

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

Reza Eslami-Somea*

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.

*Assistant Professor, Faculty of Law, Shahid Beheshti University, Tehran, Iran.

¹ See generally Abdulaziz Sachedina, *The Islamic Roots of Democratic Pluralism* (New York: Oxford University Press, 2001); Boubker Jalal Bennani, *L'islamisme et les droits de l'homme* (Lausanne: L'Aire, 1984); William Montgomery Watt, *Islamic Fundamentalism and Modernity* (London: Routledge, 1988); and Martin E. Marty & R. Scott Appleby, eds., *Fundamentalism and Society* (Chicago: University of Chicago Press, 1993).

² See A. Ahmed An-Na'im, *Toward an Islamic Reformation; Civil Liberties, Human Rights, and International Law* (Syracuse: Syracuse University Press, 1990); and Ann Elizabeth Mayer, *Islam and Human Rights, Tradition and Politics* (Boulder, CO: Westview Press, 1991).

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.³ 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.⁴ Although the idea of human rights is a moral one and has a supreme moral importance, the modern concept of “human rights”⁵ constitutes legal and political standards providing “an ideal basis on which to conceptualize and organize a human community.”⁶ 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...”⁷

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.⁸ Although human rights are justifiable through a valid moral

³ See Leszek Kolakowski, *Modernity on Endless Trial* (Chicago: University of Chicago Press, 1990) at 214; Michael Perry, “Is the Idea of Human Rights Ineliminably Religious?” (1993) 27 *University of Richmond L. Rev.* at 1024; Alan S. Rosenbaum, ed., *The Philosophy of Human Rights, International Perspectives* (Westport, Connecticut: Greenwood Press, 1980) at 5; and Alison Dundes Renteln, *International Human Rights, Universal Versus Relativism* (London: Sage, 1990) at 17-18.

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.

⁵ The expression “human rights”, rarely used before the end of the Second World War, appeared in both the Dumbarton Oaks proposals and the Charter of the United Nations, and later in the Universal Declaration of Human Rights. See *No Distant Millennium, ibid.* at 21

⁶ Rosenbaum, *The Philosophy of Human Rights, International perspective, supra*, note 3 at 5. See also Heiner Bielefeldt, “Muslim Voices in Human Rights Debate” (1995) 17 *H. R. Quart.* at 591; and M. Patenaude, *Droits et libertés de la personne* (Sainte-Foy, Que.: Les Presses de l’Université Laval, 1997).

⁷ Jack Donnelly, *The Concept of Human Rights* (London: Croom Helm, 1985) at 32. See also David P. Forsythe, *The Internationalization of Human Rights* (Toronto: Lexington Books, 1991) at 1 and 14.

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.⁹ Human rights then differ from benefits and privileges as well as duties and obligations; they do not correspond exactly to claim-rights either.¹⁰ Human rights, in any proposed list, are considered inalienable, interdependent, and indivisible.¹¹

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.¹²

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.¹³ In this sense, then, its Western origin as well as the argument that human rights are Western cultural imposition are largely irrelevant.¹⁴ As An-Na'im

Chicago Press, 1982) at 1 and 41; Milne, *Human Rights and Human Diversity*, *supra* note 4 at 1-3; *The Concept of Human Rights*, *ibid.* at 1 and 9; Jones, *Rights* (New York: St. Martin's Press, 1994) at 81; Jack Donnelly, "Human Rights and Human Diversity: An Analytic Critique of Non-Western Conceptions of Human Rights" (1982) 76 *Am. Pol. Sc. Rev.* at 304.

⁹ See Jack Donnelly, *International Human Rights, Dilemmas in World Politics*, 2nd ed. (Oxford: Westview Press, 1998) at 19; and J. Donnelly, *Universal Human Rights in Theory and Practice* (London: Cornell University Press, 1989) at 9.

¹⁰ See Perry, "Is the Idea of Human Rights Ineliminably Religious?" *supra* note 3 at 1027; and Jones, *Rights*, *supra* note 8 at 14 and 26.

¹¹ See *Universal Human Rights in Theory and Practice*, *supra*, note 9 at 21 and 28.

¹² See Walter Kasper, "The Theological Foundations of Human Rights" (1991) 34 *Catholic Lawyer* at 256 and 261; Nwachukwu S. S. Iwe, *The History and Content of Human Rights: A Study of the History and Interpretation of Human Rights* (New York: Peter Lang, 1986) at 159; Bruno Simma & Philip Alston, "The Sources of Human Rights Law: Customs, Jus Cogens, and General Principles" (1992) *Australian yearbook of Int'l L.* 82; and T. Meron, *Human Rights, Humanitarian Norms as Customary Law* (Oxford: Clarendon, 1989) at 114-135.

¹³ For general reference, see Milne, *Human Rights and Human Diversity*, *supra* note 4 at 5-6 and Rhoda E. Howard, "Dignity, Community and Human Rights" in Abdullahi Ahmed An-Na'im, ed., *Human Rights in Cross-Cultural Perspectives, A Quest for Consensus* (Philadelphia: University of Pennsylvania Press, 1992) at 81; Patricia H. Werhane, A. R. Gini, & David T. Ozar, eds., *Philosophical Issues in Human Rights, Theories and Applications* (New York: Random House, 1986).

¹⁴ Rosenbaum, *The Philosophy of Human Rights, International perspectives*, *supra* note 3 at 8.

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.”¹⁵

Apart from their social and political aspects,¹⁶ human rights are also legal rights, and need to be defined, protected, and promoted by the international law of human rights.¹⁷

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.¹⁸

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.”¹⁹

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

¹⁵ Abdullahi Ahmed An-Na’im, “Towards a Cross-Cultural Approach to Defining International Standards of Human Rights: The Meaning of Cruel, Inhuman, or Degrading treatment or Punishment” in *Human Rights in Cross-Cultural perspectives*, *supra* note 13 at 21.

¹⁶ See Diplomacy Training Program, *Human Rights Defender’s Manual*, written and compiled by John Scott-Murphy (Australia: University of New South Wales, 1994) Chapter 1 at 2-4.

¹⁷ For reasons why human rights should be protected by international law, see *No Distant Millennium*, *supra* note 4 at 12-15.

¹⁸ The International Bill of Human Rights consists of the Universal Declaration of Human Rights (the UDHR), G. A. Res. 217A (III), U. N. GAOR Res. 71, UN Doc. A/810 (1948); the International Covenant on Civil and Political Rights (the ICCPR), G. A. Res. 220 (XXI), 21 U. N. GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966) (entered into force on March 23, 1976); and the International Covenant on Economic, Social and Cultural Rights (the ICESCR), G. A. Res. 2200 (XXI), 21 U. N. GAOR Supp. (No. 16) at 49, UN Doc. A/6316 (1966) (entered into force on January 3, 1976).

¹⁹ Freeman, Michael, “The Philosophical Foundations of Human Rights” (1994) 16 *Human Rights Quarterly*, at 512.

Muslims' behavior in public and private matters.²⁰ It is considered to contain all the necessary rules needed for human activities, granted by God and applicable to all.²¹ 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.²² It states that the best person is the one who is the most pious.²³ 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."²⁴ Against the prevailing conditions of the time, the Qur'an removed some abuses to which women were subjected, and guaranteed certain rights which Western

²⁰ John L. Esposito, *Islam and Politics* (New York: Syracuse University Press, 1984); and Jacques Waardenburg, "Islam As a Vehicle of Protest" in Ernest Gellner, ed., *Islamic Dilemmas: Reformers, Nationalists and Industrialization* (Berlin: Mouton, 1985) 22-49.

²¹ Majid Alikhan, "A Comparative Study of Universal Declaration of Human Rights and Declaration of Human Rights in Islam" (1991) 22 *Islam & Modern Age Quart.* at 174; and Abul A'la Mawdudi, *Human Rights in Islam* (Leicester, UK: Islamic Foundation, 1980) at 19, 23, and 32.

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.²⁵ Islam recognized women's independent legal personality and allowed them to inherit and own property. Historically, this was quite advanced.²⁶

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,²⁷ nevertheless have had a negative impact on women's rights today.²⁸ 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.²⁹ 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.

²⁵ The Qur'an prohibited female infanticide, restricted the practice of polygamy, curbed abuses of divorce by husbands, and recognized women's financial independence. See Fazlur Rahman, "The Status of Women in the Qur'an" in Guity Nashat ed., *Women and Revolution in Iran* (Boulder, CO: Westview Press, 1983) at 38; For a summary of those changes, see also Tahir Mahmood, *Personal Law in Islamic Countries* (New Delhi: Academy of Law and Religions, 1987); Abula'la Mawdudi, *Purdah and the Status of Women in Islam* (Lahore: Islamic Publications, 1981).

²⁶ See al-Saadawi, "Women and Islam" in Azizah al-Hibri, ed., *Women and Islam* (Oxford: Pergamon Press, 1982) 194-202; Naila Minai, *Women in Islam: Tradition and Transition in the Middle East* (New York: Seaview, 1981) 1-24; Jane Smith, "Women, Religion, and Social Change in Early Islam" in Yvonne Y. Haddad & Ellison Findley, eds., *Women, Religion, and Social Change*, (Albany: State University of New York Press, 1985) 19-35; Barbara Stowasser, "The Status of Women in Early Islam" in Freda Hussain, ed., *Muslim Women* (New York: St. Martin's Press, 1984) 11-43; M. Wahibiddin Khan, *Women in Islamic Shariah*, trans. by Farida Khanam (New Delhi: Islamic Centre, 1995); A. Rahman Doi, *Women in the Shari'a* (London: Ta-Ha, 1989); A. R. Doi, *Women in the Qur'an and Hadith* (London: Ta-ha, 1993).

²⁷ Rahman, "Status of Women in the Qur'an" *supra* note 25 at 37.

²⁸ Margot Badran & Göle Nilüfer, *The Forbidden Modern: Civilization and Veiling* (Ann Arbor: University of Michigan Press, 1996); Camillia Fawzi, El-Solh, & Judy Mabro, eds., *Muslim Women's Choices: Religious Belief and Social Reality* (Oxford: Berg, 1994); Yves Linant de Bellefonds, *Traité de droit musulman comparé, le mariage et la dissolution du mariage*, vol. 2 (Paris: Mouton, 1965); and Jamal Nasir, *The Islamic Law of Personal Status* (London: Graham & Trotman, 1986).

²⁹ See generally Ghassan Ascha, *Du statut inférieur de la femme en Islam* (Paris: L'Harmattan, 1987); Khawar Mumtaz & Farida Shaheed, *Women in Pakistan, Two Steps Forward, One Step Back* (London: Zed, 1987) at 77-122; Anita Weiss, "Implications of the Islamization Program for Women" in A. Weiss, ed., *Islamic Reassertion in Pakistan* (Syracuse: Syracuse University Press, 1986) 97-114; J. Nasir, *The Status of Women Under Islamic Law and Under Modern Islamic Legislation*, 2nd ed. (London: Graham & Trotman, 1994); and D. Pearl & W. Menski, *Muslim Family Law*, 3rd ed. (London: Sweet & Maxwell, 1998).

In personal status laws, while a man has the right to freely marry up to four wives under certain conditions,³⁰ a woman, for her first marriage, needs the permission of her legal guardian -- her father or grandfather.³¹

In inheritance, the general rule accords women only half of what men are entitled to with the same relationship to the deceased person.³²

In family matters, the man, as head of the family, has the authority and *qawama* (guardianship) over the woman.³³ 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,³⁴ travel,³⁵ or engage in any kind of work or profession. The man could withhold maintenance for her disobedience.³⁶

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

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.

³¹ Joseph Schacht, *An Introduction to Islamic Law* (Oxford: Clarendon Press, 1964) at 161; and Ascha, *Du statut inferieur de la femme en Islam*, *supra* note 29.

³² Qur'an, 4: 11 and 176. See also S. Tahir Mahmood, *Personal Law in Islamic Countries: History, text and Comparative Analysis* (New Delhi: Academy of Law and Religion, 1987); and Stowasser, "The Status of Women in Early Islam" *supra* note 26.

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.

³⁶ Fadela M'rabet, *La femme Algérienne suivi de les Algériennes* (Paris: Maspéro, 1969) 143-65; Dawoud Sudqi al-Alami, *The Marriage Contract in Islamic Law, in the Shari'ah and Personal Status Laws of Egypt and Morocco* (London: Graham & Trotman, 1992); and Malladi Subbamma, *Islam and Women*, trans. by M. V. Ramamurty (New Delhi: Sterling, 1988).

husband's consent or a legal order on very specific grounds to get divorced.³⁷ The custody of the children also goes to the husband at two years old for boys and seven years old for girls.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.³⁹

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

³⁷ Qur'an, 2:226-32; *An Introduction to Islamic Law*, *supra* note 16 at 163-4.

³⁸ Ascha, *Du statut inférieur de la femme en Islam*, *supra* note 29; Elizabeth W. Fernea, *Women and the Family in the Middle East: New Voices of Change* (Austin: University of Texas Press, 1985); Nikki Keddie & Beth Baron, eds., *Women in Middle Eastern History: Shifting Boundaries in Sex and Gender* (New Haven: Yale University Press, 1991); Amira el-Azhary Sonbol, ed., *Women and the Family and Divorce Law in Islamic History* (Syracuse: Syracuse University Press, 1996).

³⁹ See generally Deniz Kandiyoti, *Women, Islam and the State* (Philadelphia: Temple University Press, 1991); Homa Hoodfar, "The Veil in Their Minds and on Our Heads: The Persistence of Colonial Images of Muslim Women" (1995) 22 *Resources for Feminist Research* 5-18; Barbara Stowasser, "Women's Issues in Modern Islamic Thought" in Judith E. Tucker, *Arab Women: Old Boundaries, New Frontiers* (Bloomington: Indiana University Press, 1993) 3-28.

⁴⁰ *Hudud* (pl. of *Hadd*) crimes are those prohibited and, under certain conditions, punished with defined mandatory punishments, and *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, "Qesas Crimes" in M. C. Bassiouni, ed., *The Islamic Criminal Justice System* (New York: Oceana, 1982), at 195 & 203.

⁴¹ Qur'an, 2: 282.

female or a male accompanying two female witnesses would be necessary to prove the same case.⁴²

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

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.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.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

⁴² "Amina Wadud-Mohsin, *Qur'an and Women* (Kualalumpur: Penerbit Fajar, 1992); and Doi, *Women in the Shari'a*, *supra* note 26.

⁴³ Qur'an, 2: 179, 186; 5: 45; 6: 92, 94, and 135; Bassiouni, "Qesas Crimes" *supra* note 40 at 203-209.

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

⁴⁵ Schirazi, Asghar, *The Constitution of Iran, Politics and the State in the Islamic Republic*, trans. by John O'Kane (London: I. B. Tauris, 1997) at 124; and Said Amir-Arjomand, "Constitution of the Islamic Republic" (1993) 6 *Encyclopedia Iranica*.

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 ethnic 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

⁴⁶ *Islam and Human Rights, Tradition and Politics*, *supra* note 2 at 81-86; and Human Rights Watch, "As Fragile As a Crystal Clear: Press Freedom in Iran" (Human Rights Watch, October 1999) Sec. IV at 1-4.

⁴⁷ The constitution, art. 19. Article 20 of the Constitution clearly states that human rights are subordinate to Islamic criteria. It reads: All citizens of the nation, whether men or women, are equally protected by the law, and they enjoy human, political, economic, and social and cultural rights *according to Islamic standards*.

⁴⁸ In contrast, art. 8 of the 1907 Supplementary to the Constitution, like the stipulation of most Western constitutional instruments, enunciated that "the people of the Persian Empire are to enjoy equal rights before the law." See also Mayer, Ann Elizabeth, "Islamic Rights or Human Rights: An Iranian Dilemma" (1996) 29 *Iranian Studies*, at 273.

⁴⁹ *Ibid.* art. 21 [emphasis added].

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.⁵⁰ 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.⁵¹ 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.⁵² 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.⁵³

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

⁵⁰ Abdollah Javadi-Amoli, *Zan dar A'ineh-ye Jalal va Jamal* [Women in the Mirror of Glory and Beauty] (Tehran: Reja' Cultural Press, 1993); A. Javadi-Amoli, *Falsafeh-ye Hoquq-e Bashar* [The Philosophy of Human Rights] (Qum, Iran: Isra, 1996) at 235-36; Riffat Hassan, "Equal Before Allah? Women-Man Equality in the Islamic Tradition" (1988) 7 *Harvard Divinity Bulletin*, no. 2.

⁵¹ Mohammad-Taqi Mesbah Yazdi, *et al.*, *Status of Women in Islam* (Tehran: Islamic Propagation Organization, 1985); Fatima Mernissi, *Women and Islam: An Historical and Theological Enquiry* (Oxford: Blackwell, 1991).

⁵² Maududi, *Purdah and the Status of Women in Islam*, *supra* note 25 at 113-22; Murtada Mutahhari, *The Rights of Women in Islam* (Tehran: World Organization of Islamic Service, 1981); Farida Shaheed, *Controlled or Autonomous: Identity and the Experience of the Network Women Living Under Muslim Laws* (Grabels, France; Women Living Under Muslim Laws, 1994).

⁵³ B. Stowasser, "Gender Issues and Contemporary Qur'an Interpretation" in Yvonne Haddad & John L. Esposito, eds., *Islam, Gender, and Social Change* (Oxford: Oxford University Press, 1998). at 30-44.

is why this system does not advocate discrimination against women through its general laws.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.”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.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.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

⁵⁴ Amina Wadud-Muhsin, *Qur’an and Women*, *supra*, note 42; Hoodfar, “The Veil in Their Minds and on Our Heads” *supra* note 39 at 5-18; Riffat Hassan, “Feminist Theology: The Challenges For Muslim Women” (1996) 9 J. for Critical Studies of the Middle East 53-65.

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

⁵⁶ Gewirth, *Human Rights: Essays on Justification and Applications*, *supra*, note 8 at 1 and 41; Donnelly, *Universal Human Rights in Theory and Practice*, *supra*, note 9 at 9; and Warren Lee Holleman, *Human Rights Movement, Western Values and Theological Perspectives* (New York: Praeger, 1987).

⁵⁷ Fernea, *Women and the Family in the Middle East: New Voices of Change*, *supra* note 38; Azadeh Kian, “L’émérgence d’un discours féminin indépendant: un enjeu de pouvoir” (1997) 47 Les Cahiers de l’Orient at 55-72.

balanced rights, not equal rights, to fulfill their duties together.⁵⁸ 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"⁵⁹ 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"⁶⁰ according to Shari'a criteria. It also provides legal and social protection and welfare for mothers, widows, and old women.

Article 10 repeats the family theme stressed in the Preamble⁶¹ and stipulates:

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.⁶²

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,

⁵⁸ Mawdudi, *Human Rights in Islam*, *supra* note 21 at 21-22; and Sajda Nazlee, *Feminism and Muslim Women* (London: Ta-Ha, 1996).

⁵⁹ The Constitution, *supra* note 44, the Preamble.

⁶⁰ *Ibid.* art. 21.

⁶¹ 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..." *ibid.* the Preamble.

⁶² *Ibid.* art. 10.

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,⁶³ 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.⁶⁴

Concerning civil law and personal status, the moderately-formulated Family Protection Act of 1967, amended in 1975, was nullified after the Revolution, and Shari'a laws were closely reflected in the Civil Code. This represented a major setback for women's rights.⁶⁵ A woman, in general, needs her father's permission to get married.⁶⁶ After marriage, the husband heads the family⁶⁷ and decides on the location of residency.⁶⁸ Generally, he may prohibit his wife from pursuing any profession he considers harmful to the interests of the family.⁶⁹ A woman also has to secure her husband's permission to

⁶³ Adele K. Ferdows, "The Status and Rights Women in Ithna Ashari Shi'i Islam" in Asghar Fathi, ed., *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., *In the Eye of the Storm: Women in Post-Revolutionary Iran* (Syracuse: Syracuse University Press, 1994) 61-79; H. Esfandiari, *Reconstructed Lives: Women and Iran's Islamic Revolution* (London: John Hopkin's University Press, 1997).

⁶⁴ Guity Neshat, "Women in the Ideology of the Islamic Republic" in G. Neshat, ed., *Women and Revolution in Iran*, *supra* note 25 at 195-216; Ziba Mir-Hosseini, "Women and the Shari'a in the Islamic Republic of Iran: A Changing Relationship" paper presented at the Carsten Niebuhr Institute of Near Eastern Studies Conference "Women, Culture and Modernity" (Copenhagen, February 18-21, 1996); Nahid Yeganeh & Nikki R. Keddie, "Sexuality and Shi'a Sexual protest in Iran" in Juan R. I. Cole & N. R. Keddie, eds., *Shi'ism and Social Protest* (New York: Yale University Press, 1982) 108-36; Fariba Adelkhah, *La révolution sous le voile* (Paris: Karthala, 1991).

⁶⁵ Nouchine Yavari-d'Hellencourt, "Discours islamique, actrices sociales et rapports sociaux de sexe" in N. Yavari-d'Hellencourt, ed., *Les femmes en Iran: pressions sociales et stratégies identitaires* (Paris: Harmattan, 1998) 190-229; Azar Tabari, "Islam and the Struggle for Emancipation of Iranian Women" in A. Tabari & Nahid Yeganeh, eds., *In the Shadow of Islam* (London: Zed, 1982) 5-25; Sohila Shahshahani, "Religion, Politics and Society: A Historical Perspective on the Women's Movement in Iran" (1984) 1-2 Samya Shakti 100-20; Eliz Sanasarian, "Politics of Gender and Development in the Islamic Republic of Iran" (1992) 8 J. Developing Societies 56-68; and Tamilla F. Godsi, "Tying a Slipknot: Temporary Marriage in Iran" (1994) 15 Michigan J. Int'l L. 645.

⁶⁶ The Civil Code of Iran, art. 1043. It should be mentioned that she is considered an adult and mature at the age of 9, and can get married under certain conditions.

⁶⁷ *Ibid.* art. 1105.

⁶⁸ *Ibid.* art. 1114.

⁶⁹ *Ibid.* art. 1117. This is on the fault basis that since the husband provides the family needs, he heads the family and she has the duty to obey him, meets his emotional and sexual needs, and refrain from any action or profession that may contradict these duties. Certain laws, including provisions in marriage contract, have

travel abroad.⁷⁰ The Civil Code, however, recognizes her financial independence and her legal entity.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.⁷² Custody of the children also reverts to the father after age two for boys and seven for girls, automatically.⁷³ A woman generally inherits only half the share of a man with the same relation to the deceased person.⁷⁴ In addition, the husband can inherit from his deceased wife more than what his wife can inherit from him.⁷⁵

Family duties and responsibilities leave women little opportunity to participate in public or political life.⁷⁶ Due to some openness in the political sphere, however, Iranian

been introduced in order to improve women's rights within the family, at least in practice.

⁷⁰ The Passport Act, art. 18(3).

⁷¹ The Civil Code, art. 1118.

⁷² *Ibid.* arts. 1133, 1129, and 1130.

⁷³ *Ibid.* art. 1169 and 1180. Based on the recent resolution adopted in the Council of Expediency, the custody of boys goes to the father after age seven as well.

⁷⁴ *Ibid.* art. 907 and 920.

⁷⁵ *Ibid.* art. 946. For more on Women's rights on personal status, see Ziba Mir-Hosseini, *Marriage on Trial: A Study of Islamic Family Law: Iran and Morocco Compared* (London: I. B. Tauris, 1993); Z. Mir-Hosseini, "Divorce, Veiling and Feminism in Post-Khomeini Iran" in Haleh Afshar, ed., *Women and Politics in the Third World* (London: Routledge, 1996) 142-70; Firouzeh Khalatbari, "L'inégalité des sexes sur le marché du travail: une analyse des potentiels économiques de croissance" in *Les femmes en Iran*, *supra* note 356 at 95-118; Homa Hoodfar, "Devices and Desires: Population Policy and Gender Roles in the Islamic Republic" (1994) 190 *Middle East Report* 11-17; S. Haeri, "Obedience Versus Autonomy: Women and Fundamentalism in Iran and Pakistan" in M. E. Marty & R. S. Appelby, *Fundamentalism and Society: Reclaiming Science, the Family, and Education* (Chicago: University of Chicago Press, 1993) 181-213; Haleh Afshar, "Women, Marriage and the State in Iran" in H. Afshar, ed., *Women, State and Ideology: Studies From Africa and Asia* (London: Macmillan, 1987) 70-86; H. Afshar, "Women and Reproduction in Iran" in Nira Yural-Davis & Floya Anthias, eds., *Women-Nation-State* (London: Macmillan, 1989) 110-25; Ibrahim Amini, *Principles of Marriage: Family Ethics* (Qum, Iran: Ansariyan, n. d.); Homa Hoodfar, "Bargaining With Fundamentalism: Women and the Politics of Population Control in Iran" (1996) 8 *Reproductive Health Matters*, 30-40.

⁷⁶ A. Kian, "Gendered Occupation and Women's Status in Post-Revolutionary Iran" (1995) 31 *Middle Eastern Studies* 407-21; A. Kian, "Women and Politics in Post-Islamist Iran: the Gender Conscious Drive to Change" (1997) 24 *British J. Middle Eastern Studies* 75-96; and Valentine Moghadam, "Public Life and Women's Resistance" in Saeed Rahnema & Sohrab Behdad, *In Iran After the Revolution* (London: I. B. Tauris, 1995) 251-67.

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.⁷⁷ 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.⁷⁸

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 Women⁷⁹ to which Iran is not signatory.⁸⁰

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 *hijab*⁸¹ is one example. Although it seems a purely religious or personal matter, it has

⁷⁷ The constitution, *supra* note 44 art. 115.

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.

⁷⁹ Convention on the Elimination of All Forms of Discrimination Against Women (the CEDAW), Dec. 18, 1979, G.A. Res., 34/180, 34 UN GAOR Supp. (no. 46), at UN Doc. A/34/46 (1979), entered into force in 1981.

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" *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.

⁸¹ The veil. According to Shari'a interpretation of the Qur'anic verses, the principle of *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, *Women and Revolution in Iran*, *supra* note 25 at 55-68.

been used to deprive Muslim women of social activities like sports.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.”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.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

⁸² See Farzaneh Milani, *Veils and Words: The Emerging Voices of Iranian Women Writers* (Syracuse: Syracuse University Press, 1992); and Azar Tabari, “The Enigma of the Veiled Iranian Women” (1982) 103 MERIP 22-27.

⁸³ M. Reisman, “Some Reflection on Human Rights and Clerical Claim to Political Power” (1994) 19 Yale J. Int'l L. 509-23 at 519.

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.⁸⁵

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.⁸⁶ 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."⁸⁷

⁸⁵ See generally Fatima Mernissi, *The Veil and the Male Elite: A Feminist Interpretation of Women's Rights in Islam*, trans. by Mary J. Lakeland (Reading, MA: Addison-Wesley, 1991), also published as *Women and Islam: An Historical and Theological Enquiry*, trans. by Mary J. Lakeland (Oxford: Blackwell, 1991), first published as *Le harem politique* (Paris: Albin Michel, 1987); Wiebke Walther, *Women in Islam from Medieval to Modern Time* (1993) at 47-55; W. Walther, *Women in Islam*, trans. from the German by C. S. V. Salt (Montclair, NJ: A. Schram, 1981), also published as *Les femmes en Islam*, trans. by Madeleine Maléfant (Paris: Sindbad, 1981); Yvonne Yazbeck Haddad & John L. Esposito, eds., *Islam, Gender, and Social Change* (Oxford: Oxford University Press, 1998); Riffat Hassan, "Equal Rights Before Allah? Women-Man Equality in the Islamic Tradition" *supra*, note 50; Barbara Stowasser, *Women in the Qur'an: Traditions and Interpretations* (New York: Oxford University Press, 1994); A. Ahmed An-Na'im, "The Rights of Women and International Law in the Muslim Context" (1987) 9 *Whittier L. Rev.* 491. For a different view on this, see Samih Atef al-Zein, *Islam and Human Ideology*, trans. by M. H. Omran (London: Kegan Paul International, 1996) 286-99.

⁸⁶ Donnelly, "An Analytic Critique of non-Western Conceptions of Human Rights" *supra*, note 8 at 307.

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.⁸⁸ 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."⁸⁹ 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.⁹⁰

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.⁹¹ 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

Construct?" (1994) 15 Michigan J. Int'l L. 307-404 at 325. On the conditions that can be placed on human rights in international human rights law, see Thomas Buergenthal, "To Respect and to Ensure: State Obligations and permissible Derogations" in Louis Henkin, ed., *The International Bill of Human Rights: The Covenant on Civil and Political Rights* (New York: Columbia University Press, 1981) at 72; and *Islam and Human Rights, Tradition and Politics*, *supra* note 2 at 73-6.

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.

⁸⁹ Donnelly, "An Analytic Critique of Non-Western Conceptions of Human Rights" *supra* note 8 at 307.

⁹⁰ Mohammed Arkoun, *Rethinking Islam, Common Questions, Uncommon Answers*, trans. & ed. By Robert D. Lee (Boulder, CO: Westview, 1994) at 106-13; Mawdudi, *Human Rights in Islam*, *supra* note 21 at 17-34; and Sachedina, *The Islamic Roots of Democratic Pluralism*, *supra* note 1 at 102-12.

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).⁹² 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.⁹³ 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,⁹⁴ or wrongly

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.

⁹⁴ See Riffat Hassan, "On Human Rights and the Qur'anic Perspective" in Arlene Swidler, ed., *Human*

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.”⁹⁵ He makes no mention of gender and religion.⁹⁶ 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.”⁹⁷ This approach, as An-Na’im states, “is both simplistic and misleading.”⁹⁸ 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 than what it can or ought to be.⁹⁹

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.¹⁰⁰ Any proper legal system should, first, conceptualize a woman as an independent individual and a person with

Rights in Religious Traditions (New York: Pilgrim Press, 1982) at 63.

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.*

¹⁰⁰ See “Ascha, *Du statut inférieur de la femme en Islam*, *supra* note 38; Vieille, “Iranian Women in Family Alliance and Sexual Politics” in Lois Beck & Nikki Keddie, eds., *Women in the Muslim World* (Cambridge: Harvard University Press, 1978) 451.

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.¹⁰¹ 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.¹⁰² 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.¹⁰³ 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.¹⁰⁴ Of course, these efforts have been challenged by

¹⁰¹ Mohammed Arkoun, "The Concept of Islamic Reformism" in Tore Lindholm & Kari Vogt, eds., *Islamic Law Reform and Human Rights, Challenges and Rejoinders* (Oslo: Nordic Human Rights, 1993) 11-24; Vali-Reza Nasr, "Religious Modernism in the Arab World, India, and Iran: The Perils and Prospects of a Discourse" (1993) 83 *The Muslim World* 20-47; and S. Hossein Nasr, "Present Tendencies, Future Trends" in Marjorie Kelly, ed., *Islam, the Religious and Political Life of a World Community* (New York: Praeger, 1984).

¹⁰² John L. Esposito, *The Islamic Threat: Myth or Reality?* (New York: Oxford University Press, 1992) at 9; J. Esposito, ed., *Voices of Resurgent Islam* (New York: Oxford University Press, 1983); *Toward an Islamic Reformation*, *supra* note 2 at 35; Reza Afshari, "An Essay on Islamic Cultural Relativism in the Discourse of Human Rights" (1994) 16 *H. R. Quart.* at 263; and Heiner Bielefeldt, "Muslim Voices in the Human Rights Debate" *supra* note 6 at 601-02.

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.

¹⁰⁴ Bassam Tibi, "Islamic Law/Shari'a, Human Rights, Universal Morality and International Relations" (1994) 16 *H. R. Quart.* at 290-91; Dale Eickelman, "Inside Islamic Reformation" (1998) 22 *Wilson Quart.* at 80-89; Michael Fischer & Mehdi Abedi, *Debating Muslims: Cultural Dialogue in Post-Modernity and Tradition* (Madison: University of Wisconsin Press, 1990); Muhammad Said al-Ashmawy, *L'islamisme contre l'Islam* (Paris: Éditions la découverte, 1989) at 37; Subhi Mahmasani, "Adaptation of Islamic

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.

Jurisprudence to Modern Social Needs" in John J. Donohue & John L. Esposito, eds., *Islam in Transition: Muslim Perspectives* (New York: Oxford University Press, 1982) at 183; and Mohammed Talbi, "Religious Liberty: A Muslim Perspective" in *Conscience and Liberty* (1991) at 31.

¹⁰⁵ Ahmed Farrag, "Human Rights and Liberties in Islam" in Jan Berting, et al., eds., *Human Rights in a Pluralist World: Individuals and Collectivities* (Westport, Conn.: Meckler, 1990) at 141; Bennani, *L'islamisme et les droits de l'homme*, supra note 1; Aziz al-Azmah, "Islamist Revivalism and Western Ideologies" (1991) 32 *History Workshop* at 48; and Bassam Tibi, *Islam and the Cultural Accommodation of Social Change* (Boulder, CO: Westview Press, 1991).

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.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.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

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, *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 *Toward an Islamic Reformation, supra* note 2 at 297-99.

¹⁰⁸ R. J. Vincent, *Human Rights and International Relations* (Cambridge: Cambridge University Press, 1986) at 99-105.

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.¹⁰⁹ 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."¹¹⁰

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.¹¹¹ 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

¹⁰⁹ Tibi, "Islamic Law, Human Rights, Universal Morality and International relations" *supra* note 104 at 296-98; Also generally B. Tibi, *The Crisis of Modern Islam: A Pre-Industrial Culture in the Scientific-Technological Age*, trans. by Judith von Sivers (Salt Lake City: University of Utah Press, 1988); and John Voll, *Islam: Continuity and Change in the Modern World* (Boulder, CO: Westview Press, 1982).

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.
