

sustain such discrimination must be constantly reassessed. That reassessment in India by Dalit NGOs has led to the conclusion that the enforcement of social and economic rights is the next direction that the Dalit struggle must take. This should be supported within human rights law, and extended to other situations of *de facto* racial discrimination. The ability of special measures in the private sphere to tackle racial discrimination is being tested in one state in India; the international community needs to take note of the results.

The progressive steps towards the elimination of racial discrimination have been highlighted: identification; non-discrimination; affirmative action; and finally enhanced protection, involving a push towards social and economic equality between groups. These are common to all forms of racial discrimination.

However enhanced protection must also be focussed on the root of the particular problem. Belief structures must be unravelled. A belief in biological difference underlies discrimination on the basis of skin colour. The classification of mankind into biological 'races' must cease, if the belief in a natural superiority and inferiority of peoples is to end.

In regard to caste, the system is primarily a religious belief structure. Its discriminatory elements have their genesis in the religious texts of Hinduism. There is a vibrant discourse on the compatibility of religious tenets and human rights law within other religions, such as Islam, that has not permeated Hinduism. Ambedkar singled out the nature of Hindu prescriptions on caste and labelled them laws that are capable of reform. It was only the discriminatory aspect of Hinduism, translated into the reality of caste prejudice that he sought to attack. In *The Annihilation of Caste* (1936), Ambedkar wrote:

The only question that remains to be considered is – *How to bring about reform of the Hindu social order? How to abolish caste?* This is a question of supreme importance.¹⁵¹

His analysis concentrates on the Hindu religion, as contained in the *Vedas* and the *Smritis*. Describing these texts as 'a multitude of commands and prohibitions', he linked the *dharma* codes to the concept of law: 'To put

¹⁵¹ B.R. Ambedkar, 'The Annihilation of Caste' (1936), above n. 1, p. 288.

it in plain language, what the Hindus call religion is really Law or at best legalized class-ethics. Frankly, I refuse to call this code of ordinances...religion.¹⁵² The consequence of 'misnaming this law as religion' is the loss of the possibility of reform.¹⁵³

152 Ibid., pp. 298–299.

153 Ibid.

PART FOUR

ISLAM, STATE PRACTICES
AND CONTEMPORARY
INTERNATIONAL LAW

CHAPTER ELEVEN

THE ROLE OF ISLAM IN HUMAN RIGHTS AND
DEVELOPMENT IN MUSLIM STATES

*Mashood A. Baderin**

I. INTRODUCTION

THE CONCEPT OF human rights has, today, become an important form of social ordering which no State can ignore. This status of human rights as a form of social ordering is boosted by the fact that there is a strong link between respect for human rights and development within States.¹ The development of a State depends largely on the level of human development within the State² and human development is a principal objective of human rights, especially through the guarantee of economic, social and cultural rights. In his report titled *In Larger Freedom: Towards Development, Security and Human Rights For All*, which was presented to the 59th Session of the United Nations General Assembly in March 2005, the UN Secretary General noted significantly that: ‘...we will not enjoy development without security, we will not enjoy security without development, and we will not enjoy either without respect for human rights.’³ He also observed that: ‘...countries which are well governed and respect the human rights of their citizens are better placed to avoid the horrors of conflict and to overcome obstacles to development.’⁴ These observations clearly capture the strong link between respect for human rights and the attainment

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1 See e.g. Former UN High Commissioner for Human Rights, Mary Robinson’s lecture on: ‘Bridging the Gap between Human Rights and Development: From Normative Principles to Operational Relevance’ Presidential Fellows’ Lecture, World Bank Washington D.C., 3 December 2001. See also P. Alston and M. Robinson (ed.), *Human Rights and Development: Towards Mutual Reinforcement* (Oxford University Press, Oxford, 2005).

2 See e.g. Art. 2(1) of the UN Declaration on the Right to Development (1986), GA Resolution 41/128 of 4 December 1986, which provides that: ‘The human person is the central subject of development and should be the active participant and beneficiary of the right to development.’

3 UN Doc. A/59/2005, 21 March 2005, para. 17.

4 Ibid., para. 16.

of development and the consequent need for respect for human rights especially in developing States.⁵ Development is itself being promoted as a human right through the concept of 'right to development',⁶ while the concept of a 'human rights-based approach' to development is fast emerging.⁷ The quest for human rights and development is therefore a matter of great public and international interest in the affairs of all States today.

Regrettably, different inter-governmental and non-governmental organisational reports as well as individual academic research on the global situation of human rights and development reveal that, despite their substantial human and natural resources, Muslim States are amongst the States of the world that are relatively much behind in the practical guarantee of human rights and in developmental progress.⁸ This has engendered significant focus of interest, by different stakeholders, on the human rights situation in Muslim States. There is currently an important need to engage with the question of identifying the best means of enhancing the practical guarantee of human rights and developmental progress in Muslim States. In addressing that question, Islam is a relevant factor that cannot be ignored. This chapter therefore examines the role that Islam as a religion can play in the promotion of human rights and development in Muslim States.

5 On this point see generally P. Tlakula, 'Human Rights and Development' in P.T. Zeleza and P.J. McConaughay (eds.), *Human Rights, the Rule of Law, and Development in Africa* (University of Pennsylvania Press, Philadelphia, 2004), pp. 109–119.

6 See the UN Declaration on Right to Development adopted by the UN General Assembly Resolution 41/128 on 4 December 1986. The Constitutions of developing countries such as Malawi and Ethiopia also provide for a right to development.

7 See e.g. UNICEF, *Guidelines for Human Rights-Based Programming Approach* (UNICEF, 1998); OHCHR, *Frequently Asked Questions on a Human Rights-based Approach to Development Cooperation* (United Nations, New York and Geneva, 2006); Overseas Development Institute, *What Can We Do With A Rights-Based Approach To Development?* ODI Briefing Paper 1999(3) September.

8 See e.g. M. Ahsan, 'Human Development in the Muslim World: From Theory to Practice' (2004) 94 *The Muslim World*, pp. 181–200; UNDP, *The Arab Human Development Report 2002: Creating Opportunities for Future Generations* (UNDP, New York, 2002); UNDP, *The Arab Human Development Report 2003: Building a Knowledge Society* (UNDP, New York, 2003); UNDP, *Arab Human Development Report 2003: Towards Freedom in the Arab World* (UNDP, New York, 2005); UNDP, *Human Development Report 2003: Millennium Development Goals: A Compact Among Nations to End Poverty* (OUP, New York, 2003); UNDP, *Human Development Report 2004: Cultural Liberty in Today's Diverse World* (UNDP, New York, 2004); UNDP, *Human Development Report 2005: International Cooperation at a Cross-Road* (UNDP, New York, 2005).

II. THE PUBLIC ROLE OF ISLAM IN MUSLIM STATES

The theme of this book, *Religion, Human Rights and International Law*, is relatively more relevant to the situation in Muslim States than others. That is because religion, specifically Islam, continues to play a considerable role in the public sphere of a significant number of Muslim States today. An observation of the current political and legal developments in States such as Egypt, Morocco, Iraq, Saudi Arabia, Malaysia, Palestine and Nigeria, among others, reveals a practical potency of Islam in the politico-legal affairs of many Muslim States. Buskens has noted that: 'In most Muslim societies it is impossible to speak about family law except in terms of Islam,'⁹ which, on the one hand, reveals the influence of Islam also in the socio-cultural affairs of Muslims, but on the other hand, has an important human rights implication especially in the area of women's rights in most Muslim States today.

The public role of Islam is formally demonstrated in the Constitutions of different modern Muslim States that declare Islam as the religion of the State,¹⁰ or recognise Islamic law is part of State law¹¹ or provide for the establishment of State courts that apply Islamic law.¹² Also, Muslim States have adopted regional instruments such as the Arab Charter on Human Rights,¹³ the Charter of the Organisation of Islamic Conference (OIC),¹⁴ the OIC Cairo Declaration on Human Rights in Islam¹⁵ and the OIC Covenant

9 L. Buskens, 'Recent Debates on Family Law Reform in Morocco: Islamic Law as Politics in an Emerging Public Sphere' (2003) 10(1) *Islamic Law and Society* pp. 70–131 at 71.

10 See e.g. R.C. Blitt, and T. Stahnke, 'The Religion-State Relationship and the Right to Freedom of Religion or Belief: A Comparative Textual Analysis of the Constitutions of Predominantly Muslim Countries' (USCIRF: March 2005), p. 7 where the authors record that 22 of 44 predominantly Muslim States have constitutionally declared Islam as the religion of the State. <http://www.uscirf.gov/countries/global/comparative_constitutions/o3082005/Study0305.pdf> (25 August 2005).

11 Ibid., pp. 10–12.

12 See e.g. the Constitution of the Federal Republic of Nigeria (1999) Sections 260–264 and Sections 275–279; the Constitution of the Islamic Republic of Pakistan (1973 as amended) Article 203.

13 Adopted by the League of Arab States on 15 September 1994, reprinted in (1997) 18 *Human Rights Law Journal*, 151. A Revised version of the Charter was adopted in May 2004.

14 914 UNTS, p. 111.

15 Adopted on 5 August 1990. See UN Doc. A/45/5/21797, p. 199.

on the Right of the Child in Islam,¹⁶ all of which make reference to Islam as a relevant factor in the quest for human rights in the Muslim world. There are also references to Islam as a relevant factor in the Arab Human Development Reports published by the United Nations Development Programme (UNDP) which aims at identifying and remedying the problems of human development in the countries of the Arab world.¹⁷ Islam, therefore, has both a socio-cultural and politico-legal relevance in the affairs of many Muslim States and that of regional organisations such as the Arab League and the OIC. Thus, Islam is also an important form of social ordering in the Muslim world. This raises the question of what role can Islam play as a parallel form of social ordering in the promotion of human rights and development in Muslim States.

Depending on one's perspective, Islam as a parallel form of social ordering in Muslim States can be conceived either as a positive or a negative factor in the promotion of human rights and development in Muslim States. While it is acknowledged that some hard-line traditional and conservative interpretations of Islamic sources can be of negative effect in the quest for human rights and development in Muslim States, this chapter strongly advocates the former. It argues that Islam can, and should, serve as a positive factor for the promotion of human rights and development in Muslim States. The *Qur'an* and the *Sunnah* (i.e. the *Sharī'ah*), which constitute the main sources of Islamic religious, moral and legal norms, contain relevant provisions that support the guarantee of human rights and the promotion of development in Muslim States. Also, the methods and relevant principles of Islamic law can be positively employed to ensure the practical realisation of that objective. Rather than presenting human rights as a form of alternative ideology, this chapter advocates the possibility of harmonising Islam and human rights as parallel forms of social ordering in predominantly Muslim States. This harmonistic approach finds support in an observation by one of the oldest and renowned American human rights scholars, Professor Louis Henkin, that:

Human rights are not a complete alternative ideology, but rights are a floor, necessary to make other values, including religion, to

¹⁶ Adopted by the 32nd Islamic Conference of Foreign Ministers in Sana'a, Republic of Yemen in June, 2005.

¹⁷ See e.g. UNDP, *Arab Human Development Report 2004: Towards Freedom in the Arab World* (UNDP, New York, 2005).

flourish...religion can accept if not adopt the human rights idea as an affirmation of its own values, and can devote itself to the larger, deeper area beyond the common denominator of human rights. Religion can provide, as the human rights idea does not adequately, for the tension between rights and responsibilities, between individual and community, between the material and the spirit.¹⁸

The veracity of this harmonistic proposition is based on the fact that the ideals of human rights is best reflected through persuasive authority rather than through forceful authority; and one way of doing that in Muslim societies is through the medium of Islam, which has a persuasive influence in most Muslim States as earlier identified above. To advance the harmonistic proposition, I will analyse the relevant theoretical, transitional and substantive perspectives respectively in Sections III, IV and V below, with a brief conclusion in Section VI.

III. THEORETICAL PERSPECTIVES

In analysing the theoretical aspect of the harmonistic proposition herein, I will employ the two theories of social ordering established by Professor Lon Fuller, in his seminal jurisprudential essay on *The Forms and Limits of Adjudication* first published in full in the Harvard Law Review in 1978.¹⁹ Fuller identified that there are two basic approaches to social ordering in human society, namely, 'organization by common aims' and 'organization by reciprocity'.²⁰ He observed that these two approaches 'represent the two basic ways in which men [and by implication, States] may, by coming together, secure an advantage for all participants'.²¹ Organization by common aims applies where the participants want the same thing or things, meaning, they have a common objective. Conversely, organization by reciprocity applies where the participants want different things. Fuller then noted, in relation to organization by common aims, that: 'In an organiza-

¹⁸ L. Henkin, 'Human Rights and Competing Ideas' in E.G. Bello and B.A. Ajibola (eds.), *Essays in Honour of Judges Teslim Olawale Elias*, Vol. 1 (Martinus Nijhoff, The Hague, 1992), p. 333 at 338.

¹⁹ L.L. Fuller, 'The Forms and Limits of Adjudication' (1978) 92 *Harvard Law Review*, 353-409, particularly at pp. 357-362.

²⁰ *Ibid.*, at 357.

²¹ *Ibid.*

tion dominated by the principle of common ends, nothing is easier than to slip into the assumption that the other fellow wants what we want, or that he will want the same thing when his perception has developed to the level of our own.²² Whereas, in relation to organization by reciprocity, he noted that: 'we must know, if we are to obtain what we want, what the other fellow wants.'²³

Although Fuller discussed these two forms of social ordering as applying independently, in my view, expediency may demand a combination of the two theories in some situations. In practice, complex human relations – and by implication, inter-State relations – are usually based on a combination of organization by common aims and organization by reciprocity. This is because, sometimes the participants may have a common objective, which calls for the application of the theory of common aims, but they may still want to achieve the common objective through different means, which concurrently calls for the application of the theory of reciprocity.

Applying the common aims theory to the relationship between Islam and human rights, my first proposition is that the protection and enhancement of human welfare constitutes a common objective of both the *Shari'ah* and the international human rights scheme. Islamic jurists agree that the overall objective of the *Shari'ah* (*maqāsid al-shari'ah*) is the enhancement of human welfare (*maslahah*).²⁴ Similarly, the overall objective of international human rights is to enhance human welfare universally. This common objective of enhancing human welfare can therefore serve as an important link between Islam and human rights as parallel forms of social ordering in Muslim States. However, in promoting this common objective of human welfare, the human rights approach and the Islamic approach may respectively be seen as theoretically different. The international human rights system adopts a liberal and anthropocentric approach while Islam adopts a religious and theocentric approach in the pursuance of human welfare

22 Ibid., at pp. 361–362.

23 Ibid.

24 See M.A. Baderin, *International Human Rights and Islamic Law* (OUP, Oxford, 2003), pp. 42–44.

respectively.²⁵ However, these theoretical differences are, in my view, 'not vehemently incompatible'.²⁶ I have argued elsewhere that:

Both perspectives are accommodative of each other through constructive analysis and proper understanding of the concepts. While the recognition of the right to freedom of religion and belief²⁷ does facilitate the accommodation of the theocentric perspective within international human rights law, *Shari'ah* provisions such as "...God intends every facility for you (humans); He does not want to put you in difficulties..."²⁸ also facilitate the accommodation of the anthropocentric perspective within Islamic law.²⁹

As indicated earlier above, a combination of the theory of common aims and the theory of reciprocity is necessary in some complex human and inter-State relations, especially where the participants in a common objective pursue it through different approaches as demonstrated in this case. Consequently, my second theoretical proposition is that in pursuing this common aim of human welfare in Muslim States, there is the need, as demanded by the reciprocity theory, that 'we must know, if we are to obtain what we want, what the other fellow wants'.³⁰ Certainly, what we want, as international human rights scholars and advocates, is the realisation of human rights and human development in Muslim States. To help us achieve this objective effectively, we must, in relation to the reciprocity principle, also know what Muslim States want in that regard. Relevant submissions of some Muslim States to international human rights bodies demonstrate that they aim at pursuing their international human rights obligations within their adherence to Islam as a parallel form of social ordering in their respective States. For example, the Saudi Arabian Deputy Minister for Foreign Affairs observed, *inter alia*, in a statement before the UN Commission on Human Rights in 2000 that:

25 See M.A. Baderin, 'Dialogue Among Civilisations as a Paradigm for Achieving Universalism in International Human Rights: A Case Study with Islamic Law' (2001) 2 *Asia-Pacific Journal on Human Rights and the Law*, p. 1 at 22–29.

26 *Ibid.*, at p. 29.

27 See e.g. Art. 18 of the Universal Declaration of Human Rights 1948 (UDHR) and Art. 18 of the International Covenant on Civil and Political Rights 1966 (ICCPR).

28 *Qur'an* 2:185.

29 Baderin, above n. 25, at p. 29.

30 See above n. 23.

There was a need to develop current human rights concepts with reference to the humanitarian values enshrined in the various religions, civilizations and cultures of the world. Islam, like other religions, was clearly playing a leading role in that regard, since it continued to enrich the concepts of human rights through its noble moral values and principles and its comprehensive way of life, in which rights and obligations were defined in a just and equitable manner.³¹

Other Muslim States have also called for understanding in their effort to balance between Islamic principles and their international human rights obligations.³² In my view, they are entitled to such understanding. However, in calling for such understanding, the reciprocity principle demands conversely that Muslim States should also not lose sight of the fundamental common objective, which is the enhancement of human welfare, and thus must be able to demonstrate practically that they can still realise, appropriately, that fundamental common objective within their maintenance of Islam as a parallel means of social ordering in their respective States. While there has been some tangible practical effort in some Muslim States, there still remains much to be done in that regard by most Muslim States. It is submitted that with the right political will and commitment, it is possible for Muslim States to improve their human rights practice significantly within their Islamic ethos.

A study of the Islamic sources will reveal that, where applied appropriately in the context of its overall objective of *maslahah*, maintaining an Islamic ethos by Muslim States should not be an impediment to human rights and development in the Muslim world. It is the non-contextual, hard-line and conservative interpretations of Islamic provisions by some Muslim States that often lead to constraints on international human rights norms and consequently create discord between their maintenance of Islam as a form of social ordering on the one hand, and international human rights as a parallel form of social ordering on the other. With the right political will and cooperation amongst States and other relevant stakeholders, a combination of the two theories of social ordering, namely 'organization by common aims' and 'organization by reciprocity', as proposed above, can

³¹ See UN Doc. E/CN/4/2000/SR.30 at para. 2 (Saudi Arabia).

³² See generally, M.A. Baderin, 'A Macroscopic Analysis of the Practice of Muslim State Parties to International Human Rights Treaties: Conflict or Congruence?' (2001) 1(2) *Human Rights Law Review*, 265–303.

provide the proper foundation and understanding for employing Islam as a positive means for the realisation of human rights and development in Muslim States. We shall now consider the relevant transitional factors in that regard.

IV. TRANSITIONAL PERSPECTIVES

Transitionally, the promotion of human rights and developmental progress has both an external and internal aspect. The external aspect calls for international co-operation among States and other stakeholders in that regard. Since the realisation of human rights and developmental progress ensures the enhancement of human welfare to human beings everywhere, everyone must be concerned and thus co-operate in pursuing its realisation in every State. The need for international co-operation for the realisation of human rights and development is expressed, for example, in the UN Charter,³³ the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR)³⁴ and the UN Declaration on the Right to Development.³⁵ The Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights in Vienna in 1993 also emphasised the importance of international co-operation for the realisation of human rights and eliminating obstacles to development.³⁶ More specifically, the UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms adopted in 1999³⁷ provides that: 'Everyone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels.'³⁸

The Islamic principle of '*ta'āwun alā al-birr wa al-taqwā*' (cooperation in goodness and devoutness) can serve as a motivating factor for such

33 Art. 1(3) of the UN Charter calls for 'international co-operation in solving international problems of an economic, social cultural or humanitarian character and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.'

34 Art. 11, ICESCR.

35 Art. 4(2), Declaration on the Right to Development.

36 Vienna Declaration on the Cause of Action, para. 10.

37 A/RES/53/144, 8 March 1999.

38 Ibid., Art. 1.

international cooperation in Muslim States. This principle is based on the provision of *Qur'an* 5:2, which enjoins Muslims generally to 'cooperate in goodness and piety but not in evil and enmity'. As the guarantee of human rights and developmental progress are both acts of goodness for the benefit of humanity, Muslim States are obliged under this Qur'anic provision to cooperate amongst themselves as well as with other States and stakeholders in realising the fundamental objective of enhancing human welfare. By such cooperation Muslim States can enhance their developmental progress through access to international assistance and developmental cooperation with other States, international organisations and other stakeholders in the international human rights venture. The fourteenth century Islamic scholar Ibn Taimiyyah articulated the benefits of external cooperation for the attainment of human welfare in the introduction of one of his early works, *al-Hisbah fī al-Islam* (Public Order in Islam), by stating that:

None of mankind can attain complete welfare, whether in this world or in the next, except by association, co-operation and mutual aid. Their co-operation and mutual aid is for the purpose of acquiring things of benefit to them and their mutual aid is also for the purpose of warding off things injurious to them.³⁹

Conversely, this external aspect also requires Muslim States to be prepared to accept and act upon constructive criticism and international pressure for improvement in their human rights practices. One of the problems in that regard is the issue of distrust, often from Islamist groups in Muslim States and sometimes from the respective Muslim States themselves, regarding the constructivism and good faith underlying such external interventions and criticisms. For example, in his analysis of the debates on family law reforms in Morocco leading to the promulgation of the new Moroccan Family Law Code (*Mudawwana*) in February 2004, Buskens noted that some Islamist and political groups in Morocco opposed the proposed family law reforms on grounds of external connivance against Islamic norms and Moroccan cultural values which, they claimed, was seeking 'to destroy one of the last strongholds of Islam: the family'.⁴⁰ The significance of such claims is that

³⁹ T. Ibn Taimiyyah, *al-Hisbah fī al-Islām*, al-Jāmi' al-Islāmiyyah, Madinah al-Munawwarah, n.d. Translation quoted from A.K.S. Lambton, *State and Government in Medieval Islam* (OUP, Oxford, 1981), p. 147.

⁴⁰ L. Buskens, above n. 9, at p. 97.

they are often addressed to, and acted upon by, a large constituency of the populace in the respective Muslim States, which can be quite significant in the human rights debates and initiatives in those countries, and therefore cannot be ignored. For example, in response to the above claims by the Islamist groups in Morocco, there was what Buskens described as a remarkably well-organized demonstration organised by the Islamist groups in Casablanca, which attracted an estimated 60,000 to 200,000 male and female participants from all parts of Morocco, carrying placards with slogans such as: 'Yes to the integration of women in development. No to westernization and submission.'⁴¹

Such reactions, in my view, indicate the need to present human rights initiatives in ways that can re-assure the general populace in Muslim States that human rights are not meant to undermine their religious norms and beliefs, but, in the words of Henkin, serve as 'a floor, necessary to make other values, including religion, to flourish',⁴² and that religious norms can be harmonised with human rights and *vice versa*. In an apparent attempt to re-assure the Moroccan populace in that regard, the preamble of the new Moroccan Family Code adopted in 2004 stated that the Moroccan monarch had

...provided the Commission with his constant enlightened guidance and advice in order to prepare a new Family Code bill, and insisted upon their fidelity to the provisions of *Sharia* (religious law) and Islamic principles of tolerance, and encouraged the use of *ijtihad* (juridical reasoning) to deduce laws and precepts, while taking into consideration the spirit of our modern era and the imperatives of development, in accordance with the Kingdom's commitment to internationally recognized human rights.⁴³

The preamble further observed that the provisions of the new Family Code was:

...drafted in a modern legal jurisprudential style, in conformity with Islam's tolerant rules and exemplary purposes while providing balanced, fair and pragmatic solutions resulting from enlightened open

⁴¹ Ibid., at p. 104.

⁴² Henkin, above n. 18.

⁴³ 4th Preambular Paragraph of the English Translation of the Moroccan Family Code (*Moudawana*) of February 5, 2004 by Global Rights.

ijtihad (juridical reasoning). This code further stipulates that human and citizenship rights are accorded to all Moroccans, women and men equally, in respect of the holy divine religious references.⁴⁴

However, despite the importance of international cooperation as analysed above, the primary responsibility for the realisation of human rights and development lies on each respective State.⁴⁵ This brings us the internal aspect, which is the need for appropriate political will and commitment of the State itself to improve the human rights conditions of its populace for the better. A motivating provision can be found in the *Qur'an* to encourage Muslim States to take this primary internal responsibility seriously. The *Qur'an* says: 'God will never change the condition of a people [or nation] until they change it themselves (with their own souls)'.⁴⁶ This demands appropriate internal political will and determination on the part of Muslim States in relation to human rights guarantees and developmental progress. Under the Islamic politico-legal principle of *al-Siyāsah al-Shar'īyyah*, the ruling authority has the mandate under Islamic law to exercise a wide discretion in matters of public law to improve the welfare (*maslahah*) of the populace in the Muslim State. Similar to other human beings anywhere in the world, the populace of Muslim States would certainly prefer the liberties and welfare, which the respect for human rights and developmental progress can bring them. Often however, the under-trodden populace in Muslim States may be deluded by conservative interpretations of Islamic religious provisions to the effect that they should only concentrate on attaining heavenly bliss and not bother about their worldly conditions and welfare. However, it must be noted that even though the *Qur'an* encourages Muslims to seek heavenly attainment with what God has provided them, it immediately adds categorically that: '...and forget not your portion of legitimate enjoyment in this world and do good as God has been good to you...'.⁴⁷

In that regard, good governance is the most important internal agent of human rights and development in any State, without which it is difficult,

44 Ibid., 5th Preambular Paragraph.

45 See e.g. Art. 3(1), Declaration on the Right to Development 1986.

46 *Qur'an* 13:11.

47 *Qur'an* 28:78.

if not impossible, to guarantee both.⁴⁸ In Resolutions on the role of good governance in the promotion of human rights adopted by the former UN Commission on Human Rights,⁴⁹ the Commission consistently recognised the necessity of good governance as an enabling agent for the enjoyment of human rights and attainment of sustainable human development. The Commission identified transparency, responsibility, accountability, participation and responsiveness to the needs and aspirations of the populace as the main attributes of good governance.⁵⁰ In my view, the two key elements of these identified attributes of good governance are accountability and participation. Where the elements of accountability and participation are fully respected, all the other attributes of good governance will be easily realized.

In relation to Muslim States that uphold Islam as a form of social ordering, there are relevant provisions within the *Shari'ah* which equally advocate the concept of good governance as well as its two key elements of accountability and participation in Muslim States. First, Islam considers governance as a Trust (*Amānah*) primarily from God and subsequently from the populace to those in authority. Thus, those in authority are accountable to God in the hereafter and accountable to the populace here in this world for that Trust. This is confirmed in the *Qur'anic* provision that: 'God commands you to render the Trusts back to those whom they are due...'⁵¹ Since governance is a Trust entrusted by God and the populace unto the leadership, this Quranic provision imposes a duty of accountability upon the leadership to both God and the populace, which must be fulfilled. The Prophet of Islam makes this clearer in a statement where he is reported to have said: 'Each of you is [like] a shepherd and each of you is accountable regarding his flock. The leader of a people is [like] a shepherd and is accountable regarding his subjects...'⁵² Thus, no government of a Muslim

48 See generally, H. Sano, G. Alfredsson, and R. Clapp (ed.), *Human Rights and Good Governance* (Martinus Nijhoff Publishers, Leiden, 2002).

49 See e.g. the Commission on Human Rights Resolution 2000/64 adopted on 26 April 2000 and Commission of Human Rights Resolution 2001/72 adopted on 25 April 2001. The Human Rights Commission was replaced by a new Human Rights Council in 2006. See UN General Assembly Resolution A/RES/60/251 of 3 April 2006.

50 Ibid.

51 *Qur'an* 4:58.

52 Reported by al-Bukhari and Muslim.

State can plead Islam as a ground to deny good governance or accountability in that regard.

Accountability in governance was demonstrated practically by the first Caliph, Abubakar, in his acceptance speech on his appointment as the Caliph after the death of the Prophet. He is reported to have addressed the populace in the following words, *inter alia*:

O People!, you have elected me as your leader, yet I am not the best of you. So help me when I do well and correct me when I go wrong. Truthfulness is a Trust and deception is betrayal. The weak amongst you will remain strong with me until I restore their rights, God willing, and the strong amongst you will remain weak with me until I recover the rights [of others] from them, God willing...⁵³

By inviting the populace to help him when he did well and to correct him when he did wrong, the speech of Caliph Abubakar above also recognized participation as an element of good governance. In fact the *Qur'an* had specifically directed the Prophet to consult the Muslim populace in their affairs in an injunction saying: '...and consult them in the affairs...'⁵⁴ In another verse the *Qur'an* also states that the Muslims should conduct '...their affairs by mutual consultation...'⁵⁵ Many contemporary Muslim scholars and organizations currently refer to these two verses as the Islamic basis for promoting democratic government and public participation in the governance of Muslim States.⁵⁶ I shall now proceed to examine the substantive perspectives of applying the theoretical and transitional aspects analysed above.

V. SUBSTANTIVE PERSPECTIVES

Substantively, all civil and political rights as well as economic, social and cultural rights must be promoted and protected to ensure the full enjoyment of human rights generally and for sustainable human development

⁵³ See e.g. A.S. Najeebabadi, *The History of Islam*, Vol. 1 (Darussalam International Publishers, Riyadh, 2000), p. 276.

⁵⁴ *Qur'an* 3:159.

⁵⁵ *Qur'an* 42:38.

⁵⁶ See e.g. A.A. Sachedina, *The Islamic Roots of Democratic Pluralism* (OUP, New York, 2001); J.L. Esposito and J.O. Voll, *Islam and Democracy* (OUP, New York, 1996), pp. 25–38.

in all States. However, in the context of this chapter, I will highlight six specific rights for particular attention by Muslim States.

To ensure accountability and participation in relation to good governance, it is proposed that Muslim States should pay particular attention to the substantive guarantee of three essential rights, namely, the right to freedom of opinion and expression, the right to public and political participation, and the right to fair trial and due process of law. And in relation to the enhancement of developmental progress, it is proposed that Muslim States should also pay particular attention to the substantive guarantee of women's rights, the right to education and the right to work. That is not to suggest that these six rights are more important than all other rights, rather it is submitted that the substantive guarantee of these six rights can boost the ultimate realization of all other human rights and promote development in Muslim States. The scope of each of these proposed rights and the possible role of Islam in advocating their realization in Muslim States are briefly analysed below.⁵⁷

a. The Right to Freedom of Opinion and Expression

The importance of freedom of opinion and expression cannot be over-emphasised, both as a human right and as a channel for development. Opinion and expression are an inherent part of being human. The right to freedom of opinion and expression is therefore one of the most important human rights, without which being fully human will be jeopardised. It is a universal right that is guaranteed under international instruments,⁵⁸ regional instruments⁵⁹ and the constitutions of many States, including Muslim States.⁶⁰ This right includes 'freedom to seek, receive and impart

⁵⁷ See M.A. Baderin, above n. 24, for an extensive analysis of each of these six rights in the light of Islamic law.

⁵⁸ See e.g. Article 19, UDHR; Article 19, ICCPR.

⁵⁹ See e.g. Article 10, European Convention for the Protection of Human Rights and Fundamental Freedoms (1950); Article 13, American Convention on Human Rights (1969); Article 9, African Charter on Human and Peoples' Rights (1981); Article 32, Arab Charter on Human Rights (2004); Article 22, Cairo Declaration on Human Rights in Islam (1990).

⁶⁰ See e.g. Article 34 *Constitution of the Islamic Republic of Afghanistan* (2004); Article 41 *The Constitution of the People's Democratic Republic of Algeria* (1976 as amended); Article 23 *Constitution of the Kingdom of Bahrain* (2002); Articles 24 and 175 *Constitution of the Islamic Republic of Iran* (1979 as amended); Article 19 *Constitution of the Islamic Republic of Pakistan* (1973 as amended); Article 39, *Constitution of the Federal Republic of Nigeria* (1999).

information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media.⁶¹ The human intellect is the greatest instrument of human life and its full potential can only be achieved through interaction of ideas among individuals. Guaranteeing the right to freedom of opinion and expression is therefore essential to stimulate intellectual and dialectical exchanges that help human development and well-being. Respect for this right is necessary for achieving participatory democracy and encouraging individuals to contribute views and opinions on good governance. Similarly, this right must be guaranteed to ensure press freedom, which is an important vehicle for government accountability. The respect for freedom of opinion and expression has contributed in many ways to the promotion and protection of human rights and good governance in most developed nations of the world, which can be emulated by developing nations, including Muslim States. Under its Anti-Poverty Projects, the United Nations Educational, Scientific and Cultural Organisation (UNESCO) has observed in respect of freedom of expression that:

The right to freedom of expression guarantees the right of the poor and their representatives to express and impart any opinions, ideas or information, in relation to the Poverty Reduction Strategy process and in general, either orally, in writing or in print, in the form of art, or through any other media.⁶²

Thus, to enhance the general promotion and protection of human rights and good governance in Muslim States, it is imperative that the right to freedom of opinion and expression, in terms of both individual expression and freedom of the press, must be respected, actively encouraged and guaranteed.

In many Muslim States, freedom of expression is often subjected to the fundamental beliefs of Islam or to the principles of the *Shari'ah* either in fact or by law. For example, Article 19 of the Constitution of the Islamic Republic of Pakistan provides that:

⁶¹ Art. 19, ICCPR.

⁶² See UNESCO web page at: http://portal.unesco.org/shs/en/ev.php-URL_ID=4674&URL_DO=DO_TOPIC&URL_SECTION=201.html (24 April 2006).

Every citizen shall have the right to freedom of speech and expression, and there shall be freedom of the press, *subject to any reasonable restrictions imposed by law in the interest of the glory of Islam* or the integrity, security or defence of Pakistan or any part thereof, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, commission of or incitement to an offence. (emphasis added)

Similarly, Article 23 of the Constitution of Bahrain provides that:

Freedom of opinion and scientific research is guaranteed. Everyone has the right to express his opinion and publish it by word of mouth, in writing or otherwise under the rules and conditions laid down by law, *provided that the fundamental beliefs of Islamic doctrine are not infringed*, the unity of the people is not prejudiced, and discord or sectarianism is not aroused. (emphasis added).

The Constitution of the Islamic Republic of Iran also provides in that regard that:

Publications and the press have freedom of expression *except when it is detrimental to the fundamental principles of Islam* or the rights of the public. The details of this exception will be specified by law.⁶³ (emphasis added)

The freedom of expression and dissemination of thoughts in the Radio and Television of the Islamic Republic of Iran must be guaranteed *in keeping with the Islamic criteria* and the best interests of the country...⁶⁴ (emphasis added)

This position is also reflected in Article 22 of the OIC Cairo Declaration on Human Rights in Islam which provides, *inter alia*, that 'Everyone shall have the right to express his opinion *freely in such manner as would not be contrary to the principles of the Shari'ah*'⁶⁵ and that 'Information is a vital necessity to society. *It may not be exploited or misused in such a way as may violate sanctities and the dignity of Prophets, under moral and ethical values or disintegrate, corrupt or harm society or weaken its faith.*'⁶⁶

⁶³ Art. 24, *Constitution of the Islamic Republic of Iran* (1979 as amended).

⁶⁴ Ibid., Art. 175.

⁶⁵ Art. 22(a).

⁶⁶ Art. 22(c).

From a strict human rights perspective, this subjection of freedom of expression to Islamic principles or to the *Shari'ah* by Muslim States can be problematic, where interpreted restrictively. The possible friction that can arise between the limits of freedom of expression under human rights law and the protection of Islamic principles in that regard was demonstrated by the Salman Rushdie affair in 1988 and the Danish cartoons affair in 2006. On the one hand, both situations were seen by some, from a human rights angle, as an instance of religious constraint on the right to freedom of expression. On the other hand, others considered the two situations as an abuse of the right to freedom of expression without regard to the religious sensibilities of others.⁶⁷

While opinion is a private and internal phenomenon, which cannot actually be restricted, its expression is a public and outward phenomenon, which can interfere with the rights of others and thus not absolute. The non-absolute nature of freedom of expression under human rights law is depicted by the subjection of the exercise of that right to certain restrictions under both international and regional human rights instruments. For example, the International Covenant on Civil and Political Rights 1966 (ICCPR)⁶⁸ provides that the exercise of the right to freedom of expression may be subjected to the 'respect of the rights and reputations of others'⁶⁹ and the 'protection of national security or of public order (*ordre public*), or of public health or morals.'⁷⁰ The European Convention on the Protection of Human Rights and Fundamental Freedoms 1950 (ECHR)⁷¹ also provides that the exercise of the right may be subjected to:

...the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for

67 See e.g. M.H. Kamali, *Freedom of Expression in Islam* (Islamic Texts Society, Cambridge, 1997) pp. 294–301 and M.M. Ahsan and A.R. Kidwai, *Sacrilege versus Civility: Muslim Perspectives on the Satanic Verses Affair* (The Islamic Foundation, Markfield, 1991) on the Salman Rushdie affair. See e.g.: <http://libertysecurity.org/article849.html> (24 April, 2006) and <http://hrw.org/english/docs/2006/02/15/denmar12676.htm> (24 April 2006), on the Danish cartoon affair.

68 999 UNTS 171.

69 See Art. 19(3)(a) ICCPR.

70 See Art. 19(3)(b) ICCPR.

71 ETS 005.

preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.⁷²

It is important to emphasise that, similar to the established human rights approach,⁷³ the general rule under Islamic law is that of guaranteeing freedom of opinion and expression. Any restrictions on the right is the exception that must be interpreted and applied as narrowly as possible in ways that does not put the right itself in jeopardy. According to Mawdudi, 'Islam does not prohibit people from holding debate and discussion, on religious matters, but it wants that these discussions should be conducted in decency'⁷⁴ This rule applies to all religions and faiths reciprocally. Muslims are therefore equally enjoined to debate with others 'in ways that are best and most gracious'.⁷⁵ They are also enjoined to respect the opinion of other faiths and 'not to revile those whom they worship beside God, lest they revile God wrongfully without knowledge. Thus We [God] have made fair-seeming to each people its own doings; to their Lord is their final return and He shall inform them of all that they did'⁷⁶ This indicates an equitable and reciprocatory demonstration of respect for religious sensibilities of others, while exercising the right to freedom of expression. Although respect for the religious sensibilities of others is not expressly mentioned in the list of possible restrictions under the international and regional human rights instruments earlier mentioned above, the European Court of Human Rights did accommodate in the case of *Otto-Preminger Institute v Austria*,⁷⁷ within the context of protection of the 'rights of others',⁷⁸ a restriction on the right to freedom of expression under Article 10 of the ECHR 'to ensure religious peace...and to prevent that some people

⁷² See Art. 10(2) ECHR; See also Art. 13(2) of the American Convention on Human Rights (1961) and Art. 27(1) of the African Charter on Human and Peoples' Rights (1981), which subjects all the rights in the Charter to: 'due regard to the rights of others, collective security, morality and common interest.'

⁷³ See the Human Rights Committee (HRC) General Comment 10 on Freedom of Expression.

⁷⁴ A.A. Maududi, *Human Rights in Islam* (The Islamic Foundation, Marakfield, 1993), p. 30.

⁷⁵ *Qur'an* 16:125.

⁷⁶ *Qur'an* 6:108.

⁷⁷ (1994) ECHRR, Series A, Vol. 295-A.

⁷⁸ Under Art. 10(2) of the ECHR.

should feel the object of attacks on their religious beliefs in an unwarranted and offensive manner.⁷⁹

There are both direct and indirect provisions within Islamic sources to promote the general rule of respect for the freedom of opinion and expression in Muslim States. In respect of freedom of opinion, there are many verses of the *Qur'an* that constantly challenge human beings to use their mind, to think and to reflect.⁸⁰ In his commentary on one of such verses of the *Qur'an*, Yusuf Ali observed, *inter alia*, that: 'All the means by which knowledge can be gathered, judgement formed and goodness cultivated are provided' to human beings by God.⁸¹ The inherent and fundamental nature of the right of every human being to freedom of expression is clearly demonstrated by the provisions of *Qur'an* 55:1–4, which states:

[God] The Most Gracious!; [He] Taught the Qur'an; [He] Created Man;
[and] *Taught him expression.*

Also, there are many verses of the *Qur'an* that begins with the phrase '*yas'alūnaka an...*', meaning 'they ask you [Muhammad] about...' and many recorded Traditions indicating that the Companions of the Prophet Muhammad asked him many probing questions, which represents an exercise of their right to freedom of expression. The Prophet is also reported to have specifically stated that: 'The best form of *jihad* is to tell a word of truth to a tyrannical ruler.'⁸²

Islam cannot therefore be arbitrarily employed by the political authority to constrict political or developmental debates by individuals and the press in Muslim States. Rather, the above provisions, *inter alia*, can be used as valid evidence from Islamic sources to promote the concept of the right

79 (1994) ECHRR, Series A, Vol. 295–A, para. 56. This decision of the European Court of Human Rights has however been criticised as carrying 'matters to extremes in order to spare and "protect" the... States (and not the individual holders of the guaranteed rights)' See G. Haarscher, 'Tolerance of the Intolerant?' (1997) 10 *Ratio Juris*. No. 2, 236 at p. 243.

80 See e.g. *Qur'an* 2:44; *Qur'an* 2:242; *Qur'an* 3:118; *Qur'an* 10:16; *Qur'an* 23:80; *Qur'an* 24:61. According to Afzalur Rahman, 'These and many other verses of the *Qur'an* invite people to think and understand and make their judgement rationally, basing them on the Truth and the facts of life and not merely on conjecture or in pursuance of their vain and selfish desires' A Rahman, *Readings in Political Philosophy, Vol. 1, LIBERTY* (Seerah Foundation, London, 1987), p. 148.

81 Y. Ali, *The Meaning of the Holy Qur'an* (Amana Corporation, Maryland, USA, 1992), p. 857, n. 2924.

82 Ibn Majah, *Sunan* (Cagri Yayinlari, Istanbul, 1981, *Hadith* No. 4011).

to freedom of expression as an indispensable means for the realisation of other human rights and developmental progress in Muslim States.⁸³

b. *The Right of Citizens to Public and Political Participation*

The right to public and political participation is another important channel of ensuring respect for other human rights and good governance within States. As States are represented by governments, who are responsible for the guarantee of human rights and development, the importance of the right of every citizen of the State to participate in the public and political processes for the establishment of the government cannot be overemphasised. This right is guaranteed under the Universal Declaration of Human Rights 1948 (UDHR),⁸⁴ the ICCPR⁸⁵ and regional human rights instruments.⁸⁶ Article 25 of the ICCPR offers the most comprehensive provision of the right:

Every citizen shall have the right and the opportunity, without any of the restrictions mentioned in article 2 and without unreasonable restrictions;

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- (c) To have access, on general terms of equality, to public service in his country.

This provision reflects a democratic process that calls for the right and opportunity of every citizen to participate directly or indirectly in the conduct of public and political affairs of a State. Thus, autocratic regimes 'which offer no opportunities for political participation by citizens' are

⁸³ See further, M.H. Kamali, *Freedom of Expression in Islam* (Islamic Texts Society, Cambridge, 1997).

⁸⁴ Art. 21 UDHR.

⁸⁵ Art. 25 ICCPR.

⁸⁶ See Article 23 ACHR, Article 13 ACHPR; Article 3 of Protocol 1 to the ECHR; Article 23(b) OIC Cairo Declaration on Human Rights in Islam.

incompatible with this right.⁸⁷ The Human Rights Committee (HRC) has indicated that:

The conduct of public affairs, referred to in paragraph (a), is a broad concept which relates to the exercise of political power, in particular the exercise of legislative, executive and administrative powers. It covers all aspects of public administration, and the formulation and implementation of policy at international, national, regional and local levels. The allocation of powers and the means by which individual citizens exercise the right to participate in the conduct of public affairs protected by article 25 should be established by the constitution and other laws.⁸⁸

It is important to note that this right is guaranteed to all citizens of a particular State, and '(n)o distinctions are permitted between citizens in the enjoyment of the right on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status'⁸⁹

The importance of this right in relation to the overall guarantee of human rights in a State is reflected in the preamble of the ECHR that human rights and fundamental freedoms 'are the foundation of justice and peace in the world and are best maintained...by an effective political democracy'.⁹⁰ Similarly, the importance of this right in relation to the enhancement of development and eradication of poverty is reflected under the UNESCO Anti-Poverty Project as follows:

Active and informed participation by the poor is not only consistent with, but also demanded by the rights-based approach to poverty eradication because the international human rights framework affirms the right to take part in the conduct of public affairs.⁹¹

The practical guarantee of this right, in the democratic sense, is currently lacking in many Muslim States, particularly, of the Middle East. The ques-

87 S. Joseph, J. Schultz and M. Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (OUP, Oxford, 2000), p. 498. See also H. Steiner, 'Political Power as a Human Right' (1988) 1 *Harvard Human Rights Yearbook*, 77.

88 HRC General Comment 25, Par. 5.

89 HRC General Comment 25, Par. 3.

90 5th Preambular Paragraph, ECHR.

91 See above, n. 62.

tion has thus often being raised whether or not the democratic process which this right calls for can be realised within an Islamic social order. Generally, the *Qur'an* and *Sunnah* have not laid down any specific political system for Muslim States. The *Shari'ah* only emphasises good governance based on justice, equity and responsibility but leaves its actual administration and process in the hands of the community. However, there is evidence within the *Shari'ah* that the community has the right to elect its leaders either directly or indirectly.⁹² While the *Qur'an* states in many verses that sovereignty of the heavens and earth belongs to God⁹³ it also mentions in other verses that God has made human beings agents and representatives on Earth.⁹⁴ Islamic scholars and jurists agree that this representative capacity of human beings is conferred upon all human beings alike. Based on these *Qur'anic* provisions and the practices of electing Caliphs after the demise of Prophet Muhammad, contemporary Islamic jurists concur that every Muslim has the right to participate, either directly or indirectly in the public and political affairs of the State, particularly in the election of the leadership. For example Mawdudi, writing on the right of Muslims to participate in the public affairs of the Muslim State, stated as follows:

According to Islam, governments are representatives (*khalifa*) of the Creator of the universe: this responsibility is not entrusted to any individual or family or to any particular class or group of people, but to the entire Muslim community. The Holy Qur'an says: "God has promised to appoint those of you who believe and do good deeds as (His) representatives on earth" (24:55). This clearly indicates that *khilāfa* (representation) is a collective gift of God in which the right of every individual Muslim is neither more nor less than the right of any other person.

The method recommended by the Holy Qur'an for running the affairs of the state is as follows: "And their business is (conducted) through consultation among themselves" (Q43:38). According to this principle it is the right of every Muslim either to have a direct say in the affairs of the state or to have a representative chosen by him and other Muslims to participate in the running of the state.

⁹² See e.g. A.K. Zaidan, *Individual and the State in Islamic Law* (IIFSO, Kuwait, 1982), pp. 16–26.

⁹³ See e.g. *Qur'an* 3:189.

⁹⁴ See e.g. *Qur'an* 24:55.

Under no circumstances does Islam permit an individual or a group or party of individuals to deprive the common Muslims of their rights or usurp powers of the state. Nor does Islam regard it as right and proper for an individual to put on a false show of setting up a legislative assembly and by means of such tactics as fraud, persecution, bribery and so on, get himself and men of his choice elected to the assembly. This is not only treachery against the people whose rights are illegally usurped, but also against the Creator who has entrusted Muslims to rule on earth on His behalf, and has prescribed the procedure of an assembly for exercising these powers.

The *shūrā* or legislative assembly should embrace the following principles:

1. The executive head of the government and the members of the assembly should be elected by free and independent choice of the people.
2. The people and their representatives should have the right to criticize and freely express their opinions.
3. The real conditions of the country should be brought before the people without suppression of fact so that they are in a position to judge whether the government is working properly or not.
4. there should be adequate guarantee that only those people who have the support of the masses should rule over the country and those who fail to win this support should be removed from their position of authority.⁹⁵

The *Qur'anic* principle of consultation (*shūrā*) to which Maududi referred above has been interpreted by most contemporary Islamic scholars to accommodate the right to public and political participation as well as the process of democratic free and fair elections for the selection of leaders. In fact, some Islamic scholars and jurists consider free and fair elections as the best way to reflect the principle of *shūrā*, because this involves the participation of all citizens in selecting their ruler and giving him the contract to govern them known as *bay'ah* (allegiance) under Islamic law.⁹⁶ Article 23(b) of the OIC Cairo Declaration on Human Rights in Islam provides in that regard that:

⁹⁵ Maududi, above n. 74 at pp. 33–34.

⁹⁶ See e.g. G.M. Hussein, 'The *Shura* and Human Rights in Islamic Law', Paper delivered at the Cairo Conference on Democracy and the Rule of Law (Dec. 7th–9th 1997), pp. 5–6; and also, M.S. Chaudhry, *Islam's Charter of Fundamental Rights and Civil Liberties* (Al-Matbaat-l-Arabia, Lahore, 1995), pp. 56–60.

Everyone shall have the right to participate directly or indirectly in the administration of his country's public affairs. He shall also have the right to assume public office in accordance with the provisions of Shari'ah.

This Islamic concept of *Shūrā* is currently being employed as an Islamic principle for advocating and promoting democracy and public participation in the Muslim world by different institutes, organisations and scholars.⁹⁷

c. The Right to a Fair Trial and due Process of Law

The right to a fair trial and due process of law has both a general and specific significance in relation to both human rights and development. Its general significance is depicted by the fact that the protection of all other human rights in a State depends, *inter alia*, on the availability of fair trial and due process procedures in the domestic courts through which remedies can be sought for human rights violations. Its specific significance is in the sense that the right to a fair trial and due process of law aims specifically at protecting the liberty and security of individuals through ensuring equity and fair play in the administration of justice by the State.

The term 'fair trial and due process of law' is a generic expression connoting procedural norms that ensure an equitable access to justice and humane administration of justice by the State. It can be considered generally as an innate concept for the equitable dispensation of justice, the scope of which has expanded through human experiences and civilisation. Today, it is a fundamental human right of great importance to ensure, *inter alia*, that individuals, groups and organisations have access to a dependable justice system to fall back on when the campaign for human rights and good governance gets rough with the political authority of the State. Thus, no justice system in any modern State is complete without provision for this right. Due to its importance, a clear identification of its existence and scope is essential within every legal system. In international law, provision for it is found in different international and regional human rights instruments,

⁹⁷ See e.g. Centre for the Study of Islam and Democracy, <http://www.csidonline.org/> (24 May 2006). See also M. Al-Sulami, 'Democracy in the Arab World: The Islamic Foundation' *Open Democracy*, 2005, <http://www.opendemocracy.net/debates/article.jsp?id=3&debateId=135&articleId=2990> (24 May 2006).

while in domestic law it is normally provided for in State constitutions and other domestic judicial procedural legislation.

This right consists of different elements, which are usually categorised into 'pre-trial rights', 'in-trial rights' and 'post-trial rights'. Under international human rights law, the combined provisions of Articles 9, 10, 14, 15, 17 and 26 of the ICCPR covers, comprehensively, the different elements of the right. It is doubtful whether any State today will generally declare itself as a non-recogniser of the right to a fair trial and due process of law. Even States that violate elements of this right usually deny such violations or find one excuse or another to justify their action rather than an outright refutation of its imperativeness. Since it is one right the elements of which is generally provided for in most States' constitutions today, it is therefore arguable that the actual practice of States and the general provision for elements of this right in most States' constitutions demonstrate an existence of the elements of State practice and *opinio juris* necessary to consider this right generically as a norm of customary international law binding on every State.⁹⁸ Elements of the right are also specifically made non-derogable even in times of 'emergency that threatens the independence or security' of the State under Article 27(2) of the American Convention on Human Rights 1969 (ACHR),⁹⁹ Article 15(2) of the ECHR¹⁰⁰ and Article 4(2) of the ICCPR.¹⁰¹ The above analysis no doubt demonstrates the recognition of the importance of the right to a fair trial and due process of law in ensuring the protection of every other recognised human right under international law, which makes its guarantee universally binding

98 See e.g. *North Sea Continental Shelf Case* (1969) ICJ Reports, p. 44, para. 77. See also American Law Institute, *Restatement of the Law, Second* (Minn, American Law Institute Publishers, 1965), pp. 534 ff.

99 36 OAS Treaty Series No. 1. Art. 27(2) of the American Convention disallows derogation from eleven rights, which include the Right to Juridical Personality (Art. 3), Freedom from Ex Post Facto Laws (Art. 9), and '*the judicial guarantees essential for the protection of such rights*' (emphasis added).

100 ETS No. 5. In relation to the right to a fair trial and due process, the European Convention disallows derogation in respect of Art. 7, i.e., 'no punishment without law', and in respect of the principle of double jeopardy (*ne bis in idem*) under Article 4(3) of Protocol 7 to the Convention.

101 999 UNTS 171. In relation to the right to a fair trial and due process, the ICCPR disallows derogation in respect of Article 15, i.e. 'the right not to be subjected to retroactive legislation (ex post facto laws)' and Article 16, i.e. 'the right to recognition as a person before the law'.

on all States especially in relation to protecting those rights considered as customary international law.

While the constitutions of many Muslim States currently provide for different elements of this right, its practical guarantee is generally lacking in most Muslim States. Where the populace are sure to receive fair trial and due process in a State, that will go a long way to encourage public participation and ensure government accountability in respect of human rights, good governance and developmental progress. Muslim States must therefore strive to ensure the practical respect for this right in all its ramifications to encourage human rights advocacy and developmental endeavours. It is submitted that relevant Islamic provisions and principles can be positively utilised for advocating and promoting the practical respect for this right in Muslim States.

Under Islamic law, the issue of fair trial and due process of the law, being procedural, is covered mostly by the methods rather than by the sources of Islamic law *per se*.¹⁰² The *Shari'ah*, *per se*, mainly covers substantive aspects of Islamic law while the procedural aspects fall within the realms of *Fiqh* as formulated by the jurists. Provisions of the *Qur'an* and *Sunnah* often mainly emphasise substantive justice, leaving the procedure for its realisation to the authorities of State to decide in accordance with the best interests of society.¹⁰³ Drawing from the practices of Prophet Muhammad and the Caliphs after him during the early period of Islamic law, classical Islamic jurists endeavoured to lay down judicial procedures which they believed would facilitate the realisation of substantive justice as prescribed by the *Shari'ah*. It is within that procedural context of Islamic law that rules

¹⁰² See Baderin, above, n. 24, at pp. 33–39, for an analysis of the distinction between the 'Sources' and 'Methods' of Islamic law.

¹⁰³ For classical analysis of the development of Islamic judicial procedure, See e.g. M. Ibn Qayyim al-Jawziyyah, *al-Turuq al-Hukmiyyah fi al-Siyâsah al-Shar'iyyah* [Arabic] (al-Mu'asasah al-Arabiyyah, Cairo, 1961), p. 218ff and al-Mâwardi, *al-Ahkâm as-Sultâniyyah: The Laws of Islamic Governance*, Trans. A. Yate (Ta Ha Publishers, London, 1996), pp. 99ff. See also contemporary analysis on the subject by A.M. Awad, 'The Rights of the Accused under Islamic Criminal Law' in M.C. Bassiouni (ed.), *The Islamic Criminal Justice* (Oceania Publications, New York, 1982), pp. 91–92; T.J. Al-Alwani, 'Judiciary and Rights of the Accused in Islamic Criminal Law', in T. Mahmood, *et al.* (eds.), *Criminal Law in Islam and the Muslim World* (Institute of Objective Studies, Delhi, 1996), pp. 256–263; T. Mahmood, 'Criminal Procedure at the Shari'ah Law as Seen by Modern Scholars: A Review', in T. Mahmood, *et al.*, *Ibid.*, pp. 292ff; and generally M. Lippman, *et al.* (eds.), *Islamic Criminal Law and Procedure: An Introduction* (Praeger Publications, New York, 1988).

on fair trial and due process are found. The judicial procedures as found in the works of the classical Islamic jurists were not rigid but were adjusted in practice under the doctrine of *siyāsah shar‘īyyah*,¹⁰⁴ especially during the Abbasid Caliphate to fulfil the needs of time and substantive justice. It would be wrong therefore for any Muslim State to insist that the judicial procedures under traditional Islamic law cannot be modified to ensure the realisation of substantive justice as is necessary for contemporary times. Muslim scholars and jurists fully agree that the particularities of the Islamic judicial system are not inflexible, but leave room for necessary refinement as the needs of substantive justice may demand from time to time.¹⁰⁵

Thus, although the judicial procedures found in the works of classical Islamic jurists may not expressly contain a specific listing of all the elements of the right to a fair trial and due process of law as can be found in modern international human rights instruments, it is not difficult to establish those elements within the broad spectrum of the *Shari‘ah* and the general principles of Islamic administration of justice laid down by the jurists. For instance, Tabandeh rightly observed that all the six articles of the UDHR¹⁰⁶ relating to the guarantee of a fair trial and due process of law ‘conform fully to Islamic law, which has long dealt with all the points they raise under its perfect social regulations.’¹⁰⁷

There are therefore relevant provisions and principles of Islamic law that can be positively advanced to advocate and promote the right to fair trial and due process of law within Muslim States.¹⁰⁸

d. *Women’s Rights*

The important role of women in the developmental progress of a State cannot be overemphasised. However, women have traditionally been subjected to a long culture of discrimination in almost all societies, which continues to affect, adversely, the cultural, social, economic and political positions of

¹⁰⁴ This is a doctrine of legitimate political exigency and governance under Islamic legal and political thought.

¹⁰⁵ See materials cited above n. 103.

¹⁰⁶ I.e. Articles 6, 7, 8, 9, 10, and 11.

¹⁰⁷ See S.A. Tabandeh, *Muslim Commentary on the Universal Declaration of Human Rights*, F. Goulding (trans.) (F.J. Goulding, Guildford, 1970), p. 28.

¹⁰⁸ See M.A. Baderin, ‘A Comparative Analysis of the Right to a Fair Trial and Due Process under International Human Rights Law and Saudi Arabian Domestic Law’ (2006) 10(3), *International Journal of Human Rights*, pp. 241–284.

women in most parts of the world today. The promotion and protection of women's rights is therefore an important aspect of international human rights discourse.¹⁰⁹

The guarantee of women's rights remains, perhaps, the most topical question in relation to human rights and development in Muslim States today. Muslim scholars often argue that Islamic law had, over fourteen centuries ago, established the woman's position as a dignified human being sharing equal rights with her male counterpart in almost all spheres of life.¹¹⁰ However, due to factors such as patriarchal conservatism, illiteracy and poverty, women in most parts of the Muslim world still suffer, practically, one form of gender discrimination or the other. Muslim States therefore need to take the issue of women's rights seriously in terms of both human rights and developmental progress. Ensuring women's rights and enhancing their socio-cultural, economic and politico-legal empowerment will not only improve the position of women but will ultimately contribute to the overall developmental progress of the State. This is based on the fact that women approximately constitute half of the population of every State, so ignoring their rights and empowerment means ignoring the rights and empowerment of approximately half of the population, which will, ultimately, affect adversely the development of the State itself.

It must be acknowledged that conservative and restrictive interpretations of Islamic sources can impede the enjoyment of different rights by women in Muslim States. Islamic religious and cultural arguments have often been applied selectively to practically restrict women's rights in most Muslim States. However, Islamic law and culture have generally never been static but have, in fact, been evolutionary and responding to modernity and changes in most Muslim societies, albeit to the advantage of men. I have stated elsewhere that 'it is hypocritical if men on one hand acquire and

109 See e.g. Common Article 3 of the ICCPR and ICESCR; The Convention on the Elimination of All Forms of Discrimination Against Women (1979); The Additional Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003) and The Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (1994).

110 See e.g. A.R. Doi, *Woman in Shari'ah* (TaHa Publishers, London, 1989); S. El-Bahnassawi, *Woman between Islam and World Legislations* (Dar-ul-Qalam, Safat, 1985); L. Al-Faruqi, *Women, Muslim Society and Islam* (American Trust Publications, Indianapolis, 1988); Z. Chaudhry, 'The Myth of Misogyny: A Re-analyses of Women's Inheritance in Islamic Law' (1997) 61, *Albany Law Review*, 511 at pp. 512–515.

enjoy many rights and liberties of today's world, often through constructive and evolutionary interpretations of the *Shari'ah* but on the other hand consider the rights and liberties of women to be stagnated upon the juristic views of the classical schools of Islamic law.¹¹¹ However, it is important to emphasise that many of the adverse cultural attitudes attributed to Islam in most Muslim States are based on traditional cultural practices and not on Islamic legal provisions or religious norms. One example is the so called 'honour killing' that occurs in some Muslim societies, which cannot be justified under any Islamic legal or religious source. Rather, there are relevant evidences within the sources of Islam to justify women's enjoyment of the evolutionary nature of Islamic law and culture in a way that ensures their human rights similar to their male counterparts. Muslim States therefore have an important responsibility to ensure the guarantee of women's rights and to ensure that Islam is not negatively or erroneously pleaded to deny women's rights in Muslim States.

The important role of Islam in promoting women's rights in Muslim societies is reflected in the observation of one researcher on women's rights in Afghanistan that:

From my impressions and interviews in Afghanistan, ... [m]any women expressed that while they were keen to have rights, they wanted it within the framework of Islam and not as a cultural imposition from the West. Afghan women felt that the U.S. was pushing them to undermine Islam.¹¹²

The research also revealed that:

Many Afghan women believed that the Qur'an offered women enough rights for them to negotiate their rights, but it was the fundamentalist interpretations that prevented women from claiming those rights and from educating themselves. Given the strategies employed by various women's organizations in Afghanistan to empower women, it became obvious that their perceptions of culture and religion played a crucial role in their women's rights strategies.¹¹³

¹¹¹ Baderin, above n. 24, at p. 65.

¹¹² H. Ahmed-Ghosh, 'Voices of Afghan Women: Women's Rights, Human Rights, and Culture' (2004) 27 *Thomas Jefferson Law Review* 27 at p. 29.

¹¹³ *Ibid.*, at 31.

The author quoted the former Afghanistan Minister for Women's Affairs, Habiba Sorabi,¹¹⁴ as stating that 'Islam is here to stay and women want rights within the Islamic framework;...Islam gave women rights to education and employment and that her Ministry was working within that framework.'¹¹⁵

The role of Islam is similarly reflected in the report of a desk-based research published in 2005 by the Centre for Islamic Legal Studies of the Ahmadu Bello University, Zaria, Nigeria. The report titled *Promoting Women's Rights through Sharia in Northern Nigeria*,¹¹⁶ observed, *inter alia*,

Muslim women in Northern Nigeria, like women in other societies across the world, have been subjected to practices that violate their rights. Some of these violations are carried out in the name of Islam in spite of the fact that such practices are against the teachings of Islam and that the Islamic prescriptions in respect of women, if practised, can serve as a model to other societies.¹¹⁷

Based on a conviction that women's right can be promoted through the *Shari'ah* and that the *Shari'ah* can be used to 'improve the position of women, and to improve their means to face the challenges confronting them in this global age and ever-changing Muslim society',¹¹⁸ the report identified some 'harmful practices affecting Muslim women in Northern Nigeria and evaluates them according to Sharia.'¹¹⁹ The report covered issues relating to the girl-child, inheritance, marriage and marital relationships, property ownership, divorce, access to health and reproductive health services, custody of children, political participation, economic rights, access to justice and criminal justice.

The new Moroccan Family Code earlier mentioned above also represents an endeavour to ensure the enhancement of women's rights in Morocco within the framework of Islam.¹²⁰

114 Now appointed as the first female Governor in Afghanistan for the Province of Bamiyan.

115 Ahmed-Gosh, above, n. 112.

116 *Promoting Women's Rights through Sharia in Northern Nigeria*, British Council, 2005.

117 Ibid., p. 5, para. 1.1.4.

118 Ibid., para. 1.1.1.

119 Ibid., p. 7, para. 1.2.

120 See text to n. 44.

Due, on the one hand, to the topicality of women's rights in human rights discourse generally and its relevance to developmental progress of States, and the current poor situation of women's rights in most Muslim States, on the other, Muslim States still need to do a lot more regarding the practical guarantee of women's rights. It is submitted that advocates of women's rights can, in that regard, find many provisions within Islamic sources for advocating and promoting positive development of women's rights in Muslim States.¹²¹

e. *The Right to Education*

Education is an important channel for development. It is the key to mental liberation which helps the individual not only to develop his own personality but also to be useful to his society. The right to education is guaranteed under Articles 13 and 14 of the ICESCR, with the States Parties agreeing that:

education shall be directed to the full development of the human personality and the sense of dignity, and shall strengthen the respect for human rights and fundamental freedoms' [and that] education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups and further the activities of the United Nations for the maintenance of peace.¹²²

There is therefore some consensus amongst States on the fact that education is an important tool of individual and societal development. Education has been described as an empowerment right.¹²³ Without some minimum level of formal or non-formal education, an individual's awareness about his human rights would be greatly impaired and his contribution to societal development will be limited. Article 13(1) states that education 'shall strengthen the respect for human rights and fundamental freedoms'. This is achieved through both general education and provision of specific human rights education in the educational curriculum. The Vienna Declaration and Programme of Action adopted after the 1993 World Conference on

¹²¹ See Baderin, above n. 24.

¹²² Art. 13(1) ICESCR.

¹²³ See ESCR Committee, General Comment 13, Par. 1.

Human Rights called on all States and institutions 'to include human rights, humanitarian law, democracy and rule of law as subjects in the curricula of all learning institutions in formal and non-formal settings.'¹²⁴ In explaining the scope of this right, the ESCR Committee has observed:

The right to education, like all human rights, imposes three types or levels of obligations on States parties: the obligations to *respect*, *protect* and *fulfil*. In turn, the obligation to fulfil incorporates both an obligation to facilitate and an obligation to provide. The obligation to respect requires States parties to avoid measures that hinder or prevent the enjoyment of the right to education. The obligation to protect requires States parties to take measures that prevent third parties from interfering with the enjoyment of the right to education. The obligation to fulfil (facilitate) requires States to take positive measures that enable and assist individuals and communities to enjoy the right to education. Finally, States parties have an obligation to fulfil (provide) the right to education. As a general rule, States parties are obliged to fulfil (provide) a specific right in the Covenant when an individual or group is unable, for reasons beyond their control, to realize the right themselves by the means at their disposal. However, the extent of this obligation is always subject to the text of the Covenant.¹²⁵

The ideals and aspirations regarding the right to education under international human rights law are very much in consonance with the Islamic ideals on education. There is consensus among all Islamic schools of thought that education is absolutely important and compulsory under Islamic law. Right from its inception, Islam had laid great emphasis on the importance of education and highlighted its role in the development of the human person and society. The first five revealed verses of the *Qur'an* were very much related to education and learning:

Read! In the name of your Lord Who created (everything). He created Man from a clot of congealed blood. Read! And your Lord is Most Generous. He has taught (writing) by the Pen. He has taught Man that which he knew not.¹²⁶

¹²⁴ UN Doc A/CONF.157/23. Part II Par. 79.

¹²⁵ Ibid., paras. 46–47.

¹²⁶ *Qur'an* 96:1–5.

These five verses continue to be the basic reference point for advocating the right to education under Islamic law. There are also many other references in both the *Qur'an* and *Sunnah* on the importance of education, the obligation of seeking knowledge, and the superiority of scholarship. The *Qur'an* summarises the importance of education and scholarship with an affirmatory interrogative statement that: '...Can those who are learned be compared with those who are unlearned? It is those who are endowed with understanding that receive admonition.'¹²⁷ The Prophet of Islam is reported to have also stated emphatically in one Tradition that seeking of knowledge (i.e. education) is compulsory on every Muslim.¹²⁸ Asad thus concluded that from an Islamic perspective 'it is the citizens' right and the government's duty to have a system of education which would make knowledge freely accessible (and compulsory) to every man and woman in the state.'¹²⁹

This recognition and emphasis on the importance of education within Islamic sources can be positively used to advocate the right to education in Muslim States.

f. *The Right to Work*

Work is obviously an important channel of development in every State. Work is traditionally recognised as the legitimate means of earning a livelihood in every human society. Sieghart has thus rightly pointed out that work is 'an essential part of the human condition'.¹³⁰ It is through work that a dignified source of income is often guaranteed and the material well being of an individual and a harmonious development of his personality and the society may be realised. The popular saying that 'there is dignity in labour' substantiates the fact that the right to work is fundamental to the maintenance of the dignity of the individual. Article 6 of the ICESCR therefore guarantees the right to work and recognises the value of work

¹²⁷ *Qur'an* 39:9.

¹²⁸ Reported by Ibn Mâjah, See A.A. Fazlul-Karim, *Al Hadis: An English Translation and Commentary of Mishkat-ul-Masabih with Arabic Text*, 4 Volumes (Islamic Books Service, New Delhi, 3rd ed., 1994), Vol. 1, p. 351, Hadith No. 37.

¹²⁹ M. Asad, *The Principles of State and Government in Islam* (Dar Al-Andalus, Gibraltar, 1980), p. 86.

¹³⁰ P. Sieghart, *The Lawful Rights of Mankind: An Introduction to the International Legal Code of Human Rights* (OUP, Oxford, 1986), at p. 123.

as 'an element integral to the maintenance of the dignity and self-respect of the individual.'¹³¹

As Muslim States are mostly developing nations, the level of unemployment is often very high. It is therefore imperative that the right to work should be very much promoted in Muslim States to enhance developmental progress. While States may argue that the right to work does not necessarily mean full employment and total elimination of unemployment, it places an obligation on the States to, at least, provide the opportunity of work for everyone who wants to work and narrow the channels of unemployment.¹³² Also, while the right to work under Article 6(1) of the ICESCR may be subject to progressive realisation, as is the case with most economic, social and cultural rights, Article 6(2), as read with Article 2(1), provides that certain steps must be taken by the States Parties to achieve the full realisation of the right. Such steps, which include 'technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual', can be very demanding for many developing nations, including Muslim States, and may still take some time to be achieved, depending on available resources. This re-emphasises the need for international and regional cooperation, as earlier discussed above under Section IV of this chapter, by Muslim States to realise this important right.

As work and dignity of labour is fully recognised under Islamic law, this can play an important role in promoting the right to work in Muslim States. There are many relevant provisions in the Islamic sources that extol the value of labour and work.¹³³ For example the *Qur'an* states categorically that God has ordained daytime for seeking sustenance (through work) by

¹³¹ M.C.R. Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Clarendon Press, Oxford, 1995), p. 194.

¹³² See Art. 23(1) of the UDHR which provides that 'Everyone has the right to work...and protection against unemployment'.

¹³³ See e.g. M al-Ghazālī, *Huqūq al-Insān Bayn T'alīm al-Islām Wa I'lān al-Umam al-Mutahidah* (Arabic) (Dār al-Da'wah, Alexandria, 1993), pp. 177–203; W Al-Zuhayli, *Fiqh al-Islāmī wa Adillatuh*, 11 Volumes (Dār al-Fikr, Pittsburg, 1997), Vol. 7, pp. 4986–4989 and M.F. Uthmān, *Huqūq al-Insān Bayn al-Sharī'ah al-Islāmiyyah wa al-Fikr al-Qānūniyy al-Garbiyy* (Arabic) (Dār al-Surūq, Beirut, 1982), pp. 151–155; where the authors discuss many Qur'anic verses and Prophetic Traditions on dignity of labour and work in Islamic law.

humans,¹³⁴ and has also made trade lawful.¹³⁵ The Prophet Muhammad himself set many examples on the dignity of labour both in deeds and words. In one Tradition he is reported to have said: 'There is no better way of sustenance than through the labour of one's own hands, because even the Prophet David used to feed from the labour of his own hands.'¹³⁶ And in answer to a question put to him as to which was the best means of sustenance the Prophet gave a similar answer that: '...the best means of sustenance is through the labour of your own hands or through lawful trade.'¹³⁷ He also stated in another Tradition that it is better and dignifying for an individual to earn a living by cutting and selling fire-wood than through begging.¹³⁸ The Prophet himself is recorded to have worked for his livelihood.

It is clear from the above Islamic sources that Islam encourages labour and working for one's sustenance. The State therefore has a duty under Islamic law to respect the right of every individual to work, encourage work and take steps to provide opportunities for work. The duty of the State to recognise the right to work and to take steps to ensure the provision of opportunity for work and the protection of individuals from unemployment is often inferred by Muslim scholars from a precedent laid by Prophet Muhammad when a man came to him begging for alms. The Prophet asked the man to bring two items from his own house, which he sold for two silver coins. He then gave the coins to the man instructing him to feed his family with one of the coins and to buy an axe with the other coin. The Prophet fixed a handle to the axe and gave it to the man saying: 'Go, cut wood and sell it, and do not come back to me for fifteen days.' The man did as he was told and returned thereafter to the Prophet having earned up to ten silver coins from few days' work, and was able to fulfil his needs conveniently from his own labour. The Prophet then advised him that this was better and more dignifying for him than begging. Based on this precedent of the Prophet of Islam, as an embodiment of the State during his time, Chaudhry concluded that the 'Islamic State is, thus, responsible to

134 See *Qur'an* 78: 11.

135 See *Qur'an* 2:275.

136 Reported by al-Bukhārī, See e.g. Fazlul-Karim, above n. 128, Vol. 1, p. 403, Hadith No. 109.

137 Reported by Ahmad, See Fazlul-Karim, *ibid.*, p. 406, Hadith No. 131w.

138 Reported by al-Bukhārī See e.g. Fazlul-Karim, *ibid.*, Hadith No. 108.

provide employment to its citizens if they have no employment or occupation to earn their livelihood.¹³⁹ Al-Zuhayli reached the same conclusion by reference both to this Tradition¹⁴⁰ and also through another Tradition in which the Prophet stated that the ruler (i.e. State) is like a shepherd over the people and is thus responsible for the affairs of the people.¹⁴¹

Muslim scholars also argue from the facts of the above precedent of the Prophet that there is a corresponding duty to work on every individual who has the capacity to do so under Islamic law.¹⁴² The concept of a duty to work can complement the right to work in furthering development in the State. A relevant point here is the question of the right of women to work under Islamic law. The ESCR Committee has expressed concern regarding the prohibition of women from certain jobs in some Muslim States.¹⁴³

Generally, one finds nothing in the *Qur'an* and *Sunnah* that specifically excludes women from doing any legitimate work of their choice provided they possess the required skills and expertise and are not exposed to any hazards therefrom. It is important to state that the *Shari'ah* recognises the independence of women within basic moral and ethical rules that equally apply to men. Most contemporary Muslim scholars support the view that women can not be legally discriminated against in the right to work and choice of profession. For instance, Hamidullah has observed that:

In every epoch of Islamic history, including the time of the Prophet, one sees Muslim women engaged in every profession that suited them. They worked as nurses, teachers, and even as combatants by the side of men when necessary, in addition to being singers, hair-dressers, cooks, etc. Caliph 'Umar employed a lady, Shifa' bint 'Abdullah as inspector in the market at the capital (Madinah) as Ibn Hajar (*Isabah*) records. The same lady had taught Hafsa, wife of the Prophet, how to write and read. The jurists admit the possibility of women being appointed as judges of tribunals, and there are several examples of

¹³⁹ Chaudhry, above n. 96, p. 41. See also F. Uthmân, above n. 133, at p. 153. and Fazlul-Karim, above n. 128 at p. 401, Hadith No. 107.

¹⁴⁰ See Al-Zuhayli, above n. 133, Vol. 7, p. 5010.

¹⁴¹ See *ibid.*, p. 49–89.

¹⁴² See e.g. Art. 36(1) of the *Syrian Constitution* of 1973 which provides that: (1) Work is a right and duty of every citizen. The state undertakes to provide work for all citizens.

¹⁴³ See e.g. Concluding Observations on Islamic Republic of Iran (1993), UN. Doc. E/C.12/1993/7. Par. 6.

the kind. In brief, far from becoming a parasite, a woman could collaborate with men, in Muslim society, to earn her livelihood and to develop her talents.¹⁴⁴

Similarly, Abdulati has also stated that:

Historical records show that women participated in public life with the early Muslims, especially in times of emergencies.... They were not shut behind iron bars or considered worthless creatures and deprived of souls. Islam grants woman equal rights to contract, to enterprise, to earn and possess independently.¹⁴⁵

The current position in most Muslim States however indicates the need to redress the misconception about the right of women to work and also ensure their safety and security in that respect both in the private and public sectors in Muslim States. In the light of the above, it is submitted that the Islamic provisions on the right and duty to work can positively complement the advocacy for the guarantee of the right to work in Muslim States.

VI. CONCLUSION

Religion, in a broad sense, has been part and parcel of human existence since its inception. Religion can however be a very sentimental and an explosive phenomenon, which has sometimes been misused to perpetrate hatred and human rights violations in many parts of the world. Paradoxically however, religion also forms the basis of the actions of many individual and collective humanitarian endeavours in many parts of the world today. Islam is perhaps the most misunderstood religion in that regard today and often perceived as an impediment to human rights and development in Muslim States.

The analysis in this chapter advocates with relevant evidence and arguments that due to its very significant role in Muslim States, Islam can and should, where employed appropriately, provide the glue that can make human rights to stick and a channel to promote development in Muslim States.

¹⁴⁴ M. Hamidullah, *Introduction to Islam* (Ansariyan Publication, Qum, 1982), p. 139.

¹⁴⁵ H. Abdul Ati, *Islam in Focus* (El-Falah Foundation, Cairo, 1997), pp. 364–5; See also generally J. Badawi, 'The Status of Woman in Islam' (1971) 8(2) *Al-Ittihad*, September, at p. 33.

CHAPTER TWELVE
HUMAN RIGHTS, NATURAL JUSTICE AND PAKISTAN'S
SHARIAT COURTS

*Dr Martin Lau**

I. INTRODUCTION

IN 1979, ALMOST thirty years ago, General Zia ul Haq promulgated a series of Ordinances, collectively referred to as the Hudood Ordinances, which revolutionised Pakistan's system of criminal law. The stated objective of these Ordinances was the Islamisation of the legal system of Pakistan. The impact of these Islamisation measures on the landscape of human rights has been dramatic. The Zina (Enforcement of Hudood) Ordinance, 1979, has been responsible for a dramatic increase of Pakistan's female jail populations and even committees appointed by the government itself have demanded its repeal.

Such has been the impact of the 1979 Hudood Ordinances on human rights in Pakistan, that they have tended to obscure another, significant Islamisation measure, which was carried out in the very same year: the creation of courts empowered to strike down laws on the basis of Islam. The setting up of the Federal Shariat Court as court of appeal against convictions under the Hudood Ordinances and as the only court with the jurisdiction to examine the validity of laws on the basis of Islam was a truly revolutionary measure. Never before had there been in Pakistan a court endowed with the express power to invalidate laws on the basis of Islam. Whilst revolutionary at the time, more recently other countries have created similar mechanism to ensure that their legal systems comply with Islamic law. Both the new constitutions of Iraq and of Afghanistan contain provisions which will allow the highest court of the land to review legislation on the basis of Islam. The Pakistanis experience with a judicial review based on Islam not only sheds light on an area of law which is of very real relevance to any debate on religion and human rights but is also of interest in a comparative perspective.

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II. THE JURISDICTION OF THE FEDERAL SHARIAT COURT

The Constitution (Amendment) Order 1980 (P.O. No. 1 of 1980) incorporated into the Constitution provisions relating to a new court, the Federal Shariat Court (Article 203 C. (1)). The Federal Shariat Court consists of not more than eight Muslim Judges including the Chief Justice of the Federal Shariat Court (Article 203C (2)). Of the judges, not more than four have to be qualified as High Court Judges and not more than three of them have to be ulema (religious scholars) well versed in Islamic law (Article 203C (3A)). The Federal Shariat Court has, *inter alia*, the power to examine and decide whether or not any law or provision of law is repugnant to the injunctions of Islam (Article 203D (1)). The Shariat Appellate Bench of the Supreme Court, consisting of three Muslim Judges of the Supreme Court and two ulema, hears appeals from the Federal Shariat Court (Article 203F. (3)). The decision of the Shariat Appellate Bench of the Supreme Court is binding on all High Courts and courts subordinate thereto (Article 203GG). In 1983 the Federal Shariat Court was given the power 'of its own motion' to 'examine and decide the question whether or not any law or provision of law is repugnant to the Injunctions of Islam, as laid down in the Holy Quran and Sunnah of the Holy Prophet [...]'.¹ The *suo moto* jurisdiction of the Federal Shariat Court was unprecedented in the legal history of Pakistan and constituted a significant departure from the principle that courts in the words of the Supreme Court, 'do not, therefore, decide abstract, hypothetical or contingent questions or give mere declarations in the air.'² The fact that the Federal Shariat Court in its *suo moto* jurisdiction did not operate like an ordinary court but more like a commission has been criticized even by supporters of the radical Islamisation of Pakistan's legal system. Justice Tanzil-ur-Rahman observed that the Federal Shariat Court hardly ever received any response to the notices published in national newspapers inviting comments from the general public and 'received no assistance whatsoever from any quarter, perhaps, for lack of involvement of any personal interests.'³

¹ The *suo moto* powers were conferred upon the Federal Shariat Court in 1982, see Article 203-D as amended by section 4 of *The Constitution (Second Amendment) Order, 1982*.

² See *Province of East Pakistan v. Md. Mehdi Ali Khan* PLD 1959 SC 387, at p. 407.

³ See Justice Tanzil-ur-Rahman, *Enforcement of Islamic Law in Pakistan – A New Approach*, n.d., quoted in *Habib Bank Ltd. v. Muhammad Hussain* PLD 1987 Kar 612., at p. 628.

Another surprising feature of the exercise of *suo moto* jurisdiction was that hardly any laws were ever declared to be repugnant to Islam. The provisions declared repugnant in respect of statutes related to commercial law can be counted on the fingers of one hand. The first substantive change to an important commercial statute came about in 1983 when the Federal Shariat Court in exercise of its *suo moto* jurisdiction reviewed *The Specific Relief Act, 1877*.⁴ Justice Aftab Hussain found that those provisions of the act which hold a buyer liable to pay for goods destroyed before delivery, but after the completion of an executory contract, repugnant to Islam and directed that the illustrations (a) and (b) of section 13 and illustration (e) of section 22 should be deleted. In another *suo moto* case a whole tranche of statutes including *The Trademark Act, 1941* were declared not to be repugnant to Islam.⁵ Equally, *The Contract Act, 1972*, *The Partnership Act, 1932* and *The Sales of Goods Act, 1930* survived the examination conducted by the Federal Shariat Court largely intact.⁶ The most interesting outcome of the *suo moto* jurisdiction was the emergence of a set of general principles based on Islamic law which were employed to test the Islamic *vires* of legislation. These will be examined in the next part.

III. FUNDAMENTAL RIGHTS AND ISLAM: THE RIGHT TO EQUALITY

Its *suo moto* jurisdiction enabled the Federal Shariat Court to conduct a systematic review of a large number of statutes on the basis of Islam. The most surprising effect of the solitary, inquisitorial nature of the proceedings – as mentioned above in most cases the Federal Shariat Court did not receive any comments or input from third parties – was the emergence of a set of fundamental rights and principles of natural justice, both derived from Islamic law, against which legislation was tested.

The two most important Islamic rights were the right to equality and the right to be heard. These two 'Islamic fundamental rights' were applied in a manner similar to the constitutionally guaranteed fundamental rights: if a statutory provision was in conflict with any of these rights it was liable to be invalidated on the ground that the law was repugnant to the injunctions of Islam. It will be seen that the reliance on generic rights rather than concrete provisions of Islamic law was considered controversial amongst

4 *In re: The Specific Relief Act (I of 1877)* PLD 1983 FSC 113.

5 *In re: Trade Marks Act, 1940* PLD 1983 FSC 125.

6 See SSM 1-3/82, 20 October 1983, Federal Shariat Court (unreported).