Shari’a and Human Rights: Rights of Women and Equal Partnership within Marriage

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Introduction

After having struggled for decades with the issues of national independence, cultural identity, modernization and development, and fundamentalism, Muslims now face the challenge of pluralism, democracy, and human rights.¹ While the old issues had mostly political impact on Muslim world, the new challenge requires delicate debates and intellectual disputes from legal perspectives. It has to do with the interpretation and practice of Islam and the traditional formulation of Islamic law, known as Shari’a.² How these debates are carried on, and the question of democracy and human rights is resolved, will also have an effect on political structure of Muslim societies. This paper examines the question of human rights in Shari’a generally, and the rights of women, especially within marriage, in particular.

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A Brief Review of International Human Rights Law

In one form or another, the idea of human rights, as an issue in religious, political, and moral philosophy, is very old, and has an ancient and illustrious pedigree. In its contemporary form, however, the doctrine is certainly new, and has been central to some of the most important discussions and developments of modern times. Although the idea of human rights is a moral one and has a supreme moral importance, the modern concept of “human rights” constitutes legal and political standards providing “an ideal basis on which to conceptualize and organize a human community.” It also involves a social and behavioral process for dealing with public authority, and establishes and guarantees “the conditions necessary for the development of the human person…”

This paper holds that human rights are those rights that all persons equally have by virtue of being human, whether or not they are recognized, or embodied in a system of positive law, and irrespective of religion, gender, nationality, or any other social or cultural characteristic. Although human rights are justifiable through a valid moral

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4 Besides the Magna Carta (1215), the British Bill of Rights (1689), the American Virginia Declaration of Rights (1776), the United States Declaration of Independence and Constitution (1789), and the French Declaration of the Rights of Man (1789) were all proclaimed in the name of human rights. See John Humphrey, No Distant Millennium, The International Law of Human Rights (France: UNESCO, 1989) at 27; and A. J. M. Milne, Human Rights and Human Diversity, An Essay in the Philosophy of Human Rights (New York: State University of New York Press, 1986) at 1.


8 See Alan Gewirth, Human Rights: Essays on Justification and Applications (Chicago: University of
principle, they represent, in a legal and political sense, the entitlements of all human beings, which pertain to individuals simply because they are human beings. Human rights then differ from benefits and privileges as well as duties and obligations; they do not correspond exactly to claim-rights either. Human rights, in any proposed list, are considered inalienable, interdependent, and indivisible.

The study suggests that human rights have their roots in human nature and human dignity which is derived from the endowment of all individuals with reason and free will, and in which all persons are equal.

Moreover, the study holds that the doctrine of human rights, by definition presented above, as well as the basic and fundamental rights and freedoms are universal, held equally by all and applicable to all cultures and civilizations, irrespective of differences between them. In this sense, then, its Western origin as well as the argument that human rights are Western cultural imposition are largely irrelevant.

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puts it, “human beings and societies share certain fundamental interests, concerns, qualities, traits and values which can be identified and articulated as the framework for a common ‘culture’ of universal human rights.”

Apart from their social and political aspects, human rights are also legal rights, and need to be defined, protected, and promoted by the international law of human rights. Basic human rights and freedoms as well as the standards of conduct are covered in numerous international documents, such as the International Bill of Human Rights. Human rights also need to be protected by constitutional and legal systems of all states in order not to be reduced, as Michael Freeman puts it, “from universal values to either arbitrary products of power or particular cultural developments.”

Shari’a and the Rights of Women

As a religious law of Islam accepted by Muslim scholars throughout the centuries, Shari’a covers all social, ethical, and spiritual aspects of human life, and regulates

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17 For reasons why human rights should be protected by international law, see No Distant Millennium, supra note 4 at 12-15.
Muslims’ behavior in public and private matters. It is considered to contain all the necessary rules needed for human activities, granted by God and applicable to all. Many Shari’a laws deal with human rights, political liberties, and religious tolerance, which are placed with the boundaries of duties and obligations. For example, Shari’a defines the extent and characteristics of the rights of women and non-Muslims, the right to participate in public life, and freedom of expression and religion. Intellectual debates on these issues which examine the validity of the application of Shari’a laws in modern time will certainly challenge the deeply-rooted authority of Shari’a and have an enormous effect on the process of development in Muslim societies.

Before examining women’s rights in Shari’a, a distinction should be made between the approach of Shari’a sources towards the dignity and honor of women and Shari’a laws in this regard. The Qur’an declares the equality of all human beings with equal value in dignity and honor. It states that the best person is the one who is the most pious. Compared to the degraded status of women in the Jahiliyya (pre-Islamic traditions), where female infanticide was commonly practiced, “the changes in women’s status are in the direction of enhancing their rights and elevating their status and dignity.” Against the prevailing conditions of the time, the Qur’an removed some abuses to which women were subjected, and guaranteed certain rights which Western

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22 Qur’an, 4: 1 and 124, 49: 13, 33: 35.
23 Qur’an, 49: 13.
24 *Islam and Human Rights, Tradition and Politics*, supra note 2 at 110.
women did not even enjoy until recently. Islam recognized women’s independent legal personality and allowed them to inherit and own property. Historically, this was quite advanced.

From a legal point of view, however, Shari’a laws on the rights of women were codified through only the legal verses of the Qur’an, not those verses which recognized the equality of men and women in dignity and honor. The laws pioneered by the Qur’an and considered appropriate then, nevertheless have had a negative impact on women’s rights today. Early jurists resorted to Qur’anic legal verses to put some disabilities on women and to create a subordinate role for women. This resulted in male-oriented discriminatory laws and rules in almost every public and private domain of human life. Below is a short review of the rights of women in Shari’a in the public and private spheres, with an emphasis on women’s rights in family life.


In personal status laws, while a man has the right to freely marry up to four wives under certain conditions, a woman, for her first marriage, needs the permission of her legal guardian -- her father or grandfather.

In inheritance, the general rule accords women only half of what men are entitled to with the same relationship to the deceased person.

In family matters, the man, as head of the family, has the authority and qawama (guardianship) over the woman. She has the duty to obey him and to abstain from anything that might contradict his control and guardianship. She also must obtain her husband’s permission to leave the house, travel, or engage in any kind of work or profession. The man could withhold maintenance for her disobedience.

Only a man may initiate divorce -- through a unilateral repudiation. And he need not provide any reason to justify it. On the other hand, the woman must obtain either her

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30 Qur’an, 4: 2-3. Although it is claimed that polygamy was partly allowed for the benefit of widows and orphans in Muslim societies, it violates the equality of genders before the law. See Towards an Islamic Reformism, supra note 2 at 176.
33 Qur’an, 4: 34. The discussion of the kinds and extents of Qawama in different readings of Qur’an is out of the object of this study. See Towards an Islamic Reformism, supra note 2 at 90 and 99-100; Abdullahi Ahmed An-Na’im, “Human Rights in the Muslim World: Socio-Political Conditions and Scriptural Imperatives, A Preliminary Inquiry” (1990) 3 Harvard H. R. J. at 37.
34 In some interpretations, the permission to leave the house is only for urgent issues, which is an orthodox understanding of the principle of hijab (veil) that, according to the majority of jurists, requires women to cover their hair and body except face and hands. See Qur’an, 24: 31 and 33: 33, 53, and 59. Also Toward an Islamic Reformation, supra note 2 at 99-100; Mawdudi, Purdah and the Status of Women in Islam, supra note 25.
35 Iranian women willing to travel abroad, should by law secure the permission of their husbands or legal guardians.
husband’s consent or a legal order on very specific grounds to get divorced.\textsuperscript{37} The custody of the children also goes to the husband at two years old for boys and seven years old for girls.\textsuperscript{38}

Women’s rights and positions in personal and family issues have resulted in even more restriction in public life. In fact, the dominant definition of a woman as a daughter, wife, or mother of a male, intrinsic to domestic-oriented laws of Shari’a, has long prohibited women from participating actively in social and public affairs. Moreover, women are disallowed to adjudicate as judges, nor to take part in the leadership of Muslim societies.\textsuperscript{39}

Regarding evidence, the woman’s testimony is not accepted at all in serious criminal cases which involve the application of certain \textit{hudud} and \textit{qysas}\textsuperscript{40} punishments. In other cases and civil subjects, the testimony of two women is equal to that of a man.\textsuperscript{41} In other words, if it took the testimony of two males to prove a case, the testimony of four

\begin{footnotesize}
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\item \textsuperscript{37} Qur’an, 2:226-32; \textit{An Introduction to Islamic Law}, supra note 16 at 163-4.
\item \textsuperscript{40} \textit{Hudud} (pl. of \textit{Hadd}) crimes are those prohibited and, under certain conditions, punished with defined mandatory punishments, and \textit{Quysas}, meaning equivalence or retaliation, is the punishment for murder and bodily harm, which is exact retaliation in the same way and by the same means. See Aly A. Mansour, “Hudud Crimes” and C. Bassiouni, “Quesas Crimes” in M. C. Bassiouni, ed., \textit{The Islamic Criminal Justice System} (New York: Oceana , 1982), at 195 & 203.
\item \textsuperscript{41} Qur’an, 2: 282.
\end{itemize}
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female or a male accompanying two female witnesses would be necessary to prove the same case.\textsuperscript{42}

In \textit{diya} (monetary compensation paid to surviving blood relatives of a victim), the general rule of Shari’a is that the \textit{diya} of a woman is half that of a man. In other words, a male murderer would not be retaliated (\textit{qysas}) for killing a woman unless her family pays him half a full \textit{diya} (\textit{diya} of a Muslim male) in advance.\textsuperscript{43}

\textbf{Rights of Women in Iran’s Constitutional and Legal System}

For the study of the application of Shari’ law in a Muslim country, one may examine the case of Iran where both personal status laws and public law are strictly based on Shari’a standards. The belief in the supremacy of Shari’a over all types of constitutional and other laws, and, thus, the necessity of applying Shari’a laws in every aspect of public and private life, is a major principle and characteristic of the Constitution of the Islamic Republic of Iran.\textsuperscript{44}

The Constitution has imposed Islamic standards and qualifications on the rights provisions, restricting their definition, scope, and application in order to accommodate those rights and liberties within an Islamic framework.\textsuperscript{45} Since the vague Islamic human rights standards and principles presented in the Constitution have never been defined, and the scope of these rights have not been clarified, the government could end or restrict at


\textsuperscript{43}Qur’an, 2: 179, 186; 5: 45; 6: 92, 94, and 135; Bassiouni, “Quesas Crimes” \textit{supra} note 40 at 203-209.

\textsuperscript{44}The Constitution of the Islamic Republic of Iran, 1979, amended in 1989, art. 4.

will rights and liberties approved even by Shari’a. The vagueness of Islamic qualifications would serve the government only to justify its conduct.⁴⁶

Concerning the equality of all citizens before the law, article 19 states:

The people of Iran, regardless of their ethic or tribal origins, shall enjoy equal rights; color, race, language and the like shall not be a cause for privilege.⁴⁷

This constitutional article deliberately excludes the equality of rights regardless of gender or religion. Because of the phrase “and the like”, the article is not exclusive. However, based on Shari’a qualifications, it certainly does not cover gender or religion. As pointed out, this could constitute grounds for denying equality in Shari’a.⁴⁸

Other rights provisions in the Constitution are also subject to Islamic restrictions. For example, Article 21 states that: “The government shall guarantee the rights of women in all areas according to Islamic standards.”⁴⁹

The constitutional articles have then been formulated in a way that accommodates Shari’a restrictions; any article must be interpreted according to these standards.

Muslim jurists and the proponents of Iran’s legal system, however, believe that Shari’a laws and their system do respect the principle of equality and guarantee equal...
protection under the law. The reason is that Shari’a theoretically acknowledges the rights of both men and women with regard to their social and family positions. In other words, it is the people’s role and position in the family and society that determines their specific rights and duties. In this system, men and women are equal in dignity and honor. This is derived from a philosophical view to human beings; but equal dignity does not lead to the equal rights. Therefore, men and women do not enjoy the equal rights. Muslim jurists believe that because of their physical, psychological, and emotional differences, men and women bear different responsibilities and duties in the family and society. This implies different rights. In this system, duties come first. Rights are granted to allow people to fulfill their duties in society; they enjoy rights as much as the society they live in can accommodate. For example, the inequality of the rights to inherit between men and women and the major role of man in the family are simply justified by the claim that the male gender has the duty to look after family needs.

This system, therefore, does not regard a woman individually but as someone attached to a man, be it her father, her husband, etc. It is the kind of relation to a man that determines a woman’s rights and requires the performance of her duties concerned. This


is why this system does not advocate discrimination against women through its general laws.\textsuperscript{54}

The reality, nevertheless, is that this theoretical consideration of human rights ignores a major philosophical point: Human rights are attributed to human beings individually and only because of their humanness, “as autonomous and separate persons, and not as components of family or community structure in a social context.”\textsuperscript{55} The modern theory of human rights considers rights prior to duties and responsibilities, regardless of family position or social status. It does not consider women’s rights conditional upon their family or social relations with men; nor does it consider physical and emotional differences between the sexes. It addresses the duties of human beings only after recognizing their basic and fundamental rights and freedoms.\textsuperscript{56}

One theoretical problem is that Shari’a laws and any system based on it cannot picture females out of their family or social contexts. They fall short of acknowledging and appreciating the philosophical foundations of modern human rights theory and standards, which ascribe human rights to individuals unconditionally.\textsuperscript{57}

In Shari’a and in Iran’s legal order, men and women are considered as two creatures who complete each other even in the field of human rights. They enjoy


\textsuperscript{55} \textit{Islam and Human Rights, Tradition and Politics, supra} note 2 at 47. See also Milne, \textit{Human Rights and Human Diversity, supra}, note 4 at 1-3; Jack Donnelly, \textit{The Concept of Human Rights} (London: Croom helm, 1985) at 1 and 9; and Jones, \textit{Rights, supra}, note 8 at 81.


balanced rights, not equal rights, to fulfill their duties together.\footnote{Mawdudi, \textit{Human Rights in Islam}, supra note 21 at 21-22; and Sajda Nazlee, \textit{Feminism and Muslim Women} (London: Ta-Ha, 1996).} This understanding contains a theoretical flaw from the perspective of the modern theory of human rights. It identifies women as second-class citizens, and deprives them from their internationally-recognized rights and liberties. Below, we will briefly highlight women’s rights in Iran’s legal system, where unlike what the Preamble of the Constitution claims, women do not “enjoy their rights proportionately more” \footnote{Ibid. art. 21.} than before. Of course, the detailed examination of these rights is beyond the scope of this study.

Article 21 of the Constitution enjoins on the government “the creation of an environment favorable to the personal growth of women, and to the restoration of their material and spiritual rights”\footnote{Ibid. art. 21.} according to Shari’a criteria. It also provides legal and social protection and welfare for mothers, widows, and old women.

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<th>Article 10 repeats the family theme stressed in the Preamble\footnote{The Preamble on women and the Constitution reads: “... with the restitution of the noble and respected duty of motherhood, to raise faithful persons, women will be in the vanguard and, in fact, the comrade of men in all aspects of active life...” \textit{ibid.} the Preamble.} and stipulates:</th>
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<td>The family being the fundamental unit of the Islamic society, all laws, regulations, and programs which pertain to it shall facilitate the establishment of the family. They shall safeguard the sanctity of the family and the stability of family relationships, based on Islamic laws and moral concepts.\footnote{Ibid. art. 10.}</td>
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Taken in isolation, these articles may well provide social and legal protection for families and women, in particular. The overemphasis on the family and motherhood,
nevertheless, leads one to think that, failing to acknowledge women’s individual rights, this system considers women only as mothers to bear children and wives to look after the family, not as active members in social and political life, particularly with regard to inequality of rights between men and women in public and private law domains.\footnote{Adele K. Ferdows, “The Status and Rights Women in Ithna Ashari Shi’i Islam” in Asghar Fathi, ed., \textit{Women and the Family in Iran} (Leiden: E. J. Brill, 1985) 13-36; Haleh Esfandiari, “The Majlis and Women’s Issues in the Islamic Republic of Iran” in Mahnaz Afkhami & Erika Friedl, eds., \textit{In the Eye of the Storm: Women in Post-Revolutionary Iran} (Syracuse: Syracuse University Press, 1994) 61-79; H. Esfandiari, \textit{Reconstructed Lives: Women and Iran’s Islamic Revolution} (London: John Hopkin’s University Press, 1997.)} 


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travel abroad.\textsuperscript{70} The Civil Code, however, recognizes her financial independence and her legal entity.\textsuperscript{71}

Despite some amendments in the marriage contract, the husband could easily initiate divorce unilaterally, and repudiate his wife without just cause; while the wife must apply for divorce in specific cases and through the court.\textsuperscript{72} Custody of the children also reverts to the father after age two for boys and seven for girls, automatically.\textsuperscript{73} A woman generally inherits only half the share of a man with the same relation to the deceased person.\textsuperscript{74} In addition, the husband can inherit from his deceased wife more than what his wife can inherit from him.\textsuperscript{75}

Family duties and responsibilities leave women little opportunity to participate in public or political life.\textsuperscript{76} Due to some openness in the political sphere, however, Iranian
women have become more active in social unions and the political arena. Legally, women are prohibited from participating in the leadership of the country, and the Constitution implicitly deprives women from running for presidential office. Although women have recently been welcomed by the Judiciary Branch, they are barred from serving as judges and are still not accepted to adjudicate or preside over a court.

All these articles in the Constitution, Civil and Criminal Codes, and other laws clearly contradict modern standards of human rights for women, as codified in different international covenants and documents of which Iran is a member. The constitutional and legal provisions also contradict various articles of the Convention on the Elimination of All Forms of Discrimination Against Women to which Iran is not signatory.

It should also be pointed out that, besides the legality of women’s rights and freedoms, there are historical and cultural factors that, in practice, have restricted women’s activities. Some of these are supported by legal provisions. The notion of \textit{hijab} is one example. Although it seems a purely religious or personal matter, it has

\begin{itemize}
  \item \textsuperscript{77} The constitution, \textit{supra} note 44 art. 115.
  \item \textsuperscript{78} The Act of the Selection of the Judges (1983), amended in 1995. Article 163 of the Constitution also stipulates that the conditions for the selection of judges are determined by Shari’a in which only men could serve as judges.
  \item \textsuperscript{80} Many Muslim countries that signed or ratified the CEDAW have entered several reservations to various articles, such as those that provide for the equality of men and women in all matters -- i.e., marriage and family relations, during the marriage, and upon its dissolution. See “Human Rights in the Muslim World” \textit{supra} note 1 at 265-67. Ayatollah Nasser Makarem-Shirazi, a leading conservative cleric, has recently denounced Iran’s ratification of a UN document that encourages more sex education for girls and condemns violence against women. He said: “I say it very clearly that it is religiously forbidden to adhere to these documents.” The document was adopted in the UN Conference in New York, in June 2000, held to review progress made since the 1995 Beijing Conference. See Agance France Presse, “Influential Cleric Opposes UN Document on Women” Tehran, June 24, 2000.
  \item \textsuperscript{81} The veil. According to Shari’a interpretation of the Qur’anic verses, the principle of \textit{hijab} requires women to cover their bodies and hair. The face and hands are generally excluded. See also generally Adele K. Ferdows & Amir H. Ferdows, “Women in Shi’a Fiqh: Images Through the Hadith” in Neshat, \textit{Women and Revolution in Iran}, \textit{supra} note 25 at 55-68.
\end{itemize}
been used to deprive Muslim women of social activities like sports.\textsuperscript{82} In certain Muslim
countries, the law compels women to comply with a narrow-minded interpretation of
Shari’a dress requirements. Consequently, women risk arrest, prosecution, and
punishment like flogging for not observing *hijab* regulations. Although a great number of
Muslim women would freely wear *hijab*, the use of force to ensure compliance seems to
contradict the official claims that it is merely reinforcing national cultural norms.

One may conclude that men and women, as Reisman points out, “symbolize
different aspects of human life and have separate rights and obligations.”\textsuperscript{83} This system
recognizes neither equality of rights nor the equal protection of men and women before
the law; whereas the natural equality of all human beings leads to the equality of all
before the law, and any discrimination on the basis of religion or gender runs against the
administration of justice and equality of all under the rule of law.\textsuperscript{84} The discriminatory
treatment of women results from Shari’a qualifications formulated in vague legal
provisions which restrict women’s rights and freedoms in public and private life. These
restrictions are in clear contradictions with international human rights standards.

**Problematic of Women’s Rights in Shari’a**


\textsuperscript{84} Iwe, *The History and Contents of Human Rights*, supra, note 12 at 360.
The rights of women is an obvious area of conflict between Shari’a and modern international human rights standards. In Shari’a, the equality of rights before the law, regardless of gender, is not recognized, and men and women do not enjoy equal rights. Universal standards of women’s rights lack precise equivalent in Shari’a and some generally accepted principles of Shari’a contradict corresponding principles of international human rights of women. Shari’a laws are hard to reconcile with modern norms of women’s rights, and their application would result in problems and shortcomings for women in Muslim societies. In fact, certain forms of discrimination against women are considered lawful, and women suffer from an inferior status. Concept of human being as private and individual, and individual rights in the sense of entitlements are not recognized, and Shari’a rights therefore are not human rights by international human rights standards; at most, they are legal rights held only as a result of one’s legal or spiritual status. The scope and extent of these rights are subject to Shari’a qualification, and are limited based on gender and faith which affect many human rights of women. International human rights theory, on the other hand, does not permit “religious criteria to override or circumscribe human rights.”

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87 Ann E. Mayer, “Universal Versus Islamic Human Rights: A Clash of Cultures or a Clash with a
The advocacy of a system of human rights in Shari’a is based on a confusion of human rights and human dignity. Of course, a concern for human dignity is central to Islamic ethical and legal tradition, and Shari’a’s social and political percepts “reflect a strong concern for human good and human dignity.” Many fundamental values and qualities concerning human honor and dignity have been indicated in religious sources, and basic human rights and values, such as the right to life, the right to individual freedoms, the right to justice, and the right to respect, and concepts such as equality of human being, are generally mentioned and blessed in those sources.

All these principles, nevertheless, have remained only general guidelines in Muslim communities, and have been considered as moral and religious values and recommendations with no specific legal sanction and judicial enforcement. They were never developed into legal provisions in a proper legal and judicial system. It may be plausible to say that Islamic law contains some elements of human rights, but, certainly, the concept of human rights as the individual’s claim against the state is not recognized. In Shari’a, individuals are situated in a given positions in a social context, and are seen as

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88 The study prefers Rhoda Howard’s definition of human dignity, as “the particular cultural understanding of the inner moral worth of the human person and his or her proper political relations with society.” “Unlike human rights, which are private, individual, and autonomous, human dignity is public, collective, and prescribed by social norms.” Rhoda E. Howard, “Dignity, Community and Human Rights” supra note 15 at 83. See also Rhoda E. Howard & Jack Donnelly, “Human Dignity, Human Rights and Political Regimes” (1986) 80 Am. Pol. Sci. Rev. at 805-7.


91 Amin Amin, Islamic Law and Its Implications for Modern World (Glasgow: Billing & Sons, 1989) at 57; and Sachedina, ibid, at 79-81.
components of family or community structures, rather than as autonomous and separate persons.

Muslim jurists and Shari’a advocates have always tried to justify Shari’a gender-biased laws by comparing them to women’s situation in pre-Islamic period (in case of personal issues); by referring to physical, mental, and emotional differences between men and women (in family matters); and by pointing to women’s different social duties and obligations which result in different rights (in public affairs). These reasons, the discussion of which is beyond the object of this study, fail to justify the great differences between the rights of men and women in Shari’a. The great social, economic, and political changes that occurred in human societies in modern times necessitate an alternative to the traditional male-centered approach of the past; respect for the principle of equality of genders before the law. Human rights are conferred on individuals because of their humanness, and not as a result of their duties and obligations to the family or social milieu recognized in Shari’a.

The conservatives ignored the structural aspects and critical points in the human rights debate, such as the equality of all human beings before the law, or wrongly

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92 Rahman, “The Status of Women in the Qur’an” supra note 25; al-Hibri, Women and Islam, supra note 26; Mawdudi complained that “the limited and conditional freedom that women had been allowed by Islam in matters other than home science is being used [in the work of Muslim feminists] to encourage the Muslim women to abandon home life and its responsibilities like the European women and make their lives miserable by running after political, economic, social and other activities shoulder to shoulder with men.” Purdah and the Status of Women in Islam, supra note 25 at 24.

93 In practice, most Muslim countries, keeping some elements of Shari’a system of personal status, have included many reforms improving the rights of women. See Islam and Human Rights, Tradition and Politics, supra note 2 at 114; “Human Rights in the Muslim World” supra note 33 at 2-6; Herbert L. Bodman & Nayereh Tohidi, eds., Women in Muslim Societies: Diversity Within Unity (Boulder, CO: Lynne Rienner, 1998); Shahin Gerami, Women and Fundamentalism: Islam and Christianity (New York: Garland, 1996); Freda Hussain, Muslim Women (London: Croom Helm, 1984); Sajda Nazlee, Feminism and Muslim Women (London: Ta-Ha, 1996); Barbara Stowasser, “Gender Issues and Contemporary Qur’an Interpretation” in Islam, Gender, and Social Changes, supra note 53 at 30-44.

understood and interpreted modern concepts of human rights and liberty. In fact, they tried to redefine and somehow Islamize the concept of human rights. For example, on the equality of human beings, Mawdudi stated that “Islam not only recognizes the principle of absolute equality between men irrespective of colour, race, or nationality, it makes it an important reality.” He makes no mention of gender and religion. Some Muslim feminists also select certain verses of Qur’an favoring the status of women while overlooking other verses and many traditions in sunna, “failing to take into account the ways in which the parts they select have been interpreted by Shari’a jurists.” This approach, as An-Na’im states, “is both simplistic and misleading.” It emphasizes the positive aspects of Shari’a, and overlooks the negative ones. To undertake any reform in Shari’a, a Muslim reformist should first be clear on what Shari’a is rather that what it can or ought to be.

One may conclude that women’s rights in Shari’a do not comply with, and violate, the principle of equality of rights for all human beings before the law. This inferior position affects women from early childhood and places before them many obstacles to proper socialization and active participation in public affairs. Any proper legal system should, first, conceptualize a woman as an independent individual and a person with

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95 Human Rights in Islam, supra note 21 at 21.

96 In contrast, article 2 of the Universal Declaration of Human Rights reads: “Everyone is entitled to all rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origins, property, birth or other status.” See the UDHR, supra note 18. See also “Muslim Voices in the Human rights Debate” supra note 6 at 603.

97 Ibid. at 40.

98 “Human Rights in the Muslim World” supra note 33 at 22.

99 Ibid.

rights separate from her status in the family. It must also legally guarantee these rights and freedoms in private and public life.

Reform Movement and Prospects

Muslim thinkers and scholars, seeking suitable solutions to the problems facing contemporary Muslim societies, have long been concerned about the inability of Shari’a to cope with the needs of modern life. In recent years, the issue of human rights has been the focus of numerous dissertations by Muslim reformists who have sought Islamic solutions by rendering Shari’a-sanctioned rights more compatible with modern standards and values. Pointing to the great social and political changes in modern societies, Muslim reformists demand the recognition of human rights as an entitlement of all human beings. By reevaluating Shari’a laws, rights of women in particular, and offering new interpretations of Islamic sources, they hope to reconcile Shari’a rights with international human rights standards. Of course, these efforts have been challenged by

103 Fazlur Rahman, for example, referring to women’s rights, states that “women’s inferior status written into Islamic law … is by and large the result of prevailing social conditions rather than of the moral teachings of the Qur’an.” Fazlur Rahman, “Status of Women in the Qur’an” supra note 25 in at 37.
traditional Muslim jurists and conservatives who either have rejected the modern idea of human rights or denied the presence of any significant difference between the two systems.¹⁰⁵

In practice, Muslim countries have adopted a pragmatic approach to legal systems. They have retained Shari’a laws in private matters, with some reforms in family law in order to improve women’s family and public rights. They have however distanced themselves from Shari’a public law, criminal law in particular. ¹⁰⁶ Nevertheless, fundamental human rights standards and the equality of all citizens before the law have not been fully observed. This study also argues that it should be, then, possible for contemporary Muslim jurists to undertake a similar process of interpretation and application of the sources in the present historical context, and to develop an alternative Islamic law, such as a human rights law, which is more compatible with modern life and appropriate for implementation today. Only then would Islamic law offer adequate solutions to resolve the problems and hardships facing Muslim societies in the modern era. In other words, Muslim thinkers and scholars could appreciate the impact of time upon the interpretation and application of those fundamental sources of the religion.


¹⁰⁶ Bielefeldt, “Muslim Voices in the Human Rights Debate” supra note 6, at 610-14; Joseph Schacht, An Introduction to Islamic Law, supra note 31 at 76-77; and John L. Esposito, Islam and Politics, 2nd ed. (Syracuse: Syracuse University Press, 1991) at 51.
These sources should be understood and applied in historical context as they address people in their human condition and circumstances as they change over time.\textsuperscript{107}

The present study argues that pragmatic solutions and some changes in legal practice are the only practical options available in Muslim societies. However, due to fundamental and explicit Qur’anic injunctions and their authoritative traditional interpretations, the efficiency of these modifications and adjustments remains limited. Moreover, pragmatic solutions serve temporarily and as short term remedies. They do not address fundamental and theoretical problems; nor do they provide structural solutions for major legal reforms. A fundamental reform in structure, principles, and standards is needed to provide an appropriate legal system that enforces universal norms and standards of human rights law. This essential and primary reform cannot, admittedly, be achieved within a Shari’a context. Its contradiction with universal human rights norms cannot be avoided. Any claim about its consistency with modern human rights law would be, legally speaking, problematic in theory and practice.

The study, therefore, suggests that such reform in legal system and human rights law could only be achieved through a broader religious and cultural initiatives based on cross-cultural foundations and dialogue among societies with different beliefs and backgrounds.\textsuperscript{108} Cultural reform would establish the appropriate grounds to address Shari’a’s restrictions and deficiencies in private and public subjects, as well as the

\textsuperscript{107} Sayeed argues that the response of socio-political Islam to modern necessities, and Western challenge in particular, “could be more effective if there were a systematic effort on the part of Muslim societies to reinterpret their values and traditions, and reorganize their political and economic institutions.” Khalid Bin Sayeed, \textit{Western Dominance and Political Islam, Challenge and Response} (New York: Oxford University Press, 1995) at 1. Also “Human Rights in the Muslim world” supra note 33 at 17; and \textit{Toward an Islamic Reformation}, supra note 2 at 297-99.

possibility of a new interpretation of religious sources which is more compatible with modern needs. Only religious dialogue among people of different convictions, especially scholars and intellectuals, could lead to a different and modern outcome which Muslims could regard as acceptable and legitimate. It may result in a different outlook on political structure and on people’s demand for constitutional democracy and guarantees of fundamental rights and freedoms. It also provides a forum to promote the equality of all human beings, not only in dignity and honor but rights and liberties as well. That is what makes Muslim community a pluralistic society where people are considered equal citizens, enjoying basic rights and freedoms. The key to this, as An-Na’im puts it, is “to convince Muslims that the other person with whom they must identify and accept as their equal in human dignity and rights includes all other human being, regardless of gender and religion.”

Such a change in Muslim attitudes may help enhance human rights norms. It is only after this change in perceptions that modern human rights will appear compatible with Muslims’ religious beliefs. Consequently, Muslim intellectuals need to illustrate the prospects of a modern life and to remove the religious and cultural obstacles to success.

This paper also proposes that any approach to human rights must first seek to establish and demonstrate how the basic human rights derive from, and are directly attributable to, the fundamental characteristics of the human personality. It should locate

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110 *Toward an Islamic Reformism*, supra note 2 at 180.

111 See Tibi, “Islamic law, Human Rights, Universal Morality and International relations” supra, note 104 at 298.
the objective foundations of human rights in reason, human dignity, and natural law, as noted earlier. From this perspective, human rights are not a religious matter. They are extra-religious and comprise those basic values that deal with all human beings equally, whether they are believers or not. Notions like justice, freedom and HR are generally defined on rational and intellectual grounds and cannot be determined by religious criteria and qualifications alone. Human rights could be applied only in a society where concept of individual has been introduced and well situated in its cultural patterns.