation of international human rights in the Muslim world demands priority in these endeavours. The OIC needs to encourage among Muslim States, the practical interpretation of the general “Islamic spiritual, ethical, social and economic values”, which they hold as “one of the important factors of achieving progress for mankind”<sup>35</sup> in a manner that enhances the realisation of international human rights.

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<sup>31</sup> See Par. B of Tehran Declaration on Dialogue Among Civilizations. See OIC Website at: <http://www.oic-un.org/news.htm> [14/12/2000].

<sup>32</sup> See Address of Secretary General of OIC Before the 56<sup>th</sup> Session of the UN Commission on Human Rights, Geneva, on 24 March, 2000, Online: <http://www.oic-un.org/Statements/SG56.html> [19/12/2000]

<sup>33</sup> Res. 3369 (XXX) of 10 October 1975.

<sup>34</sup> See e.g. A/RES/53/16 of 11 November 1998. See also the Report of the UN Secretary General A/53/430 of 24 September 1998 on Cooperation between the United Nations and the Organization of the Islamic Conference.

<sup>35</sup> See Par. 4 of the Preamble of the OIC Charter.

However, an identified important problem in that regard is that while the *Sharî'ah* is a strong value-unifier in the Muslim world, there presently exists no interpretative or enforcement organ with the competence of a "universal" interpretation of the *Sharî'ah* in relation to international human rights, or with the jurisdiction of determining the scope of the *Sharî'ah* on any violation that might arise even under the Cairo Declaration adopted by the OIC. This situation gives room to each member State to individually determine its own scope of the *Sharî'ah*, which is sometimes vaguely pleaded by some States to restrict even the most basic human rights. The lack of an interpretative or enforcement organ has rendered the Cairo Declaration a dormant document which neither the Muslim States individually, nor the OIC as a body formally refers to in the face of the sometimes obvious violations of basic fundamental human rights in some Muslim States. There is thus a real need for a supervisory and enforcement organ for the rights guaranteed by the Declaration. In the absence of such institution, the political authorities will, for example, not be restricted in any way from clawing-back whatever rights may be apparently guaranteed even by the OIC Cairo Declaration. The nearest to having a judicial organ by the OIC was in 1981 when the Organisation decided at its Third Islamic Summit Conference in Saudi Arabia to create an Islamic Court of Justice in Kuwait with the competence to hear, *inter alia*, cases "which the concerned Member States of the Organization of the Islamic Conference agree to refer to it" and cases "whose referral to the Court is provided for in any treaties or conventions in force".<sup>36</sup> The court has so far not been established. The Regional and the UN human rights enforcement organs have contributed greatly to the protection of international human rights by serving as independent determiners of the scope of human rights within the regional and UN systems respectively. The OIC as a unifying organisation of the modern Muslim States can emulate the regional institutions in that regard for the Muslim world. In his exposition on Human Rights in Islam, Maududi had stated that

"(t)he charter and the proclamations and the resolutions of the United Nations cannot be compared with the rights sanctioned by God;" because, he continued, "the former are not obligatory on anybody, while the latter are an integral part of the Islamic faith. All Muslims and all administrators who claim to be Muslim have to accept, recognize and enforce them."<sup>37</sup>

It is regrettable to observe that the above statement is today, at best only theoretic. Due to lack of any enforcement or monitoring mechanism, the administrators of modern Muslim

<sup>36</sup> See Art. 25 Organisation of the Islamic Conference, Statute of the Islamic Court of Justice, ICJ/2-86/D.1(FINAL). Available at the OIC Permanent Mission to the UN in Geneva.

<sup>37</sup> Maududi, A.A., *Human Rights in Islam* (1993) p.16.



States often violate those “rights sanctioned by God” and even on some occasions vaguely cite the *Shari’ah* as an excuse to violate international human rights law. And when this happens, other Muslim States stand by and watch hopelessly. Perhaps the Muslim States have resigned the redress of such violations to God in the judgement of the hereafter. Yet one finds in the Qur’an such provisions as follows:

“And what is wrong with you that you fight not in the cause of God and for those weak, ill-treated and oppressed among men, women, and children, whose cry is: Our Lord! Rescue us from this town whose people are oppressors; and raise for us from You one who will protect, and raise for us from You one who will help.”<sup>38</sup>

“And if two groups among the believers fall to fighting, then make peace between them both. But if one of them outrages against the other, then fight you (all) against the one that outrages till it complies, then make reconciliation between them justly, and be equitable. Verily God loves those who are the equitable.”<sup>39</sup>

“...for had it not been that God checks one set of people by means of another, monasteries, churches, synagogues and mosques wherein the name of God is mentioned much would surely have been pulled down. Verily God will help those who help His cause. God is All-Strong, All-Mighty.”<sup>40</sup>

The clarity of the above Qur’anic provisions in relation to the principle of collective co-operation against oppression and violation of human rights under Islamic law needs no further commentary.

#### *A Binding Covenant and an International Islamic Court of “Mazâlim”*

Based on OIC’s commitment to the enforcement of human rights there is firstly the need for a full and binding Islamic Human Rights Covenant, to be ratified by all its member States. This is necessary because, apart from the present Cairo Declaration not being legally binding, it also leaves out many essential rights as depicted by our analysis of the ICCPR and ICESCR in this thesis. Secondly there is the need for a supervisory and enforcement organ that will bind all the member States. The enforcement organ could be in the form of an international Islamic Court of *Mazâlim* with jurisdiction to hear complaints against States and interpret the scope of the rights guaranteed under the present Cairo Declaration, the proposed binding Covenant and under the *Shari’ah* in general.<sup>41</sup> The International Islamic

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<sup>38</sup> Q4:75.

<sup>39</sup> Qur’an 49:9.

<sup>40</sup> Qur’an 22:40.

<sup>41</sup> See Chapter 4 *supra*, for the concept of the *mazâlim* court under Islamic law.

Court of *Mazâlim* would be composed of highly qualified Islamic law jurists not only learned in Islamic jurisprudence, but also conversant with international human rights law and jurisprudence. That would provide a definite and unified Islamic parameter for determining the scope of human rights within the application of Islamic law by Muslim States.

As earlier proposed in Chapter 2 the international Islamic Court of *Mazâlim* would adopt an evolutionary approach in its interpretation of the law whereby it would employ a combination of the jurisprudence of all the Islamic schools. It would take advantage of the utility of the doctrine of *maslahah* enabling it to adopt the juristic opinions that ultimately enhances human well being and benefit and averts human difficulty and hardship. The Islamic legal principle of *takhayyur* (eclectic choice) permits movement within the different schools of Islamic jurisprudence and is supported by the Tradition that whenever the Prophet had a choice between equally lawful situations, he always chose the easiest and most beneficial option.<sup>42</sup> The international Islamic Court of *Mazâlim* would then consciously develop a definite human rights jurisprudence that would serve as a specific departure point for international human rights practice in the Muslim world. Thirdly, the international Islamic Court of *Mazâlim* should have compulsory jurisdiction for individual complaints under the proposed Islamic Human Rights Convention. This would afford a more collective approach to guaranteeing human rights practice amongst Muslim States based on a common interpretation of Islamic law, and a more unified and determinable approach towards international human rights practice in the Muslim world.

The reaffirmation of commitment to the UN Charter by the Muslim States in the preamble of the OIC charter indicates a commitment to the international legal principles of the UN and also to the international human rights regime. The General Assembly of the UN, at its 53<sup>rd</sup> Session in November 1998 had equally recognised the need for close co-operation between the UN and the OIC in the search for solutions to global problems including fundamental human rights.<sup>43</sup> In pursuance of such co-operation and dialogue for universalism in international human rights, which aims at combining the best in all cultures and legal traditions for all human beings wherever they are, the international Islamic Court of *Mazâlim* would be expected to co-operate with the UN international human rights bodies as well as with the other regional human rights bodies in realising a “universal universalism” in international human rights law.

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<sup>42</sup> See e.g. Kamali, M.H., “Have We Neglected the Sharî‘ah Law Doctrine of Maslahah?” (1988) 27 *Islamic Studies*, p.287 at 290.

<sup>43</sup> See UN Doc A/RES/53/16 of 11<sup>th</sup> November, 1998.

## *The “Margin of Appreciation” Doctrine as a Means of Universalism*

Complementary to the above Islamic regional human rights regime, this thesis has also emphasised the need for the adoption of the margin of appreciation doctrine by the UN international human rights treaty bodies in interpreting international human rights treaties<sup>44</sup>. The margin of appreciation doctrine exists within the European human rights regime and it has been defined as “the line at which international supervision should give way to a State Party’s discretion in enacting or enforcing its laws”.<sup>45</sup> While the doctrine has its critics, it no doubt allows for the sustenance of justifiable moral values of different societies through “striking a balance between a right guaranteed ... and a permitted derogation [or limitation]”.<sup>46</sup> In practice the UN Human Rights Committee has not formally adopted the margin of appreciation doctrine<sup>47</sup> but has referred to it only on one occasion in *Hertzberg and Others v. Finland*<sup>48</sup> where the authors had brought a complaint alleging violation of their freedom of expression under Article 19 of the ICCPR. The State Party had in that case censored TV programmes dealing with homosexuality. The State Party argued that the restrictions were for the protection of public morals. In finding that there had been no violation of Article 19, the HRC stated that:

“It has to be noted, first, that public morals differ widely. There is no universally applicable common standard. Consequently, in this respect, a certain margin of discretion must be accorded to the responsible national authorities.”<sup>49</sup>

The Committee however rejected the doctrine in *Ilmari Lansman et al v. Finland*<sup>50</sup> where the authors had brought a complaint alleging violation of their right to enjoy their own culture under Article 27 of the ICCPR. The State Party had argued that the acts complained of were in pursuance of national development and that “a margin of discretion must be left to national authorities in the application of article 27” in that regard.<sup>51</sup> Although the HRC did not find a breach of Article 27, it however pointed out that the scope of a State Party’s

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<sup>44</sup> On the “margin of appreciation” doctrine See e.g. Steiner, H.J. and Alston, P., *International Human Rights in Context, Law, Politics, Morals*, (2<sup>nd</sup> Ed. 2000) pp.854- 857; Harris, D.J., O’Boyle, M, and Warbrick, C, *Law of the European Convention on Human Rights* (1995) pp. 12-15; and Clayton, R., and Tomlinson, H., *The Law of Human Rights* (2000) Vol.1, pp.273-278; Gandhi, P.R., *The Human Rights Committee and the Right of Individual Communication: Law and Practice* (1998) pp.311-314 and n.96 at p.326.

<sup>45</sup> See Yourow, H.C., *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (1996) p.13, citing Wong, “The Sunday Times Case: Freedom of Expression Versus English Contempt-of-Court Law in the European Court of Human Rights” (1984) 17 *New York University Journal of International Law and Politics*, 35 at 58.

<sup>46</sup> *ibid.*

<sup>47</sup> See Gandhi, P.R., (1998) *supra*, note 44 above, p.314.

<sup>48</sup> Communication No. 61/1979 Finland: 2/4/82. UN Doc. Supp. No.40 (A/37/40) at 161 (1982).

<sup>49</sup> *ibid.*, Par. 10.3.

<sup>50</sup> Communication No. 511/1992: Finland 08/11/94. CCPR/C/52/D/511/1992.

<sup>51</sup> *ibid.*, Par. 7.13.

freedom to encourage development “is not to be assessed by reference to a margin of appreciation, but by reference to the obligations it has undertaken in article 27”.<sup>52</sup> It is probable that the rejection of the margin of appreciation by the HRC in the later case was due to its non-relatedness to the protection of morals. The HRC has obviously refrained from adopting the margin of appreciation doctrine due to the fear of its potential abuse by States Parties to limit important rights like freedom of expression or as justification for imposing states of emergency on grounds of threat to the existence of the State. The issues of public morals and religious values does not however give rise to such fears because the application of a margin of appreciation on these grounds is based on public sensibility and morality rather than for the protection of the State *per se*. Its application on grounds of public sensibility and morality will thus be justifiable on the obvious accepted practice in the State concerned.

The European Court of Human Rights has effectively applied the doctrine in a variety of cases under the European Convention of Human Rights. Macdonald has observed that “(t)he margin of appreciation is now the primary tool of the Court in ensuring the efficacy of the application of Articles 8 to 11, 14 and 15 and Article 1 of Protocol No.1.”<sup>53</sup> This has consisted of cases brought under the European Convention involving issues such as protection of morals, protection of reputation of others, commercial speech, respect for private and family life, matrimonial status, family life and home, sexual morality, respect for private life, peaceful enjoyment of possessions, expropriation and nationalism, control of rental property, licensing and regulations, non-discrimination, liberty and security of person.<sup>54</sup> The relevance and rationality of the proposal in this thesis for the adoption of the margin of appreciation doctrine within the UN international human rights regime can not be better buttressed than in the following conclusion of Macdonald after his detailed exposition of the doctrine. He justified the doctrine as follows:

“The margin of appreciation which is more a principle of justification than interpretation, aims to help the Court show the proper degree of respect for the objectives that a Contracting Party may wish to pursue, and the trade-offs that it

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<sup>52</sup> *ibid.*, Par. 9.4. See also the debate on cultural practices during consideration of Nigeria’s initial report to the ICESCR, where in response to the cultural arguments of the Nigerian delegation the ESCR Committee Members stated, *inter alia*, that “it was not the Committee’s mandate to evaluate cultural practices and pass judgement on them, but rather to determine whether a State party to the Covenant was conforming with the obligations it had entered into”. UN Doc. E/C.12/1998/SR.7 of 09/09/98.

<sup>53</sup> Macdonald, St. J. R., “The Margin of Appreciation” in Macdonald, J, *et al.* (ed.) *The European System for the Protection of Human Rights* (1993) p.83.

<sup>54</sup> See generally *ibid.*, pp.83-124; See also Yourow, H.C., (1996) *supra*, note 45 above.

wants to make, while at the same time preventing unnecessary restrictions on the fullness of the protection which the Convention can provide.<sup>55</sup>

This flexibility has enabled the Court to avoid any damaging dispute with Contracting States over the respective areas of authority of the Court and the Convention and the Contracting States and their respective legislatures. The margin of appreciation has also helped the Court strike a proper balance between the application of the Convention by national organs and the central institutions of the Court and Commission. Practices within States vary. In one State a law viewed in the abstract outside other national circumstances might be seen as violating the convention, but viewed in the light of some other national matter or practice it may not. The intention of the drafters of the Convention was not that each Contracting State would have uniform laws but that there would be a European standard which, if violated, would give redress to the Members of the Contracting State. The margin of appreciation has very much assisted in this task.

The justification of the margin of appreciation is usually a pragmatic one. The argument is that the margin of appreciation is a useful tool in the eventual realization of a European-wide system of human-rights protection, in which a uniform standard of protection is secured. Progress towards that goal must be gradual, since the entire legal framework rests on the fragile foundations of the consent of the Contracting Parties. The margin of appreciation gives the flexibility needed to avoid damaging confrontations between the Court and Contracting States over their respective spheres of authority and enables the Court to balance the sovereignty of Contracting Parties with their obligation under the Convention".<sup>56</sup>

It will be observed that the margin of appreciation doctrine is likened to the principle of justification, which we had also referred to as an important principle for addressing the differences of scope between Islamic law and international human rights earlier in this thesis. Expressing the fears of the HRC on the adoption of the doctrine, Schmidt has argued that the adoption of the margin of appreciation doctrine by the Committee "might prompt some states parties to rely on arguments of 'cultural relativism', however ill-defined or inappropriate in the circumstances of a given case, or to seek to justify serious human-rights abuses."<sup>57</sup> The proposal in this thesis is not for an arbitrary or unjustifiable application of the doctrine. The margin of appreciation will be exercised proportionately and supervised by the Treaty Bodies to prevent its abuse. A State Party that pleads the doctrine would be saddled with the onus of establishing a legal justification for exercising its margin of discretion in any alleged violation of right. The scope of the doctrine would thus be determined by the circumstances of each case as has been demonstrated in the practice of the European Court. The approach of the European Court in that regard is to search for an "European consensus" in interpreting the

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<sup>55</sup> See also Mahoney, "Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin", (1990) 11 *Human Rights Law Journal* p.57.

<sup>56</sup> Macdonald, St. J. R., (1993) *supra* note 53 above, p.123.

<sup>57</sup> Schmidt, M.G., "The Complementarity of the Covenant and the European Convention on Human Rights – Recent Developments" in Harris, D.J., and Joseph, S., *The International Covenant on Civil and Political Rights and United Kingdom Law* (1995) p.628 at 657.

provisions of the Convention. Whenever the practice among member States achieves a certain measure of uniformity the Court raises “the standard of rights-protection to which all states must adhere”.<sup>58</sup> According to Helfer, the Court, broadly speaking, relies “on three distinct factors as evidence of (an European) consensus: legal consensus, as demonstrated by European domestic statutes, international treaties, and regional legislation; expert consensus; and European public consensus.”<sup>59</sup> In the absence of any such consensus, the Court gives a wide margin of appreciation to the State concerned.<sup>60</sup>

The European human rights regime is regarded as the most developed human rights regime. If, as observed by Macdonald above, the margin of appreciation has provided the system with the “flexibility needed to avoid confrontations” and considered as a “useful tool in the eventual realization of a European-wide system of human-rights protection, in which a uniform standard of protection is secured”, then the adoption of the doctrine supplemented with the Islamic regional approach proposed above would ultimately lead to a similar stability within the international human rights regime in relation to Muslim States, who constitute a significant proportion of the parties to the Covenants and whose practice is relevant to any consensus as to the meaning of Covenant rights. In respect of the international bill of rights examined in this thesis, the margin of appreciation doctrine will be a useful tool in addressing issues such as definition of family, homosexuality, blasphemy, abortion and other moral questions in relation to Muslim States Parties that apply Islamic law. The consensus approach will also require an equitable balance of membership of both the HRC and the ESCR Committee to reflect at least the civilisations and legal systems of all the State Parties if not of the world as a whole. This will facilitate a universal interpretation that accommodates the norms of all the States Parties to the Covenants as observed by McGoldrick earlier above.<sup>61</sup>

To assist the international human rights committees on questions of Islamic law the proposed international Islamic Court of *Mazâlim* will be a harmonising institution on Islamic law for matters brought before it among Muslim States, and its jurisprudence and opinions would thus serve as the reference point on Islamic values and norms in the determination of any necessary margin of appreciation for Islamic values by the UN international human

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<sup>58</sup> See Helfer, L., “Consensus, Coherence and The European Convention on Human Rights” (1993) 26 *Cornell International Law Journal*, No.1, 133 at 139.

<sup>59</sup> *ibid* at 134.

<sup>60</sup> See e.g. *Rees .v. United Kingdom* (1986) 106 *Eur. Ct. Human Rights* (Series A) at 15; *Cossey .v. United Kingdom* (1990) 184 *Eur. Ct. Human Rights* (Series A) at 16; and *B .v. France* (1992) 232 *Eur. Ct. Human Rights* (Series A).

<sup>61</sup> See p. 339 above.

rights treaty bodies. This will eliminate any problems of differences of opinion in respect of Islamic legal norms under consideration before the international treaty bodies.

The above propositions, implemented in good faith and backed with political and humanitarian will, is capable of providing the flexibility needed to avoid confrontation between Islamic law and international human rights law and create “breathing space” or “elbow room” for a more closer rapport that will gradually and ultimately lead to the realisation of a common standard of universalism in human rights between Islamic law and international human rights law in the Muslim world.

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