

HUMAN RIGHTS IN ISLAM

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INTRODUCTION

Conflicts between human rights and religion do exist. Is this true of Islam? The answer is not as simple as 'yes' or 'no'. Although an examination of human rights in an Islamic context will reveal its theocentric rather than secular and judicial basis,¹ this paper asserts that, notwithstanding (later) Islamic law interpretations to the contrary, (original) Islam is compatible with the modern notion of human rights. The fact that some Muslim countries have opted for Western constitutional models because of uncertainty as to what constitutes Islamic constitutional law clearly supports this assertion. On the other hand, because of the Western origin of modern constitutions, countries like Saudi Arabia have no formal written constitution.² Further support for an Islamic human rights culture is the fact that some Muslim countries have not only become signatories to and/or ratified³ international human rights instruments, but have even played an active role in the formulation of some of these instruments without acknowledging any conflict between Islamic law and human rights. Such participation and condonation signals compatibility with an Islamic human rights culture. Nonetheless, the fact that separate Islamic human rights documents have been formulated, indicates that this is not necessarily the case. In this paper, brief reference will be made to examples of both United Nations (UN) and Islamic human rights instruments to indicate how they differ from each other and some of the implications of these differences will be examined. Emphasis will be placed on the human rights of freedom of religion and equality.⁴

The problem pertaining to compatibility is further exacerbated by the

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1 K Taperell 'Islam and human rights' (1985) 56 *Australian Foreign Affairs Record* 1177 at 1178.

2 Cf Najma Moosa *An Analysis of the Human Rights and Gender Consequences of the new South African Constitution and Bill of Rights with regard to the Recognition and Implementation of Muslim Personal Law (MPL)* (unpublished LLD dissertation University of the Western Cape, 1996) 179-83.

3 Signing these documents indicates support for them while ratification means that states are bound by these instruments.

4 These rights will not be discussed in any detail. Cf Moosa op cit note 2 at 120-63.

fact that forty years of international human rights experience have not been able to resolve conflicts between human rights and Islamic law. Reasons for this include reservations placed on UN instruments by some countries and the fact that UN instruments themselves are problematic and have their share of inconsistencies.

In the final analysis, if there is something tantamount to human rights in Islam then it has to be ascertained which aspects of human rights are divine (Islamic) and which aspects are based on man-made interpretations of the primary sources of Islam (Islamic law). While the most conservative of Muslim religious authorities (Ulama) and the most liberal modernists do not deny that such a human rights culture exists, each perceives it from a different ideological perspective. Some conservatives even go so far as to claim that the Western notion of human rights has its origin in Islam, but they deny that Muslims can be subject to the very rights that the West has 'copied' from Islam.

ISLAMIC HUMAN RIGHTS: DO THEY EXIST?

The existence of Islamic human rights documents comparable to international human rights documents reinforces the idea that there is an Islamic human rights ethic. Nevertheless, there are views in favour of and against the existence of such a human rights ethic. These views can only be assessed after determining, albeit briefly, whether an equivalent human rights ethic exists in Islam and if so whether it conforms to, or is compatible with, the human rights principles espoused in international instruments. Furthermore, the actual practical position in various Muslim and non-Muslim countries also needs to be determined.

Islam⁵ versus Islamic law⁶

Traditional interpretations of Islam, namely, Islamic law govern personal laws and as a result these personal law codes conflict with the constitutions of Muslim majority and minority countries. While the constitutions of these countries guarantee equal rights to all citizens, the personal law codes privilege men over women in the areas covered by these personal laws

5 Islam evolved in the seventh century of the Christian era. During this time two of its primary sources developed. They are namely, the Qur'an (a religious text considered by Muslims to be the literal word of God) and Sunna (traditions) of Prophet Muhammad (received customs associated with him which are explanatory of and complementary to the Qur'anic text). Cf Moosa op cit note 2 at 14-17.

6 The Qur'an is separated from the classical formulation of Islamic law (Shari'a) by a process of legal development lasting more than two centuries. During this period Qur'anic norms underwent considerable dilution, often to the detriment of women. It is common for Islamic law, which is the conservative interpretation and application of the primary sources by early Muslim jurists, to be mistaken with Islam itself. There is a difference between Islam and Islamic law.

resulting in the inequality of the sexes.⁷ There does not, however, appear to be any Islamic justification for this state of affairs. The practice of Muslims today, as opposed to the spirit of equality in Islam as contained in its primary sources, discriminates against women.

Muslim Personal Law (MPL) is a religiously-based private law which has its origin in the Qur'an. It pertains to, among others, marriage, divorce, inheritance, polygyny, custody and guardianship and falls under the category of family law. Because of its divine origin one finds little or no change in various Muslim countries where personal codes remain governed by religion. Although minor reforms to MPL were introduced in the twentieth century, they have remained relatively conservative when compared with the secular commercial and criminal codes adopted by these countries. Moreover, it is interesting to note that all laws affecting the status of Muslim women have historically been relegated to MPL (the private sphere). This leads to the inference that discrimination against women is religiously based. However, reasons advanced for this discrimination include patriarchal (male interpretations of Islam in a male-dominated society), cultural and customary influences along with the influence of centuries of Islamic development and the refusal of some Muslim countries to reform. Furthermore, women's illiteracy and ignorance of the laws and hence their inability to use them has also been identified as contributing to the fact that the position of Muslim women today is less favourable compared to the status which early Islam in its true or original form (and the Qur'an) had conferred on them.⁸

Examples of MPL discrimination faced by women include polygyny and divorce. As far as marriage is concerned, Islam limited the practice of polygyny to four wives but with a strong directive towards monogamy.⁹ However, polygyny is restricted in Pakistan while Tunisia prohibits it. This reflects how Qur'anic interpretations can differ from country to country. As far as divorce is concerned, one of the five categories of divorce spoken of by Islamic jurists, known as the 'three-in-one' or triple divorce, is still the subject of much controversy among conservative and modernist Muslims. The triple divorce allows a husband to unilaterally divorce his wife in one sitting, making the divorce immediate and irrevocable. This practice appears to be contrary to Islam which introduced a (Qur'anic) waiting period, called *iddat*, the purpose of which is to effect reconciliation between the spouses and which implies equal participation by the spouses.

7 D Kandiyoti 'Introduction' in D Kandiyoti (ed) *Women, Islam and the State* (1991) 5.

8 N Honarvar 'Behind the Veil : Women's Rights in Islamic Societies' (1988) 6 *Journal of Law and Religion* 355 at 365; F Shaheed 'The Cultural Articulation of Patriarchy: Legal Systems, Islam and Women' (1986) 6 *South Asia Bulletin* 38 at 38; D C Gordan *Women of Algeria. An Essay on Change* (1968) 31; A A Engineer *The Rights of Women in Islam* (1992) v-vi.

9 Qur'an Chapter 4 verses 3,129.

The position in some Muslim and non-Muslim countries

A study of the historical background of Islamic constitutions will reveal that there is no real certainty as to what constitutes Islamic constitutional law.¹⁰ Some Muslim countries have therefore opted for Western models. This uncertainty has had dire consequences for Muslim women. Although all modern Islamic governments claim to entrench equality in their constitutions they rarely uphold these ideals in reality. This applies equally to 'reforms' to MPL.

Women are perceived in Muslim countries to have equality with men in public rights and duties, but not in the private sphere of the family, which is mainly or exclusively regulated by MPL. However, close examination of some of the constitutions and other pertinent legislation in some Muslim countries shows that even such professed equality in the public sphere is not always unqualified. In Egypt, for example, the conflict between MPL and the constitution has not been resolved. The 1971 Egyptian Constitution, as amended in 1980, provides for equality between the sexes but adds the qualification that the state will ensure women's equality with men only in so far as it does not conflict with the Islamic law in this regard.¹¹ This pattern is evident in, for example, Egypt, Algeria, Nigeria, India, Pakistan and Malaysia, although countries like Indonesia and Tunisia do depart from it.¹²

As detailed below, the same pattern of conflict is evident in UN human rights instruments to which these countries have either become signatories or ratified with reservations in so far as the provisions of equality in these instruments might conflict with MPL.

Islamic and international human rights instruments: some differences and their implications

While most Muslim countries are signatories to and have even ratified certain UN documents, it is not at all clear that these Muslim governments understand the rights contained in these documents in the same way as other countries nor that they would rank these rights in the same order of priority.¹³ For example, religious rights are interpreted in a way that is very different from a Western perception especially in so far as the rights of women are concerned. There is thus also a clear gap between states' verbal assertions of adherence to international law and their actual conduct in the area of religious freedom. There is, in other words, a clear discrepancy between the theory and practice of human rights. Even

10 Cf Moosa op cit note 2 at 75-82.

11 Articles 11, 40. Cf Moosa ibid at 204-5.

12 Cf Moosa ibid at 170.

13 D Hollenbach 'Human Rights and Religious Faith in the Middle East: Reflections of a Christian Theologian' (1982) 4 *Human Rights Quarterly* 94 at 94.

though human rights are legally recognized and guaranteed by states in their national constitutions, they are often limited by reservations or eliminated by legislation or treated arbitrarily in these states.¹⁴ Religion plays an important role in determining how these rights are interpreted, whose rights are important and which rights are given priority.

It is interesting to note that the human rights norms set out in international documents do not demand the separation of religion and state. There is also no reference to any theological basis for the existence of religious rights. These rights ought therefore not to be curtailed by reference to the requirements of a particular religion. The international documents merely allude to the basis of human rights by stating that they are based on the 'inherent dignity of the human person'.¹⁵ In this sense international instruments are acceptable to most Muslim countries. Twentieth-century human rights are based on, among other things, Western traditions of individualism. However, individualism is said not to be characteristic of Islam since the individual is conceived of as part of a greater whole or group.¹⁶ For this reason, rights contained in an Islamic system cannot be equated with rights as understood in international law.¹⁷ Human rights in Islam are said to be static.¹⁸ The language of human rights adopted in international documents differs from that contained in the scriptures of major religions including the Qur'an:

'The notion that religious language and human rights language can be translated into each other without distortion is highly doubtful . . . [the moral code advocated by these documents] prescind[s] from the cultural, ideological, and religious differences of the peoples of the world.'¹⁹

It is generally difficult to define human rights. They have, however, been defined ' . . . as those rights which are "held equally by all human beings" . . . independent of the economic, social, political, cultural or religious context in which they live.'²⁰ Although not absolute they are deemed to be universal, inalienable and enforceable against organized society as represented by government and its officials and not against God.²¹

14 L Levin *Human Rights. Questions and Answers* (1981) 12.

15 S A Burr 'The Principle of Religious Liberty and the Practice of States: Seek and Ye Shall Find a Violation of Human Rights Obligations' (1988) 6 *Dickinson Journal of International Law* 237 at 242.

16 A Pollis & P Schwab 'Human Rights: A Western Construct with Limited Applicability' in A Pollis & P Schwab (eds) *Human Rights. Cultural and Ideological Perspectives* (1979) 8.

17 Ann E Mayer *Islam and Human Rights. Tradition and Politics* (1991) 44, 47, 66.

18 M Khadduri 'Human Rights in Islam' (1946) 243 *Annals of the American Academy of Political and Social Science* 77 at 79.

19 Hollenbach op cit note 13 at 99.

20 Ibid at 94.

21 L Ackermann *A South African Bill of Rights: History and Current Thinking on Rights*. Forum Discussion on: 'A South African Bill of Rights' (1989) 8.

Islamic human rights instruments

There are many Islamic and Arabic human rights documents that can be compared to UN documents. Their development has, however, been slow and thus far only one such document has been enforced. These documents are said to represent a compromise of two extremes by asserting that Islam accepts human rights as long as they conform to Islamic standards. It is mostly these declarations that are used for comparison with international standards. The two extremes represent, on the one hand, Muslims who claim that Islam embraces international human rights standards and declarations and argue that these standards are universal because most Muslim governments participated in the formulation of these international declarations or subsequently ratified them. On the other hand, there are those who disagree with this view. The latter claim that these standards are not universal, are alien to and lack legitimacy in major cultural traditions and are incompatible with Islam and Islamic law.²² It provides only one interpretation of human rights and therefore may not be relevant to societies with a non-Western cultural tradition. In addition, it is pointed out that at the time of adoption of the Universal Declaration of Human Rights (UDHR), most third world countries were still under colonial rule.²³ Tibi²⁴ stresses the need for establishing cross-cultural foundations of human rights. He writes that there is no universal Islam but a variety of local Islamic cultures.²⁵ Tibi²⁶ is of the opinion that, although efforts by leading Islamic authorities (like the late A Mawdudi of Pakistan), institutions (like the famous al-Azhar)²⁷ and movements (like the London-based Islamic Council responsible for some of the Islamic documents) are regarded as the current Islamic contributors to establishing human rights schemes in Islam, '[t]he results of an analysis of these efforts are as shattering as they are disillusioning . . . [they] repudiate rather than embrace the standards of international human rights law.'²⁸

An example of an Islamic document is the Universal Islamic Declaration of Human Rights (UIDHR) proclaimed by the Islamic Council of Europe in Paris (not an Islamic city) in September 1981²⁹ (referred to as

22 Cf Mayer op cit note 17 at 29; A A An-Na'im 'Introduction' in A A An-Na'im (ed) *Human Rights in Cross-Cultural Perspectives. A Quest for Consensus* (1992) 3; D E Arzt 'The Application of International Human Rights Law in Islamic States' (1990) 12 *Human Rights Quarterly* 202 at 210.

23 Pollis & Schwab op cit note 16 at 1, 4; A Z Said 'Precept and Practice of Human Rights in Islam' (1979) 1 *Universal Human Rights* 63.

24 B Tibi 'International Relations and the Universality of Human Rights as a Background for Islam's Predicament with the Western Concept of Human Rights' (1992) 3 *Islam and Christian Muslim Relations* 58 at 58.

25 B Tibi 'The European Tradition of Human Rights and the Culture of Islam' in AA An-Na'im & FM Deng (eds) *Human Rights in Africa. Cross-Cultural Perspectives* (1990) 113.

26 Tibi op cit note 24 at 62.

27 Al-Azhar University in Cairo is considered to be the seat of Islamic learning.

28 Tibi op cit note 24 at 62.

29 E M Patel & C Watters *Human Rights. Fundamental Instruments and Documents* (1994) 163 n 2.

the 'Declaration of Human Rights'). On the surface it appears to resemble the UDHR but a closer examination shows that this is not the case. The UIDHR was prepared by representatives from countries like Egypt, Pakistan and Saudi Arabia and is generally a conservative document. It is considered to be the authoritative Islamic statement on human rights which it places in a religious and not a social context.³⁰ It can be compared to the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (1979)³¹ and from if one can gauge the status of Muslim women. Its purpose, as set out in its preamble,³² is to establish an Islamic order in which all humans are equal. It purportedly grants equality in virtually all spheres but it does not mention *religion* as a sphere of equality and yet, interestingly, it relies on the Qur'an, which emphatically states that both sexes are equal in the eyes of God,³³ and Sunna as its guidelines. It is therefore inspired by the primary sources (divine origin) of Islamic law in contrast to the secular nature (human origin) of the UN documents.³⁴ There are also differences between its English and Arabic versions and inconsistencies between them.³⁵

A second Islamic human rights document is the Cairo Declaration on Human Rights in Islam, adopted by Member States of the Organization of Islamic Organization in Cairo in 1990.³⁶ Article 19 states that all individuals are equal before the law but Article 24 limits this by stating that '[a]ll the rights and freedoms stipulated in this Declaration are subject to the Islamic *Shari'ah* [law]'. Article 10 on religion stipulates that '... [i]t is prohibited to exercise any form of compulsion on man ... to convert him to another religion. . .'. No mention is made of him being able to voluntarily change his religion. As far as the right to religious freedom is concerned, it has been contended that Muslims must uphold the right to freedom of belief since Islam itself began by inviting (and not coercing) people to embrace it on the merits of its rationality and truth, thereby giving them a choice in the matter.³⁷ Some of the Qur'anic injunctions in this regard clearly imply that God does not need people to believe in him but it is people who are in need of God and

30 Tibi op cit note 25 at 117.

31 By March 1996 CEDAW had been signed by 97 countries and ratified by 152 countries representing peoples from all cultural and religious backgrounds in the world.

32 At g-i.

33 Cf note 51.

34 S A Aldeeb Abu-Sahlieh 'Human Rights Conflicts between Islam and the West' (1991) 25 *Comparative Law Review* 17 at 25.

35 Cf Mayer op cit note 17 at 27, 98.

36 Patel & Watters op cit note 29 at 170 n 12.

37 M H Kamali 'Freedom of Religion in Islamic Law' (1992) 21 *Capital University Law Review* 63 at 65.

further that there be no compulsion in religion.³⁸ However, on the basis of Islamic law interpretations, a Muslim is not allowed to change his faith as apostasy is deemed to be against a major religious tenet of the Islamic faith. In Islamic instruments the right to change religion to or be without one is not a human right. This appears to also be the case in international instruments and Muslim states³⁹ (although there were differences of opinion among their representatives) have had a hand in developments to this effect.⁴⁰ It is also surprising that, taking into consideration the different types of relationships that exist between states and religious communities in the world today, the states participating in the formulation of the freedom of religion article were able to reach consensus or compromise to create a common formula.⁴¹

UN documents on human rights

While a detailed review of international human rights documents and the development of international human rights concepts is necessary to understand fully, the position of human rights in Islam and differences between them, such a review falls beyond the scope of this paper. Brief reference will, however, be made to UN instruments to gain some clarity and further highlight some of these differences.

Examples include the UN Charter (1945), which embodies the mandate and principles of the UN, and which is binding on all Muslim countries which are UN members.⁴² Article 1(3) refers to international co-operation in promoting human rights for all without distinction as to, amongst other things, sex or religion. The human rights that Muslim countries must respect and promote include those set out in the UDHR⁴³. The UDHR, unlike the UN Charter, is not in itself a legally binding document. However, it is considered to have become mandatory for at least those states who have shown support for it by signing it and is said to constitute evidence of the interpretation and application of the relevant provisions of the UN Charter.⁴⁴ The UDHR was created by religious as well as secular leadership.⁴⁵ Its content is, however, regarded as controversial in the Muslim world. Alternative Islamic declarations

38 See Q.35:15; 2:256; 2:257; 10:99; 18:29.

39 The right to change one's religion or belief is also specifically excluded from the scope of the right to freedom of religion right in the Constitution of the Republic of South Africa, Act 108 of 1996.

40 Cf Moosa op cit note 2 at 135.

41 K J Partsch 'Freedom of Conscience and Expression, and Political Freedoms' in L Henkin (ed) *The International Bill of Rights. The Covenant on Civil and Political Rights* (1981) 210.

42 A A An-Na'im 'Religious Minorities under Islamic Law and the Limits of Cultural Pluralism' (1987) 9 *Human Rights Quarterly* 1 at 6.

43 Cf note 30.

44 Pollis & Schwab op cit note 16 at 6.

45 R Traer *Faith in Human Rights. Support in Religious Traditions for a Global Struggle* (1991) 182.

confirm this. The human rights contained in the UDHR are subject to limitations which are consistent with the principle of non-discrimination (Articles 29-30).⁴⁶ Article 16(1) of the UDHR requires equal rights for women and men at the time of marriage, during marriage and at its dissolution. However, '[a]ttitudes in respect of marriage differ and family laws are often based on specific religious, cultural and social patterns. The rights are stated but their protection is not uniform.'⁴⁷

A Muslim country would, for example, construe the contents of Article 16 as conflicting with the provisions of its religiously-based MPL. For this reason family law (with its different jurisprudential interpretations as well as its inherent discrimination in, for example, the areas of marriage and divorce) is almost always exempt from constitutional scrutiny. In other words, family law and all of its related problems and discrimination are endorsed by the very same constitutions which simultaneously guarantee rights to freedom of religion *and* equality notwithstanding their conflict with each other. Thus, irrespective of the fact that there is much Qur'anic legislation protecting the rights of women in the context of marriage, women can never claim equality with their husbands.⁴⁸ This would be the case even though the Qur'an also teaches that men and women are equal in the eyes of God.⁴⁹ It is felt that a liberal and not literal construction of Article 16 would provide the solution.⁵⁰ It seems, however, that one cannot construe this Article liberally without doing so literally.⁵¹ Article 7 of the UDHR states that:

'All are equal before the law and are entitled without any discrimination to equal protection of the law'.

However, in most Islamic declarations and constitutions women are granted 'equal protection by the law' but this does not necessarily imply that they are 'equal before the law'. Some authors on human rights believe that the UDHR is compatible with Islamic values and principles formed by the conditions of modern society while others reject it as being incompatible with seventh-century normative Islamic prescriptions.⁵²

Of particular interest is the right to freedom of religion which has had

46 An-Na'im op cit note 44 at 7.

47 Levin op cit note 14 at 65.

48 Cf Q.4:19; 24:33; 2:187; 9:71; 7:189; 30:21; 4:4.

49 Q.3:195; 4:124; 9:71-72; 16:97; 33:35; 40:40; 49:13. Cf notes 91, 92.

50 M Z Khan *Islam and Human Rights* 4 ed (1989) 90-1.

51 See Article 16 (1) of CEDAW in S Wright 'Human Rights and Women's Rights: An Analysis of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women' in K E Mahoney and P Mahoney (eds) *Human Rights in the Twenty-first Century. A Global Challenge* (1993) 84. Cf note 32.

52 A K S Lambton 'Introduction' in K Ferdinand and M Mozaffari (eds) *Islam: State and Society* (1988) 8; J Hjärpe 'The Contemporary Debate in the Muslim World on the Definition of Human Rights' in K Ferdinand & M Mozaffari (eds) *Islam: State and Society* (1988) 27.

global relevance since the drawing up of the UDHR. Article 2 of the UDHR states that:

'[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as . . . sex [and] religion.'

However, when religion (including Islam) is regarded as normative for society and a system of jurisprudence is deduced from it as is the case in Islam then it is inevitable that in order to give effect to the right to freedom of religion such right must be interpreted to include the right not to be treated equally before the law. In this way, different laws apply (at least in part) to individuals according to their religious affiliation. For example, traditional interpretations of Islamic law differentiate between the status of Muslims and non-Muslims and between men and women.⁵³ UN instruments themselves are also problematic. For example, both the UN Charter and UDHR provide equally for religious and women's rights (equality) but neither document foresees a potential conflict between these two kinds of rights. Since the drafting of the UN Charter, the UN has been committed, 'at least as a matter of rhetoric', to equality between the sexes.⁵⁴ However, the division of rights in these international instruments, into categories and definitions, poses a theoretical barrier to the accurate definition of women's rights as part of 'human' rights, which definition is needed to ensure the effective implementation of these rights.⁵⁵ This reflects the marginalization of women's rights in all international instruments. Their effectiveness is further hindered by weak implementation processes and the lack of enforcement mechanisms. While purportedly being binding on member states, in reality the UN Charter omits the power to enact and enforce laws.⁵⁶

The fact that a separate UN instrument, CEDAW, had to be created to deal specifically with women is representative of the failure of general human rights law to deal adequately with women's issues. Modern Muslim and non-Muslim countries (for example, Egypt and India, respectively) have either ratified or become signatories to CEDAW, albeit subject to reservations placed on certain Articles where they conflict with MPL. It appears as if the UN's goal of equality between the sexes can never come to fruition in Muslim countries as it is inconsistent with the traditional interpretations of Islam practised today in these countries and which disadvantage women.

Conflicting views of authors

Authors on human rights in Islam, Muslim and otherwise, present ambivalent views which go from one extreme (conservative) to another

53 Hjärpe *ibid* at 29.

54 Wright *op cit* note 53 at 76.

55 *Ibid* at 77.

56 Article 2(7).

(modernist).⁵⁷ Some critics are of the opinion that there is no notion of individual rights in Islam.⁵⁸ Arzt⁵⁹ argues that the fact that an individual has only duties as opposed to rights in Islam must be viewed as reflective of the 'rejection of individualism in favor of communalism'. On the other hand, some Muslims advocate strongly that Islam entrenches and protects human rights as well as the rights of religious minorities.⁶⁰ While, theoretically, this might be the case, historically or culturally it does not appear to be so because 'Muslims don't respect their own Holy Book [Qur'an], as they pretend, particularly in the field of human rights'.⁶¹ This is especially due to patriarchal interpretations of Islamic sources.⁶² A number of these Muslim scholars who maintain that human rights exist in Islam also believe that there is no fundamental inconsistency between universal human rights and Islam except in respect of some rights of equality to be accorded to, among others, women.⁶³ The approaches used to reach this conclusion are, however, much less consistent. One view assumes that scriptural sources are found for all universal rights which, according to this view, have in any case always existed in Islam.⁶⁴ A second view is that modern secular states must be ruled by secular law including bills of rights but that religious law must be confined to family matters.⁶⁵ A third and radical view maintains that historical Islamic law (a man-made construct and not Islam as such) is neither sacred nor relevant to modern Muslim society. What is of more importance is the need to find ways in which Islamic polities can formulate and adapt human rights so that they can be both meaningful and useful to ordinary people.⁶⁶

Non-Muslim authors are labelled 'critics' by some Muslims because they question the existence of Islamic human-rights concepts. These authors believe that such concepts developed after Western and international human-rights models were already in existence and that allegedly authentic Islamic human rights documents are patterned in form and substance on international instruments. They claim that the notion of human rights has a Western origin dating back to the seventeenth century. Certain Muslim authors are also of this opinion and concur

57 Cf Mayer op cit note 17 at 52-7.

58 Cf J Donelly 'Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights' (1982) 76 *American Political Science Review* 303 at 306.

59 Arzt op cit note 22 at 206.

60 E Mortimer 'Islam and human rights' (1983) 5 *Index on Censorship* 5 at 5.

61 Cf Aldeeb Abu Sahlieh op cit note 35 at 18.

62 Cf Mayer op cit note 17 at 142.

63 Cf Taperell op cit note 1 at 1177, 1184.

64 M S Omar 'Foundational principles underlying Human Rights in Islamic Law' (1991) *De Rebus* 661 at 661.

65 J C N Paul 'Islam and the State: The Problems of Establishing Legitimacy and Human Rights' (1991) 12 *Cordozo Law Review* 1057 at 1067.

66 Ibid at 1068.

with the arguments of their non-Muslim counterparts.⁶⁷ Other Muslims (labelled apologists), believe that Islam indirectly influenced the early stages and continued development of international human rights law.⁶⁸ If this is the case then why are there obstacles in implementing internationally recognized human rights in Muslim majority countries?⁶⁹

The conservative and modernist views of authors on human rights can be summed up as follows: Brohi,⁷⁰ who reflects essentially conservative views, writes that Muslims have a dual obligation to discharge. It embraces duties like prayer (the rights of God (Haqooqullah)) and duties that regulate relationships between men and also between man and state (the rights of society (Haqooq-un-Nas)). Therefore there are no human rights as all rights belong to God, while men have only human duties. The rights men have against other believers are seen as 'derivative rights' as they derive from the believer's primary duty to God while human rights in the Western sense requires a corresponding duty on the part of state to enforce those rights.⁷¹ While Brohi⁷² is of the opinion that Islam and secular Western philosophies do not have much in common, he measures Islamic views on human rights by using rights set out in the international human rights documents as the norm.⁷³ Arzt⁷⁴ says that in Islam "rights" are but the corollaries of duties owed to God and other individuals'. Amin⁷⁵ is of the opinion that only the rights of society (Haqooq-un-Nas) relate to human rights as understood in modern legal systems. Tibi⁷⁶, who adopts a liberal approach, thinks that in order to establish human rights as individual rights in Islam would be 'tantamount to *introducing the concept of rights and to shift away from the concept of duties*. To achieve this, drastic religious-cultural reforms are required.'

He maintains that cultural obstacles stand in the way of establishing human rights standards in Muslim countries.⁷⁷

67 Tibi op cit note 24 at 58; Mortimer op cit note 62 at 5.

68 Cf Mayer op cit note 17 at 45, 47, 53-6; Paul op cit note 67 at 1067-8; A A Mawdudi *Human Rights in Islam* (1977) 11-12; M K Nawaz 'The Concept of Human Rights in Islamic Law' (1965) 11 *Howard LJ* 325 at 326.

69 Nawaz ibid at 325.

70 A K Brohi 'Human Rights and Duties in Islam. A Philosophic Approach' in S Azzam (ed) *Islam and Contemporary Society* (1982) 231.

71 Brohi does not deliberately use the word 'men' as excluding people or Muslims in general. Brohi ibid at 233, 235.

72 Ibid.

73 Cf Taperell op cit note 1 at 1177.

74 Arzt op cit note 22 at 205.

75 S H Amin *Islamic Law in the Contemporary World: Introduction, Glossary and Bibliography* (1985) 30.

76 Tibi op cit note 24 at 62.

77 Ibid at 64.

The Islamic and Western views on human rights are contrasted and measured by using international (Western) human rights documents as the norm.⁷⁸ This is said to lead to unfair evaluations and assumptions as far as Islamic notions of human rights are concerned because they are being judged in terms of Western standards. However, Muslims themselves use these documents as a basis of comparison or the yardstick by which to measure Islamic notions of human rights.

Muslim countries have placed restrictions on human rights despite some of them being treated as 'absolute' in international instruments. The degree of toleration of, as well as restrictions on, freedom of religion varies from country to country as does the degree of interference in or control of ecclesiastical affairs.⁷⁹ Many practices, including interpretations of Islamic law, social customs, as well as internal and external factors or determinants influencing women's status, have contributed to this state of affairs and it is women who usually suffer the most in this regard. In countries where Muslims are a religious minority, developing an interest in secular constitutionalism and respect for universal human rights is often the norm. This is particularly noticeable in the younger generations of secular, educated Muslims. It is interesting to note that most of the influential works in these areas are written by Muslims who are not themselves members of the Ulama or religious establishment.

Non-Muslim and Muslim authors rely on the primary sources of Islamic law, namely the Qur'an and Sunna, in seeking direct counterparts for or rejections of modern human rights norms. This must inevitably lead to a respect for human rights within the Muslim community which in turn may pave the way for an equitable adaptation of Islamic law to suit the constitutional order of the pluralist state and result in the improvement in the status of Muslim women.⁸⁰ The reality is that there are markedly different social groupings within the Muslim community. There are those who lead an essentially secular existence in the public sphere and those who reject these secular influences as un-Islamic. As a consequence '[w]omen are . . . caught up in these cross-currents of change and reaction'.⁸¹ It is interesting to note that even the most conservative Muslims are 'secular' in their daily lives, professions and basic needs. While they may practice 'material modernity' they reject 'intellectual modernity'.⁸² It is of little consequence whether or not a devout Muslim accepts human rights concepts detailed in international instruments ' . . . as having validity as an expression of collective human idealism or

78 Cf Mayer op cit note 17 at 53, 196; Arzt op cit note 22 at 202-3.

79 R P Dhokalia 'The Human Right to Religious Freedom: Problems of Definition and Effective Enjoyment' (1986) 1 *Calabar LJ* 90 at 100.

80 Cf Paul op cit note 67 at 1058.

81 Ibid at 1062.

82 Lambton op cit note 54 at 6-7.

as deriving legitimacy from religious teachings . . . provided that the concepts attract universal acceptance.⁸³

It is said that '[i]n the Islamic view human rights are universally true, and yet implementation of these rights may require various forms. . . As law reflects the achievements of society so too the 'rightness' of human rights is determined by time, place and experience.'⁸⁴ Whether this would constitute a modernist viewpoint (and therefore an unacceptable viewpoint in terms of Islamic law) will be determined from the discussion below. Emphasis is placed on the dignity of the individual.⁸⁵ There are authors, Muslim and otherwise, who are of the opinion that dignity is often confused by non-Western Islamic societies as being equivalent to human rights.⁸⁶

Many (though not all) Muslims confuse a reliance on the right to freedom of religion in its fullest sense to ultimately mean freedom from religion.⁸⁷ In other words, they believe that, if giving practical effect to freedom of religion entails deviating from Islamic principles, it would be tantamount to claiming freedom from religion (Islam) itself. In other words certain interpretations or practices are deemed to be denied within the religion itself. This could be viewed in both a negative and positive way. So, for example, if a group of Muslims was to interpret Islam in a particular (modernist) way in a conservative Muslim state, this freedom could be negatively viewed as antagonistic to Islam (and the state of course). On the other hand if freedom of religion in terms of Islamic law is deemed to preclude the right to change one's religion or belief such conversion cannot be condoned by Muslim countries and therefore from a religious perspective their restriction of this right is viewed positively. International documents have not convinced Muslims and governments otherwise and the reality is that the ' . . . meaning of human rights will be shaped more by people than by the rules of language or logic'.⁸⁸

In assessing these conflicting views it becomes clear that the Islamic reaction to the Western challenge concerning human rights has evoked varying responses all of which have failed to address effectively this challenge. If we, for example, look at the status of Muslim women we see that the Qur'an⁸⁹ emphatically states that God not only created the sexes of like nature, manner and substance but that they are also equal in the sight of God.⁹⁰ The Qur'an does not make a distinction between men

83 Taperell op cit note 1 at 1178.

84 Traer op cit note 47 at 123.

85 Said op cit note 23 at 63.

86 Cf Donnelly op cit note 60 at 303; Tibi op cit note 24 at 58.

87 Traer op cit note 47 at 199.

88 Ibid at 208.

89 Cf Q.4:1; 7:189; 16:72; 42:11. Cf note 51.

90 Cf Q.3:195; 4:32; 4:124; 16:97(8); 9:71-2. Cf note 51.

and women in the process of creation, in its purpose, or in the reward promised in it. While we need not abandon the classical formulation of Islam (Islamic law) because the principles of justice which it espouses remain constant, the problem remains a failure to acknowledge that the application of these principles cannot remain constant in a changed context such as ours. We cannot speak of 'purely' religious or secular discourse about the rights of women or any other human right for that matter because the two interact and overlap so much in practice.

While conceding that Qur'anic exegesis has been used in mitigation or disapproval of various views on human rights, it would appear that ultimately it is not really a question of the Qur'an and its correct interpretation but rather the extent to which the above authors approve of Western ideas on human rights.

CONCLUSION

Forty years of UN experience have not resolved potential conflicts between human rights like freedom of religion and equality. Furthermore, the fact that Muslim countries pay lip-service or practise double standards with regard to these human rights by placing constitutional reservations, emphasizes that ultimately the protection offered by these instruments becomes meaningless as they cannot compete with political expediency and cultural ramifications. This serves to highlight the fact that politics and culture (not necessarily Islamic) are the main impediments to the practical application of human rights and instruments in Muslim countries. Thus, even though the reverse ought to be the case, factors like law, politics and religion clearly influence the measure and application of human rights in states. The concept of human rights, therefore, has unmistakable political implications. These implications are used to justify the application of human rights by both Western and Muslim countries to the detriment of, among others, women. Nevertheless these types of implications do not detract from the validity of such rights. They do, however, emphasize the differences between state and individual interests.

Muslim governments have been active in drawing up and supporting UN instruments although acceptance of these instruments is always made subject to the caveat or reservation that their obligations be compatible with principles of Islamic law. In this sense, Muslim governments and cultures have proven themselves to be the measure of human rights and not vice versa as should have been the case. Whether in a Muslim or non-Muslim state, this gives rise to identity problems as Muslims have to deal with the dual identity of being Muslim and citizen.

Repudiating international human rights norms as 'an exotic Western luxury', or as a 'Euro-Christian-modern-secular' yardstick which emerged from a particular human experience and to which an Islamic culture under the pretext of Islamic law therefore cannot be expected to

measure up to is often a matter of expediency, based on self-interest, on the part of some governments.⁹¹ Today, Muslim governments readily consult public international law in their international relations but not in their internal affairs. The standards proclaimed in the UN documents are not being realized in the majority of Muslim and non-Muslim states. Muslim governments should become more responsive to their aspirations of having international instruments observed in their countries where it appears that rights contained in these instruments are merely illusory and theoretical especially in so far as their application to women is concerned. Social, cultural and economic factors should not stand in the way of uniformity. It must be remembered that human rights still belong to people even though the laws of their own countries do not recognize or protect them.

Although these general conclusions are drawn from international experience, South Africa as a member of the UN and with a Muslim population of approximately half a million for whom these issues are important, should take note of them. There is no easy solution to the problems experienced with both UN instruments and Islamic law. It is doubtful that a reconciliation between Islamic law and international human rights norms can be accomplished in the near future. Any attempt at reconciliation would either require a total rejection of Islamic law or a total reconstruction of it – steps that have as yet not been, and probably never will be, taken. The South African government has, however, taken a firm stand in this regard. It has supported and ratified various UN instruments and, furthermore, constitutionally committed itself to upholding the provisions of these instruments. For example, in terms of s 15(3)(b) of the 1996 Constitution, MPL, or any other personal laws for that matter, can only be recognized subject to the provisions of the Constitution and its Bill of Rights in particular. While provisions of this nature are not necessarily un-Islamic and in conformity with an Islamic conception of human rights, this paper has shown that there are disagreements among Muslim scholars.

There is a maxim which says ‘there can be no *ijtihad* [in this context meaning re-interpretation of ancient texts] in any matter covered by a text’. It is postulated that, on the basis of this maxim, Islamic law cannot be amended to remove all discrimination against, among others, women.⁹² This does not mean that such a process of formulating an equitable Islamic law of human rights from a number of sources has not been

91 Ann E Mayer ‘Current Muslim Thinking on Human Rights’ in A A An-Na’im & F M Deng (eds) *Human Rights in Africa. Cross-Cultural Perspectives* (1990) 136-7; Mayer op cit note 17 at 206.

92 A A El Naiem ‘A Modern Approach to Human Rights in Islam: Foundations and Implications for Africa’ in C E Welch & R I Meltzer (eds) *Human Rights and Development in Africa* (1984) 83.

given any consideration. Ideas put forward by academics like the Sudanese An-Na'im who advocates solutions from within Islam and who has frequently been referred to in this paper, is testimony to this.⁹³

Tibi⁹⁴ is of the opinion that '[u]nless Muslims change their world view and the cultural patterns and attitudes related to it, the conflict between Islamic human rights and international human rights standards will continue to prevail . . .'

While there is really no such thing as Eastern and Western human rights, there is no doubt that deeply held religious or cultural beliefs and practices may violate other human rights to a large extent. Mayer⁹⁵ sums up the current position thus:

' . . . [W]hen Muslims present ideas on rights that are similar to modern, Western ones, these should not be dismissed out of hand on the theory that any similarities to Western ideas mean that the ideas are inherently "un-Islamic" or that their proponents are necessarily alienated from their own tradition. It would be particularly hard to justify dismissing one segment of Muslim views on rights as insufficiently "Islamic" in character in the face of the dissension among Muslims on where the Islamic tradition stands on rights issues.'

Finally, the fact that there is a sore lack of a human rights culture in Muslim societies certainly does not mean that Islam does not possess an ethos of human rights. Islam, albeit a duty-based moral system, is compatible with the modern notion of human rights, notwithstanding Islamic law and other assertions to the contrary.

93 'An-Na'im is a . . . Muslim scholar who stresses equally his Islamic identity and his adherence to international human rights standards. [He] is aware of the European origins of the modern concept of individual human rights and acknowledges the conflict between the call for an implementation of the Islamic shari'a [law] and the universally accepted human rights standards. . . He operates on the premise that Islam is in substance compatible with Western human rights legal norms if interpreted correctly.' Tibi op cit note 24 at 58-60.

94 B Tibi 'Islamic Law/Shari'a, Human Rights, Universal Morality and International Relations' (1994) 16 *Human Rights Quarterly* 277 at 296.

95 Cf Mayer op cit note 93 at 146.