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Ebrahim Moosa †

INTRODUCTION

The gulf in perception between Islamic and secular perspectives over the meaning of human rights is growing. Media reports and western governments repeatedly charge Muslim governments from Sudan to Iran of human rights violations. In some parts of the Muslim world, a string of events indeed suggest that the violation of human rights continue with little sign of immediate abatement. Tragedy is the overriding topos of the media attention that such events receive. The list can become endless, but I will only mention a few incidents in order to highlight the salient contexts and issues for the purposes of a discussion on human rights. The Turkish Muslim feminist Konca Kuris was kidnapped by a Turkish group known as the *Hizbullah* in 1998 and her dead body was found in 1999.[1] In 1997 Egypt's highest court ruled that the writings of a Cairo University professor, Naṣr Ḥāmid Abū Zayd were tantamount to apostasy.[2] In 1992, Muslim militants assassinated the Egyptian human rights activist and essayist Farag Fouda. The 1980s witnessed the international imbroglio amounting to a debacle when Iran's clergy offered a ransom to anyone who would assassinate the Indian-born British author Salman Rushdie for writing novels that offended Muslim sensibilities. On a daily basis, spine chilling reports of death and civilian casualties perpetrated by Muslim militants and the military in Algeria bewilder observers after the army's subversion of the democratic process in that country. In many Muslim countries like Egypt, Syria, Saudi Arabia, Iraq, Iran, Bangladesh, Pakistan and Tunisia, intellectuals are subjected to harassment by traditionalist and

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1. Stephen Kinzer, *Turkish Terror Victim Espoused a Tolerant Islam*, N.Y. Times Foreign Desk (Jan. 26, 2000).

2. Charles Hirschkind, *Heresy or Hermeneutics: The Case of Nasr Hamid Abu Zayd*, 12/7 The Am. J. Islamic Soc. Sci. 463 (Winter 1995); in the special issue by Nancy Reynolds & Saba Mahmood, eds., on *Contested Polities Religious Disciplines & Structures of Modernity*, appearing in 5.1 Stanford Elec. Humanities Rev (Spring 1996). (http://www.stanford.edu/group/SHR/5-1/text/toc.htlml)

fundamentalist quarters alike as well as by governments for their critical study of religion and for opinions that do not meet with approval from the religious establishment. When human rights concerns are raised, officials from Muslim countries accuse the West of using a double standard in its application of human rights, of mounting the human right claim as an instrument of political power against nations who do not further its political and economic agendas.[3]

Anyone familiar with the intercultural debate on human rights would agree that the media debates and dramatic events conceal much more complex issues of history, tradition and the contested perceptions of law and religion. Few Westerners are aware that the debate within Muslim societies about human rights is fierce in its intellectual rigor as well as its political consequences, as events in Iran over recent years suggest. Some Muslims argue that Islam has a human rights dispensation that surpasses secular human rights declarations.[4] Others claim that the differences between Islamic and secular constructs of human rights are but minor philosophical quibbles without significant consequences in content and practice.[5] Contrary to both these sets of claims, the content of a human rights doctrine and how they are achieved remains a vexing question within contemporary Muslim legal,

3. *See* Azizah al-Hibri, *Islam, Law and Custom: Redefining Muslim Women's Rights*, 12 Am. U. J. Intl. L. & Policy 1, 4 (1997), in which she states:

> This view has received added support given the attitude that Western governments have taken recently towards democracy in Muslim countries. They advocate it, they praise it, but their deeds belie their words. They lend unconditional support to regimes that consistently violate human rights, so long as these regimes continue to protect Western economic and geopolitical interests.

See also Muhammad Wāḍiḥ Rashīd al-Nadawī, *Mafāhim Muta'ārida li 'l-Ḥurriyya*, al-Rā'id 1 (7 Sha'bān 1620/Nov. 16, 1999). Samuel P. Huntington, *The West Unique, Not Universal*, 75 For. Affairs 28, 38 (Nov./Dec. 1996); Samuel P. Huntington, *The Clash of Civilizations*, 72 For. Affairs 22, 36 (Summer 1993).

4. *Human Rights and the Conflict of Cultures: Western and Islamic Perspectives on Religious Liberty* 4 (David Little, John Kelsay & Abdulaziz A. Sachedina, eds., Columbia, S.C.: U.S.C. Press 1988).

5. Rāshid al-Ghannūshī, *al-Ḥurriyā at 'Āmma fī 'l-Dawla al-Islāmiyya* 320 (Beirut: M'arkaz Dirāsāt al-waḥda al-'Arabiyya 1993) [hereafter *Ḥurriyā*]. Boaventura de Sousa Santos, *Toward a New Common Sense: Law, Science and the Politics in the Paradigmatic Transitions* 344 (London: Routledge 7 Sha'bān 1620/Nov. 1995) says:

> What I find remarkable . . . is the attempt to transform the Western conception of human rights into a cross-cultural one that vindicates Islamic legitimacy rather than relinquishing it. In abstract and from the outside, it is difficult to judge whether a religious or secularist approach is more likely to succeed in an Islamic-based cross-cultural dialogue on human rights. However, bearing in mind that Western human rights are the expression of a profound, albeit incomplete, process of secularization which is not comparable to anything in Islamic culture, I would be inclined to suggest that, in the Muslim context, the mobilizing energy needed for a cosmopolitan project of human rights will be more easily generated within a religious framework.

political and ethical theory. These are staggering issues that have hardly been addressed let alone satisfactorily resolved. I do not therefore pretend to provide a comprehensive answer, but rather view this as an opportunity to contribute to the larger debate in a bid to identify some problem areas in the context of Islamic human rights. This essay thus examines the differences between secular human rights and Islamic rights and argues that they are indeed conceptually different things. However, contemporary Muslim thought may be able to produce a rights system, I would argue, that may be based on different ethical and moral premises but not dissimilar to secular human rights declarations in their outcomes. The success of a modern Islamic human rights theory depends on the extent to which modern Islamic thought would be open to a revisionist or reconstructionist approach in philosophy and ethical orientation.[6] In this century the Indian thinker Muhammad Iqbal gave new impetus to the term "reconstruction." His attempt at reconstruction, Iqbal argued, stems from the understanding "that there is no such thing as finality in philosophical thinking."[7] Reconstruction involves both a critique and adaptation of the present. Iqbal argued that while early Muslims allowed for the evolution of religious experience in Islam, he was severely critical of modern Muslim thinkers whom he said had "become incapable of receiving any fresh inspiration from modern thought and experience."[8] Reconstruction for him thus meant a critical approach to the Muslim philosophical tradition and modern human knowledge in order to open new frontiers of thought and human understanding.

ISLAM AND RIGHTS: ISSUES AND PROBLEMS

From its very inception in seventh century Arabia, the message of Islam demonstrated a preoccupation with the social, moral and spiritual condition of human beings. The deity proclaimed by the Prophet Muhammad to the world was both the "Lord of the Worlds" (*rabb al-'ālamīn*) and "Lord of the People" (*rabb al-nās*). The subject of the prophet's revelation, the Qur'ān, was not exclusively a self-revelation of God to humanity, but an instant where humanity became the very leitmotif of revelation.

6. Fazlur Rahman, *Internal Religious Developments in the Present Century Islam*, 2 J. World History 862, especially 872-875 (Nov. 1955).

7. Muhammad Iqbal, *The Reconstruction of Religious Thought in Islam* vi (Shaikh Muhammad Ashraf 1960).

8. *Id.* at 5.

In governing the city of Madina the Prophet Muhammad established the basic rules of inter-communal coexistence hailed as the Compact of Madina at the time, a sort of primitive constitution. This agreement between the Arab-Muslim tribes, Jews, and other non-Muslim religious and ethnic groups (such as Christians and perhaps even some adherents of pre-Islamic Arabian religious traditions) bound the parties to observe certain rights and duties while they lived in the territories governed by the Prophet. However, the Prophet's immediate successors soon encountered governance problems. That was due to the fact that the Islamic order of Arabia rapidly expanded to become an empire that included rural folk as well as urbanized non-Arab converts to Islam. Necessities of that time led to several political innovations. During the reign of both the Prophet and his righteous successors, known collectively as the caliphate (632-661), some landmark events serve as standard reference points for the invention of a rights discourse in Islam. These include, among other things, the Prophet's famous farewell sermon to his followers at the last pilgrimage; passages from the Qur'ān dealing with the sanctity of life, property, dignity and honor; and actions taken by the Prophet's successors to rectify rights violations of their subjects. One notable example was the response of the caliph `Umar. News reached him in Madina that the son of `Amr bin al-`Ās (his governor to Egypt) chastised an Egyptian Copt during a sporting game without any corrective justice from his father. The caliph hurriedly expedited a letter of reproach to his governor which contained the memorable line: "Since when have you enslaved a people, oh `Amr, when their mothers had given birth to them in freedom?"[9]

The story of `Umar and other examples are advanced by human rights advocates as proof that Islamic culture has a legacy of rights that is compatible with modern human rights regimes. Such comparisons are alas, hasty if not immodest, and do not take into account the assumptions and intellectual foundations of pre-modern Islamic law, the *sharī`a*, which contrasts vastly with the legal and political assumptions made by modern human rights codes. Islamic rights discourse has an entirely different genesis and pedigree compared to the secular human rights discourse. The failure on the part of Muslim human rights theorists to account for the very fundamental differences between the two systems result in major conflicts, misunderstandings and miscommunication. For it is now well accepted that rights are also

9. Ibn 'Abd al-Hakam, *Futūḥ Miṣr wa' l-Maghrib* 225-226 ('Abd al-Mun'im Āmir ed., Cairo: `Isā Babi al-Ḥalabī 1961).

culturally constructed. In each ethical and moral culture there is not only a sense of *what* human rights means, but also *how* rights are created. There is a heated debate whether human rights are universal or a Western concept and whether concomitantly they are universally valid or not. I agree with de Sousa Santos that the genesis of a moral claim may condition its validity, but it certainly does not determine it. The two questions (cultural origins and universality) are interrelated, because the mobilizing energy that can be generated to make the acceptance of human rights concrete and effective depends, in part, upon the cultural identification with the presuppositions that ground human rights as a moral claim.[10] It is therefore important to clarify the salient differences between the two moral traditions before attempting a comparison to explore their mutual compatibility or incompatibility.

One of the weaknesses in contemporary Muslim human rights literature is the attempt to conflate the two very different legal, ethical and moral traditions so that they look instantly compatible. I concede that there is considerable overlap in some of the concerns and objectives that both rights traditions address. However, these similarities do not in themselves justify the grafting of presumptions from one system to the other and in so doing packaging Muslim notions of rights as compatible to modern human rights practices. To the extent that these perspectives can be shared, rejected, appropriated or modified depends on the cross-cultural dialogues that are made possible by concrete contexts.

Without such a dialogue and the careful calibration of the two systems there are obvious risks involved. One danger is that when put to the test, Islamic rights schemes are found lacking in protecting people's rights after having announced that Islam had endorsed "human rights." In several cases involving freedom of speech in the last few decades of the twentieth century, Muslim human rights proclamations and declarations have by and large capitulated in favor of authoritarian and anti-rights tendencies.[11] The persecution of reformist politicians, writers in Iran, as well as the violation of women's rights in Iran and Afghanistan, are well known examples. Often these violations are justified in terms of particularistic Islamic human rights claims. These crises demonstrate the weakness and problems inherent in Muslim adaptations and formulations of human rights schemes. Rhetorically,

10. de Sousa Santos, *supra* n. 5, at 337.

11. *See* Ann Elizabeth Mayer, *Islamic Law and Human Rights: Conundrums and Equivocations*, in *Religion and Human Rights: Competing Claims?* 190 (Carrie Gustafson & Peter Juviler eds., Armonk, N.Y.: M.E. Sharpe 1999) for a discussion on how the Iranian constitution stipulates how human rights should be subordinated to Islamic criteria.

Islamic and secular human rights formulations may sound the same, but they have very different theoretical assumptions and practical applications.

THE MODERN CONCEPT OF HUMAN RIGHTS

The notion of human rights as we know it today arises in the context of the evolution of the nation-state as a political system, even though some may claim a more ancient pedigree for it to date back to the Magna Carta and the French Revolution. The legal culture generated by the nation-state increasingly imposed its own logic of social behavior and social conditions in societies receptive to it. A crucial feature of this model of statecraft is the relationship between the individual and the state, which brought about an awareness of the individual's encounter with a powerful and dominant entity, unknown in pre-modern times. The state is a permanent legal entity, which exercises its claim over a territory and community through a legal order and organized government, and also demonstrates a measure of political identity. Those rights, now known as "first generation" human rights were especially designed to protect the individual from the overwhelming powers of the modern bureaucratic state. Since then human rights, have already advanced to second and third generation rights that cover socio-economic and political rights as well as environmental rights.

The most critical development in the nation-state polity model was the conferral of citizenship on the individual. In theory this bestowal entitled the bearer of citizenship to claim certain rights as well as to fulfill certain duties. The individual was no longer subject to the discretion of a ruler or a system of governance, but instead had claims against such authority in the form of rights, some more fundamental than others that precede one's social status, ethnic or religious affiliation. Human rights in this context are thus inviolable rights that one has "simply because one is a human being."[12] They also have a secular character, having been derived from the jurisprudence of natural rights when natural law separated itself from religion. Here the word "right" distinguishes between two concepts that have political and moral significance: being right and having a right. In the first instance "right" refers to moral righteousness and in the second it may refer to entitlement. Human rights are rights of entitlement and the failure to discharge a duty or fail to respect rights is an affront to the person. In the secular human rights scheme, rights revolve around an ethical and

12. Jack Donnelly, *The Concept of Human Rights* 1 (London: Routledge 1985).

moral system where one's personhood or the humanity of a person is of consequence. At least in theory, limitations of religion, politics or economics can not impede the protection of human rights. In practice however, it is a different matter in that we know that a range of political, economic and cultural factors impinge on the rights discourse.

NOTION OF RIGHTS IN MUSLIM JURISPRUDENCE

In order to gain a better overview of the evolution of Muslim thought on the subject of "rights" I will examine the views of mainly early jurists and then briefly contrast these with those of more contemporary writers. In Arabic a "right" or "claim" is called *ḥaqq* (pl. *ḥuqūq*), but also has a wider meaning. While the original Arabic root of the term "*ḥaqq*" is somewhat obscured it can be recovered from its corresponding Hebrew root. It means among other things "to engrave" onto some object, "to inscribe or write," "to prescribe and decree." And, it also means that which is "due to God or man."[13] *Ḥaqq* means "that which is established and cannot be denied," and therefore it has more in common with the terms "reality" and "truth."[14] For this reason the opposite of *ḥaqq* is "falsehood" (*bāṭil*). The term *ḥaqq* is considered polysemous or multivalent and thus could mean right/claim/duty/truth depending on context and the use of the word in a specific context.

Muslim jurists or jurist-theologians have provided a general meaning for *ḥaqq* in their legal, theological and political treatises. The Egyptian jurist, Ibn Nujaym (d. 970/1563),[15] in discussing property rights made a very clear case that human beings are bearers of rights, without stipulating a reciprocal duty. He argued that a "right" is the "competence" or "capacity" (*ikhtiṣāṣ*) conferred upon an individual or a collective entity. Thus the individual or entity becomes the subject of a right.[16] From very early on, dating back to the medieval period, Muslim scholars delineated typologies of rights or claims. They differentiated between three primary kinds of rights: the "rights of God" (*ḥuqūq*

13. Encyclopaedia of Islam second edition cited in full as Encyclopedia of Islam 2 [hereinafter cited as EI 2] s.v. *ḥakk* (Leiden: Brill 1960).

14. 'Alī b. Muhammad b. 'Alī al-Jurjānī, *Kitāb al-Ta'rifāt* 120 (Ibrāhīm al-Ibyāri ed., Beirut: Dār al-Kitāb al-'Arabī 1405AH/1985AD).

15. The first date is the *hijri* date, AH, and the second according to the Gregorian calendar, AD.

16. *See* Muhammad Fathi 'Uthmān, *Taqrīr Ḥuqūq al-Insān bayna al-shari'a al-Islāmiyya wa'l Fikr al-Qānūnī al-Gharbī* 555 (2d ed., Wazarat al-Ta'lim al-'Ali 1398/1978). 'Uthmān is of the opinion that Ibn Nujaym's notion of rights is very similar to that of the Belgian jurist, Jean Dabin (d. 1963). *See* Jean Dabin, *General Theory of Law*, in *The Legal Philosophies of Lask, Radbruch, and Dabin* 232 (Kurt Wilk trans., Cambridge, Mass.: Harv. U. Press 1950).

Allāh), the "rights of persons" (*huqūq al-'ibād*) and "dual rights" shared by God and persons.[17] "Rights of God" are those rights and duties that have a revealed imperative and a religious rationale. They can be both mandatory obligations of a devotional kind such as ritual obligations, or they could involve the performance of actions that benefits the entire community. Observing the five pillars of Islam for instance, such as belief in one God, praying five times daily, paying charity, observing the annual fasting, and performing the pilgrimage would be considered to be fulfilling the rights of God. The provision of services that result in the protection of the community from harm and the promotion of good in the broadest sense can also be included in the category of "rights of God."

"Rights of persons" are overtly world affirming—secular and civil—in their imperative and rationales. They are attached to individual and social interests. Such rights can be general, like the right to health, to have children, to safety or, they could be specific, such as protecting the right of a property-owner or the right of a purchaser and seller in commercial transactions. "Dual rights" are a hybrid of both religious and secular imperatives and rationales. The mandatory waiting-period of three menstrual semesters to check for pregnancy immediately after a divorce or death of a husband, for example, is viewed as an instance where dual rights apply. The logic is that God demands that lines of kinship are maintained by means of paternity within wedlock and hence it is imperative that a pregnancy test is applied by requiring the divorcee or widow to wait a mandatory period before re-marrying.[18] In this case, the "right of persons" are the right of parents and offspring to know that paternity had been established with certainty in order to avoid the social stigma of illegitimacy.

The significance of this rights scheme in traditional Muslim jurisprudence is that civil and devotional obligations are accorded the same moral status. Muslim law deems certain collective civil rights and specific individual religious rights as inviolable and disallows their forfeiture, especially when they involve the right or claim of another

17. Ibn Amīr al-Ḥāj, *al-Taqrīr wa 'l-Tahbīr* vol. 2, 104 (2d ed., Beirut: Dār al-Kutub al-'Ilmiyya 1403/1983); 'Abd al-Razzāq al-Sanhuri, *Maṣādir al-Haqq fi' l-Fiqh al-Islāmī* vol. 1, 14 (Cairo: Dar al-Ma'ārif 1967); *see also* Baber Johansen, *Secular and Religious Elements in Hanafite Law: Function and Limits of the Absolute Character of Government Authority*, in *Contingency in a Sacred Law: Legal and Ethical Norms in the Muslim Fiqh* 210-216 (Leiden: E.J. Brill 1999).

18. In early Islam, pregnancy after a divorce or death of a husband was established by a waiting period of three menstrual cycles. It is still a matter of controversy whether this waiting period could be replaced by newer modes of pregnancy tests.

person. There are however, some types of rights that can be transferred while others can be forfeited by the consent of the owner of such rights. The relationship between rights and duties is an interpersonal and correlative one. In the enforcement of a right jurists understand that one party has a claim to have a "right" (*ḥaqq*) and another "obligation" (*wājib*) to honor a right: every right thus has a reciprocal obligation.

The *sharī'a* is the source of rights and obligations in Islam. The *sharī'a* also defines practices of rights as derived from the teachings of the Qur'ān, the prophetic tradition (*sunna*), jurists' consensus and reason. Clearly, rights are framed within a religious-moral framework where the omission of a duty/right is subject to religious sanction and its commission results in the acquisition of virtue. The crucial point in the Islamic rights scheme is that God is the one who confers rights on persons, via revealed authority although human authority mediates these rights. The rationales underpinning Islamic rights may be derived from reason, a divine order and public interests. The latter category are essentially the policy objectives of the revealed law (*maqāṣid al-sharī'a*) that jurists take into consideration when developing law. These goals that the *sharī'a* advances are the protection of religion, life, progeny, intellect and wealth. In modern times this public policy aspect of Muslim jurisprudence has gained greater currency and acceptance. So the modern jurist, Muṣṭafa al-Zarqa' (d. 1999) argues that in addition to a right as being conferred by the law (*sharī'a*), political authority (*sulṭa*) and the recognition of a moral responsibility (*taklīf*) can also become the grounds for conferring rights.[19] There is thus a greater openness to rights being created by means of a political process, rather than exclusively by scriptural or juristic authority. While Islamic law does have a ritual function one cannot ignore it is equally cognizant of "worldly"—secular and civil concerns—and social needs based on pragmatism.

In order to establish a credible discourse within Muslim jurisprudence, closer attention should be given to methodological issues as well as the underlying juridical theology and legal philosophy. It may be convenient to employ an eclectic method in order to validate a particular point of view, but it does not provide a rigorous theoretical framework for a debate such as human rights. One of the problems that the human rights debate exposes is the fact that it is extremely difficult to talk of Islamic rights as if it is a monolithic and undifferentiated

19. Wahba al-Zuhayli, *al-Fiqh al-Islāmi wa Adillatuhu* 9 (2d ed., Damascus: Dār al-Fikr 1404/1985).

category. For instance, early eighth century humanist interpretations by an influential theological group called the *Mu'tazilis*, privileged reason and freedom to produce universalist discourses in Islam. On the opposite side was the *Ash'ari* theological tradition whose hallmark was to limit human freedom and to defend theocentrism and advocate divine voluntarism in both theology and law.[20] More extreme than the Ash'aris were the Hanbalis for whom the authority of the literal meaning of the Scripture was supreme. Each one of these theological traditions produced different assumptions about what a "right" is and how it is implemented in law since they are based on different legal philosophies.

Another error frequently committed by both "insiders" and "outsiders" to the study of Islamic law, is the tendency to accept the medieval constructions and interpretations of law as final and immutable normative statements. These normative statements are then held out as ready-made solutions for application in the contemporary world without any interpretative mediation. The claim that Islamic law is immutable denies the historical evolution of the legal system over centuries. This easily translates into the popular mindset that Islamic rights schemes are absolutist, unchangeable and based on ineffable religious norms. Such a view is entirely inconsistent with the history and practice of Muslim jurisprudence. In contemporary times there is no shortage of legal sloganeering on the part of advocates of Islamic revivalism who circulate such simplistic and reductionist notions as gospel.[21] This trend has become so pervasive that even traditional Muslim jurists, who once treated the legal tradition with great subtlety and complexity, have succumbed to such reductionist views.

Part of the problem of reductionism can be attributed to some longstanding debates within Islamic jurisprudence. Viewed chronologically, many legal historians will concede that there is a tangible dissonance between the sources of Islam—the Qur'ān and the prophetic tradition—and later juristic interpretations of these sources.[22] The explanation for that has been that the primary sources were not always considered to be identical with the law. Rather the legal tradition was a contextual application and interpretation of what the sources said. Classical and medieval jurists developed a hermeneutical approach in order to understand the law. However there was also a tension between

20. *See* Abdul Aziz Said, *Human Rights in Islamic Perspective*, in *Human Rights: Cultural and Ideological Perspectives* 92 (Adamantia Pollis & Peter Schwab eds., N.Y.: Praeger 1980).

21. *See* Ann Elizabeth Mayer, *Islam and Human Rights Policy*, in 9 Intl. Rev. Comp. Pub. Policy: Islam & Pub. Policy 123 (1997) for a more full review of Islam and human rights policy.

22. Muhammad Asad, *This Law of Ours and Other Essays* (Gibraltar: Dar al-Andalus 1987).

the hermeneutical approach and those who argued in favor of a more literal approach to the sources. Over time two major trends have emerged in Muslim jurisprudence. One promotes the idea that Islamic law and ethics should follow the canonical interpretations of the established law schools. The other trend argues that each generation of scholars should be free to have direct access to the textual sources and make their derivations and interpretations from the primary sources *ab initio*.[23] A survey of the Muslim human rights literature shows that three main methodological approaches have been adopted. The first relies on the established juristic traditions as the authoritative canon of interpretation. The difficulty with this approach is that it is a formidable task to negotiate juristic traditions that are very diverse and variegated, spanning several centuries. The result is an eclectic approach. While eclecticism does have its merits, it depends entirely on the rigor and finesse of the jurists, who can either enrich the legal tradition with insightful interpretations or it can result in almost arbitrary choices of authorities. The second approach is to have direct access to the primary sources of Islamic teachings, namely the Qur'ān and the prophetic traditions (*sunna*), without taking into consideration the intervening canonical tradition. While this approach runs the risk of lacking credibility and acceptability among the traditional religious establishment, it also disrupts the continuity of an established tradition. The third approach is to combine the two methods. Jurists would take into consideration the canonical interpretations of the law in a non-binding manner, while also providing creative interpretations to the sources of the law.

MUSLIM CHARTERS FOR HUMAN RIGHTS

Some contemporary Muslim thinkers do not have much difficulty in making the transition from the pre-modern Islamic concepts of reciprocal rights and duties to the modern understanding of human rights. One scholar triumphantly proclaimed that ". . . it was 14 centuries ago that the Prophet declared the world's first human rights manifesto . . . ."[24] Others argue that the rights enshrined in the Universal Declaration of Human Rights (UDHR) are not only compatible with Islamic thinking but that Islam has addressed the

23. Malcolm Kerr, *Islamic Reform: The Political and Legal Theories of Muhammad Abduh and Rashid Rida* (Berkeley: U. of Cal. Press 1966) for a detailed discussion of the various interpretations of Islamic law among modern Muslim jurists.

24. Badria al-Awadhi, *Address by the Dean of the Faculty of Law and Shari'a in the University of Kuwait*, in *Human Rights in Islam* 28 (Geneva: Intl. Commn. of Jurists 1982).

question of rights more comprehensively. Zafrullah Khan, a former foreign minister of Pakistan wrote:

> Religion must travel far beyond the Declaration [UDHR] both in its objectives and in its methods. It is concerned with the totality of life, both here and hereafter .... Thus in spirit the Declaration and Islam are in accord.[25]

However, some thinkers have realized that the dominant human rights discourse stemmed from a secular political culture, which made very different assumptions. Khan was aware of this tension and consistent with his Islam-centered approach, warned that in the event of a conflict between Islam and human rights then "the Islamic provision must continue to have priority."[26]

In modern times the Muslim approximation of the human rights debate culminated in the publication of the Universal Islamic Declaration of Human Rights (UIDHR), an effort co-ordinated by the Islamic Council of Europe and launched at an International Islamic Conference held in Paris on September 19, 1980.[27] The UIDHR overlapped in content with the Universal Declaration of Human Rights (UDHR) adopted by the United Nations. However, the differences between the two systems deserve our attention. The language employed by the UIDHR is not only framed in an Islamic idiom. It is also theocentric in that it makes reference to the divinity that is named in Arabic as "Allah" and pledges loyalty to the model behavior of the Prophet Muhammad. It makes reference to the fact that human beings were entrusted by God with a "vicegerency" (*khilāfa*) and that the protection of human dignity was paramount on the imperatives of both reason and revelation.

Then the UIDHR explicitly states that in "terms of our primeval covenant with God, our duties and obligations have priority over our rights."[28] This statement sharply distinguishes the Islamic rights-scheme from what is generally meant by secular "human rights" where the term rights mean certain fundamental and unconditional entitlements simply on the grounds of being human. This presentation of "Islamic human rights" does contain a paradox in conception and nomenclature. Islamic

25. Muhammad Zafrullah Khan, *Islam and Human Rights* 141-142 (4th ed., Tilford, Surrey: Islam Intl. Publications 1989).

26. *Id.* at 142.

27. *Universal Islamic Declaration of Human Rights*, in *Islam and Black Muslim Roots in Azania* 77-88 (Yusuf Nazeer ed., Johannesburg: Africa-Islam Research Found. 1982) [hereinafter UIDHR]. *See also* Mayer, *supra* n. 11, at 123-148 for a more full review of Islam and human rights policy.

28. UIDHR, *supra* n. 27, at 79.

rights schemes argue that duties are prior to rights and that it is only the fulfillment of these duties that would produce a requisite set of rights to be claimed. In such a configuration it may have been more appropriate to call the UIDHR, the Universal Islamic Declaration of Human Duties.

Another recurring feature in the UIDHR is the reference to "the Law" which refers to the *sharī'a*. The *sharī'a* is meant to be the statutory limitation that could potentially trump several other clauses. In the UIDHR for example, freedom, especially freedom of speech is limited by the "Law" clause. It is striking that despite the omnipotence and almost fetish like invocation of the *sharī'a* in Muslim legal and ethical discourse, it remains undefined in the UIDHR as an inarticulate premise. In practice the notion of *sharī'a* is not only subject to diverse interpretations but also an enigmatic category. Section 2 (x) of the UIDHR for example, states that "no one shall be deprived of the rights assured to him by the Law except by its *authority* and the extent permitted by it." (my emphasis). Since *sharī'a* law is not codified in the sense that we are accustomed to understand codification in modern law, such limitation clauses introduce an element of arbitrariness to the declaration. There could be various interpretations of what the *sharī'a* view is on a single matter. In the absence of an international Muslim synod or international *sharī'a* court, it would be difficult to enforce uniform or consistent *sharī'a* verdicts within national jurisdictions, let alone in the international domain.[29] Not only do such statements render the declaration vague but they also have immediate consequences. In the absence of any institutional regulation of the *sharī'a*, legal power is then vested in the formally and informally constituted religious authorities who interpret the *sharī'a* as the final arbiters of God's law. A closer look at the arguments of the advocates of an Islamic rights scheme may serve to illustrate some of the points made above.

The chief exponent of a theocentric interpretation of Islamic-rights is the late Allah Bukhsh K. Brohi, a former law minister of Pakistan and prominent lawyer in that country. Brohi's apologetics are best illustrated when he says:

> There is a fundamental difference in the perspectives from which Islam and the West view the matter of human rights. The Western perspective may by and large be called anthropocentric in the sense that man is regarded as constituting the measure of everything since he is the starting point of all thinking and action. The perspective of Islam on the other hand is theocentric—God

29. The Organization of Islamic Conference (OIC) has made provision for an Islamic Court of Justice based in Kuwait, but little is known of its activities.

> conscious .... [I]n essence, the believer has only obligations or duties towards God since he is called upon to obey the Divine Law, and such human rights as he is made to acknowledge stem from his primary duty to obey God. Yet paradoxically, in these duties lie all the rights and freedoms. 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.[30]

Brohi accentuates the difference between anthropocentric and theocentric notions of human rights. He then embroiders entitlements (secular human rights tradition) and reciprocal rights (Islamic rights) into a unified rights-system premised on the performance of duties. This obviously creates a hybrid philosophy of rights, one that employs the language of rights, but with rhetoric that actually signifies the prior performance of duties before any rights could be confirmed. So whereas the secular human rights tradition recognizes the sovereignty of the individual as a right-bearer, the same right in an Islamic rights-scheme could be subject to limitation. Political and religious authority, as well as the competing interests between the rights of the community versus the right of the individual can lead to an infringement of individual rights. For this reason, Prozesky has rightly pointed out that theistic religions in particular may be incompatible with the notion of human rights since these faiths do not recognize the notions of individual and personal sovereignty.[31]

Nevertheless, Brohi's distinction between anthropocentric and theocentric classifications of human rights may be questionable. Despite the face that Brohi presents to his human rights-scheme as theocentric, he hardly accounts for the role that the jurist-theologians and human authorities play in the construction and adjudication of these rights. To claim that that human rights in Islam are theocentric, is to suggest that they have transcendent origins. But it does not necessarily mean that they become immutable and absolutist. Perhaps human beings played a far greater role in the shaping of theocentric legal systems than what religious ideologies are prepared to admit.

Donnelly and Nasr perhaps best capture the fundamental conflict between Muslim and secular perceptions of human rights. Donnelly

30. A.K. Brohi, *Islam and Human Rights*, in *The Challenge of Islam* 179-181 (Altaf Gauhar ed., London: Islamic Council of Europe 1978).

31. Martin Prozesky, *Is the Concept of Human Rights Logically Permissible in Theistic Religion?*, 2 J. for the Study of Religion 17, 26 (1989).

distinguishes between human rights and human dignity.[32] The latter he believes, is normally the concern of religious-rights and cultural rights discourses. He points out that there are certain conceptions of human dignity that can be realised entirely independent of human rights discourse. On the other hand, human rights are something under the control of the right-holder. In Donnelly's words,

> Human rights are conceived as naturally inhering in the human person. They are neither granted by the state nor are they the result of one's actions ... they are general rights, rights that arise from no special undertaking beyond membership in the human race. To have human rights one does not have to be anything other than a human being. Neither must one do anything other than be born a human being.[33]

Nasr grasps the essence of a rights-system inspired by the tradition of Muslim juristic-theology. Rights in his scheme are part of a social contract or covenant between humans and God which requires conformity with the religious law (*sharī'a*). Says Nasr:

> As a result of fulfilling these obligations we gain certain rights and freedoms which are again outlined by the Divine Law. Those who do not fulfil these obligations have no legitimate rights; any claims of freedom they make upon the environment or society is illegitimate and a usurpation of what does not belong to them, in the same way as those persons who refuse to recognize their theomorphic nature and act accordingly are only "accidentally" human and are usurping the human state which by definition implies centrality and divine vicegerency.[34]

Nasr emphasizes an almost irreconcilable conceptual gulf between Islamic and secular notions of rights. Nasr's view on this point has recently been explored by Perry who has raised the question whether our common understanding of human rights discourse is not "inescapably religious."[35] Perry believes that the human rights talk coheres and is more consistent with the metaphysics and cosmology of religious ideas than with secular foundations. However, Nasr goes as far as denying those who do not subscribe to a religious worldview any "legitimate" grounds for making claims to rights since they have failed to realize their theomorphic nature. Perry is of course much more tentative in his

32. Jack Donnelly, *Human Rights and Human Dignity: An Analytic Critique of Non-Western Conception of Human Rights*, 76 Am. Pol. Sci. Rev. 303 (1982).

33. *Id.* at 305-306.

34. S.H. Nasr, *The Concept of Reality and Freedom in Islam and Islamic Civilization*, in *Islamic Life and Thought* 18 (Albany, N.Y.: S.U.N.Y. 1981).

35. Michael J. Perry, *The Idea of Human Rights* 13 (N.Y.: Oxford U. Press 1998).

propositions. He does not deny that secularists, atheists or those hostile to a religion can embrace the cause of human rights or lay claim to protection under human rights. Instead he challenges non-religious advocates of human rights to explore the consistency of their views and urges them to interrogate the foundations of their philosophical convictions.

Different to Brohi and Nasr, are other Muslim writers who do not interrogate the metaphysics of secular human rights. Rahid al-Ghannūshi, a liberal Tunisian Islamist ideologue adopts an approach that reduces the differences between the religious and secular views on human rights as superficial. Other writers too have tried to color the traditional religious source-texts with contemporary meanings. Ghannūshi eloquently states his point.

> A comparison between the principles of human rights in Islam and the modern human rights charters discloses that there is a large area of commonality, with few exceptions, which is the reason why the universal declaration of human rights, for example—in its general thrust—is so widely received by the Muslim who has a good understanding of his religion.[36]

By minimizing the differences between Islamic rights and modern human rights, Ghannūshi and others transplant the rhetoric of secular human rights onto the discourse of religio-moral rights.

THE DILEMMA OF ISLAMIC HUMAN RIGHTS

Despite the attempts to forge an Islamic equivalent of the modern human rights charter adopted by the United Nations there remain areas of incompatibility in practice. Human rights advocates highlight these contradictions when Islamic requirements seem to conflict with recognized secular human rights. Areas of conflict are the prohibition against Muslims converting to other religions; the historically entrenched "protected" (*dhimma*) status of non-Muslims living in Islamic states, or predominantly Muslim states; and, the patriarchal presumptions that pre-modern Islamic jurisprudence makes with respect to women that affect their civic and personal liberties especially, but not exclusively, in marital life.

CONVERSION

Classical Islamic law prohibits conversion out of Islam to another

36. *Ḥurriyāt*, *supra* n. 5, at 320.

religion, which would prima facie be in violation of article 18 of the Universal Declaration which confers the right to freedom of thought, conscience and religion, including the right to change one's religion and belief. Conversion would be tantamount to apostasy (*ridda*) in terms of Islamic law and thus an offense punishable by death according to most legal schools of thought. In explaining this rule, some contemporary scholars have argued that apostasy in early Islam and medieval times was viewed as one of a number of subversive activities that threatened the public security of the Muslim community.[37] Sachedina, for instance, explains that while the Qur'ān advocated religious freedom, the disruptive events and political realities in the career of early Islam managed to restrict the interpretation of such freedoms.[38] And when the state becomes the guardian of the faith, then any threat to the state is also regarded as an attack on religion. "In the face of the expansion of Islamic political power and hegemony," Sachedina argues,

> the deep Qur'ānic impulse toward religious freedom steadily lost ground—in practice and in theory—to the equally strong concern for defending the faith against active persecution and violent assault. The defensive use of force gradually gave way to more aggressive legal and political policies.[39]

This is also the view adopted by some of the leading theorists in the modern Islamic revivalist movement who do not view apostasy as a religious offence punishable by religion.[40] Instead, they hold that it is a political offence that is subject to punishment at the discretion of political authorities. This is a departure from the medieval consensus, which regarded apostasy as a religious offence and its penalty sanctioned by law.[41] It becomes easier for latter day scholars to dissent from the traditional consensus on this issue because of subtle epistemological transformations that had taken place in modern Muslim thought in dealing with the primary sources. Modern thinkers place

37. Abdulaziz A Sachedina, *Islam and Religious Liberty: Freedom of Conscience and Religion in the Qur'an*, in *Human Rights and the Conflict of Cultures*, *supra* n. 4, at 79. *See also Conference of Riyad, Paris, Vatican City, Geneva and Strasbourg on Moslem Doctrine and Human Rights in Islam between Saudi Canonists and Eminent European Jurists and Intellectuals* 55 (Riyad: Ministry of Justice, n.d.).

38. Sachedina, *supra* n. 37, at 85.

39. *Id.*

40. *Ḥurriyāt*, *supra* n. 5, at 48-50. Al-Ghannūshi says that this was also the view al-Imam Muhammad 'Abduh, al-Shaykh 'Abd al-Mut'āl al-Sa'd, 'Abd al-Wahhāb al-Khallāf, Abū Zahra, al-Shaykh 'Abd al-'Aziz Shāwish, Fathi 'Uthmān, 'Abd al-Ḥamīd Mutawalli, 'Abd al-Ḥakīm, Ḥasan al-Turābi, and Muhammad Sālim Ghazūr.

41. Taqi al-Din Ahmad ibn 'Abd al-Halīm Ibn Taymiyya, *Majmū' Fatāwā*, vol. 37, 28, 413-416 (Mu'assasat al-Risāla (1618/1997).

greater emphasis on the Qur'ān and are less fastidious with *ḥadīth* sources.[42] The warrant for apostasy is not derived from the Qur'ān, but from prophetic reports (*ḥadīth*) that can be impugned with error in transmission or interpretation with less controversy. The modern view has also attempted to reconcile the law with the overall spirit of the Qur'ānic teachings that does advocate greater freedom to choose one's faith.

PROTECTED STATUS OF NON-MUSLIMS

Pre-modern interpretations of the *sharī'a* saw the world as two primary domains or jurisdictions: the jurisdiction of Islam (*dār al-Islām lit. "abode of Islam"*) where Muslim suzerainty prevails, and the jurisdiction of war (*dār al-harb lit. "abode of war"*) where such legitimate Islamic authority is absent. Modern jurists have developed hybrids of these two primary categories such as an intermediate jurisdiction, called a jurisdiction of peace or a jurisdiction of reconciliation (*dār al-Islām. lit. "abode of peace" dār al-mu'āhada lit. "abode of mutual contracting"*). In this jurisdiction, Islamic authority does not prevail, but the Muslim subjects of the territory come to some security arrangement with the non-Muslim political leadership, pledging to uphold the rules of domicile in exchange for protection.

Changes in the international system of governance have rendered these political and juridical models obsolete. No Muslim state, including modern day Iran and Saudi Arabia, adopts these as part of their public international law. Nevertheless, these models of a bygone political era still inform the thinking of traditional jurists and some ideologues of Islamic revival today. Non-Muslims living within Islamic jurisdictions or even in secular Muslim countries, constantly fear that a return to an Islamic state could result in the reinstatement of these pre-modern political and legal models. The fear is that if Islamic parties come to power they may declare the country to be a "domain of Islam" and relegate non-Muslims to a status of second-class citizens under the guise of being a protected person (*ahl al-dhimma*) as defined by Islamic law. A protected citizen (*dhimmi*) while enjoying most civil rights as his/her Muslim counterparts do, would be barred from enjoying some crucial liberties that are available to Muslims. For instance, a non-Muslim would not be able to become a head of state or occupy jobs in key military and intelligence positions of a Muslim country, according

42. *See* Daniel Brown, *Rethinking Tradition in Modern Islamic Thought* (Cambridge, Mass.: Cambridge U. Press 1966).

to classical interpretations of the *sharī'a*.[43] Although these rules are not implemented as law in the majority of Muslim countries today, they are still the unwritten cultural practice in many states. Again such notions may conflict with the requirements of the rights of citizenship in democratic contexts. While early Muslim political theory may have allowed for persons of other religions to be treated differently such as requiring non-Muslim subjects to wear specific forms of dress, or the differential application of law, there is no fundamental imperative in modern Islamic law and ethics to perpetuate such enforcement.[44] In the annals of Islamic history there is evidence of non-Muslims serving Muslim governments in high office without their presence being viewed as either a violation of the law or a threat to the security or identity of the state. Many apologists for the retention of the *dhimmi* status of non-Muslim citizens use the discriminatory treatment of Muslim communities in the West as an argument in defense of their positions.[45] The inexcusable levels of discrimination against Muslims by western powers cannot, however, be the basis for the relativization of Muslim ethics that result in "tit for tat" justice.[46]

THE STATUS OF WOMEN

Most contemporary religious expressions of Islam, excluding crass advocates of savagery in the name of religion, would deny that discrimination against women is permissible. Despite their vehemence, these very same groups approve a range of manifestly discriminatory practices inherited from the medieval formulation of Islamic law.[47] The

43. *Hurriyāt, supra* n. 5, at 291.

44. For instance some Muslim legal schools held the view that a Muslim subject cannot be executed under the rule of *lex talion*, if he killed a *dhimmi*. The assumption is that it would undermine the status of the "believers" if a Muslim is killed for taking the life of a non-Muslim citizen. The Muslim offender or his family is required to pay compensation.

45. *Hurriyāt, supra* n. 5, at 292.

46. *See* Arcot Krishnaswami, *Study of Discrimination in the Matter of Religious Rights and Practices*, 11 N.Y.U. J. Intl. L. & Pol. 227 (Fall 1978).

47. For an interesting study of public reactions to extending citizenship rights to women in Kuwait, *see* Katherine Meyer, Helen Rizzo & Yousef Ali, *Islam and the Extension of Citizenship Rights to Women in Kuwait*, 37 J. for the Sci. Study of Religion 131 (1998). The authors' conclusions reflect the complexity in trying to pin down misogynistic trends within religious trends.

> Models explaining Kuwaiti citizens' attitudes towards incorporating women more fully in political life made clear several things about relationships among Islam, social structure and women's rights .... Citizens, both Sunni and Shia, who strongly upheld Islamic orthodoxy were very supportive of more fully including women. However, those favoring traditional Islamic practices regarding appearance were less inclined to want to include others. Religious orthodoxy supported women's rights although Islamic religiosity did not.

result is that some trends in Muslim jurisprudence still hold that women do not acquire legal and moral majority in certain transactions, and hence require the guardianship of males. According to some legal schools, women lack the capacity to contract marriages independently, although they can paradoxically own property.[48] Women also do not have an unfettered right to sue for divorce as men have the unqualified power to repudiate their spouses.[49] Recent changes in Egyptian law may be inching in the direction of giving more freedoms in such matters but the legislation has also provoked a great deal of controversy and criticism from religious quarters. Most of the rules affecting inter-spousal and male-female relations are premised on the strong patriarchal and patrilineal assumptions of medieval Islam. For example, women's evidentiary testimony has to be corroborated by that of another female before the cumulative testimony of both can be equal to that of a male. Some schools argue that the requirement of two females' evidence only apply to financial and commercial transactions and does not apply to all domains of life. Similarly, most traditional juristic opinion disqualifies women from holding senior political and judicial office as in the case of Iran where women were prevented from holding judicial office after 1979 which is now gradually being rectified. In Pakistan it was debated whether a woman could be a Prime Minister of a Muslim country. There is nevertheless a vibrant debate taking place in almost all Muslim societies about the status of women; the more gender sensitive reading of Qur'ānic ethics proposed by some jurists, contrasts sharply with readings of traditional jurisprudence.[50]

PROTECTING HUMAN RIGHTS OR HUMAN DIGNITY

The existing differences between the two rights systems (secular and Islamic) does not lead to the conclusion that the Islamic system should be denied a role in the defense of human rights, even if some Islamic interpretations may conflict with secular human rights conclusions. Failure to accept parallel models despite differences may

Id. at 142.

48. Muhammad ibn Ahmad al-Ramlī, *Nihāyat al-Muhtāj alā Sharh al-Minhāj*, vol. 8, at 6:224 (Mustafā Bābi al-Halabi 1967-1969).

49. *See* Werner F. Menski, *South Asian Muslim Law Today: An Overview*, 9 Sharqiyyāt 16 (1997), an essay that covers a range of issues from constitutional issues to questions of divorce and polygamy.

50. *See Feminism & Islam: Legal and Literary Perspectives* (Mai Yamani ed., N.Y.: N.Y.U. Press 1996); Amina Wadud, *Women and the Qur'an: Rereading the Sacred Text from a Woman's Perspective* (2d ed., N.Y.: Oxford U. Press 1999); *see also* Ziba Mir-Hosseini, *Islam and Gender: The Religious Debate in Contemporary Iran* (Princeton, N.J.: Princeton U. Press 1999).

generate miscommunication between societies and nations. Rentlen has shown that rights enumerated under a moral system different from the secular rights system, does not necessarily derogate it from being "rights," albeit rights in a different sense.[51] The rights-based notion of human rights advanced by Donelly, it should be remembered, is based on a Western understanding and experience of what it means to be human, which excludes the understanding of "human" nature and relationships in other cultures. The human rights culture today has to address the fact of postcolonialism. It is also part of a process of globalization that has hegemonic designs on the part of economically advantaged Western nations to incorporate as many compatible political entities into a unified economic world.[52] Cooke and Lawrence ask the relevant political question, albeit in rhetorical fashion.

> In the context of Western global hegemony under siege, can human rights ever find expression except as a reflex of power so pervasive that it feels no need to account for its own interests, but only for the deviance and non-compliance of others?[53]

In recent years the hegemony of market capitalism and the globalization of Western political culture has witnessed the abuse of human rights discourse. It has become a political weapon in the hands of powerful nations in order to subdue emerging nations and those communities contesting the monopoly of global political power. The United States in its military adventures abroad has openly violated human rights conventions, just as some of its Third World allies have committed abuses that remain unpunished by the world community. At the same time, countries not friendly to Western powers are subjected to sanctions and international isolation for human rights offences. Some Islamic nations are at the forefront of contesting these contradictions and issuing jeremiads of Western double standards, often for the wrong reasons, and mainly to justify their own human rights abuses. This state of affairs results in a monumental, unrelentingly bleak account of the status of human rights in the international discourse. Neither does the unremitting concentration of Western antipathy about Muslims'

51. Alison Dundes Rentlen, *The Concept of Human Rights*, 83 Anthropos 343 (1988).

52. Robert W. Cox, *A Perspective on Globalization*, in *Globalization: Critical Reflections* 24 (James Mittelman ed., Boulder, Colo.: Lynne Rienner Publishers 1996), states that "Globalism and globalization arose together as orientations for thought and action." *See also* Bassam Tibi, *Islam and the Cultural Accomodation of Social Change* (Clare Krojzl trans., Boulder, Colo.: Westview Press 1990).

53. Miriam Cooke & Bruce B. Lawrence, *Muslim Women Between Human Rights and Islamic Norms*, in *Religious Diversity and Human Rights* 313 (Irene Bloom, J. Paul Martin & Wayne L. Proudfoot eds., Columbia, S.C.: Colum. U. Press 1996).

essential inability to accept of human rights help to further the languages for meaningful moral and political discourse.

The global and universalist aspirations of the human rights movement raises thorny issues of cultural relativism versus universalism. The transfer of human rights from one cultural setting to another may be possible, but whether it delivers satisfactory results is altogether another question. Cultural relativists, like Rentlen, and Islamists, like Ghannūshi, argue that the differences between secular rights-based human rights and Islamic duty-based theories of rights are negligible and at best semantic, but not real.[54] Western human rights can function within non-Western social, moral and political systems. It requires us to grasp the meaning of human rights as a "cumulative political struggle," says Ashcraft.[55] When the Universal Declaration was announced there was resistance to it in certain African, Asian, socialist and Muslim countries. Already that was an early indication that the mechanical transfer and grafting of rights discourse from one cultural context to another could not be done mechanically. For this reason the United Nations adopted the International Covenant on Economic, Social and Cultural Rights and International Covenant on Civil and Political Rights, both came into force in 1976 in order to give attention to rights that UDHR did not fully explore. Irene Bloom, echoing Ashcraft's idea of human rights as a "cumulative struggle" that needs to be understood in its historical, sociological and political dimensions, writes:

> Here we find an unmistakable truth emerging from the complex reality of religion and human rights: despite the universalism implied in its premises and affirmed in its achievements, the human rights movement itself entails struggles that must be carried on in many parts of the world in response to particular problems and conditions, with the energy and courage for such struggles coming from individuals who, while ultimately sharing some common goals and aspirations, often draw on religious resources that remain richly and irreducibly diverse.[56]

ISLAM'S WINDOW TO A HUMAN RIGHTS ORDER

Raimundo Pannikar, a Catholic thinker, has addressed the issue of human rights in a multi- and cross-cultural context in a helpful manner.

54. Rentlen, *supra* n. 51, at 345.

55. Richard Ashcraft, *Religion and Lockean Natural Rights*, in *Religious Diversity and Human Rights*, *supra* n. 53, at 209.

56. Irene Bloom, *Introduction*, in *Religious Diversity and Human Rights*, *supra* n. 53, at 10.

Instead of trying to transliterate the concept of human rights into another culture, he suggests that we should rather search for the homeomorphic equivalent for human rights in another culture.[57] If the goal of modern human rights is to protect and show respect for human dignity, then we should investigate how a particular culture satisfies that need. Needless to say, just as tradition is not static but constantly re-invents itself, similarly the cultural equivalent for human rights is not fixed. Only after we have established consensus around a mutually understandable intercultural language about, say, human dignity, can a genuine dialogue and moral conversation take place. The language of international law may allow inter-governmental discourse or conversations among cosmopolitan elites to occur, but that does not necessarily translate into a successful inter-cultural dialogue. Human rights, to use Pannikar's simile, are but one "means" or "window" through which a specific culture envisages a just human order. Those who inhabit such a human rights culture do not necessarily see that "window" and then erroneously assume the panorama to be their home. Furthermore, other cultures may have different kinds of windows that provide a different angle on the view.

Some interpretations of Islamic ethics, as discussed above, may seemingly appear to be incompatible with secular human rights. However, there are other approaches that may be able to find a common language and a modicum of compatibility between Islamic rights and secular rights systems. A revisionist or reconstructionist stance towards the Islamic juristic legacy may be the most suited approach to accomplish such a challenge. Reformist and revisionist Muslim thinkers take into account the sociological, economic and political transformations that have occurred in Muslim societies. This empirical reality is then brought into dialogue with the tradition in a bid to reinvent it for newer contexts. To clarify this point we might explore an important presumption commonly ignored by Muslim thinkers: the tension that exists between the notions of "status" and "contract" in Islamic law. It becomes evident that some of the Muslim thinkers cited above, such as Nasr and Brohi in their respective explanations endorse the presumption that it is the "status" of the individual which determines a body of reciprocal obligations, duties and responsibilities in traditional societies.[58] In modern societies, perhaps less so in traditional societies,

57. Raimundo Pannikar, *Is the Notion of Human Rights a Western Concept?*, 120 Diogenes 78 (Winter 1982).

58. Norbert Rouland, *Legal Anthropology* 124, 228 (Phillipe G. Planel trans., London: The Athlone Press 1994).

"contract" is the operative means of exchange, where the individual is seen as a separate entity that exercises independent authority.[59] Most anthropologists agree that there is no chronological sequence from "status" to "contract," but that societies are characterized by the predominance of one model over another. Most societies contain practices of both "status" and "contract", though the former is more a feature of traditional societies and the latter of modern ones. Nevertheless, it is observable how the effects of colonization, for instance, transformed traditional "status" societies into the "contract" model, by instituting centralized authority, bureaucratization, introducing written constitutions, legal codification, rule of law and notions of citizenship.[60] On the other hand we observe that when dictatorships and authoritarian regimes reverse democratic societies into autocratic systems, the shift from "contract" to "status" occurs.[61]

Any discussion of Islamic law and ethics must acknowledge and recognize the broader political and economic system that regulates people's lives. The nature of contemporary Muslim societies varies between models that are preponderant "status" or "contract," as well as variant hybrids of the two systems.[62] To the extent that a society successfully implements a political system that resembles a contract model between state and citizen, it may be more predisposed to interpret Islamic law as compatible with contract and hence open to modern human rights. In such instances, the Islamic "text" would be read as supporting individual liberty, given that traditional Islamic law does make provision for the will of the individual to be authoritative in a contract.[63] In places where society, ethnicity, religion, class and gender,

59. *Id.*

60. *See* Said Amir Arjomand, *Religion and Constitutionalism in Western History and in Modern Iran and Pakistan*, in *Political Dimensions of Religion* 69-99 (Said Amir Arjomand ed., Albany, N.Y.: S.U.N.Y. Press 1993).

61. For instance a dictatorship may favor a particular political class, an ethnic group or even the army for political privileges. Thus, the status of the beneficiary becomes more important than the rights and covenant that the political entity has entered into with its subjects.

62. Most of the Sunni schools of law, with the exception of the Hanafi school, insist that an adult woman cannot get married without the consent of her guardian. This is a clear example that her "status" as a woman is crucial in denying her contractual capacity in marriage according to the jurists of those schools. These very same schools, however, would allow a woman (who lacks marital capacity) discretion and capacity to dispense or acquire property without any impediments. In this instance property is regulated according to notions of contract. Similarly, the distinctions that Islamic law makes between penalties and obligations for women, slaves, and free persons all suggest that status considerations are operative.

63. For the status of individual liberty *see* Muhammad Yusuf Musa, *The Liberty of the Individual in Contracts and Conditions according to Islamic Law* (pts. 1 & 2), II Islamic Q. 79-95 (July 1955), II Islamic Q. 252-263 (Dec. 1955); *see also* S.D. Goitein, *Individualism and Conformity in Classical Islam*, in *Individualism and Conformity in Classical Islam* 3-17 (Amin Banani & Speros Vryonis Jr. eds., Wiesbaden: Otto Harrassowitz 1977) (presented at the Fifth Giorgio Levi Della Vida Biennial Conference; Richard W. Bulliet, *The Individual in Islamic Society*, in *Religious Diversity in Human Rights*, *supra* n. 53, at 175.

largely determines the reciprocal duties and obligations, not the will of the individual, such Muslim communities would find the concept of "status" abundantly evident in the traditional interpretation of Islamic law, mainly to reinforce their social conditions and expectations. Such communities might find modern human rights to be too individualistic and incompatible with their communitarian culture and religious values. On the other hand, where Muslims live in democratic and liberal political contexts they may be more inclined to elicit the "contract" model in the Islamic legacy. It is therefore not surprising to find that Muslims, who live as minorities in Europe, as well as in economically developed or rapidly developing countries, would easily endorse modern bourgeois human rights notions to be compatible with Islam. Despite the flaws in the UIDHR, it is significant to note that it was Muslims in Europe who adopted it.

It should become evident that nothing about either the Islamic or the secular human rights traditions make them inherently compatible or incompatible with each other. In fact, it is the location of the interpreter, the reading of the text and the social conditions that generate different responses to issues such as human rights. Plurality is a feature of living traditions. Brohi and Nasr, who are opposed to the anthropomorphic nature of modern human rights, and al-Ghannūshi who states that anyone "who has a good understanding of his religion" will not find a problem with secular human rights, constitute two diametrically opposed perceptions and interpretations of both the Islamic tradition and the contemporary context. Most Muslim scholars would argue that the pith of the modern human rights debate is about the preservation of human dignity (*karāma*), even though some secularist proponents would disagree. The Qur'ān and the teachings of the Prophet explicitly entrench human dignity as a fundamental ethical norm in human conduct. Islamic law and ethics have an established philosophy that was designed to protect human dignity.

In theory, whatever means were used in the past to protect human dignity can undergo change, provided the new measures give effect to justice and fairness, since the essence of the *sharī'a* is justice. We have to consider, says a contemporary *mufti* (jurisconsult) "that which is more convenient and better for people, as long as God had commanded us to act with justice and equity (*'adl*) without limiting us to the means of

achieving this justice and equity (*'adl*)."[64] Long before him, the noted fourteenth-century jurist belonging to the Hanbali school, Ibn Qayyim al-Jawziyya (d. 751/1350), eloquently made what could be termed a revolutionary statement in defining the meaning of *sharī'a*:

> The foundation of the *sharī'a* is wisdom and the safeguarding of people's interests in this world and the next. In its entirety it is justice, mercy and wisdom. Every rule which transcends justice to tyranny, mercy to its opposite, the good to evil and wisdom to triviality does not belong to the *sharī'a* although it might have been introduced into it by implication. The *sharī'a* is God's justice and mercy amongst His people. Life, nutrition, medicine, light, recuperation and virtue are made possible by it. Every good that exists is derived from it, and every deficiency in being results from its loss and dissipation. For the *sharī'a*, which God entrusted His prophet to transmit, is the pillar of the world and the key to success and happiness in this world and the next.[65]

Ibn Qayyim also stated:

> God had sent His Prophets and revealed His books so that people can establish justice. It is the truth on which the firmament of the heavens and earth rests. When the indices of truth are established; when the proofs of reason are decided and become clear by whatever means then surely that is the Law of God, His religion, His consent and His command. And God the sublime has not limited the methods and sources of justice and its indices in one genus [of methods] and invalidated it in other methods, which are more clear, more explicit and self-evident. In fact, He demonstrated in His methods as contained in His legislation that His goal was to establish truth and justice and ground people in equity. So by whatever means truth is discovered and justice is known, then it is obligatory to rule by the dictates and compulsion of these two [notions]. Methods are but causes and means which are not desired in themselves, but for their ends, which are the objectives (*maqāṣid*) [of the law] . . . .[66]

Some contemporary revivalist and revisionist Muslim thinkers would happily endorse the views of Ibn Qayyim and announce the compatibility of Islam and modern rights discourses. However, the

64. *Al-Fatāwa al-Islāmiyya*, vol. 8, 3032 (Cairo: al-Majlis al-A'lā li' l-Shu'ūn al-Islāmiyya 1403/1983-1984).

65. Ibn Qayyim al-Jawziyya, *I'lām al-Muwaqqi'īn 'an Rabb al-'Ālamīn* vol. 3, 3 (Tāhā 'Abd al-Ra'ūf Sa'd ed., Beirut: Dār al-Jīl n.d.); *see also* Subhi Mahmasāni, *Falsafat al-Tashrī' fi'l-Islām* 220 (5th ed., Beirut: Dār al-'Ilm 1980). *See also* the same book translated by Farhat J. Ziadeh, *Philosophy of Jurisprudence in Islam* 106 (Leiden: E.J. Brill 1961).

66. Al-Jawziyya, *I'lām al-Muwaqqi'īn 'an Rabb al-'Ālamīn*, *supra* n. 65, at vol. 4, 373.

mere adoption of formulations like those offered by Ibn Qayyim is not enough. At best the statement shows that in earlier times a critical and courageous legal scholarship did have a place in Muslim society. At worse Ibn Qayyim's views can serve as an apologetic to satisfy the "Islam has all the answers" nostrums. On the positive side the apologia provides some short-term relief and provides some legitimacy to efforts of juridical reconstruction in drawing on eminent authorities of the past. The long-term health of Islamic jurisprudence, however, can only be furthered if, and when, a substantial revision of Muslim legal theory takes place. Some of the rethinking that takes place can be gleaned from the small-scale social experiments taking place in Muslim minority contexts such as South Africa.

ISLAM AND HUMAN RIGHTS IN SOUTH AFRICA

In South Africa, part of the Muslim community was guided by an understanding of the *sharī'a*, that carried a sense that a religious imperative is also a just one. A number of Muslims, along with their secular and other compatriots belonging to other religions opposed the policies of enforced legal racial segregation known as *apartheid*. Muslims in South Africa are estimated to number close to a million people.[67] The earliest among them descended from East Asia, from the islands near modern Indonesia and Malaysia and were brought to the Cape of Good Hope in the seventeenth century with the earliest Dutch colonizers. Another group from the Indian sub-continent arrived as indentured laborers and some as traders in the middle of the nineteenth century. At various periods in the twentieth century, many persons from a Muslim background participated in resistance politics from a secular platform and attained national prominence. However in the last four decades of the twentieth century there has been a noticeable growth of Muslim political activists and groups motivated to participate in the political struggle on the strength of their religious convictions. They were influenced by pan-Islamic revivalist discourses emanating from the Middle East and South Asia. Among the main revivalist groups is the Muslim Brotherhood in Egypt and the Jamāt Islāmi in Pakistan that have been influential on an international scale.[68]

67. *See* Ebrahim Moosa, *Islam in South Africa*, in *Living Faiths in South Africa* 129 (John de Gruchy & Martin Prozesky eds., Cape Town: David Philip 1995).

68. *See* Abdulkader Tayob, *Islamic Resurgence in South Africa: the Muslim Youth Movement* (Cape Town: U. of Cape Town Press 1995).

Within the South African context, groups like the Muslim Youth Movement, the Call of Islam, as well as the ultra-radical group *Qibla* Mass Movement spearheaded the role in constructing a Muslim ethos of liberation. Together with independent progressive clerics as well as those affiliated with the Muslim Judicial Council (MJC), these groups provided an Islamic rationale—based on juristic and theological arguments—to resist oppression and political injustice. These efforts culminated in a number of religious declarations that condemned apartheid as an illegitimate political order in terms of Islamic law and ethics.[69] In contrast to the Muslim progressives, the traditional *'ulamā'* groups functioning as organized councils of theologians did little to issue any guidance to the Muslim community on how to deal with apartheid in terms of an Islamic ethos.[70] Individual clergymen in their individual capacity from time to time took anti-apartheid positions. It was only from 1984 onwards, and that too only in specific instances, that Muslim clergy groups under pressure from the younger Muslim progressives felt the need to issue statements and offer minimal pastoral guidance on matters related to race and Islam.

The task of formulating the equivalent of a Muslim liberation theology largely fell on the shoulders of a younger generation of *'ulamā'* and activists under the influence of Islamic revivalism in the 1980s who began to describe the rudimentary elements of a contextual Islam in South Africa. Prior to this, much of South African revivalist Islam was viewed through the prism of the large-scale vision and universal goals of pan-Islamism that romanticized the coming of a global Islamic order, in which the advent of the Islamic state was but the first stage. That vision was gradually abandoned in the search for an Islamic human rights ethos within a South African context. Challenged to combat racism and advance human rights, a few Muslim intellectuals began to rethink some of the fundamental questions of what it meant to be a Muslim in a multi-cultural and multi-religious setting. Many of the exclusivist notions of "self" and "other" inherited from traditional theology came under critical scrutiny. Muslim ethics in this context embraced the humanist aspects of Islam in a cultural context shared with multiple "others." The Qur'ānic injunction that humanity was a "single family" acquired greater prominence and began to overshadow the inherited Muslim

69. *See* Asghar Ali Engineer, *Islam and Liberation Theology: Essays on Liberative Elements in Islam* (New Delhi: Sterling Publishers 1990); Farid Esack, *Qur'ān, Liberation & Pluralism: An Islamic Perspective of Interreligious Solidarity against Oppression* (Oxford: One World 1997).

70. *See* Ebrahim Moosa, *Muslim Conservatism in South Africa*, 69 J. Theology for S. Africa 73 (Dec. 1989).

theological formulations that promised salvation for Muslims exclusively.

Gradually and almost imperceptibly something more far-reaching was taking place from the periphery of the Muslim world, South Africa. Most of the inherited juridical and theological teachings are premised on a model where Islam serves and advances the interests of an empire. Despite the collapse of the Ottoman empire, many of the assumptions of empire as well as aspirations to re-invent the empire persist in Muslim thinking. In multi-cultural and multi-religious South Africa, Islamic particularism gave way to more universal or humanist interpretation of Islam. This meant that for a generation of conscientious Muslims, freedom of belief and conscience was an absolute and unfettered right, not only to believe but also the freedom to make one's choice of faith. Serving another human being became as important as serving a person of one's own faith. Any human being could be the beneficiary of a Muslim's deeds and vice versa. Most conscientious Muslims under apartheid, where racism oppressed the majority of non-Muslims as well as a few Muslims, felt that this immoral practice had to be resisted and combated because it was deemed an affront to a common humanity. Self-serving ethnic and religious interests had to be cast aside on moral grounds since they conflicted with the universal vision of Islam. In short, racial injustice clashed with the vision of Islamic justice. The traditional clergy (*'ulamā'*) nevertheless continued to clash with Muslim progressives over the emerging interpretations. They felt that the emergence of a humanist Islamic ethics as advocated by Muslim progressives threatened the very foundations of traditional notions of "self" and "other" and issued loud protestations against such reinterpretation.[71]

For the Muslim progressives, one thing led to the other. Consistency, as well as a commitment to racial justice, also required that one could no longer ignore gender injustice perpetuated by tradition and the constructions of male jurists over the centuries. Women, who have suffered in all societies, were entitled to equality and freedom that acknowledged their humanity, not in rhetorical platitudes and triumphalist slogans, but in demonstrable action. This meant that discriminatory aspects and practices found in Islamic law towards women had to be replaced with newer and more equitable solutions. In this regard the license that Islamic law allows for the adjustment of the law to new contexts and changing conditions through the process of

71. *Id.*

creative legal reasoning (*ijtihād*) and renewal (*tajdid*) came to good effect.

Outside the specific example of South Africa, it is evident that most Muslim societies are gradually moving in the direction of establishing social relationships on the basis of "contract," and abandoning notions of "status." Contemporary thinkers increasingly interpret the traditional Islamic notion of leadership (*imāma*) to mean a form of "social contract" (*'aqd*) between the ruler and the ruled.[72] The need to make the leap from personal government of the pre-modern *imāma* model, to governance by means of an impersonal state, is actuated by a need in contemporary Muslim societies to fetter the powers of rulers and subject them to the scrutiny of the citizenry or their elected representatives. This interpretative innovation brings Muslim political thought closer, albeit haltingly, to modern forms of representative government of which democracy is only one among many models, even though in a world in which market liberalism is triumphant it may appear to be the only model. In such a model the notion of citizenship will replace the idea of a political "subject". Citizenship becomes a norm that is grafted onto Muslim political and constitutional jurisprudence. For some, this holds a promise that the nation-state, whose citizen enjoyed certain rights and obligations irrespective of religious, ethnic affiliation and number, could become compatible to an Islamic ethos.[73]

CONCLUSION

The human rights discourse in Islam has undergone several phases producing a kaleidoscope of views ranging from those that equate Islamic human rights with the secular rights discourse to those who claim that the two are radically different. I have shown that the concept of rights imagined in the early period of Islam, renders aspects of inherited notions of ethics incompatible with the modern rights discourse. On the other hand, those thinkers who do equate Islamic rights discourse with human rights do so without explaining why and how they abandon the presumptions of the pre-modern Islamic rights discourse. The result is that they operate within a paradoxical theoretical framework that displays its deficiency in several instances

72. *Ḥurriyā*, *supra* n. 5, at 140.

73. *Id.* at 290; Abdullahi Ahmed An-Na'im, *Islamic Law, International Relations, and Human Rights: Challenge and Response*, 20 Cornell Intl. L. J. 317 (1987); Abdullahi Ahmed An-Na'im, *Religious Minorities under Islam Law and the Limits of Cultural Relativism*, 9 Human Rights Q. 1 (1987).

when Islamic human rights are put to the test.

I have argued that Muslim jurists and thinkers must acknowledge that quantum shifts have occurred in both human society and our inherited conceptions of "self" and "other", in addition to a range of other categories not discussed above. These are not static categories and they imperceptibly undergo change within the Islamic tradition over the centuries. In order to produce a credible version of human rights in dialogue with both the tradition and the present, a fundamental re-thinking need to take place.