

Université de Montréal

**HUMAN RIGHTS IN SHARI'A AND IRAN'S
CONSTITUTIONAL AND LEGAL SYSTEM:
THE CASE OF FREEDOM OF EXPRESSION**

Par

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Faculté de droit

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HUMAN RIGHTS IN SHARU A. ADIRAN'S

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Université de Montréal
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Cette thèse intitulée :

**HUMAN RIGHTS IN SHARI'A AND IRAN'S
CONSTITUTIONAL AND LEGAL SYSTEM:
THE CASE OF FREEDOM OF EXPRESSION**

Présentée par :

Reza Eslami Somea

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To my wife, Mahdiah Zargarazad

Abstract

This thesis advances a theoretical framework for the evaluation of Shari'a (Islamic law) with respect to the modern notion of international human rights law. It analyzes the concepts of individual, rights, citizenry, and constitutionalism in Shari'a, and examines the principles, characteristics, and standards of Shari'a in the field of human rights. With reference to the principle of equality, it also reviews the rights of women and religious minorities under Shari'a. As a case study, the thesis also establishes a framework for analyzing the notions of freedom and freedom of expression, and discusses Shari'a criteria and qualifications for freedom of speech, the right to participate in public life, freedom of thought, conscience and religion, and freedom of the press. Focusing on Iran's constitutional and legal system, the study illustrates the implementation of Islamic law in Iran, where Shari'a is strictly applied. The thesis concludes that universal standards of human rights are not established features in Islamic law, and Shari'a principles contradict the principles and norms of international human rights law. It is also argued that the application of Shari'a, public and criminal law in particular, is problematic and results in deficiencies and hardships in Muslim societies.

Muslim reformists have sought an alternative Islamic law more compatible with modern standards and values. This thesis contributes to the debate on Islamic reformism and human rights in arguing that Shari'a's contradiction of universal human rights norms cannot be avoided, and that traditional mechanisms of reform within the

framework of Shari'a are inadequate for achieving the necessary degree of reform. It is suggested that, based on a cross-cultural dialogue and intellectual debate, an essential and primary reform should define the notion of human rights on rational and intellectual grounds, and identify the objective foundations of human rights in reason and human dignity, not on Shari'a criteria and qualifications.

Résumé

En tant que corpus unifié de la loi islamique, la Shari'a couvre tous les aspects sociaux, éthiques et spirituels de la vie humaine, et régit le comportement des Musulmans dans les affaires publiques et privées. Elle est considérée comme contenant toutes les règles nécessaires aux activités humaines, donnée par Dieu et applicable à tous. Plusieurs lois de la Shari'a traitent des droits humains, des libertés politiques et de la tolérance religieuse, lesquels sont régis par des devoirs et des obligations. Par exemple, la Shari'a définit l'étendue et le caractère des droits des femmes et des non-Musulmans, le droit de participation à la vie publique et la liberté d'expression et de religion. Les débats intellectuels sur ces questions, qui se penchent sur la validité de l'application des lois de la Shari'a à l'époque moderne, remettront certainement en question l'autorité solidement enracinée de la Shari'a, et auront un impact énorme sur le processus de développement des sociétés musulmanes. Cette thèse propose un cadre théorique pour l'évaluation de la Shari'a (loi islamique) relativement à la notion moderne de droit international des droits humains.

Notre objectif est d'étudier la Shari'a en tant que tradition légale vieille de plusieurs siècles. Nous comptons discuter la question des droits humains dans la Shari'a et analyser la signification, les caractéristiques ainsi que les conditions et principes généraux qui sont communs à presque toutes les écoles de pensée de la Shari'a. Nous donnerons un aperçu de la conception des droits humains sous la Shari'a en nous référant aux normes élémentaires des droits humains telles que fournies par la

Déclaration Universelle des Droits de l'Homme. L'objectif ici poursuivi est de présenter les différences fondamentales et théoriques entre ces deux systèmes. À cause de son importance dans le débat sur les droits humains, le principe d'égalité est mis en relief et les droits des femmes et des minorités religieuses sont discutés en détail. Plus particulièrement, cette thèse passe en revue le concept de liberté d'expression en tant qu'une des valeurs suprêmes d'une société libre et démocratique, et examine la liberté de parole, le droit à la participation dans la vie publique, la liberté de pensée, de conscience et de religion ainsi que la liberté de presse dans la Shari'a. Puisque les fondements théoriques des droits humains -- i.e. légitimité, origines, sources et principes de base -- sont largement différents dans les deux systèmes, une étude comparative semble impossible. Chaque système comporte des prérogatives et des normes différentes.

L'individualisme, la liberté et l'égalité ne sont pas des valeurs établies dans la Shari'a. Les concepts d'être humain en tant qu'individu et de droits humains en tant que prérogatives ne sont pas reconnus dans la Shari'a. Les droits sont le privilège de Dieu et constituent des devoirs et des obligations. Ils sont assujettis aux conditions de la Shari'a et sont limités en fonction du sexe et de l'appartenance religieuse. De plus, le concept de démocratie est inconnu du modèle étatique de la Shari'a, et le droit à la participation égale des citoyens dans la vie publique n'est pas protégé. La liberté d'expression, de même que la liberté de pensée, de conscience et de religion ne sont pas garanties. En somme, la notion moderne des droits humains est absente de la Shari'a, dont les principes et critères contredisent, et peuvent difficilement être conciliés avec les normes internationales des droits humains.

La thèse conclut que les normes universelles des droits humains ne sont pas des caractéristiques établies dans la loi islamique et que les principes de la Shari'a contredisent les principes et les normes du droit international des droits humains. On considère également que l'application de la Shari'a et en particulier de ses lois publiques et criminelles est problématique et entraîne des carences et de la misère dans les sociétés musulmanes.

Pour l'étude de l'application des lois de la Shari'a dans les pays musulmans, nous avons choisi l'Iran, où les lois sur le statut personnel et le droit public sont strictement basées sur les standards de la Shari'a. La croyance dans la suprématie de la Shari'a sur tout type de droit, constitutionnel ou autre, et donc dans la nécessité d'appliquer les lois de la Shari'a dans tous les aspects de la vie publique et privée sont un principe et une caractéristique majeurs de la Constitution de la République Islamique d'Iran.

Aussi, cette étude pourrait être profitable pour le récent mouvement de réforme en Iran et pour le débat sur la société civile, la démocratie et les droits humains qui s'y déroule actuellement. Cette étude présente au mouvement de réforme le concept moderne de droits et libertés fondamentaux, dans l'espoir que l'institutionnalisation des notions de démocratie, de droits humains et de pluralisme constituera la préoccupation principale de la société iranienne envers le modernisme. Cette étude examine aussi quelques déclarations islamiques des droits humains, rédigées sous l'influence de la Shari'a, afin d'illustrer la réponse collective des états islamiques à l'idée de droits humains.

Cette thèse contribue au débat sur le réformisme islamique et les droits humains en soutenant que la contradiction entre la Shari'a et les normes universelles des droits humains ne peut être évitée, et que les mécanismes traditionnels de réforme à l'intérieur du cadre de la Shari'a sont inadéquats pour en arriver au degré de réforme nécessaire.

En fournissant une analyse critique des lois de la Shari'a dans le domaine des droits humains et en soulignant leur contradiction des normes internationales, cette étude espère inspirer une discussion intellectuelle ainsi que pragmatique sur le besoin d'une nouvelle compréhension des textes religieux, laquelle s'avèrerait plus compatible avec les standards modernes de droits humains. De plus, cette étude propose l'idée inédite que la notion de droits humains est un concept extra-religieux, généralement défini sur des bases rationnelles et intellectuelles et selon des considérations épistémologiques, et non par des critères religieux. Elle suggère qu'un dialogue entre les éléments internes et externes à la religion serait en mesure de fournir des fondations intellectuelles pour la pensée islamique dans le domaine des droits humains.

Notre investigation se base sur des sources primaires et secondaires écrites en quatre langues, à savoir l'anglais, le français, l'arabe et le persan. Afin d'illustrer la tendance générale de la pensée islamique sur les droits humains, cette thèse se réfère à la fois à des sources classiques et contemporaines, à partir de celles qui supportent le droit islamique et le système légal iranien jusqu'à celles qui critiquent les lois de la Shari'a et les dispositions légales concernant les droits et libertés dans le système iranien.

La Partie I de cette thèse suggère un cadre théorique pour les droits humains dans la Shari'a et le système iranien. Le Chapitre Un discute de la compatibilité des principes de la Shari'a avec la théorie internationale des droits humains et résume le débat sur le réformisme islamique et les droits humains. La théorie de l'expansion et de la contraction du savoir religieux de Soroush et la méthodologie de réforme de An-Na'im font l'objet d'une attention particulière. Dans le Chapitre Deux, nous analysons la notion de droits humains sous la Shari'a, les déclarations islamiques sur les droits humains et le système légal de l'Iran avec un accent particulier sur les conceptions de "droit", d'individu, de citoyenneté et de constitutionnalisme. Ce chapitre examine aussi le principe d'égalité et offre une brève revue des droits des femmes et des minorités religieuses.

La Partie II traite de la question de la liberté d'expression. Selon nous, la liberté d'expression représente la pierre angulaire d'une société libre et démocratique. Elle inclut la liberté de parole, le droit à la participation dans la vie publique, les libertés de pensée, de conscience et de religion (dans une certaine mesure) ainsi que la liberté de presse. Il pourrait être difficile d'offrir une évaluation critique de la loi islamique sur les droits humains sans discuter en profondeur de la liberté d'expression sous la Shari'a. Les concepts de liberté, de liberté de parole et de liberté de religion, et en particulier la question de l'apostasie dans la Shari'a sont examinés dans le Chapitre Trois. Ce chapitre passe aussi en revue les caractéristiques majeures des garanties constitutionnelles pour les libertés politiques en Iran. Le Chapitre Quatre se concentre sur la liberté de presse et traite principalement du droit de publier des journaux et périodiques selon la Loi sur la Presse d'Iran. La liberté de parole et de presse dans les

déclarations islamiques des droits humains ainsi que la question de la liberté d'expression en Iran sont aussi discutées dans cette partie.

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Table of Contents

Dedication.....	iii
Abstract.....	iv
Résumé.....	vi
Acknowledgements.....	xii
Table of Contents.....	xiii
Introduction.....	1
Part I: The Theoretical Framework of Human Rights in Shari'a and Iran's	
Constitutional and Legal System.....	10
Introduction: Modern International Human Rights Law.....	11
Chapter One: An Introduction to Human Rights in Islam and Islamic	
Reformism.....	17
I. A System of Human Rights in Islam?.....	17
II. Islamic Reformism and Human Rights: A Preliminary Inquiry.....	31
--The Theory of Expansion and Contraction of Religious Knowledge	41
--An-Na'im's Reform Methodology.....	54
Chapter Two: Human Rights in Shari'a and Iran's Constitutional	
and Legal System.....	67
Introduction.....	67
I. Human Rights in Shari'a.....	69
A. The Development and Sources of Shari'a.....	69
B. Shari'a and Constitutionalism.....	74
C. The Concept of Right and Human Rights in Shari'a.....	79
D. The Rights of Women and Religious Minorities.....	93
1. The Rights of Women.....	94
2. The Rights of Religious Minorities.....	100
II. A Short Review of Islamic Declaration of Human Rights.....	106
Rights of Women.....	111
Rights of Religious Minorities.....	113
III. Human Rights in Iran's Constitutional and Legal System.....	116
Introduction.....	116
A. A Brief History of Constitutionalism in Iran.....	117
B. An Overview of the Constitution of the Islamic Republic of Iran...	129
C. Human Rights Issue in Iran's Legal System.....	140
D. The Rights of Women and Religious Minorities.....	146
1. The Rights of Women.....	147
2. The Rights of Religious Minorities.....	158

Conclusion.....	162
Part II: The Scope of the Right to Freedom of Expression in Shari'a and Iran's Constitutional and Legal System.....	169
Introduction: Freedom of Expression in International Human Rights Law Theory.....	170
Chapter Three: Freedom of Speech in Shari'a and Iran.....	188
I. Freedom of Speech in Shari'a.....	191
A. The Concept of Freedom in Islamic Thought.....	192
B. Slavery in Shari'a.....	200
C. Freedom of Speech in Shari'a.....	204
D. The Right to Participate in Public Life.....	210
E. The Concept of <i>Fitna</i> and Its Significance on Freedom of Speech.....	215
F. Freedom of Religion under Shari'a.....	221
II. Freedom of Speech and Islamic Declarations.....	228
III. Freedom of Speech in Iran's System.....	239
Introduction.....	239
A. The Problematic of Freedom of Speech.....	244
B. Freedom of Speech and the Right to Participate in Public Life.....	251
C. Freedom of Religion.....	262
Chapter Four: Freedom of the Press in Shari'a and Iran's Constitutional and Legal System.....	273
Introduction: Press Freedom in International Law.....	273
I. Freedom of Publication in Shari'a.....	289
II. Islamic Declarations and Press Freedom.....	294
III. Freedom of the Press in Iran's System.....	298
Introduction.....	298
A. The Problematic of Press Freedom in Iran.....	301
B. Press Freedom in the Constitution.....	309
C. The Press Law.....	314
Conclusion.....	323
Selected Bibliography.....	330
Glossary.....	371
Appendix.....	377

Introduction

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

As a unified body of Islamic law, Shari'a covers all social, ethical and spiritual aspects of human life, and regulates Muslims' behavior in public and private matters.³ It is considered to contain all the necessary rules needed for human activities, granted

¹ See generally Abdulaziz Sachedina, *The Islamic Roots of Democratic Pluralism* (New York: Oxford University Press, 2001); Ali E. Hillal Dessouki, ed., *Islamic Resurgence in the Arab World* (New York: Praeger, 1982); Oliver Roy, *l'Echec de l'Islam politique* (Paris: Seuil, 1992); Gilles Kepel, *Jihad, expansion et déclin de l'islamisme* (Paris: Gallimard, 2000); Antoine Basbous, *L'islamisme, une révolution avortée?* (Paris: Hachette, 2000); Boubker Jalal Bennani, *L'islamisme et les droits de l'homme* (Lausanne: L'Aire, 1984); William Montgomery Watt, *Islamic Fundamentalism and Modernity* (London: Routledge, 1988); and Martin E. Marty & R. Scott Appleby, eds., *Fundamentalism and Society* (Chicago: University of Chicago Press, 1993).

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

³ John L. Esposito, *Islam and Politics* (New York: Syracuse University Press, 1984); and Jacques Waardenburg, "Islam As a Vehicle of Protest" in Ernest Gellner, ed., *Islamic Dilemmas: Reformers, Nationalists and Industrialization* (Berlin: Mouton, 1985) 22-49.

by God and applicable to all.⁴ Many Shari'a laws deal within human rights, political liberties, and religious tolerance, which are placed with the boundaries of duties and obligations. For example, Shari'a defines the extent and characteristics of the rights of women and non-Muslims, the right to participate in public life, and freedom of expression and religion. Intellectual debates on these issues which examine the validity of the application of Shari'a laws in modern time will certainly challenge the deeply-rooted authority of Shari'a and have an enormous effect on the process of development in Muslim societies.

Muslim thinkers and scholars, seeking suitable solutions to the problems facing contemporary Muslim societies, have long been concerned about the inability of Shari'a to cope with the needs of modern life.⁵ In recent years, the issue of human rights has been the focus of numerous dissertations by Muslim reformists who have sought Islamic solutions by rendering Shari'a-sanctioned rights more compatible with modern standards and values.⁶ Pointing to the great social and political changes in modern societies, Muslim reformists demand the recognition of human rights as an entitlement of all human beings. They advocate a process of reform of Islamic law that would

⁴ Majid Alikhan, "A Comparative Study of Universal Declaration of Human Rights and Declaration of Human Rights in Islam" (1991) 22 *Islam & Modern Age Quart.* at 174; and Abul A'la Mawdudi, *Human Rights in Islam* (Leicester, UK: Islamic Foundation, 1980) at 19, 23, and 32.

⁵ Mohammed Arkoun, "The Concept of Islamic Reformism" in Tore Lindholm & Kari Vogt, eds., *Islamic Law Reform and Human Rights, Challenges and Rejoinders* (Oslo: Nordic Human Rights, 1993) 11-24; Vali-Reza Nasr, "Religious Modernism in the Arab World, India, and Iran: The Perils and Prospects of a Discourse" (1993) 83 *The Muslim World* 20-47; and S. Hossein Nasr, "Present Tendencies, Future Trends" in Marjorie Kelly, ed., *Islam, the Religious and Political Life of a World Community* (New York: Praeger, 1984).

⁶ John L. Esposito, *The Islamic Threat: Myth or Reality?* (New York: Oxford University Press, 1992) at 9; J. Esposito, ed., *Voices of Resurgent Islam* (New York: Oxford University Press, 1983); *Toward an Islamic Reformation*, *supra* note 2 at 35; Reza Afshari, "An Essay on Islamic Cultural Relativism in the Discourse of Human Rights" (1994) 16 *H. R. Quart.* at 263; and Heiner Bielefeldt, "Muslim Voices in the Human Rights Debate" (1995) 17 *H. R. Quart.* at 601-02.

enable Muslims to achieve solutions within religion itself. By reevaluating Shari'a laws and offering new interpretations of Islamic sources, they hope to reconcile Shari'a rights with international human rights standards.⁷ Of course, these efforts have been challenged by traditional Muslim jurists and conservatives who either have rejected the modern idea of human rights or denied the presence of any significant difference between the two systems.⁸

In practice, Muslim countries have adopted a pragmatic approach to legal systems. They have retained Shari'a laws in private matters, but have distanced themselves from Shari'a public law, criminal law in particular.⁹ However, fundamental human rights standards and the equality of all citizens before the law have not been fully observed. In fact, the modern concept of human rights and the notions of constitutionalism and democratic structure of government "are still missing or poorly developed in many Muslim countries."¹⁰ The Islamic world is now witnessing an increasing demand for democratic political reform and international human rights standards. The challenge of democracy and human rights should be taken seriously.

⁷ Bassam Tibi, "Islamic Law/Shari'a, Human Rights, Universal Morality and International Relations" (1994) 16 H. R. Quart. at 290-91; Dale Eickelman, "Inside Islamic Reformation" (1998) 22 Wilson Quart. at 80-89; Michael Fischer & Mehdi Abedi, *Debating Muslims: Cultural Dialogue in Post-Modernity and Tradition* (Madison: University of Wisconsin Press, 1990); Muhammad Said al-Ashmawy, *L'islamisme contre l'Islam* (Paris: Éditions la découverte, 1989) at 37; Subhi Mahmasani, "Adaptation of Islamic Jurisprudence to Modern Social Needs" in John J. Donohue & John L. Esposito, eds., *Islam in Transition: Muslim Perspectives* (New York: Oxford University Press, 1982) at 183; and Mohammed Talbi, "Religious Liberty: A Muslim Perspective" in *Conscience and Liberty* (1991) at 31.

⁸ Ahmed Farrag, "Human Rights and Liberties in Islam" in Jan Berting, et al., eds., *Human Rights in a Pluralist World: Individuals and Collectivities* (Westport, Conn.: Meckler, 1990) at 141; Bennani, *L'islamisme et les droits de l'homme*, *supra* note 1; Aziz al-Azmah, "Islamist Revivalism and Western Ideologies" (1991) 32 History Workshop at 48; and Bassam Tibi, *Islam and the Cultural Accommodation of Social Change* (Boulder, CO: Westview Press, 1991).

⁹ Bielefeldt, "Muslim Voices in the Human Rights Debate" *supra* note 6, at 610-14; Joseph Schacht, *An Introduction to Islamic Law* (Oxford: Clarendon Press, 1964) at 76-77; and John L. Esposito, *Islam and Politics*, 2nd ed. (Syracuse: Syracuse University Press, 1991) at 51.

This thesis contributes to the debate on human rights and Islamic reformism from a different perspective. Our objective is to study Shari'a as a legal tradition that is centuries old. We intend to discuss the question of human rights in Shari'a, and to analyze the meaning, characteristics, and general principles and qualifications common to almost all Shari'a schools of thought. We outline the conception of human rights under Shari'a with reference to the basic norms of international human rights law, as documented in the International Bill of Human Rights. The purpose here is to present the fundamental and theoretical differences between these two systems. Due to its importance in the human rights debate, the principle of equality is highlighted, and the rights of women and religious minorities are discussed at length. In particular, this thesis reviews the concept of freedom of expression, as one of the supreme values of a free and democratic society, and examines freedom of speech, the right to participate in public life, freedom of thought, conscience, and religion, and freedom of the press under Shari'a. Due to the fact that the theoretical foundations of human rights -- i.e., legitimacy, origins, sources, and basic principles -- are vastly different in the two traditions, a comparative study seems impossible. Each tradition entails a different entitlements and standards.

Because Shari'a is applied in many Muslim countries, the study of Shari'a laws in the field of human rights is important. Almost all Muslim states apply Shari'a in personal and family matters. Few, however, follow Shari'a public law, especially criminal law. For the study of the application of Shari' law in Muslim countries, we have chosen Iran, where both personal status laws and public law are strictly based on

¹⁰ Bielefeldt, "Muslim Voices in the Human Rights Debate" *ibid.* at 614.

Shari'a standards. The belief in the supremacy of Shari'a over all types of constitutional and other laws, and, thus, the necessity of applying Shari'a laws in every aspect of public and private life, is a major principle and characteristic of the Constitution of the Islamic Republic of Iran. This study also examines some Islamic declarations of human rights, drafted under the influence of Shari'a, in order to illustrate Islamic states' collective response to the idea of human rights.

Moreover, the application of Shari'a laws seems problematic, at least in practice. International commentators, including the United Nations Human Rights Committee and Amnesty International, have routinely reported and condemned human rights violations in Muslim countries. This study does not suggest that all human rights violations are rooted in Shari'a. In fact, many Muslim governments use Shari'a laws as a pretext for denying rights guarantees, and appeal to Islamic culture only to justify deviations from international standards. However, the study submits that many Shari'a laws are problematic in the sense that they contradict international human rights norms and standards. Shari'a qualifications on the rights of women, non-Muslims, freedom of expression, and freedom of religion exemplify this. They are all subject to Shari'a restrictions and criteria. In Iran, Shari'a provisions have been used to limit rights guarantees and to confine the scope of freedom of expression. Equality of all citizens is not recognized; freedom of religion is not protected; and the right to participate in public life is limited to those whose suitability is approved by governmental bodies.

It is hoped that this thesis may contribute positively to the debate on human rights in Islam. By providing a critical analysis of Shari'a laws in the field of human

rights and highlighting their contradiction with international standards, this study hopes to inspire intellectual as well as pragmatic discussion on the need for a new understanding of religious texts which is more compatible with modern human rights standards. Moreover, this study advances the novel idea that the notion of human rights is an extra-religious concept, generally defined on rational and intellectual grounds and epistemological considerations, not by religious criteria. It proposes that a dialogue between what is internal and what is external to religion could provide intellectual foundations for Islamic thought in the field of human rights.

In addition, this study may also benefit the recent reform movement in Iran and the current debate on civil society, democracy, and human rights therein. A dynamic public debate and the increasing role of the press have changed the social, political, and even religious culture of Iranian society. This study underlines the shortcomings and deficiencies of Iran's constitutional and legal system, and argues that its legal provisions in the field of human rights and political liberties contradict international norms and standards. The study introduces the reform movement to the modern concept of fundamental rights and freedoms, hoping that the institutionalization of the notions of democracy, human rights, and pluralism will be the main concern of the Iranian society in this new century.

This thesis analyzes only the structure and general principles of Shari'a and Iran's law, and focuses mainly on the legal dimension of the human rights issue. It is not our intention to discuss all related laws, nor to deal with all the cases concerned. There is very little work on this subject inside Iran and only a handful of sources

outside. While this makes our task more difficult, the value of our research will be enhanced.

Our inquiry is based on primary and secondary sources written in four languages -- namely, English, French, Arabic, and Persian. In order to illustrate the general trend of Islamic thought on human rights, this thesis refers to both classical and contemporary sources, ranging from those advocating Islamic law and Iran's legal system to those critical of Shari'a law and legal provisions on human rights and freedoms in Iran's system. Classical sources are in Arabic. Contemporary Muslim thought on human rights is mainly in English and, to a lesser extent Arabic and French. Iran's constitution and legal codes and documents are in Persian. All translations are ours. Both the English and Arabic versions of Islamic declarations on human rights are used and often compared. For the problematic of human rights and freedom of expression in Iran, the study relies on the reports of international human rights organizations as well as press reports, whose authenticity have been verified by comparing different domestic and foreign sources. A glossary of Arabic technical terms is provided at the end of the thesis.

Part I of this thesis advances a theoretical framework for human rights in Shari'a and Iran's system. Chapter One discusses the compatibility of Shari'a principles with international human rights law theory and summarizes the debate over Islamic reformism and human rights. Soroush's theory of expansion and contraction of religious knowledge and An-Na'im's reform methodology are particularly discussed. In Chapter Two, we analyze the notion of human rights under Shari'a, Islamic declarations

on human rights, and Iran's legal system, with a specific focus on the conceptions of "right", the individual, citizenry, and constitutionalism. This chapter also examines the principle of equality and provides a brief review of the rights of women and religious minorities.

Part II deals with the issue of freedom of expression. In our view, freedom of expression is a cornerstone of a free and democratic society. It covers freedom of speech, the right to participate in public life, partly freedom of thought, conscience, and religion, and freedom of the press. It would be difficult to offer a critical assessment of Islamic law on human rights without freedom of expression being discussed thoroughly under Shari'a. The concepts of freedom, freedom of speech, and freedom of religion, especially the issue of apostasy in Shari'a, are examined in Chapter Three. The major characteristics of Iran's constitutional guarantees of political freedoms are also reviewed in this chapter. Chapter Four focuses on freedom of the press, and deals mainly with the right to publish newspapers and periodicals under Iran's Press Law. Freedom of speech and freedom of the press in Islamic declarations of human rights and the problematic of freedom of expression in Iran are also discussed in this part.

Divided into three sections of Shari'a, Islamic declarations, and Iran's legal system, respectively, Chapters Two to Four are outlined in a similar way. They deal with the issues of human rights, freedom of speech, and freedom of the press respectively. In this way, not only the principles, characteristics, and standards of Shari'a in a given subject are discussed and the influence of Shari'a in Muslim countries is demonstrated, but the complete application of Shari'a laws in an Islamic state, Iran, is also examined,

and the extent of rights guarantees and the scope of political freedoms within the constitutional provisions are analyzed. Moreover, the study provides a brief review of modern principles of human rights, freedom of expression and freedom of the press. The aim is to present international norms and standards on these issues and to demonstrate the major differences between international human rights law and the norms of Shari'a and Iran's system in the field of human rights. The provisions of the international human rights instruments are generally referred to while discussing Islamic declarations on human rights.

The main question of this research can be framed as whether or not the traditional formulation of Shari'a in the field of human rights conforms with modern human rights theory. Included is the question whether or not Shari'a principles and qualifications correspond to international norms and standards. This study shows that the modern concept of human rights and freedoms lack precise equivalents in Islamic law and that Shari'a laws contradict corresponding international human rights principles. This study also shows that the application of Shari'a is problematic in theory and practice, and that a fundamental reform in structure, principles, and standards is needed to provide an appropriate legal system that enforces universal norms and standards of human rights law.

Part I

The Theoretical Framework of Human Rights in Shari'a and Iran's Constitutional and Legal System

Introduction: Modern International Human Rights Law

In one form or another, the idea of human rights, as an issue in religious, political, and moral philosophy, is very old, and has an ancient and illustrious pedigree.¹ In its contemporary form, however, the doctrine is certainly new, and has been central to some of the most important discussions and developments of modern times.² Although the idea of human rights is a moral one and has a supreme moral importance, the modern concept of “human rights”³ constitutes legal and political standards providing “an ideal basis on which to conceptualize and organize a human community.”⁴ It also involves a social and behavioral process for dealing with public

¹ See Leszek Kolakowski, *Modernity on Endless Trial* (Chicago: University of Chicago Press, 1990) at 214; Michael Perry, “Is the Idea of Human Rights Ineliminably Religious?” (1993) 27 *University of Richmond L. Rev.* at 1024; Walter Laqueur & Barry Rubin, eds., *The Human Rights Reader* (Philadelphia: Temple University Press, 1979) at 1; Alan S. Rosenbaum, ed., *The Philosophy of Human Rights, International Perspectives* (Westport, Connecticut: Greenwood Press, 1980) at 5; and Alison Dundes Renteln, *International Human Rights, Universal Versus Relativism* (London: Sage, 1990) at 17-18.

² Besides the Magna Carta (1215), the British Bill of Rights (1689), the American Virginia Declaration of Rights (1776), the United States Declaration of Independence and Constitution (1789), and the French Declaration of the Rights of Man (1789) were all proclaimed in the name of human rights. See John Humphrey, *No Distant Millennium, The International Law of Human Rights* (France: UNESCO, 1989) at 27; and A. J. M. Milne, *Human Rights and Human Diversity, An Essay in the Philosophy of Human Rights* (New York: State University of New York Press, 1986) at 1. Also generally Sylvanus Ndubisi Okechukwu, *The Right to Life and the Right to Live* (New York: Peter Lang, 1990).

³ The expression “human rights”, rarely used before the end of the Second World War, appeared in both the Dumbarton Oaks proposals and the Charter of the United Nations, and later in the Universal Declaration of Human Rights. See *No Distant Millennium, ibid.* at 21; and *The Philosophy of Human Rights, The International Perspectives, supra* note 1 at 9. In an old idiom, human rights are natural rights. See J. R. Pennock, & John W. Chapman, eds., *Human Rights* (New York: New York University Press, 1981) at 7. Cranston states that “human rights is a twentieth century name for what has been traditionally known as natural law, or in a more exhilarating phrase, the rights of man.” Maurice Cranston, *Human Rights Today* (London: Ampersand Books, 1962). The term “human rights” is less open to misunderstanding. See Peter Jones, *Rights* (New York: St. Martin’s Press, 1994) at 81 and 96.

⁴ Rosenbaum, *The Philosophy of Human Rights, International perspective, ibid.* at 5. In this sense,

authority, and establishes and guarantees “the conditions necessary for the development of the human person...”⁵

This thesis holds that human rights are those rights that all persons equally have by virtue of being human, whether or not they are recognized, or embodied in a system of positive law, and irrespective of religion, gender, nationality, or any other social or cultural characteristic.⁶ Although human rights are justifiable through a valid moral principle, they represent, in a legal and political sense, the entitlements of all human beings, which pertain to individuals simply because they are human beings.⁷ Human rights differ from benefits and privileges as well as duties and obligations; they do not correspond exactly to claim-rights either.⁸ The term “human rights”, in its current

“human rights”, as the ultimate legitimate basis for human community, is linked to certain interpretations of democracy as well. It is also said that human rights are political means of recognizing human dignity in a legally binding way. See Heiner Bielefeldt, “Muslim Voices in Human Rights Debate” (1995) 17 H. R. Quart. at 591; and M. Patenaude, *Droits et libertés de la personne* (Sainte-Foy, Que.: Les Presses de l’Université Laval, 1997).

⁵ Jack Donnelly, *The Concept of Human Rights* (London: Croom Helm, 1985) at 32. See also David P. Forsythe, *The Internationalization of Human Rights* (Toronto: Lexington Books, 1991) at 1 and 14. The concept of human rights raises both theoretical issues and practical problems about the requirement of legitimate government and the nature of the good life, the discussion of which is beyond the scope of this study. See Michael Freeman, “The Philosophical Foundations of Human Rights” (1994) 16 H. R. Quart. at 491.

⁶ See Alan Gewirth, *Human Rights: Essays on Justification and Applications* (Chicago: University of Chicago Press, 1982) at 1 and 41; Milne, *Human Rights and Human Diversity*, *supra* note 2 at 1-3; *The Concept of Human Rights*, *ibid.* at 1 and 9; Jones, *Rights*, *supra* note 3 at 81; Jack Donnelly, “Human Rights and Human Diversity: An Analytic Critique of Non-Western Conceptions of Human Rights” (1982) 76 Am. Pol. Sc. Rev. at 304. Also G.-A. Beaudoin, *Vues canadiennes et européennes des droits et libertés*, Actes des Journées Strasbourgeoises (Cowansville, Que.: Éditions Yvon Blais, 1989).

⁷ See *Essays on Justification and Applications*, *ibid.*; *No Distant Millennium*, *supra* note 2 at 20; Jack Donnelly, *International Human Rights, Dilemmas in World Politics*, 2nd ed. (Oxford: Westview Press, 1998) at 19; and J. Donnelly, *Universal Human Rights in Theory and Practice* (London: Cornell University Press, 1989) at 9. Also generally Jawahar L. Kaul, ed., *Human Rights, Issues and perspectives* (New Delhi: Regency, 1995); and Naorem S. Anajaoba, ed., *Human Rights: Principles, Practices, and Abuses* (New Delhi: Omsons, 1994). For a different perspective, see generally Warren Lee Holleman, *Human Rights Movement, Western Values and Theological Perspectives* (New York: Praeger Publishers, 1987).

⁸ For more on this as well as on legal rights and the functionalist account of rights, see Donnelly, “An Analytic Critique of Non-Western Conceptions of Human Rights” *supra* note 6 at 304; Renteln, *Universal Versus Relativism*, *supra* note 1 at 39-41; Perry, “Is the Idea of Human Rights Ineliminably

usage, covers individual rights and freedoms,⁹ whether they are civil and political or economic, social, and cultural rights.¹⁰ Human rights, in any proposed list, are considered inalienable, interdependent, and indivisible.¹¹

The study suggests that human rights have their roots in human nature and human dignity which is derived from the endowment of all individuals with reason and free will, and in which all persons are equal.¹² Human rights in this sense, as Peter Jones states, belong to people “in their capacity as human being, rather than as citizens

Religious?” *supra* note 1 at 1027; *Essays on Justification and Applications*, *ibid.* at 2; Jones, *Rights*, *supra* note 3 at 14 and 26; and *The Right to Life and the Right to Live*, *supra* note 2 at 37.

⁹ Freedoms or liberty rights here refer to protection from interference, especially immunity from state interference or political coercion. See *The Right to Life and the Right to Live*, *ibid.* at 43.

¹⁰ Most human rights are individual rights; but, certain collective rights are also called human rights. See *No Distant Millennium*, *supra* note 2 at 21-2 and 24-5. Donnelly, in contrast, argues that only individuals have rights, and that society has no human rights. Individuals, he adds, “may hold human rights both as separate individuals and as members of a community.” *Universal Human Rights in Theory and Practice*, *supra* note 7 at 19-21. Also R. Vandycke, “La Charte constitutionnelle et les droits économiques, sociaux et culturels” (1989-90) *Annuaire canadien des droits de la personne/ Canadian Human Rights Yearbook* 167.

¹¹ See Donnelly, *International Human Rights*, *supra* note 7 at 18; and *Universal Human Rights in Theory and Practice*, *ibid.* at 21 and 28.

¹² See Walter Kasper, “The Theological Foundations of Human Rights” (1991) 34 *Catholic Lawyer* at 256 and 261; Nwachukwu S. S. Iwe, *The History and Content of Human Rights: A Study of the History and Interpretation of Human Rights* (New York: Peter Lang, 1986) at 159; “The Philosophical Foundations of Human Rights” *supra* note 5 at 512; *The Concept of Human Rights*, *supra* note 5 at 1, 8-9 and 45; *Human Rights*, *supra* note 3 at 1; *Universal Human Rights in Theory and Practice*, *supra* note ? at 16-7; *The Philosophy of Human Rights, International Perspectives*, *supra* note 7 at 15. For discussion on human rights based on human need, see *The Concept of Human Rights*, *ibid.* at 27-31. For theological arguments on human rights, see “The Theological Foundations of Human Rights” *ibid.* at 262 and 265-8. For customary law as the formal source of human rights, see generally Bruno Simma & Philip Alston, “The Sources of Human Rights Law: Customs, Jus Cogens, and General Principles” (1992) *Australian yearbook of Int’l L.* 82; and T. Meron, *Human Rights, Humanitarian Norms as Customary Law* (Oxford: Clarendon, 1989) at 114-135. For argument that the content of human rights is self-evident, see Jones, *Rights*, *supra* note 3 at 96. For classical concept of natural law, see *The Right to Life and the Right to Live*, *supra* note 2 at 12-38; Rolando Gaete, *Human Rights and the Limits of Critical Reason* (Brookfield, Vermont: Dartmouth, 1993); and Iwe, *The History and Contents of Human Rights*, *ibid.* at 352-54.

of particular state.”¹³ It is the obligation of the government, though, to ensure that the rights of its citizens are respected.¹⁴

Moreover, the study holds that the doctrine of human rights, by definition presented above, as well as the basic and fundamental rights and freedoms are universal, held equally by all and applicable to all cultures and civilizations, irrespective of differences between them.¹⁵ In this sense, then, its Western origin as well as the argument that human rights are Western cultural imposition are largely irrelevant.¹⁶ As An-Na'im puts it, “human beings and societies share certain

¹³ Jones, *Rights*, *ibid.* at 81.

¹⁴ It was this conception of natural rights that was espoused by the Levellers, John Locke, and Thomas Paine, and from which the modern idea of human rights evolved. See Jones, *Rights*, *ibid.* at 72; Richard A. Falk, “Theoretical Foundations of Human Rights” in Paula R. Newberg, ed., *The Politics of Human Rights* (New York: New York University Press, 1980) at 78. Also generally Roland Dworkin, *Taking Rights Seriously* (London: Duckworth, 1978); and R. Dworkin, “What is Equality? Part I: Equality of Welfare” (1981) 10 *Philosophy and Public Affairs* at 185-246. For the theories of human rights, the discussion of which is out of the view of this study, see, for example, *The Right to Life and the Right to Live*, *supra* note 2 at 42-6. Also generally Jones, *Rights*, *ibid.*; *Human Rights*, *supra* note 3; and *The Concept of Human Rights*, *supra* note 5.

¹⁵ For general reference, see Milne, *Human Rights and Human Diversity*, *supra* note 2 at 5-6 and 81; *The Concept of Human Rights*, *ibid.* at 9; *Universal Human Rights in Theory and Practice*, *supra* note 7; H. L. A. Hart, “Are There Any Natural Rights?” in A. Quinton, ed., *Political Philosophy* (Oxford: Oxford University Press, 1967) at 60-6; Bielefeldt, “Muslim Voices in the Human Rights Debate” *supra* note 4 at 593; Rhoda E. Howard, “Dignity, Community and Human Rights” in Abdullahi Ahmed An-Na'im, ed., *Human Rights in Cross-Cultural Perspectives, A Quest for Consensus* (Philadelphia: University of Pennsylvania Press, 1992) at 81; Patricia H. Werhane, A. R. Gini, & David T. Ozar, eds., *Philosophical Issues in Human Rights, Theories and Applications* (New York: Random House, 1986); Gewirth, *Essays on Justification and Applications*, *supra* note 6 at 1. For arguments for cultural relativism, see for example Jack Donnelly, “Cultural Relativism and Universal Human Rights” (1984) 6 *H. R. Quart.* at 400-19; Fred Halliday, “Relativism and Universalism in Human Rights: The Case of the Islamic Middle East” (1995) 43 *Political Studies* at 152-67; Ahmad Zaki Yamani, *Islamic Law and Contemporary Issues* (Jidda, Saudi Arabia: Saudi Publishing House, 1968); Donnelly, *International Human Rights*, *supra* note 7 at 32-5. On the difficulties and limits associated with universalism, see generally A. Carty, *The Decay of International Law?: A Reprisal of the Limits of International Imagination in International Affairs* (Manchester: Manchester University Press, 1986).

¹⁶ Rosenbaum, *The Philosophy of Human Rights, International perspectives*, *supra* note 1 at 8; “Muslim Voices in the Human Rights Debate” *ibid.*; and Forsythe, *The Internationalization of Human Rights*, *supra* note 5 at 14.

fundamental interests, concerns, qualities, traits and values which can be identified and articulated as the framework for a common ‘culture’ of universal human rights.”¹⁷

Apart from their social and political aspects,¹⁸ human rights are also legal rights, and need to be defined, protected, and promoted by the international law of human rights.¹⁹ Basic human rights and freedoms as well as the standards of conduct are covered in numerous international documents, such as the International Bill of Human Rights.²⁰ The Universal Declaration of Human Rights (UDHR), which has great moral authority, in its preamble, speaks of “the inherent dignity ... of all members of the human family” and of “the dignity and worth of the human person”,²¹ and recognizes in its different articles the equality of all persons as well as the basic rights and freedoms of all human beings, as individual entitlements.²² Human rights also need to be protected by constitutional and legal systems of all states in order not to be reduced, as Michael Freeman puts it, “from universal values to either arbitrary products of power or

¹⁷ Abdullahi Ahmed An-Na’im, “Towards a Cross-Cultural Approach to Defining International Standards of Human Rights: The Meaning of Cruel, Inhuman, or Degrading treatment or Punishment” in *Human Rights in Cross-Cultural perspectives*, *supra* note 15 at 21.

¹⁸ See Diplomacy Training Program, *Human Rights Defender’s Manual*, written and compiled by John Scott-Murphy (Australia: University of New South Wales, 1994) Chapter 1 at 2-4.

¹⁹ For reasons why human rights should be protected by international law, see *No Distant Millennium*, *supra* note 2 at 12-15.

²⁰ The International Bill of Human Rights consists of the Universal Declaration of Human Rights (the UDHR), G. A. Res. 217A (III), U. N. GAOR Res. 71, UN Doc. A/810 (1948); the International Covenant on Civil and Political Rights (the ICCPR), G. A. Res. 220 (XXI), 21 U. N. GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966) (entered into force on March 23, 1976); and the International Covenant on Economic, Social and Cultural Rights (the ICESCR), G. A. Res. 2200 (XXI), 21 U. N. GAOR Supp. (No. 16) at 49, UN Doc. A/6316 (1966) (entered into force on January 3, 1976).

²¹ The UDHR, *ibid.* the Preamble.

²² See *ibid.* arts. 1-3, 5-7, 12, 15, 18-21, and 23, to name a few. The Preamble, common to both the ICCPR and the ICESCR, echoes the UDHR., Speaking of “the inherent dignity ... of all members of the human family”, it states: “[T]hese rights derive from the inherent dignity of the human person” Both covenants document the basic rights and freedoms of all individuals without distinction of any kind. See the ICCPR and the ICESCR, *supra* note 20.

particular cultural developments.”²³ This thesis will refer, in passing, to different articles of the International Bill of Human Rights throughout the study, in order to underline the differences between these articles and those of Shari’a, the Islamic declarations, and Iran’s constitutional and legal documents.

²³ Freeman, “The Philosophical Foundations of Human Rights” *supra* note 5 at 512. The study acknowledges cultural differences in this regard; however, it argues for the universality of basic and fundamental human rights, and holds that the clarification of the philosophical foundations of human rights will solve the theoretical and practical problems in this respect.

Chapter One

An Introduction to Human Rights in Islam and Islamic Reformism

I. A System of Human Rights in Islam?

The present thesis, here and in the following chapters, argues that certain universal standards of human rights and freedoms, as understood and formulated in international human rights documents, lack precise equivalents in Islamic law, and some generally-accepted principles of Shari'a contradict corresponding principles of international human rights law.²⁴ Shari'a's response to the idea of human rights and traditional interpretations of Islamic law are hard to reconcile with international human rights norms and standards.²⁵

This thesis also argues that the application of Shari'a public law, criminal law in particular, would result in problems and hardships in Muslim societies.²⁶ As will be discussed in Chapter Two, Islam has emphasized the importance of human honor and dignity. However, within the framework of Shari'a, slavery remains a legal institution,

²⁴ See Ann Elizabeth Mayer, "Universal Versus Islamic Human Rights: A Clash of Cultures or a Clash With a Construct?" (1994) 15 Michigan J. Int'l L. at 320-21; and Abdullahi Ahmed An-Na'im, *Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law* (New York: Syracuse University Press, 1990) at 151.

²⁵ See Ann E. Mayer, "Islamic Rights or Human Rights: An Iranian Dilemma" (1996) 29 Iranian Studies at 270.

²⁶ Several problems of substantive law, evidence, and procedure are raised by the prospects of

and certain forms of discrimination against women and religious minorities are considered lawful.²⁷ Notions like full equality of men and women, Muslims and non-Muslims, and freedom of religion are in clear conflict with Shari'a principles. Based on Shari'a rules, as will be discussed in Chapter Two, women suffer from an inferior status, and non-Muslims are at most second-class citizens. The idea of equal protection in Shari'a itself accommodates forms of discrimination. As Mayer states, Shari'a "mandates unequal treatment for the favored and disfavored groups in society."²⁸

Individualism, liberty, equality, constitutionalism and democracy -- notions fundamental to the development of human rights concepts -- are not established features of Shari'a. The concept of human being as private and individual as well as individual rights in the sense of entitlements are not recognized in Shari'a either.²⁹ Shari'a upholds the supremacy of revelation over reason and hostility toward rationalism, and does not recognize reason as an independent source of law.³⁰ According to Shari'a, human rights "are the privilege of Allah, because authority

implementing this branch of Shari'a. See *Toward an Islamic Reformation*, *supra* note 24 at 1-2 and 101.

²⁷ *Toward an Islamic Reformation*, *ibid.* at 179.

²⁸ Ann E. Mayer, *Islam and Human Rights, Tradition and Politics* (Boulder, CO: Westview Press, 1991) at 98. See also Roger M. Savory, "Islam and Democracy: The Case of the Islamic Republic of Iran" in C. E. Bosworth, Charles Issawi, R. Savory, *et al.*, eds., *The Islamic World From Classical to Modern Time, Essays in Honor of Bernard Lewis* (Princeton, NJ: Darwin Press, 1989) at 834; and "Universal Versus Islamic Human Rights" *supra* note 24, at 323-24.

²⁹ Bassam Tibi, "Islamic Law/Shari'a, Human Rights, Universal Morality and International Relations" (1994) 16 H. R. Quart. at 289. Also H. Patrick Glenn, *Legal Traditions of the World, Sustainable Diversity in Law* (Oxford: Oxford University Press, 2000) at 177-78.

³⁰ *Islam and Human Rights, Traditions and Politics*, *supra* note 28 at 58. This issue will be discussed more in Chapter Two. The struggles between proponents of reason and revelation in Islamic intellectual history are described in A. J. Arberry, *Revelation and Reason in Islam* (London: Allen & Unwin, 1957); Majid Khadduri, *The Islamic Conception of Justice* (Baltimore: Johns Hopkins University Press, 1984) at 34-39 and 64-70; Mohamed al-Shakankiri, "Loi divine, loi humaine et l'histoire juridique de l'Islam" (1981) 59 *Studia Islamica* 161-82.

ultimately belongs to Him.”³¹ In Chapter Two, we will argue that these rights are only duties of individuals, not rights held by anyone. The essential characteristic of human rights in Shari’a is that they constitute obligations. As Said states, “human rights exist only in relation to human obligations”³² and that what really matters is duty rather than rights. Cherif Bassiouni rightfully notes that Shari’a “insists upon the fulfillment of individual obligations before the individual can claim his privileges.”³³ Coulson maintains that Islamic legal doctrine assumes only divine rights, of which the individual may be beneficiary.³⁴ Clearly, these characteristics of human rights in Shari’a contradict modern human rights principles. Shari’a rights are not human rights by international human rights standards; at most, they are legal rights held only as a result of one’s legal or spiritual status.³⁵ The scope and extent of these rights are subject to Shari’a qualification, and are limited based on gender and faith which affect many human rights and freedoms, including freedom of thought, conscience, and religion, freedom of speech, and the right to participate in public life. International human rights theory, on the other hand, does not permit “religious criteria to override or circumscribe human rights.”³⁶

³¹ Majid Khadduri, “Human Rights in Islam” (1946) 243 *The Annals* at 77-8 in Donnelly, “An Analytic Critique of non-Western Conceptions of Human Rights” *supra* note 6 at 307.

³² Abdul-Aziz Said, “Percept and Practice of Human Rights in Islam” (1979) 1 *Universal Human Rights* at 73-4.

³³ M. Charif Bassiouni, “Sources of Islamic Law and the Protection of Human Rights in the Islamic Criminal Justice System” in M. C. Bassiouni, ed., *The Islamic Criminal Justice System* (New York: Oceana Publications, 1982) at 13. See also Reza Afshari, “An Essay on Islamic Cultural Relativism in the Discourse of Human Rights” (1994) 16 *H. R. Quart.* at 260-61.

³⁴ Noel J. Coulson, “The State and the Individual in Islamic law” (1957) 6 *Int’l & Comp. L. Quart.* at 49-51.

³⁵ Donnelly, “An Analytic Critique of non-Western Conceptions of Human Rights” *supra* note 6 at 307.

³⁶ “Universal Versus Islamic Human Rights” *supra* note 24 at 325. On the conditions that can be placed on human rights in international human rights law, see Thomas Buergenthal, “To Respect and to Ensure: State Obligations and permissible Derogations” in Louis Henkin, ed., *The International Bill of Human*

This study further argues that, as Savory notes, “there is no possibility of an Islamic state’s evolving into a democratic polity.”³⁷ According to Islamic law, ultimate state sovereignty is vested in God, and Shari’a is the law of the land.³⁸ As will be discussed in the next chapter, the notions of caliphate (the classical Islamic theory of political legitimacy and authority), *umma* (the community of believers), and *shura* (consultation) conflict with the conception of democracy, where sovereignty belongs to the people and equal participation of citizens in public life is protected by law.³⁹ The attainment of justice and the Islamic doctrine’s emphasis on the welfare of the community limit the scope of individuals’ rights and liberties. Muslims, as believers, have certain duties vis-à-vis the community/state, but not individual rights in the sense of entitlements.⁴⁰ The scope and extent of individual rights and freedoms, then, is conditioned upon the Islamic concept of justice and the welfare of the community,⁴¹ and individual entitlements can always be overridden for communal interests. In fact, in Shari’a pattern of human rights, the collectivity and duties are preferred over individual

Rights: The Covenant on Civil and Political Rights (New York: Columbia University Press, 1981) at 72; and *Islam and Human Rights, Tradition and Politics*, *supra* note 28 at 73-6.

³⁷ Savory, “Islam and Democracy” *supra* note 28 at 839.

³⁸ See Ayn B. Sajoo, “Islam and Human Rights: Congruence or Dichotomy?” (1990) 4 *Temple Int’l & Comp. L. J.* at 29; and Abul-A’la Mawdudi, *Human Rights in Islam*, trans. by Khurshid Ahmad, 2nd ed. (London: Islamic Foundation, 1986) at 9-13. Mawdudi holds that people’s only role is to interpret laws for their application and to decide on matters for which there are no divine laws. A. Mawdudi, *The Political Theory of Islam*, trans. by Mehdi Hydarpoor (1978) at 3-5. This characteristic of Shari’a implies that human beings cannot change the law because their attitudes or their personal or communal needs change. See S. Hassan Amin, *Islamic Law and Its Implications for Modern World* (Glasgow: Billing & Sons, 1989) at 10-13 and 19. Also Abdulaziz Sachedina, *The Islamic Roots of Democratic Pluralism* (New York: Oxford University Press, 2001) at 73-75.

³⁹ See *Toward an Islamic Reformation*, *supra* note 24 at 78-85.

⁴⁰ Tibi, “Islamic law, Human Rights, Universal Morality and International Relations” *supra* note 29 at 289; Sajoo, “Islam and Human Rights: Congruence or Dichotomy?” *supra* note 38 at 29-30; Khadduri, *The Islamic Conception of Justice*, *supra* note 30; C. A. O. van Nieuwenhuijze, *The Lifestyle of Islam* (Leiden: 1985) at 145.

⁴¹ M. H. A. Reisman, “Some Reflections on Human Rights and Clerical Claims to Political Power” (1994) 19 *Yale J. Int’l L.* at 516.

and rights. In contrast, the international conception of human rights safeguards “individual freedoms beyond the reach of arbitrary state authority thereby supporting the notion of ‘fundamental’ rights.”⁴²

All these components support the study’s overall argument that Shari’a lacks the modern notion of human rights and freedoms, as documented in international human rights law, and reveals the incompatibility between individual and collectivity-oriented concepts- which, in turn, derives from the conflict between, as Tibi notes, “man (reason)-centered and a cosmological theocentric view of the world.”⁴³ The incompatibility between Shari’a rights and international standards and the fact that Shari’a system of government is not democratic have been admitted by many Muslim jurists as well as several Islamic governments’ representatives in different international organizations. These statements will be presented as the discussion proceeds.⁴⁴

The present thesis also disputes the idea that Shari’a, as a unified body of moral and legal principles, mandates a distinctive approach to human rights. Such a discussion seems necessary here because of its bearing on the study and the orientation that it will take. The study argues that there is no settled Islamic human rights philosophy that induces all Muslim jurists and scholars to look at the concept of rights in a particular way. With regard to human rights, Shari’a comprises many complex traditions, often vague and undefined, and therefore subject to different interpretations⁴⁵

⁴² “Islam and Human Rights: Congruence or Dichotomy?” *supra* note 38 at 26.

⁴³ “Islamic Law, Human Rights, Universal Morality and International Relations” *supra* note 29 at 297.

⁴⁴ See also A. Ahmed An-Na’im, “Human Rights in the Muslim World: Socio-Political Conditions and Scriptural Imperatives, A Preliminary Inquiry” (1990) 3 Harvard H. R. J. at 22-5.

⁴⁵ Chapters Two and Three of the thesis argue that the permissible scope of Shari’a qualifications on rights has been left vague and undefined, and, in practice, Muslim governments are free to determine the

that, as Mayer states, “can and do create conflicts between religious doctrine and human rights norms or that reconcile the two.”⁴⁶ The founding jurists relied on these traditions and interpretations of Shari’a sources to develop an Islamic approach to rights. One may find significant diversity of opinion among various schools of thought as well as among different jurists of a particular school.⁴⁷ Due to the lack of established theoretical views on rights, however, Muslim jurists have been influenced by local cultures and political rule throughout the centuries.⁴⁸ This study proposes that if one focuses only on the legal dimensions of human rights issue, one may find that the basic principles of dominant interpretation of Shari’a, regardless of the particular school of Shari’a, conflict with international human rights theory, as explained earlier. Some ethical principles of human rights do emerge from the fundamentals of Islamic law, and Shari’a does include some elements that bear on rights,⁴⁹ but there is no body of Islamic doctrine on rights.

The conception of human rights and freedoms as individual entitlements seems unknown in Islamic legal tradition and have no genuine roots in Shari’a.⁵⁰ Islamic

scope of rights provided in Shari’a.

⁴⁶ *Islam and Human Rights, Tradition and Politics*, *supra* note 28 at xi. Also Glenn, *Legal Traditions of the World*, *supra* note 29 at 177 and 179-85.

⁴⁷ “Human Rights in the Muslim World” *supra* note 44 at 18-9.

⁴⁸ Historically Islam has been a very decentralized religion where a wide range of dissimilar opinions and competing schools of law can be found. One could say that Islamic legal tradition has been a culture of argumentation. This characteristic of Islamic law, which led to a tradition of tolerance of debate and argument among jurists will be emphasized in Chapter Two as well. See *Islam and Human Rights, Tradition and Politics*, *supra* note 28 at xiii and 1.

⁴⁹ See “Islam and Human Rights: Congruence or Dichotomy?” *supra* note 38 at 24.

⁵⁰ It seems that the usage of human “rights” and “freedoms” by Muslim scholars has been influenced by non-religious legal traditions. See Donnelly, “An Analytic Critique of non-Western Conceptions of Human Rights” *supra* note 6 at 303 and 307; Coulson, “The State and the Individual in Islamic Law” *supra* note 34 at 50-1; Adamantia Pollis & Peter Schwab, “Human Rights: A Western Construct With Limited Application” in A. Pollis & P. Schwab, eds., *Human Rights, Cultural and ideological perspectives* (New York: Praeger, 1980), at 1-18. On fundamental human rights and freedoms, see C.

jurisprudence does not address “human rights” as such and provides “no explicit model of rights principles.”⁵¹ The advocacy of a system of human rights in Shari’a is based on a confusion of human rights and human dignity.⁵² Of course, a concern for human dignity is central to Islamic ethical and legal tradition, and Shari’a’s social and political percepts “reflect a strong concern for human good and human dignity.”⁵³ According to Shari’a, as Said states, “it is the state’s duty to enhance human dignity and alleviate conditions that hinder individuals in their efforts to achieve happiness.”⁵⁴ However, this is not a recognition of human rights (entitlements) held simply by virtue of being human.⁵⁵ In other words, Shari’a concern for human dignity does not imply human rights, and has not been translated into legal guarantees and protection for human rights and freedoms.⁵⁶ Shari’a recommendations, in this regard, are of a moral and religious nature with no specific legal sanction and judicial enforcement.⁵⁷ It may be plausible to say that Islamic law contains some elements of human rights, but, certainly, the concept

Brunelle & B. Cliche, “Les droits et libertés fondamentaux” in *Formation professionnelle du Barreau du Québec, Collection de droit 1998-99*, vol. 7: *Droit public et administratif*, Titre II (Cowansville, Que.: Édition Yvon Blais, 1998).

⁵¹ *Islam and Human Rights, Tradition and Politics*, *supra* note 28 at 211.

⁵² The study prefers Rhoda Howard’s definition of human dignity, as “the particular cultural understanding of the inner moral worth of the human person and his or her proper political relations with society.” “Unlike human rights, which are private, individual, and autonomous, human dignity is public, collective, and prescribed by social norms.” Rhoda E. Howard, “Dignity, Community and Human Rights” *supra* note 15 at 83. See also Rhoda E. Howard & Jack Donnelly, “Human Dignity, Human Rights and Political Regimes” (1986) 80 *Am. Pol. Sci. Rev.* at 805-7.

⁵³ Donnelly, “An Analytic Critique of Non-Western Conceptions of Human Rights” *supra* note 6 at 307.

⁵⁴ Abdul-Aziz Said, “Human Rights in Islamic Perspective” in *Human Rights: Cultural and Ideological Perspectives*, at 87. Also generally Sultanhussein Tabandeh, *A Muslim Commentary on the Universal Declaration of Human Rights* (London: F. T. Goulding, 1970).

⁵⁵ Myres McDougal, Harold Lasswell, & Lung-Chu Chen, eds., *Human Rights and World Order: The Basic Policies of an International Law of Dignity* (New Haven: Yale University Press, 1980).

⁵⁶ Donnelly rightly states that “although [Muslims] are regularly and forcefully enjoined to treat fellow men with respect and dignity, the bases for these injunctions are not rights but divine commands which establish only duties, that is, which deal only with right in the sense of what is right.” “An Analytic Critique of Non-Western Conceptions of Human Rights” *supra*, note 6 at 306-7.

⁵⁷ Amin, *Islamic Law and Its Implications for Modern World*, *supra* note 38 at 57; and Sachedina, *The*

of human rights as the individual's claim against the state is not recognized in a legal tradition that privileges the community over the individual.⁵⁸

It has been argued that the concept of human rights as documented in international human rights law is the creation of Western liberal theory, and that human rights as such could not be considered a universal norm. According to this argument, because other cultures and traditions maintain different approaches to the issue, before applying human rights in any society, the religious beliefs and cultural and historical particularities of that society should be carefully considered.⁵⁹ Cultural relativists are inclined "to deny the legitimacy of using values taken from Western culture to judge the institutions of non-Western cultures."⁶⁰ They also tend to challenge the validity of any comparative examination of, for example, the concepts of Islamic and international rights, "because such comparisons are believed to involve judging Islamic norms by the criteria of international law, which the relativists view as an alien, Western system."⁶¹ On the other hand, cultural relativists tend to endorse the legitimacy of values, norms,

Islamic Roots of Democratic Pluralism, *supra* note 38 at 79-81.

⁵⁸ See Howard, "Dignity, Community, and Human Rights" *supra* note 15 at 81-3. Pollis and Schwab present an extreme version of the argument that the concept of human rights is in some way irrelevant to Third World. They write that "it is evident that in most states in the world, human rights as defined by the West are rejected or, more accurately, are meaningless." "Human Rights: A Western Construct With Limited Application" *supra* note 50 at 13.

⁵⁹ "Human Rights: A Western Construct With Limited Application" *ibid.* at 1-18; Afshari, "An Essay on Islamic Cultural Relativism" *supra* note 33 at 246-52; Rhoda E. Howard, "Cultural Absolutism and the Nostalgia for Community" (1993) 15 H. R. Quart. at 315-20; and "The Meaning of Cruel, Inhuman, or Degrading Treatment or Punishment" *supra* note 17 at 22-26.

⁶⁰ *Islam and Human Rights, Tradition and Politics* *supra* note 28 at 9. Sa'id Raja'i Khorasani, Iran's then-ambassador to the United Nations once stated that "the Universal Declaration of Human Rights, which represented secular understanding of the Judeo-Christian tradition, could not be implemented by Muslims and did not accord with the system of values recognized by the Islamic Republic of Iran." UN Doc. A/C. 3/39/SR. 65, Para. 95.

⁶¹ *Islam and Human Rights, Tradition and Politics*, *ibid.* at 10.

and rules that are produced within the framework of a given cultural system as authentic products, the authenticity of which is accepted by the people of that culture.⁶²

The cultural relativists' argument has been supported by several Islamic and non-Islamic states as well.⁶³ These governments maintain that human rights "must be considered in the context of a dynamic and evolving process of international norm-setting, taking into account the various historical, cultural and religious backgrounds and the principal legal systems."⁶⁴ Although these governments avoid a direct challenge to universality of human rights via the endorsement of a qualified universality, they give priority to cultural and religious factors over human rights.⁶⁵ The cooperation of several countries from various cultural backgrounds in challenging the principle of the universality of human rights during the 1993 Vienna World Conference on Human rights was significant. They appealed to culture and religion, on the one hand, and to national security, on the other, and tried to discredit international criticisms of their human rights record.⁶⁶ In the Muslim world, the Islamic governments' participation in

⁶² Fernando R. Teson, "International Human Rights Relativism" (1985) 25 *Virginia J. Int'l L.* at 870; Renteln, *International Human Rights: Universalism Versus Relativism*, *supra* note 1 at 61-87; Richard A. Falk, "Cultural Foundations for the International Protection of Human Rights" in *Human Rights in Cross-Cultural Perspectives*, *supra* note 15 at 54; Forsythe, *The Internationalization of Human Rights*, *supra* note 5; Bassam Tibi, *Islam and the Cultural Accommodation of Social Change* (Boulder, CO: Westview Press, 1991).

⁶³ Many Asian and Middle Eastern states as diverse as China, Vietnam, Singapore, Malaysia, Syria, Pakistan, Yemen, Iran, and Saudi Arabia joined in fighting against universality of human rights. See Roger Thurow, "U. N. Conference plagued by demands that rights must bow to national goals" *Wall St. J.*, June 25, 1993, 17; and Mark Clayton, "Rights controversy clouds U. N. Conference" *Christian Sci. Monitor*, June 10, 1993, 7.

⁶⁴ The Resolution of the Twenty-first meeting of foreign ministers of the Islamic Conference Organizations, held in Karachi, Pakistan, in April 1993, in anticipation of the Second World Conference on Human Rights, held in Vienna, in June 1993 in "Universal Versus Islamic Human Rights" *supra* note 24 at 371.

⁶⁵ "Universal Versus Islamic Human Rights" *ibid.* at 371-72 and 375.

⁶⁶ *Ibid.* at 371-79; and "Islamic or Human Rights: An Iranian Dilemma" *supra* note 25 at 280-82. Also Christina M. Cerna, "Universality of Human Rights and Cultural Diversity: Implementation of Human Rights in Different Socio-Cultural Contexts" (1994) 16 *H. R. Quart.* 740-52.

the debate on human rights issue is not only a response to the development of the international discourse, but also a response to reports of human rights violations in their countries by international observers, such as the Human Rights Commission and Amnesty International.⁶⁷ It also reflects the pressure and demand from within the Muslim countries for greater democratization and respect for human rights.⁶⁸ This issue will be discussed more fully below and in Chapter Two.

It should be also added, in passing, that the objection of some Muslim governments to international human rights standards has led some orientalist and scholars to believe that human rights are distinctively Western and discordant with Islamic culture;⁶⁹ and that the promotion of the principle of universal human rights would result in cultural conflict and the rise of Islamic fundamentalism.⁷⁰ Although the present thesis argues that notions like individualism, constitutionalism, human rights, and liberty are unknown in Shari'a, it by no means follows that Shari'a is the whole of Islam or Islamic culture, in view of the diversity of Muslim societies. Many Muslim scholars have supported the idea of international human rights on Islamic grounds, and

⁶⁷ Since Muslim jurists generally claim that Shari'a is a comprehensive system for universal human rights (see Chapter Two) and applicable to all societies, regardless of their cultural variety, the argument of Islamic states for the cultural relativity of human rights seems incompatible with that claim. Since Muslim governments are aware that Shari'a is not the origin of international human rights law and that Shari'a laws contradict international norms and standards, they have to resort to the cultural relativists' argument in order to justify human rights violations in both Shari'a and their countries.

⁶⁸ Halliday, "Relativism and Universalism in Human Rights: The Case of the Islamic Middle East" *supra* note 15 at 154.

⁶⁹ Samuel P. Huntington, "The Clash of Civilizations?" *Foreign Affairs* (Summer 1993) 22. The article generated sufficient controversy and attention to convince the same journal to publish several comments on Huntington's thesis. "Responses to Samuel P. Huntington's the Clash of Civilizations?" *Foreign Affairs* (Sept.-Oct. 1993) 2. Huntington offered a rebuttal in "If Not Civilizations, What? Paradigms of the Post-Cold War World" *Foreign Affairs* (Nov.-Dec. 1993). See "Universal Versus Islamic Human Rights" *supra* note 24 at 309-14.

⁷⁰ See "The Clash of Civilization?" *ibid.*

the demand for human rights and democracy is increasing in Muslim countries.⁷¹ Many Muslims, however, as Mayer notes, “resent the West’s rhetorical endorsement of universality where it is accompanied by a double standard in the actual application of rights principles.”⁷²

Although the debate on cultural relativism versus universality of human rights is beyond the scope of this study, a few points are noteworthy. First, it should be pointed out that most of the states that support the idea of cultural relativism in human rights issue tend to be undemocratic and repressive, regardless of their cultural backgrounds, and, in the Islamic context, regardless of whether or not they apply Shari’a laws.⁷³ Many Muslim governments use Islam as a pretext for denying rights, and appeal to Islamic culture only to justify deviations from international standards. The schemes for the Islamization of rights, proposed by Muslim governments, are also used to justify enormous violations of human rights in these countries. It is in their political interest to

⁷¹ The human rights movement in Muslim countries contradicts the Western mindset and stereotypes that the gap between Western and non-Western cultures cannot be bridged. See “Universal Versus Islamic Human Rights” *supra* note 24 at 379-88; Howard, “Cultural Absolutism and the Nostalgia for Community” *supra* note 59 at 315; Edward W. Said, *Orientalism* (New York: Vintage Books, c1994); E. Said, “The Phony Islamic threat” *N. Y. Times Mag.* (Nov. 21, 1993) 62; Sadiq Jalal al-Azm, “Orientalism and Orientalism in Reverse” in John Rothschild, comp., *Forbidden Agendas: Intolerance and Defiance in the Middle East* (London: Al Saqi Books, distributed by Zed Press, 1984) at 349-67; Douglas Lee Donoho, “Relativism Versus Universalism in Human Rights: The Search for Meaningful Standards” (1991) 27 *Stan. J. Int’l L.* at 345 and 353; Asef Hussein; Robert Olson; & Jamil Qureshi, eds., *Orientalism, Islam and Islamists* (Brattleboro, Vt.: Amana Books, c1984); Norman Daniel, *Islam and the West: The Making of an Image* (Oxford: Oneworld, c1993); Leonard Binder, *Islamic Liberalism: A Critique of Development Ideologies* (Chicago: University of Chicago Press, 1988) at 85.

⁷² “Universal Versus Islamic Human Rights” *supra* note 24 at 313.

⁷³ Human rights violations under basically secular and socialist regimes and under monarchies that show little interest in applying Islamic law have been as severe as those in countries where Islamic law is heavily relied on, and the rights violations in both groups of countries are in many respects similar. Countries like Iraq, Libya, Syria, and Bahrain, and others like Iran, Saudi Arabia, and Sudan, are examples of these two groups respectively. See Ann Elizabeth Mayer, “Islam and Human Rights: Different Issues, Different Contexts; Lessons from Comparisons” in Tore Lindholm, & Kari Vogt, eds., *Islamic Law Reform and Human Rights* (Oslo: Nordic Human Rights, 1993) at 119; Najib Ghabbian, *Democratization and the Islamist Challenge in the Arab World* (Boulder, CO: Westview Press, 1997).

resort to Islamic culture and civilization in order “to find rationales for asserting the non-applicability of international rights norms”⁷⁴ and to respond to the reports of human rights violations by international human rights organizations.

Moreover, the study disputes the existence of a distinctive Islamic culture and civilization with regard to the human rights issue, one which differs from the Western approach and stands in the way of adopting international human rights norms and standards.⁷⁵ There are over fifty Muslim states in three continents of the world, with different cultural backgrounds and a variety of social, legal, and political systems.⁷⁶ There is not a single, distinctly Islamic position on this question, that relies on Muslim cultures and traditions.

Many Muslim scholars have responded positively to universal human rights ideals and argued on Islamic grounds for the applicability of international human rights law in Muslim countries. Some Muslim states have supported universal human rights norms in international forums as well.⁷⁷ The Muslim governments’ resort to Islamic culture and tradition, therefore, does not seem appropriate, and only serves their political interests. However, a dominant Shari’a interpretation of human rights issue predominates in the Muslim world, which conflicts international human rights law. This thesis examines Shari’a as a body of legal provisions, not Islamic culture -- which accommodates a diversity of opinions and is not an obstacle to democratic freedom and the recognition of human rights. Therefore, Shari’a’s contradiction of international

⁷⁴ “Universal Versus Islamic Human Rights” *supra* note 24 at 373.

⁷⁵ *Ibid.* at 402.

⁷⁶ Halliday, “Relativism and Universalism in Human Rights” *supra* note 15 at 155.

⁷⁷ Tunisia, for example, was in the forefront of the battle for universal human rights in the 1993 Vienna

human rights law is by no means a confirmation of cultural relativism. Although the interpretation and practice of historical formulation of Shari'a are influenced by the sociological, economic, and political circumstances of a particular community and culture in time, a Shari'a interpretation of rights, from which human rights violations result, prevails among Muslim jurists everywhere.⁷⁸ Therefore, unlike Mayer's view that "the stakes in the battle over human rights standards are ultimately political,"⁷⁹ this argument shows that Shari'a, too, is an obstacle to establishing human rights norms in Muslim societies. As we will see throughout this thesis, Shari'a qualifications on human rights and freedoms do restrict international standards.

Finally, although the modern concept of human rights is of Western origin, and first emerged in Europe and North America, it does not follow that the idea and principles of human rights are essentially and exclusively connected with Western culture and philosophy, and hence only applicable to Western societies.⁸⁰ Human rights are rooted in human nature and dignity. The Universal Declaration of Human Rights speaks of the "inherent dignity", "spirit of brotherhood", and "inalienable rights" of the "human family".⁸¹ It endorses civil and political liberties as well as social and cultural rights, and prohibits slavery, oppression, torture, and discrimination. In a cultural context, none of these conceptions seems alien to the ideals of non-Western cultures

Conference. *Ibid.* at 155-56. Ironically, Tunisia's own human rights record is quite poor.

⁷⁸ "Human Rights in the Muslim World" *supra* note 44 at 15; and *Toward an Islamic Reformation*, *supra* note 24 at xiv.

⁷⁹ *Islam and Human Rights, Tradition and Politics*, *supra* note 28 at 211.

⁸⁰ Rather, human rights are historically connected with the experience of pluralism and multiculturalism that have become realities of many societies all over the world. See Bielefeldt, "Muslim Voices in the Human Rights Debate" *supra* note 4 at 593-94; and "Islam and Human Rights: Congruence or Dichotomy?" *supra* note 38 at 27-28.

⁸¹ See the UDHR, *supra* note 20.

and traditions. In fact, as Bielefeldt puts it, human rights and freedoms “do not compete with cultural and religious traditions directly, but concentrate on political and legal aspects of human coexistence.”⁸² Therefore, regardless of the Western origin of human rights concepts, the establishment of cross-cultural foundations and dialogue might foster the development of the concept of universal human rights in its ethical and legal claims,⁸³ without imposing a particular set of Western values, but instead aiming at the recognition of a universal minimum of human rights in pluralistic and multicultural society of the world.⁸⁴ “What counts”, Reisman notes, “is the treatment of individual human beings, regardless of the origin of the authority sanctioning the treatment.”⁸⁵ Justifications of human rights violations and discriminations based on cultural relativism would deny the universality of claims of all human beings to dignity, and would definitely conflict with the idea that there are certain human rights demanded by all human beings, regardless of their cultural and religious traditions, race, or gender.⁸⁶

⁸² “Muslim Voices in the Human Rights Debate” *supra* note 4 at 601.

⁸³ Tibi, “Islamic Law, Human Rights, Universal Morality and International Relations” *supra* note 29 at 285-86; and “The Meaning of Cruel, Inhuman, or Degrading Treatment or Punishments” *supra* note 17 at 20-22.

⁸⁴ “Muslim Voices in the Human Rights Debate” *supra* note 4 at 594.

⁸⁵ Reisman, “Some Reflections on Human Rights and Clerical Claims to Political Power” *supra* note 41 at 510.

⁸⁶ *Ibid.* at 511; and *Human Rights in Cross-Cultural Perspectives*, *supra* note 15 at 3. For moral, historical, and social objections to cultural relativism, see Halliday, “Relativism and Universalism in Human Rights” *supra* note 15 at 162-65.

II. Islamic Reformism and Human Rights: A Preliminary Inquiry

Traditional Islamic thought tends to be immutable. It is often referred to for answers to society's questions and for dealing with people's problems and difficulties. It tries to identify much older parallels for application today. It, therefore, lacks the capability to respond to the questions raised in the modern era. In contrast, the sociological, economic, and political circumstances of every community may change either rapidly or progressively. Every society faces new and unprecedented questions and problems which need proper solutions. The application of the historical Shari'a as a unified body of law, without considering the society's contemporary needs, would create severe problems and hardships and lead to ambiguity in both public life and the legal system.⁸⁷ Shari'a's conflict with modern human rights standards is particularly serious in the area of international law with respect to discrimination against women and religious minorities.⁸⁸ In the next chapter, we argue that the theoretical foundations of human rights, including legitimacy, origin, sources, and basic principles are vastly different in the two systems. In practice, each system entails a different entitlements and standards.

Historically, the early Muslim jurists built Shari'a based on the two fundamental sources of Islam: the Qur'an and *Sunna* (the Prophet's traditions and patterns of

⁸⁷ *Toward an Islamic Reformation*, *supra* note 24 at 1-2. Muhammed S. al-Ashmawi also states that the application of Shari'a is not desirable because this would only contribute to establishing totalitarian regimes. See "Islamic Law, Human Rights, Universal Morality and International relations" *supra* note 29 at 279.

⁸⁸ See Ishtiaq Ahmad, "Abdullahi An-Na'im on Constitutional and Human Rights Issues" in *Islamic Law*

behavior).⁸⁹ As a comprehensive legal and ethical system, Shari'a took shape during the first two or three centuries of the Islamic history.⁹⁰ But it was not divine law. As a normative tradition, it was rather a process of human interpretation of, and legal deviation from, the scriptures within historical time.⁹¹ In other words, Shari'a is not the whole of Islam but an interpretation of its fundamental sources as understood in a particular historical context. This study also argues that it should be, then, possible for contemporary Muslim jurists to undertake a similar process of interpretation and application of the sources in the present historical context, and to develop an alternative Islamic law, such as a human rights law, which is more compatible with modern life and appropriate for implementation today. Only then would Islamic law offer adequate solutions to resolve the problems and hardships facing Muslim societies in the modern era. In other words, Muslim thinkers and scholars could appreciate the impact of time upon the interpretation and application of those fundamental sources of the religion. These sources should be understood and applied in historical context as they address people in their human condition and circumstances as they change over time.⁹²

Reform and Human Rights, supra note 73 at 65.

⁸⁹ In the Shi'ite school of Islam, *sunna* also includes the traditions and sayings of the Prophet's twelve successors known as *imams*. See *Islamic Law and Its Implications in Modern World, supra* note 38 at 31-41; William Montgomery Watt, *Islamic Philosophy and Theology* (Edinburgh: Edinburgh University Press, 1985) at 122-28.

⁹⁰ "Human Rights in the Muslim World" *supra* note 44 at 17-9; *Toward an Islamic Reformation, supra* note 24 at 29-31; Joseph Schacht, *An Introduction to Islamic Law* (Oxford: Clarendon, 1964) at 28-68; Noel James Coulson, *A History of Islamic Law* (Edinburgh: Edinburgh University Press, 1964) at 9-74; Fazlur Rahman, *Islam, 2nd ed.* (Chicago: University of Chicago Press, 1979) at 53-59 and 79.

⁹¹ "Human Rights in the Muslim World" *ibid.* at 21; and *Toward an Islamic Reformation, ibid.* at 185. Also D. Brown, *Rethinking Tradition in Modern Islamic Thought* (Cambridge: Cambridge University Press, 1996).

⁹² Sayeed argues that the response of socio-political Islam to modern necessities, and Western challenge in particular, "could be more effective if there were a systematic effort on the part of Muslim societies to reinterpret their values and traditions, and reorganize their political and economic institutions." Khalid Bin Sayeed, *Western Dominance and Political Islam, Challenge and Response* (New York: Oxford

Religious reformers and revivalists have drawn attention to these situations and circumstances in Muslim societies for a long time, and since the construction and application of Shari'a, they have been concerned about the inability of Shari'a to cope with the needs of contemporary Muslim societies or to offer suitable solutions.⁹³ In fact, the idea of Islamic reformism, in general, has existed among Muslim scholars for a long time. The movement for the reconstruction of Shari'a, too, has been present almost since the construction of Shari'a itself. Due to the establishment of Muslim nation-states, modern technologies of communication, and cross-cultural dialogues, the concept of religious reformism has been greatly elaborated. Islamic reformers and traditional jurists have long been engaged in debate and challenge.⁹⁴

Contemporary Muslim scholars have also noticed that Muslim societies lag behind in science and technology compared to others. They have stressed the need to reconstruct religious thought for the Islamic *ummah* (nation), and have proposed several theories and methods by which to remedy the shortcomings and problems of religious society.⁹⁵ These theories reflected a variety of opinions among Islamic thinkers and differed only in how they identified the problems of society.⁹⁶

University Press, 1995) at 1. Also "Human Rights in the Muslim world" *ibid.* at 17; and *Toward an Islamic Reformation*, *ibid.* at 297-99.

⁹³ See generally Mohammed Arkoun, "The Concept of 'Islamic Reformism'" in *Islamic Law Reform and Human Rights*, *supra* note 73 at 11-24.

⁹⁴ See *ibid.*; Vali-Reza Nasr, "Religious Modernism in the Arab World, India, and Iran: The Perils and Prospects of a Discourse" (1993) 83 *The Muslim World* 20-47; Seyyed Hossein Nasr, "Present Tendencies, Future Trends" in Marjorie Kelly, ed., *Islam, the Religious and Political Life of a World Community* (New York: Praeger, 1984).

⁹⁵ An-Na'im notes that Islamic resurgence, in fact, seeks "to provide the Muslims with adequate answers from within their own tradition to the social, political, and economic problems facing Muslim societies." *Toward an Islamic Reformation*, *supra* note 24 at 4. A prime champion revivalist in this spirit was Imam Abu Hamed Mohammed al-Ghazzali (1074-1128 AC), a great Islamic scholar and the author of *Kitab al-Ihya al-Ulum al-Din* (Reviving of Religious Knowledge). William M. Watt, *The Faith and Practice of*

Before referring to some of these proposals, it is important to note in passing that, due to the fundamental social changes of the modern world, a profound question that confronts all religious thought and Muslim reformists is whether or not the idea of “change” may be reconciled with the “eternal” that the religion advocates, if at all, and how. A Muslim reformist should explain why there should be any need to change or reform religion if it is of a divine origin? And the step to follow would be to pinpoint what, if anything, may be the subject of revision and change.⁹⁷

Muslim thinkers have taken a range of stances on the question of change in Islam. Some emphasized the evolution of Shari’a, while others focused their attention on Muslim societies. Some have eagerly sought to change almost everything, omitting whatever they deem inappropriate and including whatever seems convenient.⁹⁸ Some

al-Ghazali (Chicago: Kazi, 1982). Ibn Taymiyya who may also be considered a Muslim reformer for having challenged the rigidity of *taqlid* (the imitation and following of the jurists of a school of Islamic jurisprudence). He tried to restore Shari’a to its proper place and influence by advocating the strict model of Islamic state ruled by Shari’a. Ibn Taymiyya’s model of state will be discussed below. See K. C. Wheare, *Modern Constitutions* (London: Oxford University Press, 1966) at 139.

⁹⁶ See generally John O. Voll, *Islam: Continuity and Change in the Modern World* (Boulder, CO: Westview Press, 1982); Aziz Ahmad, *Islamic Modernism in India and Pakistan, 1857-1964* (Oxford: Oxford University Press, 1967); and Edward Mortimer, *Faith and Power: The Politics of Islam* (New York: Vintage Books, 1982).

⁹⁷ From the Islamic reformists’ point of view, it seems that surrendering to the flux of “change” leaves little room for tradition and thus for religion. Whereas blind insistence on the fixity of a body of tradition and denial of the radical transformations that have actually occurred in human mode of life would render religious life in today’s changing world virtually impossible. Thus, Muslim reformists have espoused a wide range of opinions on variety of subjects. See generally Bassam Tibi, *The Crisis of Modern Islam: A Pre-Industrial Culture in the Scientific-Technological Age*, trans. by Judith von Sivers (Salt Lake City: University of Utah Press, 1988); Nasr, “Present Tendencies, Future Trends” *supra* note 94. Hourani writes of Abduh that “the key to his defense of Islam, indeed to all his thought about it, was a certain conception of true religion: a distinction between what was essential and unchanging in it and what was inessential and could be changed without damage.” Albert Hourani, *Arabic Thought in the Liberal Age, 1798-1939*, 2nd ed. (New York: Cambridge University Press, 1983) at 145. Nasr also writes that “Abduh’s efforts were directed at ‘purifying’ Islam and restoring its ‘rational’ essence by discarding its ‘inessential’ aspects.” Nasr, “Religious Modernism in the Arab World, India, and Iran” *supra* note 94 at 37.

⁹⁸ For them, the main measure of convenience has been to assess whether adding a new element or omitting a conventional one would add to the socio-economic strength and viability of the religion. One can, therefore, see radical elements of socialism (the hope for social justice), or mild positivism

thinkers also emphasized “reawakening and unity of Muslims”,⁹⁹ “back to roots”, and “try the neglected sources.”¹⁰⁰ Others, aware that the problems are not just legal and that therefore a few change in Shari’a would not bring forth solutions, hoped to free religion from tribal impurities in order to lead society towards a dynamic culture, progress, and social justice.¹⁰¹ Moreover, they concentrated on the reconstruction of Islamic philosophy to achieve a religious reformism that could save religion in modern era.¹⁰²

(presenting religion as “scientific”) in the writings of such thinkers. Apparently, the presumption is that, in order to be viable, religion must have a say on every subject. In this vein, books have been written to show how the *Qur’an* and Islamic sayings have anticipated, for example, the Laplacian theory of the expansion of the universe, the human conquest of space, the importance of vitamins, the hazards of microbial infections, etc. There has also been emphasis on the formulation of Islamic psychology, Islamic sociology, Islamic economic, etc. See Hossein Kamaly, “The Theory of Expansion and Contraction of Shari’a: A Research Program for Islamic Revivalism (an Iranian Perspective)” (unpublished paper, February 1995). For ideas and thoughts of Sayyid Qutb, Ali Abd al-Raziq, and Tariq al-Bishri, see Binder, *Islamic Liberalism, A Critique of Development Ideologies*, *supra* note 71 at 128, 170, and 243, respectively. In the political domain, see also Ali Abd al-Raziq, *Al-Islam wa Usul al-Hukumah* [Islam and the Foundations of Government] (Beirut: Dar Makhahat al-Haya, 1966).

⁹⁹ S. Jamal al-Din Asadabadi (Afghani) (1837-1897) and Mohammed Abduh. They also emphasized the need to incorporate modern philosophical and scientific disciplines to show that Islam is not inconsistent with modernity. See Rahman, *Islam*, *supra* note 90 at 216-217; *Toward an Islamic Reformation*, *supra* note 24 at 61. See also Nikki Keddie, *Jamal al-Din al-Afghani: A political Biography* (Berkeley: University of California Press, 1972); Nasr, “Religious Modernism in the Arab World, India, and Iran” *supra* note 94 at 20; Mohamed Arkoun, *Pour une critique de la raison islamique* (Paris: Maisonneuve et Larose, 1984); Abdallah Larouni, *The Crisis of the Arab Intellectual: The Traditionalism or Historicism*, trans. by Diamid Cammell (Berkeley: University of California Press, 1976).

¹⁰⁰ Other proposals include “find a brave inspired leader”, “return to, or strict application of, Qur’an and Sunna”, and “the reaffirmation of the authenticity and uniqueness of the Qur’anic experience.” See *Toward an Islamic Reformation*, *supra* note 24 at 46-7; and John O. Voll, “Renewal and Reform in Islamic History: *Tajdid* and *Islah*” in John L. Esposito, ed., *Voices of Resurgent Islam* (New York: Oxford University Press, 1983) at 32-47.

¹⁰¹ Dr. Ali Shariati (1933-1977). See generally Majid Khadduri, *Political Trends in the Arab World* (Baltimore: John Hopkin’s University Press, 1970) at 64-65; Aharon Layish, “The Contribution of the Modernists to the Secularization of Islamic Law” (1978) 14 *Middle Eastern Studies* at 263; Fazlur Rahman, “Islamic Modernism: Its Scope, Methods, and Alternatives” (1970) 1 *Int’l J. Middle East Studies* at 319 and 324-26.

¹⁰² Mohammed Iqbal Lahouri (1877-1938) wrote his famous book *The Reconstruction of Religious Thought in Islam* (Lahore: Institute of Islamic Culture, 1986); See also Rahman, *Islam*, *supra* note 90 at 231; and Sayeed, *Western Dominance and Political Islam*, *supra* note 92 at 156.

Because the gate of *ijtihad*¹⁰³ is believed by majority of Muslims to have remained closed since the tenth-eleventh century AD, *ijtihad* temporarily became a crucial mechanisms for reform within the framework of Shari'a on issues where Qur'an and *Sunna* are silent, in the hope of reconciling Islamic principles with the dynamic requirements of the world.¹⁰⁴ Far from challenging the whole structure of Shari'a as established by the founding jurists, however, *ijtihad* is restricted to matters not governed by clear and definite texts of the Qur'an and *Sunna*. Under the historical Shari'a, as An-Na'im notes, "it is therefore unlikely to achieve a significant Islamic reform."¹⁰⁵

Furthermore, some demanded the establishment of a Shari'a state and the total application of Shari'a in public as well as private life. Ibn Taymiyya, a thirteenth century scholar, for example, maintained that the state and religion should be inseparable, and that the establishment of Shari'a model of state is the only answer to the problems of Muslim societies.¹⁰⁶ His ideas on Shari'a state and Islamic resurgence, as An-Na'im puts it, "had a significant impact through their acceptance and propagation by the eighteenth century movements of Muhammed ibn Abd al-Wahab in Arabia and

¹⁰³ In brief, *ijtihad* (independent legal reasoning leading to new judgment) is the endeavor of an Islamic scholar to find solutions for today's problems by studying the original sources and considering the basic principles.

¹⁰⁴ Wael Bahjat Hallaq, *The Gate of Ijtihad: A Study in Islamic Legal History* (Ph. D. Thesis, University of Washington, 1993); "Islam and Human Rights: Congruence or Dichotomy?" *supra* note 38 at 31-32; Weiss, "Interpretation in Islamic Law: The Theory of *Ijtihad*" (1978) 26 Am. J. Comp. L. at 199; "Human Rights in the Muslim World" *supra* note 44 at 48-49; and Schacht, *An Introduction to Islamic law*, *supra* note 90 at 69.

¹⁰⁵ *Toward an Islamic Reformation*, *supra* note 24 at 65, 27-8, 36, and 46-51. See also "An Essay on Islamic Cultural Relativism" *supra* note 33 at 269.

¹⁰⁶ Ibn Taymiyya, *Al-Siyasa al-Shar'iyya fi Islah al-Ra'iy wa al-Ra'iyya*, ed. By Muhammad Mubarak (Beirut: 1966), trans. by Omar Farrukh as *Ibn Taimyya on Public and Private Law in Islam in Toward an Islamic Reformation*, *ibid.* at 36.

Shah Wali Allah in India.”¹⁰⁷ Recent proponents of the application of Shari’a, such as Mawdudi, were influenced by Ibn Taymiyya’s ideas as well.¹⁰⁸

It should be noted that, along with Islamic reformism, Islamic modernism emerged in the wake of the political and cultural subjugation of Muslim societies to Western colonialism in the nineteenth century, and in response to social, economic, and political dysfunctions produced by modernization in the twentieth century.¹⁰⁹ In many ways, this was the Islamic equivalent of “la theologie nouvelle” which sought to reform Catholicism in Europe and to bring the church into contact with the modern world.¹¹⁰ Islamic modernism, while looking to Islam for answers, stood for the recognition of the realities of the modern world and the West in absolute terms. According to Vali-Reza Nasr, “Modernism initiated the criticism of traditional Islam and opened the door to the possibility of interpreting the religion based on a worldview alien to it.”¹¹¹

Muslim modernists argued that Islam must be reconstructed in order to meet the needs of modern man and society and sought solutions for Muslim societies in the

¹⁰⁷ *Ibid.* at 37-38. See also John L. Esposito, *Islam and Politics*, 2nd ed. (Syracuse: Syracuse University Press, 1991) at 33-6; and Fazlur Rahman, *Islam*, *supra* note 90 at 196-206.

¹⁰⁸ Others whom Ishtiaq Ahmed identifies as absolutists, include Pakistani thinkers Asad, Perwiz, Hakim, and Javid Iqbal. Ishtiaq Ahmed, *The Concept of an Islamic State: Analysis of the Ideological Controversy in Pakistan* (New York: St. Martin’s Press, 1987). See also Muhammad Asad, *Principles of State and Government in Islam* (Berkeley: University of California Press, 1961) at 14-29. For the ideas of Hassan al-Turabi of Sudan, see John L. Esposito, “Sudan’s Islamic Experiment” (1986) 76 *Muslim World* at 181; Khalid Duran, “The Centrifugal Forces of Religion in Sudanese Politics” (1985) 26 *Orient* at 572; and *Toward an Islamic Reformation*, *ibid.* at 39-42.

¹⁰⁹ See generally Tibi, *The Crisis of Modern Islam*, *supra* note 97; Arkoun, *Pour une critique de la raison islamique*, *supra* note 99; Fazlur Rahman, *Islam and Modernity: Transformation of an Intellectual Tradition* (Chicago: University of Chicago Press, 1982); Hourani, *Arabic Thought in the Liberal Age*, *supra* note 97; Malcolm Kerr, *Islamic Reform* (Oxford: Oxford University Press, 1966); Hamid Enayat, *Modern Islamic Political Thought* (Austin: University of Texas Press, 1982).

¹¹⁰ L. Praamsma, *The Church in the Twentieth Century* vol. VII (St. Catherine, Ontario: Paideia Press, 1981).

¹¹¹ “Religious Modernism in the Arab World, India, and Iran” *supra* note 94 at 36. See also Michael Walzer, *The Revolution of Saints: A Study in the Origins of Radical Politics* (Cambridge: Harvard

modern era. In fact, modernists separated Islam as a religion from Islam as a civilization or cultural system. They declared their loyalty to the first and scorned the second.¹¹² Since the Constitutional Revolution (1906-1911),¹¹³ religious thinkers and modernists in Iran, too, attempted to reevaluate the validity of Islamic tradition as well as to reformulate and redefine certain religious doctrines and institutions in terms of the prevailing ideas of the time.¹¹⁴

University Press, 1965) at 9-10.

¹¹² For detailed accounts of characteristics and specifications of Islamic modernism, reformism, and revivalism, see Jacques Waardenburg, "Islam As a Vehicle of Protest" in Ernest Gellner, ed., *Islamic Dilemmas: Reformers, Nationalists and Industrialization* (Berlin: Mouton Publishers, 1985) at 22-49; John L. Esposito, *Islam and Politics*, supra note 107 at 32-59; Fazlur Rahman, "Revival and Reform in Islam" in P. M. Holt, Ann K. S. Lambton, & Bernard Lewis, eds., *The Cambridge History of Islam, Islamic Society and Civilization*, vol. 2B (Cambridge: Cambridge University Press, reprint 1982) at 632-56; Mohammed Iqbal, *The Reconstruction of religious Thought in Islam*, supra note 102; H. A. R. Gibb, *Modern Trends in Islam* (Chicago: University of Chicago Press, 1947); Charles C. Adams, *Islam and Modernism in Egypt* (New York: Russell & Russell, 1968); and Said Amir Arjomand, *The Shadow of God and the Hidden Imam: Religion, Political Order and Social Change in Shi'ite Iran From Beginning to 1890* (Chicago: University of Chicago Press, 1984); "Religious Modernism in the Arab World, India, and Iran" supra note 94 at 24-31; Farhang Rajaee, "Islam and Modernity: The Reconstruction of an Alternative Shi'ite Islamic Worldview in Iran" in Martin E. Marty & R. Scott Appleby, eds., *Fundamentalism and Society* (Chicago: University of Chicago Press, 1993) at 103-25; and Valla Vakili, *Debating Religion and Politics in Iran: The Political Thought of Abdulkarim Soroush* (New York: Council of Foreign Relations, 1996) at 9. For the works of Islamic political thinkers, see also Munawir Sjad Zali, *Islam and Governmental System: Teachings, History and the Reflections* (Jakarta: INIS, 1991) at 31-143.

¹¹³ The Constitutional Revolution (1906-1911) will be discussed in Chapter Two.

¹¹⁴ On the emergence of religious modernism in contemporary Iran and the work of Muslim reformists like Ali Shariati (1933-1977), Mahdi Bazargan (1907-1995), and Mmurtadha Mutahhari (1920-1979), see generally Mehrzad Boroujerdi, *The Iranian Intellectuals and the West: The Tormented Triumph of Nativism* (Syracuse: Syracuse University Press, 1996); "Religious Modernism in the Arab World, India, and Iran" supra note 94; Yann Richard, "Shari'at Sangilaji: A Reformist Theologian of the Reza Shah Period" in Said Amir Arjomand, ed., *Authority and Political Culture in Shi'ism* (Albany: State University of New York Press, 1988) 159-77; Mangol Bayat-Philip, "Tradition and Change in Iranian Socio-Religious Thought" in Michael E. Bonine & Nikki R. Keddie, eds., *Modern Iran: The Dialectics of Continuity and Change* (Albany: State University of New York Press, 1981); H. E. Chehabi, *Iranian Politics and Religious Modernism, The Liberation Movement of Iran Under the Shah and Khomeini* (London: I. B. Tauris, 1990); W. Millward, "Aspects of Modernism in Shi'a Iran" (1973) 37 *Studia Islamica*; Nikki R. Keddie, *Roots of Revolution* (New Haven: Yale University Press, 1981); Said Amir Arjomand, *The Turban for the Crown* (Oxford: Oxford University Press, 1988); Ervand Abrahamian, *Iran Between Two Revolutions* (Princeton: Princeton University Press, 1982); Shahrough Akhavi, *Religion and Politics in Contemporary Iran* (Albany: State University of New York Press, 1980); Shahrough Akhavi, "Islam, Politics and Society in the Thought of Ayatollah Khomeini, Ayatollah Taliqani and Ali Shariati" (1988) 24 *Middle Eastern Studies* 404-31; Hamid Dabashi, *Theology of Discontent: The Ideological Foundation of the Islamic Revolution in Iran* (New York: New York

Of course, the intellectual and institutional limitations lessened the influence of Islamic reformism and modernism on religious thought. The opposition of the *ulama* (Muslim jurists) and religious conservatives prevented Islamic modernism, as a movement of religious reform, from institutionalizing the principle of change in religious thought and institutions in Muslim societies.¹¹⁵ The *ulama*, whose education and orientation not only restricted them to traditional confines but prevented them from even perceiving the problems, adhered to Shari'a as constructed and received. They saw Shari'a as being, in the first place, closely intertwined with all aspects of life, and in the second, as a comprehensive system containing all the solutions for man's and society's problems.¹¹⁶ Autocratic governments in Muslim countries have also confronted the reformists, whose views they claimed endangered Shari'a as well as people's unity and national security.¹¹⁷ Overall, the reformists attained little success.

University Press, 1993); Forough Jahanbakhsh, *Islam, Democracy and Religious Modernism in Iran (1953-1997): From Bazargan to Soroush* (Ph. D. Thesis, McGill University, 1997); Daryush Shayegan, *Qu'est-ce qu'une révolution religieuse* (Paris: Les presses d'aujourd'hui, 1982); Mahdi Bazargan, *Bazgasht bi Qur'an* [Return to the Qur'an] (Tehran: 1983-84); Richard Campbell, trans. and ed. *Society and Economics in Islam: Writings and Declarations of Ayatollah Sayyid Mahmud Taliqani* (Berkeley: Mizan Press, 1982); Said Amir Arjomand, "Revolution in Shi'ism" in William Roff, ed., *Islam and the Political Economy of Meaning* (Berkeley: University of California Press, 1987).

¹¹⁵ For the *ulama*, modernism threatens to break the universal sovereignty of religion and the monopoly of faith over absolute truth. It also could lead to secularism which advocates privatization of faith and secularization of society and culture. See "Religious Modernism in the Arab World, India, and Iran" *supra* note 94 at 34-35 and 41-43. For example, Fazlur Rahman, who proposed a fresh examination of Shari'a in the light of the Qur'anic evidence, believed that Muslims are not ready to accept any change. Rahman, "Islamic Modernism" *supra* note 101 at 329. See also Esposito, *Islam and Politics*, *supra* note 107; Rahman, "Revival and Reform in Islam" *supra* note 112 at 632-56; Iqbal, *The Reconstruction of Religious Thought in Islam*, *supra* note 102; and Tibi, *The Crisis of Modern Islam*, *supra* note 97.

¹¹⁶ See generally Enayat, *Modern Islamic Political Thought*, *supra* note 109; Arkoun, *Pour une critique de la raison islamique*, *supra* note 99; Shayegan, *Qu'est ce qu'une révolution religieuse*, *ibid.*; and Laroui, *The Crisis of the Arab Intellectual*, *supra* note 99.

¹¹⁷ Mayer, "Universal Versus Islamic Human rights" *supra* note 24 at 315-16 and 319; Esposito, *Voices of Resurgent Islam*, *supra* note 100; "Islamic or Human Rights: An Iranian Dilemma" *supra* note 25 at 280-82; and Holliday, "Relativism and Universalism in Human Rights" *supra* note 15 at 154.

This study argues that the above-mentioned proposals have mostly been focused on the secondary subjects of religion and religious societies. This factor led to the failure of these proposals. Reform proposals generally lacked an epistemological understanding and failed to deal effectively with the theoretical aspects of social and political difficulties in Muslim societies. The reformists could not distinguish between religion and religious knowledge, between eternal religion and the changing nature of religious knowledge. Therefore, they looked for a solution from inside the religion. They expected religion, specially Shari'a, to answer all of society's questions. That there are pre-suppositions and extra-religious issues to consider was absent from their theories. Some of their proposals were misleading, because, without altering traditional assumptions, the reconstruction of religious thought leads nowhere. In short, their objectives were not likely to be achieved through their method of thinking.

The study also suggests that a religious reformer should examine religious sources within his historical context. Epistemologically, he needs to consider every pre-suppositions and the extra-religious issues that impinge on his thought. A modern reformist, then, should undertake, as the early jurists did, a process of understanding, interpreting, and application of the sources within the context of the present in order to develop an alternative religious knowledge in any areas, such as human rights law. Only in this way could the religious thinker appreciate the impact of time enough to make the religion more compatible with modern life. Here we examine a proposal that, instead of emphasizing minor elements in Muslim societies, directly addresses the reconstruction of religious knowledge in Islamic thought.

The Theory of the Expansion and Contraction of Religious Knowledge

The theory of the expansion and contraction of religious knowledge was recently asserted by Dr. Abdolkarim Soroush of Iran.¹¹⁸ Originally inspired by epistemological studies, it considers the problems of Muslim societies from different perspectives, and tries to reconcile change with immutability (modernity and religion), the main point of modern religious reformism. However, it has its own unique characteristics, and leads to conclusions which differ from those of the others.¹¹⁹

Soroush positions himself within a broader project of Islamic reformism in the modern world. Although he accepts the inevitable and the changing character of modern world, his solution does not aim at the construction or revival of Islam. For Soroush “Islam is unchanging. Any attempt to reconstruct Islam is both futile and illusory. It is not Islam that must change, but the human understanding of Islam.”¹²⁰

¹¹⁸ This theory first appeared in 1988 in an Iranian periodical called *Keyhan Farhanghi*, and sparked a controversy in Iranian intellectual circles. Soroush, a leading moderate revisionist thinker of the Muslim world and prominent Iranian religious intellectual, was hardly attacked by the conservative clergy, who accused him of skepticism and of corrupting the minds of the uninitiated. His theory was published in 1990. For a summary of this controversial debate see: Mehrzad Boroujerdi, “The Encounter of Post-Revolutionary Thought in Iran with Hegel, Heidegger, and Popper” in Serif Mardin, ed. *Cultural Transitions in the Middle East* (New York: E.J. Brill, 1994) 248-255.

¹¹⁹ See Abdolkarim Soroush, *Qabz va Bast-i Tiorik-i Shari'at* [The Theory of Expansion and Contraction of Religious Knowledge] (Tehran: Serat, 1990) at 47-52.

¹²⁰ *Ibid.* at 99. See also Abdolkarim Soroush, *Reason, Freedom, and Democracy in Islam; The Essential Writings of Abdolkarim Soroush*, ed. by Mahmoud Sadri & Ahmad Sadri, eds. (Oxford: Oxford University Press, 2000); Kamaly, “The Theory of Expansion and Contraction of Shari’a” *supra* note 98; Abdolkarim Soroush, “Evolution and Devolution of Religious Knowledge” (lecture delivered at McGill University, Montreal, in April 1995); Vakili, “Debating Religion and Politics in Iran” *supra* note 112 at 9-10; Broujerdi, *The Iranian Intellectuals and the West* *supra* note 114; and Jahanbakhsh, *Islam, Democracy and Religious Modernism in Iran*, *supra* note 114 at 248; John Cooper, “The Limits of the

Soroush argues that religion is God-sent and thus is pure and absolute. Nevertheless, in order to be understood, it is bound to pass through the channel of human cognitive faculties operating in the complex setting of human social relations.¹²¹ Therefore, one cannot attribute sacredness and completeness to any interpretation of the religion, because sacredness and absoluteness reside in religion itself. No understanding of religion is ever sacred and ultimate. According to Soroush, every proper understanding of religion is contingent upon the pursuit of a methodical, rational, and justifiable inquiry.¹²² This rational process of inquiry, aimed specifically at reading the true meaning of religious texts, always takes place within the broader context of human inquiry concerning the world of being in general.

Soroush argues that no text stands alone; every text needs to be placed with a context. "It is theory-laden, its interpretation is in flux, and presuppositions are here as actively at work as elsewhere in the field of understanding. Religious texts are no exception."¹²³ Therefore, any interpretation is subject to expansion and contraction according to prior assumptions or the inquiry.¹²⁴ Now, since presuppositions are time-bound, they can, and do, change. Religious knowledge, or the science of religion,

Sacred: The Epistemology of Abdolkarim Soroush" in J. Cooper, Ronald L. Netter, & Mohamed Mahmoud, eds., *Islam and Modernity: Muslim Intellectuals Respond* (London: I. R. Tauris, 1998) 38-56; Afshin Matin-Asgari, "Abdolkarim Soroush and the Secularization of Islamic Thought in Iran" (1997) 30 *Iranian Studies* 95-115.

¹²¹ Kamaly, *ibid.*; and *Qabz va Bast*, *ibid.* at 243.

¹²² Kamaly, *ibid.*; *Qabz va Bast*, *ibid.* at 249; Abdolkarim Soroush, "Qabz va Bast dar Mizan-i Naqd va Bahs" [The Theory of Expansion and Contraction at the Level of Critique and Discussion] (1991) 1 *Kiyan*, no. 2 at 5.

¹²³ "Evolution and Devolution of Religious Knowledge" *supra* note 120. See also Boroujerdi, "The Encounter of Post-Revolutionary Thought in Iran" *supra* note 118 at 248-55.

¹²⁴ These assumptions can be of a very different nature, ranging from philosophical, historical, theological to more specific assumptions of linguistics and sociology. See Kamaly, *supra* note 98.

which is the product of understanding (comprehending), will thus exhibit continuous change as well.¹²⁵

According to Soroush, all interpretations are bound by the era of the religious scholar, and by all pre-suppositions determined by the scholar's intellectual worldview (understanding of the other human sciences).¹²⁶ Religious knowledge and interpretation, in a continuous dialogue with other branches of human knowledge change constantly and are reconstructed over time.¹²⁷

Soroush's claim is not that man-made science and knowledge are to replace religion; rather, his point is that the body of knowledge amassed by the human intellect should be the guide that refines and develops man's understanding of religion. Every religious scholar ought constantly to consult the text and the tradition. Nevertheless, it is the task of religious scholars to be constantly aware of the framework they take for granted as they try to make sense of religious texts. And they must extend their framework and keep it rationally viable.¹²⁸

¹²⁵ Soroush argues that since it is only through those presuppositions that one can hear the voice of revelation, religion is silent. Moreover, the interpretation of the text is social by nature and depends on the community of experts. It entails right and wrong, certain and dubious ideas. A wrong interpretation is as important as a right one, from the evolutionary point of view. See "Evolution and Devolution of Religious Knowledge" *supra* note 120; "Debating Religion and Politics in Iran" *supra* note 112 at 10-11; and *Islam, Democracy and Religious Modernism in Iran*, *supra* note 114 at 249-51.

¹²⁶ "Debating Religion and Politics in Iran" *ibid.* at 11.

¹²⁷ The preceding arguments, as Soroush points out, can be briefly outlined as follows:

1. Religion, or revelation for that matter, is silent.
2. Science of religion is relative, that is relative to the presuppositions.
3. Science of religion is age-bound, because presuppositions, themselves, are time-bound.
4. Revealed religion, itself, may be true and free of contradictions, but science of religion is not necessarily so.
5. Religion may be perfect or comprehensive, but not so for the science of religion.
6. Religion is divine; but the interpretation of religion is a human endeavor. See *Qabz va Bast*, *supra* note 119 at 278; Kamaly, *supra* note 98; and *Islam, Democracy and Religious Modernism in Iran*, *supra* note 114 at 249-50.

¹²⁸ See Kamaly, *ibid.*; and "Debating Religion and Politics in Iran" *supra* note 112 at 9-12.

Soroush rightly notes that one must not confine the scope of religion to the body of Islamic legal system, Shari'a.¹²⁹ The present study concurs with the view that Shari'a in the restricted sense is but a small part of religious knowledge. It is subject to change just like any other man-made body of knowledge. The same holds true for the interpretation of religious texts, theology, and the rational methodology of jurisprudence.¹³⁰

This theory invites contemporary Muslim scholars to revise their understanding of religion in the light of the many profound questions being posed today within every living religion. It is in this sense that the theory of expansion and contraction attempts to define a research program for religious reformism.¹³¹ The kind of reformism that Soroush advocates is mainly concerned with extra-religious factors¹³² and the foundations required for a time-bound comprehension of the text.¹³³ This is where this study intersects most clearly with Soroush's theory.

The theory does not opt for the "Islamization of knowledge" or "scientification of religion"; it opts for the "humanization of religion." This is, indeed, the basic foundation on which the whole theory of expansion and contraction stands. It is

¹²⁹ "Debating Religion and Politics in Iran" *ibid.*

¹³⁰ Soroush also notes that what is eternal is the religion itself, not our understanding of it. Every man's religion is his understanding of the truth about religion; just as every man's science is his understanding of the truth about nature. See *Qabz va Bast*, *supra* note 119 at 346; Kamaly, *supra* note 98.

¹³¹ Kamaly, *ibid.*

¹³² These factors include justice, democracy, and human rights.

¹³³ This is what Soroush himself calls positive revivalism, in contrast to negative revivalism, which "consists of purging and purification of the actual understanding of the religion from alien elements, and to do justice to the more neglected dimensions thereof." "Evolution and Devolution of Religious Knowledge" *supra* note 120 at 9.

humanized in the sense that it is impressed by characteristics both mean and noble, virtually every characteristic of human beings.¹³⁴

Soroush's theory contains both general and basic arguments. It does not discuss how it relates to any field of social sciences; its principles and conclusions may be followed in any domain, including human rights law.¹³⁵ Based on external factors and progress in the system of human knowledge, our general knowledge or general understanding of the world, society, etc. changes over time to time. Because it does, Shari'a needs to change accordingly. This could ultimately lead to a totally different Shari'a or legal system in Muslim society. The mere belief in the potentiality of change in Shari'a could result in a different, and yet religiously acceptable, structure for a legal system. This is, indeed, what Muslim societies need. Any dialogue between inside and outside of religion could benefit a society faced with mounting problems and difficulties.¹³⁶

* * *

Islamic reformism has been active in the human rights domain as well. The concept of rights has preoccupied contemporary Muslim thinkers in recent years. While

¹³⁴ *Ibid.*

¹³⁵ Soroush champions democracy, pluralism, and human rights. He argues for reform in key social and political areas, and dismisses any attempts to formulate an official Islamic political ideology, for no single understanding of Islam is ever complete or final. See "Debating Religion and politics in Iran" supra note ? at 7. See also Ziba Mir-Hosseini, *Islam and Gender, the Religious Debate in Contemporary Iran* (Princeton: Princeton University Press, 1999) at 217-46.

¹³⁶ "Debating Religion and Politics in Iran" *ibid.* note ? at 12.

highlighting Shari'a's theoretical and practical problems and shortcomings in this field, Muslim scholars and reformists have sought Islamic solutions by rendering Shari'a-sanctioned rights more compatible with modern standards and values.¹³⁷ However, their effort has been challenged by traditional Muslim jurists and conservatives who either have rejected the modern idea of human rights or denied the presence of any significant difference between the two systems,¹³⁸ which is both theoretically and practically problematic.¹³⁹ Thus, the opinions of both sides of the human rights issue vary from the assertion that international human rights law are fully compatible with Islam to the claim that international human rights are a product of alien Western culture and represent values that are repugnant to Islam. Between these extremes, there are compromise positions that, based on a different understanding of the main scriptural sources, maintain that Islam accepts many but not every aspect of international human rights or that it endorses international human rights with certain restrictions and qualifications.¹⁴⁰

The conservatives deny that modern human rights theory can be universally applied on the grounds that this theory is derived from Christian values and Western

¹³⁷ Ishtiaq Ahmad, "Abdullahi An-Na'im on Constitutional and Human Rights Issues" *supra* note 88 at 62-63; *Islam and Human Rights, Tradition and Politics*, *supra* note 28 at 52-57; John L. Esposito, *The Islamic Threat: Myth or Reality?* (New York: Oxford University Press, 1992) at 9; *Toward an Islamic Reformation*, *supra* note 24 at 35; "An Essay on Islamic Cultural Relativism" *supra* note 33 at 263; and "Muslim Voices in the Human Rights Debate" *supra* note 4 at 601-2.

¹³⁸ Majid Alikhan, "A Comparative Study of the Universal Declaration of Human Rights and Declaration of Human Rights in Islam" (1991) 22 *Islam & the Modern Age Quart.* at 191. Also generally Bouberk Jalal Bennani, *L'Islamisme et les droits de l'homme* (Lausanne: Édition de l'Aire, 1984).

¹³⁹ "Human Rights in the Muslim World" *supra* note 44 at 22.

¹⁴⁰ "Muslim Voices in the Human Rights Debate" *supra* note 4 at 601-2; Aziz al-Azmeh, "Islamist Revivalism and Western Ideologies" (1991) 32 *History Workshop* at 48; and "An Essay on Islamic Cultural Relativism" *supra* note 33 at 266-68. As Mayer notes, there is no real consensus among Muslims that Shari'a mandates a culturally distinctive approach to rights or that it precludes the adoption of international human rights norms. "Universal Versus Islamic Human Rights" *supra* note 24 at 309.

liberal theories, and is therefore not acceptable nor applicable to other societies with different religious and cultural values and traditions.¹⁴¹ Human values and the dignity of all humankind are honored in all religions and cultures.¹⁴² Conservatives have also resorted to the idea of cultural relativity,¹⁴³ backed by politicians in some Muslim countries.¹⁴⁴ Some Muslim jurists argued that Shari'a laws are God-given divine laws and suited to both the social and economic conditions of society and the physical and emotional differences between genders within the family.¹⁴⁵ Others emphasized only some general principles, such as human honor and the equality of genders in human dignity, in Islamic sources, their conclusion being that Shari'a laws respect and guarantee human rights and freedoms in every public and private sphere of human

international human rights norms. "Universal Versus Islamic Human Rights" *supra* note 24 at 309.

¹⁴¹ See al-Sadiq al-Mahdi, "Islam-Society and Change" in *Voices of Resurgent Islam*, *supra* note 100 at 231-32; "An Essay on Islamic Cultural relativism" *ibid.* at 246-47 and 249; Savory, "Islam and Democracy" *supra* note 28 at 826-27; "Universal Versus Islamic Human Rights" *ibid.* at 319. Also generally Ahmed Farrag, "Human Rights and Liberties in Islam" in Jan Berting, *et al.*, eds., *Human Rights in a Pluralist World: Individuals and Collectivities* (Westport, Conn.: Meckler, 1990) at 141.

¹⁴² An-Na'im, "The Meaning of Cruel, Inhuman or Degrading Treatment or punishment" *supra* note 17 at 4.

¹⁴³ Bassam Tibi observes that "legal notion within 'Islamic intellectual tradition' differs considerably from the European one", and that international law lacks "a substantive cultural consensus" needed for an international legal order. Tibi, *Islam and the Cultural Accommodation of Social Change*, *supra* note 62 at 61. It should be noted that Tibi, generally a secular scholar, does not primarily advocate cultural relativism but mainly cultural pluralism within the emerging global civilization. See "An Essay on Islamic Cultural Relativism" *supra* note 33 at 249-50.

¹⁴⁴ Ayatollah Mohammad Yazdi, then head of the Judiciary of Iran, said on March 10, 1995, during a Friday prayer service: "Who says that human rights devised by the West should be applied to the whole world? ... Some nations have their own cultures, some nations have their own religions, you cannot describe as human rights violations the issues which concern their religion and culture. ... Islamic human rights differ from the Declaration of Human Rights. Islam has its own rules and regulations." *Islam and Human Rights, Tradition and Politics*, *supra* note 28 at 294. In 1983, Iran's UN Ambassador, Sa'id Raja'i Khorasani, also proclaimed that the UDHR, "which represented a secular understanding of the Judeo-Christian tradition, could not be implemented by Muslims and did not accord with the system of values recognized by the Islamic Republic of Iran. "Universal Versus Islamic Human Rights" *supra* note 24 at 315-16. For similar comments made by an Saudi Arabian official just before the 1993 Vienna Human Rights Conference, see *ibid.* at 319. See also William Montgomery Watt, *Islamic Fundamentalism and Modernity* (London: Routledge, 1988).

¹⁴⁵ Mawdudi, *Human rights in Islam*, *supra* note 38 at 19, 23, and 32; Muhammad Zafrullah Khan, *Islam and Human Rights*, 4th ed. (UK: Islamic International Publications, 1989) at 36-59.

life.¹⁴⁶ Some even conceived of Shari'a affording more inclusive guarantees and protections for human rights than are provided by international human rights standards. Mawdudi claims that Shari'a invented human rights and that international human rights law seeks to codify rules that Shari'a introduced in the seventh century.¹⁴⁷ Having presented his ideas on human rights, Mawdudi asserts that:

This is a brief sketch of those rights which 1400 years ago Islam gave to man. ... it refreshes and strengthens our faith in Islam when we realize that even in this modern age, which makes such loud claims of progress and enlightenment, the world has not been able to produce more just and equitable laws than those given 1400 years ago.¹⁴⁸

The conservatives ignored the structural aspects and critical points in the human rights debate, such as the equality of all human beings before the law,¹⁴⁹ or wrongly understood and interpreted modern concepts of human rights and liberty. In fact, they tried to redefine and somehow Islamize the concept of human rights. For example, on the equality of human beings, Mawdudi stated that "Islam not only recognizes the principle of absolute equality between men irrespective of colour, race, or nationality, it

¹⁴⁶ See J. Adams, "Mawdudi and the Islamic State" in *Voices of Resurgent Islam*, *supra* note 100 at 99-133; "Islam and Human Rights: Congruence or Dichotomy?" *supra* note 38 at 25; A. K. Brohi, "Islam and Human Rights" (1976) 28 PLD Lahore at 148-60; and A. K. Brohi, "The Nature of Islamic Law and the Concept of Human Rights" in International Commission of Jurists, Kuwait University, and Union of Arab Lawyers, *Human Rights in Islam, Report of a Seminar Held in Kuwait, December 1980* (International Commission of Jurists, 1982) at 43-60.

¹⁴⁷ Mawdudi, *Human Rights in Islam*, *supra* note 38 at 39. On Mawdudi's views, in this respect, see also *Toward an Islamic Reformation*, *supra* note 24 at 38-39; "Muslim Voices in the Human rights Debate" *supra* note 4 at 603 and 614; Riffat Hassan, "On Human Rights and the Qur'anic Perspective" in Arlene Swidler, ed., *Human Rights in Religious Traditions* (New York: Pilgrim Press, 1982) at 63. Also Tabandeh, *A Muslim Commentary on the Universal Declaration of Human Rights*, *supra* note 54 at 1 and 85; Farrag, "Human Rights and Liberties in Islam" *supra* note 41 at 141; and Khan, *Islam and Human Rights* *supra* note 145.

makes it an important reality.”¹⁵⁰ He makes no mention of gender and religion.¹⁵¹ Classifying the most important human rights and civil liberties, Wafi simply limits the definition of civil liberty to “conclude contracts, shoulder civil obligations, and to dispose freely of property.”¹⁵² This approach, as An-Na’im states, “is both simplistic and misleading.”¹⁵³ It emphasizes the positive aspects of Shari’a, and overlooks the negative ones. Some Muslim feminists, for example, select certain verses of Qur’an favoring the status of women while overlooking other verses and many traditions in *sunna*, “failing to take into account the ways in which the parts they select have been interpreted by Shari’a jurists.”¹⁵⁴ To undertake any reform in Shari’a, a Muslim reformist should first be clear on what Shari’a is rather than what it can or ought to be.¹⁵⁵

The Islamic human rights declarations examined in this study have approached the idea of international human rights from a traditional conservative perspective as well. These Islamic human rights schemes subordinate international human rights provisions to Islamic laws and subject them to Shari’a qualifications. They reject universality of human rights and in most respects fall far below the human rights

¹⁴⁸ *Human Rights in Islam, ibid.*

¹⁴⁹ See Riffat Hassan, “On Human Rights and the Qur’anic Perspective” *supra* note 147 at 63.

¹⁵⁰ *Human Rights in Islam, supra* note 38 at 21.

¹⁵¹ In contrast, article 2 of the Universal Declaration of Human Rights reads: “Everyone is entitled to all rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origins, property, birth or other status.” See the UDHR, *supra* note 20. See also “Muslim Voices in the Human rights Debate” *supra* note 4 at 603.

¹⁵² Wafi, “Human Rights in Islam” (1967) 11 *Islamic Quart.* at 64 and 69.

¹⁵³ “Human Rights in the Muslim World” *supra* note 44 at 22.

¹⁵⁴ *Ibid.* at 40.

¹⁵⁵ *Ibid.*

standards guaranteed under the International Bill of Rights.¹⁵⁶ These constructs are mostly derived from Islamic governments' political considerations¹⁵⁷ and are in contrast with demands for democracy and human rights in Muslim states.¹⁵⁸

For Muslim reformists, on the other hand, modern human rights theory does not contradict any specific religion or culture; rather, it underlines some basic rights, values, and standards for all human beings, as in every tradition. They believed that, under modern conditions, as Bielefeldt puts it, "a normative consensus across cultural and religious boundaries" is needed, and called upon if Muslim societies are to engage in cross-cultural dialogue on fundamental human rights and freedoms.¹⁵⁹ Tibi states that "in order to embrace human rights as entitlements, Muslims need to embrace cultural modernity."¹⁶⁰ Tibi also notes a basic conflict between cultural modernity and pre-modern doctrines. An element of this conflict is the incompatibility of Islamic

¹⁵⁶ "Universal Versus Islamic Human Rights" *supra* note 24 at 324-25 and 327-47; *Islam and Human Rights, Tradition and Politics*, *supra* note 28 at 24-27, 73, and 76-77; "Muslim Voices in the Human Rights debate" *supra* note 4 at 604-6; and "Islamic Law, Human rights, Universal Morality and International Relations" *supra* note 29 at 290-91.

¹⁵⁷ Such as the 1990 Cairo Declaration on Human Rights, discussed in Chapter Two. It departs significantly from the Universal Declaration of Human Rights through the use of religious language, and expressly links individual rights to Shari'a. See Reisman, "Some Reflections on Human Rights and Clerical Claims to Political Power" *supra* note 41 at 517.

¹⁵⁸ "Universal Versus Islamic Human Rights" *supra* note 24 at 308-9.

¹⁵⁹ "Muslim Voices in the Human Rights Debate" *supra* note 4 at 606. See S. Aldeeb Abu-Sahlieh, "Muslims and Human Rights: Challenges and Perspectives" in W. Schmale, ed., *Human Rights and Cultural Diversity* (Goldbach: Keip, 1993); and Glenn, *Legal Traditions of the World*, *supra* note 29 at 193-96.

¹⁶⁰ "Islamic Law, Human Rights, Universal Morality and International Relations" *supra* note 29 at 298. Stressing cultural pluralism, Tibi notes that "we must place human rights in our globalized yet fragmented world." He also adds that while there is a need for unity on human rights standards on an international level, the implementation of these rights takes place in multicultural context that has to be taken into account. See *ibid.* at 282-84. Also Bassam Tibi, "The Iranian Revolution and the Arabs: The Quest for Islamic Identity and Search for an Islamic System of Government" (1986) 8 *Arab Studies Quart.* at 37-42; and R. J. Vincent, *Human Rights and International Relations* (Cambridge: Cambridge University Press, 1986) at 99-105.

restrictions on the individual with the notion of individual freedom in cultural modernity.¹⁶¹

Aware that the existing normative framework of Shari'a contradicts international human rights standards, Muslim reformists took up the challenge. They emphasized Shari'a's deficiencies in the field of human rights, and sought solutions within religion itself by re-evaluating Shari'a laws and offering new interpretations of Islamic sources. They hoped that this could result in a change in the political and legal edifice, and a reconciliation of a religious human rights framework with the modern idea of human rights theory. They also stressed the original meaning of Shari'a as a "path" or guide rather than a detailed legal code. Al-Ashmawy, for example, contends that Shari'a does not form a comprehensive legal system; rather, it consists mainly of general religious and ethical principles, such as respect between genders and tolerance towards minorities.¹⁶² Mahmasani also states that particular legal instructions in Shari'a "often dominated the general principles, and, with repeated imitation, took a rigid and formalistic taint alien to the original substance."¹⁶³

¹⁶¹ "Islamic Law, Human Rights, Universal Morality and International Relations" *ibid.* at 290-91. See also Dale Eickelman, "Inside the Islamic Reformation" (1998) 22 *Wilson Quart.* At 80-89; Michael Fischer & Mehdi Abedi, *Debating Muslims: Cultural Dialogue in Post-Modernity and Tradition* (Madison: University of Wisconsin Press, 1990); and Cooper, *Islam and Modernity: Muslim Intellectuals Respond*, *supra* note 120.

¹⁶² Muhammad Said al-Ashmawy, *L'islamisme contre l'Islam*, trans. by Richard Jacquemond (Paris: Éditions la découverte, 1989), at 37; and "Muslim Voices in the Human Rights Debate" *supra* note 4 at 607.

¹⁶³ Subhi Mahmasani, "Adaptation of Islamic Jurisprudence to Modern social Needs" in John J. Donohue & John L. Esposito, eds. *Islam in Transition: Muslim Perspectives* (New York: Oxford University Press, 1982) at 183. See also Mohammed Talbi, "Religious Liberty: A Muslim Perspective" in *Conscience and Liberty* (1991) at 31; "Muslim Voices in the Human Rights Debate" *ibid.* at 609; and *Toward an Islamic Reformism*, *supra* note 24 at 99.

Muslim reformists referred to the great social and political changes in modern societies, and demanded the recognition of human rights as an entitlement of all human beings. They also referred to the importance of human dignity as an essential part of the Qur'anic teaching and emphasized, in their promotion of human rights, the role of *Ijtihad*¹⁶⁴ in changing Shari'a laws.¹⁶⁵ The Tunisian scholar Mohammed Talbi demands full recognition of freedom of religion and conscience beyond Shari'a concept of limited tolerance. He also argues against Shari'a corporal punishments, the ultimate goals underlying these punishments being justice and equality. He states that "were it possible for us today to ensure a life of justice and equality in a different way, this would certainly be a way pointing in the same direction as the Qur'an does."¹⁶⁶

Some Muslim reformers, advocating a progressive reading of the Qur'an, *Sunna*, and early Islamic history, argue that the early jurists misinterpreted Islamic sources. Fazlur Rahman, for example, referring to women's rights, states that "women's inferior status written into Islamic law ... is by and large the result of prevailing social conditions rather than of the moral teachings of the Qur'an."¹⁶⁷

¹⁶⁴ See *supra* text accompanying note 103. Also "Human Rights in the Muslim World" *supra* note 44 at 48.

¹⁶⁵ Patrick Bannerman, *Islam in Perspective: A Guide to Islamic Society, Politics and Law* (London: Routledge, 1988) at 46; Riffat Hassan, "On Human Rights and the Qur'anic Perspective" *supra* note 147 at 63; Kevin Dwyer, *Arab Voices, The Human Rights Debate in the Middle East* (Berkeley: University of California Press, 1991) at 44-45; and *Toward an Islamic Reformism*, *supra* note 24 at 50-51. Also Sachedina, *The Islamic Roots of Democratic Pluralism*, *supra* note 38 at 15-21 and 81-83; S. Aldeeb Abu-Sahlieh, "Introduction à la lecture juridique du Coran" (1988) 65 *Revue de droit international et de droit comparé* 76; R. Arhaldez, "La loi musulmane à la lumière des sciences coraniques" (1993) *Archives de philosophie du droit* 83; Mohamed Talbi & Maurice Bucaille, *Réflexions sur le Coran* (Paris: Seghers, c1989); and Glenn, *Legal Traditions of the World*, *supra* note 29 at 177-78;

¹⁶⁶ "Muslim Voices in the Human Rights Debate" *supra* note 4 at 609-10. See Sachedina, *The Islamic Roots of Democratic Pluralism*, *supra* note 38 at 83-91; Amor Abdelfattah; Néji Baccouche; & Mohamed Talbi, eds., *Études sur la tolérance: anglais, français, arabe* (Tunis: Académie tunisienne des sciences, des lettres et des arts (Beit al-Hikma), 1995).

¹⁶⁷ Fazlur Rahman, "Status of Women in the Qur'an" in Guity Nashat, ed., *Women and Revolution in*

Some Muslim scholars like the influential Islamic reformer Muhammad Abduh, advocated constitutionalism, and argued that human rights “must be translated into rights provisions of national constitutions in order to afford individuals effective legal guarantees for the rights involved.”¹⁶⁸ They emphasized the nation, citizens, and human rights rather than the religious community and duties of individuals which helped constitutional movements in the Middle East at the turn of the 20th century in their struggle against despotic rule.¹⁶⁹ The advocacy of democracy and civil liberties has become part of the campaign of independent NGOs defending human rights throughout the Middle east and North Africa.¹⁷⁰

Many Muslim reformists reject the use of any religious platform, and argue for democratic government as the only legitimate government.¹⁷¹ Soroush, for example, opposes the formulation of an official Islamic political ideology which reduces religion to a political platform.¹⁷² He does not identify democracy with a particular Western

Iran (Boulder, CO: Westview Press, 1983) at 37. See also Barbara Freyer Stowasser, “The Status of Women in Early Islam” in Freda Hussain, ed., *Muslim Women* (London: Croom Helm, 1984) at 15-18; and Alya Baffoun, “Women and Social Change in the Muslim Arab World” in Azizah al-Hirbi, ed., *Women and Islam* (Oxford: Pergamon Press, 1982); Haleh Afshar, “Islam and Feminism: An Analysis of Political Strategies” in Mai Yamani, ed., *Feminism and Islam: Legal and Liberty Perspectives* (London: Ithaca, 1996) 197-216.

¹⁶⁸ *Islam and Human Rights, Tradition and Politics*, supra note 28 at 50-51; See also Ali Rahnama, *Pioneers of Islamic Revival* (London: Zed, 1994).

¹⁶⁹ See also generally Abdol-Karim Lahiji, “Constitutionalism and Clerical Authority” in Amir Arjomand, *Authority and Political Culture in Shi’ism*, supra note 114 at 133-58; Farhat Zaideh, *Lawyers, the Rule of Law, and Liberalism in Modern Egypt* (Stanford: Hoover Institution, 1968); Hourani, *Arabic Thought in the Liberal Age*, supra note 97; Abdul-Hadi Ha’iri, *Shi’ism and Constitutionalism in Iran* (Leiden: E. J. Brill, 1977).

¹⁷⁰ “Universal Versus Islamic Human Rights” supra note 24 at 364-71 and 377-79.

¹⁷¹ A. Ahmed An-Na’im, “Islamic Law, International Relations, and Human Rights: Challenge and Response” (1987) 20 *Cornell Int’l L. J.* at 321; and Fauzi M. Najjar, “Democracy in Islamic Political Philosophy” (1980) 51 *Studia Islamica* at 117-20. Also generally *Voices of Resurgent Islam*, supra note 100; *Toward an Islamic Reformation*, supra note 24; Dabashi, *Theology of Discontent: The Ideological Foundations of the Islamic Revolution in Iran*, supra note 114; and Ami Ayalon, *Language and Change in the Arab Middle East* (New York: Oxford University Press, 1987).

¹⁷² Denying the possibility of ruling by one official religious ideology, he maintains that religious states

culture, and “considers democracy a form of government that is compatible with multiple political cultures, including Islamic ones.”¹⁷³ Soroush believes that, unlike Shari’a model of government, a democratic government does not compromise people’s extra-religious rights. This study relates to his idea that democracy is the only form of government that guarantees human rights. In his view, Muslims and non-Muslims should enjoyed equal rights, for both belong to the greater human family, where faith cannot serve as a basis for rights.¹⁷⁴ Now, we examine a reform theory that provides an Islamic solution to the question of human rights in Shari’a.

An-Na’im’s Reform Methodology

In recent years, another reform methodology providing an alternative and modern conception of Islamic public law was proposed by Ustadh Mahmoud Taha.¹⁷⁵ It was subsequently elaborated by Abdullahi Ahmed An-Na’im.¹⁷⁶ An-Na’im’s position is based on the idea that Islamic sources point to two levels of the message of Islam: the

must be democratic. “Debating Religion and Politics in Iran” *supra* note 112 at 7.

¹⁷³ *Ibid.* at 21 and 42. See also Soroush, *Reason, Freedom, and Democracy in Islam*, *supra* note 120.

¹⁷⁴ Soroush holds that a non-Muslim is not required to renounce his faith in order to enjoy equal human rights in a Muslim society. “Debating Religion and Politics in Iran” *ibid.* at 25. For his ideas on religious government and the clerical establishment, see also *Islam, Democracy and Religious Modernism in Iran*, *supra* note 114 at 251-74.

¹⁷⁵ Mahmoud Mohammed Taha, the leader of the Republican Brotherhood in Sudan, was executed in 1985 for his opposition to what he believed to be arbitrary and distorted application of Shari’a in Sudan. His main book, *The Second Message of Islam*, translated by Abdullahi An-Na’im, was published by Syracuse University Press in 1987.

¹⁷⁶ An-Na’im’s reform methodology is discussed mainly in *Toward an Islamic Reformation*, *supra* note 24.

Meccan (610-622 AD) and subsequent Medinan periods (622-632 AD).¹⁷⁷ The message of the Meccan period was described as the eternal and fundamental message of Islam emphasizing the basic values of justice, the equality and inherent dignity of all human beings regardless of gender, race, religion, etc.¹⁷⁸ After this earlier message was violently rejected, the message of the Medina period was revealed and implemented. It was more practical, requiring even the use of force under certain conditions to compel the unbelievers either to embrace Islam or to be punished under Shari'a.¹⁷⁹

Clearly, the public law of Shari'a was, and still is, based more on the sources of the Medina period than those of the Mecca stage. The founding jurists undertook a process of *naskh* (abrogation or repeal) of certain scriptural texts to reconcile the inconsistencies that arose, in the hope of establishing comprehensive system of Shari'a.¹⁸⁰ Mahmoud Taha believed that *naskh* could not be permanent, since "there would be no point in having revealed the earlier texts."¹⁸¹ He, therefore, maintained that *naskh* was an essentially logical and necessary process of implementing the appropriate texts and postponing the implementation of others until the right circumstances for their implementation should arise.¹⁸²

He also argued that since Medinan conditions no longer existed, we should return to the original message of Mecca period. Finally, Taha proposed that the basis of

¹⁷⁷ See generally *The Second Message of Islam*, *supra* note 175.

¹⁷⁸ See Qur'an 17:70 and 49:13.

¹⁷⁹ Qur'an, Chapters 4 and 6. Ustadh Taha argues that "the Meccan and Medinese texts [of the Qur'an] differ, not because of the time and place of revelation, but essentially because of the audience to which they are addressed." In other words, the shift was in response to the dictates of the time. See *The Second Message of Islam*, *supra* note 175 at 125.

¹⁸⁰ See *Toward an Islamic Reformation*, *supra* note 24 at 49; and "Human Rights in the Muslim World" *supra* note 44 at 47.

Shari'a be gradually moved from the texts of the Medinan to the earlier Meccan period.¹⁸³ Such an evolutionary principle of interpretation would reverse *naskh*, thereby enshrining those texts which were abrogated in the past into current law and abrogating texts which have been enacted as Shari'a.¹⁸⁴ The new body of law would be the modern Shari'a. An-Na'im examines this theory within the domain of public law: constitutional order, criminal justice, international relation, and human rights. He seeks to reconcile the modern version of Shari'a with international human rights standards.¹⁸⁵

An-Na'im's reform methodology appears, at least from standpoint of its outcome, to be successful. It offers an Islamic rationale for religious reform in the public domain and harmonizes the public law aspects of Shari'a with international human rights concepts.¹⁸⁶ It proposes a promising solution to the problems and difficulties in applying Shari'a in public life, adopting a rational methodology. Islamic in its interpretation of the religious sources, it offers an alternative and modern conception of Islamic public law that deals with the real hardships of Muslim societies.¹⁸⁷ This theory is a good contribution to Islamic reformism in the modern era.

However, this theory, too, seeks a solution from inside the religion and therefore neglects the extra-religious issues and values as defined in Soroush's theory. It hardly

¹⁸¹ *Toward an Islamic Reformation, ibid.* at 56.

¹⁸² *Ibid.*

¹⁸³ *The Second Message of Islam*, note 175.

¹⁸⁴ *Toward an Islamic Reformation*, note 24 at 56.

¹⁸⁵ *Ibid.* Chapters 4-7. See also Ishtiaq Ahmed, "Abdullahi An-Na'im on Constitutional and Human Rights Issues" *supra* note 88 at 63-66; and An-Na'im, "Islamic Law, International Relations, and Human Rights: Challenge and Response" *supra* note 171 at 17.

¹⁸⁶ Tibi, "Islamic Law, Human Rights, Universal Morality and International Relations" *supra* note 29 at 286.

¹⁸⁷ "Human Rights in the Muslim World" *supra* note 44 at 21.

challenges the theology of religion in this respect, and modifies only the methodology of constructing the same Shari'a that has always existed.¹⁸⁸

Moreover, in applying the theory to criminal justice, An-Na'im confines the theory to non-*hudud*¹⁸⁹ punishments with the exception of apostasy.¹⁹⁰ Although he demands clear and restrictive definitions for the application of *hudud* punishments,¹⁹¹ he seems "committed to the proposition that public law in Muslim countries should be based on Islam."¹⁹² The theory, therefore, fails to be comprehensive and deviates from its goal of shifting away from Medina period texts to Mecca ones. The subject of *hudud* punishments is both contentious in Muslim societies and incompatible with the international human rights standards with which An-Na'im attempts to reconcile Shari'a. *Hudud* punishments are severe and have been questioned by the international community. Excluding these punishments from the main theory provides no solution to the problems in criminal justice domain in Muslim societies.¹⁹³ It should also be mentioned that, although the theory confines itself only to public law in Shari'a, there are difficulties in other parts of Shari'a, such as family law, as well.¹⁹⁴

¹⁸⁸ Afshari, "An Essay on Islamic Cultural Relativism" *supra* note 33 at 263-65; Ann Elizabeth Mayer, "Current Muslim Thinking on Human Rights" in A. Ahmed An-Na'im & Francis M. Deng, eds., *Human Rights in Africa, Cross-Cultural Perspectives* (Washington, D. C.: Brookings Institution, 1990).

¹⁸⁹ Offenses for which a specific punishment is strictly applied without allowing discretion to either official or private body or person. The subject will be taken up in Chapter Two.

¹⁹⁰ Because, he believes, the *Qur'an* does not prescribe any punishment for apostasy in this life; but, Muslim jurists have classified apostasy as a *hadd* (single of *hudud*) punishment by death, as prescribed in *Sunna*. See *Toward an Islamic Reformation*, *supra* note 24 at 109 and 113-115.

¹⁹¹ *Ibid.* at 115.

¹⁹² Ann Elizabeth Mayer, "A Critique of An-Na'im's Assessment of Islamic Criminal Justice" in *Islamic Law Reform and Human Rights*, *supra* note 73 at 37.

¹⁹³ *Ibid.* at 37-52; and "An Essay on Islamic Cultural Relativism" *supra* note 33 at 263-65.

¹⁹⁴ For more critical views on An-Na'im's work, see Arkoun, "The Concept of Islamic Reformation" *supra* note 93 at 18-21; "Abdullahi An-Na'im on Constitutional and Human Rights Issues" *supra* note 88 at 68-74. For An-Na'im's response to these critics, see A. Ahmed An-Na'im, "Toward an Islamic Reformation: Responses and reflections" in *Islamic Law Reform and Human Rights*, *supra* note 73 at 97-

* * *

In practice, most Muslim countries, facing the theoretical and practical problems of Shari'a laws, on the one hand, and the legally unestablished views of reformists, on the other, have adopted a pragmatic solution in their legal systems.¹⁹⁵ They have reaffirmed Shari'a laws in the private sphere, with some reforms in family law in order to improve women's family and public rights.¹⁹⁶ They have, however, distanced themselves from Shari'a criminal law. Nowadays *hudud* punishments are applied in only a few Muslim countries.¹⁹⁷ Joseph Schacht writes that "there is a strong tendency [in Muslim countries] to restrict the applicability of *hadd* punishment as much as possible."¹⁹⁸ Certain human rights and freedoms are also mentioned in the constitutions of most Muslim states, which guarantee some basic human rights standards, such as the

116.

¹⁹⁵ Bielefeldt, "Muslim Voices in the Human Rights Debate" *supra* note 4 at 610-14; Schacht, *An Introduction to Islamic Law*, *supra* note 90 at 76-7.

¹⁹⁶ Such reforms have restricted certain practices, such as child marriage, polygamy, and the husband's right to repudiate his wife unilaterally. See "Muslim Voices in the Human Rights Debate" *ibid.*; and *An Introduction to Islamic Law*, *ibid.* at 161-68. The 1917 Ottoman law of family rights was an early reform in this area. See James Norman D. Anderson, *Law Reform in the Muslim World* (London: Athlone, 1976) at 49 and 118-23. Muhammad Abduh, grand mufti of Egypt in the late nineteenth century Egypt, also advocated restrictions on polygamy. See Esposito, *Islam and Politics*, *supra* note 107 at 51; and "Muslim Voices in the Human Rights Debate" *ibid.* at 611.

¹⁹⁷ Muhammad Makki Naciri, "Judicial Aspects of Religious Liberty in Morocco" in *Conscience and Liberty* (1991) at 73-75; Ashmawy, *L'islamisme contre l'Islam*, *supra* note 162 at 50; A. Ahmed An-Na'im, "Religious Liberty in Egypt: Under the Shadow of the Islamic *Dhimma* System" and Khalid Duran, "Religious Liberty and Human Rights in Sudan" both in Leonard Swidler, ed., *Religious Liberty and Human Rights in Nations and in Religions* (Philadelphia: Ecumenical, 1986) at 43-59 and 74, respectively; and Aly A. Mansour, "Hudud Crimes" in Bassiouni, *The Islamic Criminal Justice System*, *supra* note 33 at 199. *Hudud* Punishments are now applied in few countries – i.e., Iran, Sudan, Pakistan, and Afghanistan.

¹⁹⁸ *An Introduction to Islamic Law*, *supra* note 90 at 176.

equality of all citizens before the law. But these rights are not fully observed.¹⁹⁹ In fact, the notions of constitutionalism and democratic structure of government, as Bielefeldt notes, “are still missing or poorly developed in many Muslim countries.”²⁰⁰

It should be noted that, apart from the recent fundamentalism in some Muslim countries, these reforms have been generally welcomed by Muslims. There appears to be an increasing demand for democratic political reforms, constitutionalism, and international human rights standards among Muslim countries.²⁰¹

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

It should be also added that the mere denial of Shari’a laws in human rights or

¹⁹⁹ The constitutions of Syria, Turkey, Iran, Persian Gulf States, and Iraq are some examples in this respect. See Amin, *Islamic Law and Its Implication for Modern World*, *supra* note 38 at 58-67.

²⁰⁰ “Muslim Voices in the Human Rights Debate” *supra* note 4 at 614.

the mere promotion of modern standards in Muslim countries would lack legitimacy among faithful Muslims. The denial of Shari'a standards from a secular perspective only exacerbates the sensitivity of Muslims, because, as An-Na'im notes, "secularism is not an Islamic response to the challenges facing Muslim societies."²⁰² When politics is involved, Muslims seem to believe that the promotion of international human rights serves only Western powers as a political tool to intervene in their internal affairs and to weaken their religious and cultural beliefs.²⁰³ From an Islamic perspective, any reform must be both sufficient and legitimate. Sufficient in the sense that it could provide solutions for human rights problems with Shari'a; legitimate in the sense that it is based on Islamic sources and criteria.²⁰⁴ The interpretations of the scriptural imperatives of Islam must be considered as valid and appropriate for application today in Muslim societies.²⁰⁵

The study, therefore, suggests that such reform in legal system and human rights law could only be achieved through a broader religious and cultural initiatives based on cross-cultural foundations and dialogue among societies with different beliefs and backgrounds.²⁰⁶ Cultural reform would establish the appropriate grounds to address Shari'a's restrictions and deficiencies in private and public subjects, as well as the possibility of a new interpretation of religious sources which is more compatible with

²⁰¹ *Islam and Human Rights, Tradition and Politics*, *supra* note 28 at 52 and 204.

²⁰² *Toward an Islamic Reformation*, *supra* note 24 at 48. See also Muhammad Nuwayhi, "A Revolution in Religious Thought" in *Islam in Transition: Muslim Perspectives*, *supra* note 163 at 160-68.

²⁰³ Sayeed, *Western Dominance and Political Islam*, *supra* note 92 at 5-49; and Mohammed Arkoun, *Rethinking Islam; Common Questions, Uncommon Answers*, trans. & ed. by Robert D. Lee (Boulder, CO: Westview Press, 1994) at 24-6 and 106-13.

²⁰⁴ "Human Rights in the Muslim World" *supra* note 44 at 46.

²⁰⁵ *Ibid.* at 51.

²⁰⁶ Vincent, *Human Rights and International Relations*, *supra* note 160 at 99-105.

modern needs. Only religious dialogue among people of different convictions, especially scholars and intellectuals, could lead to a different and modern outcome which Muslims could regard as acceptable and legitimate.²⁰⁷ It may result in a different outlook on political structure and on people's demand for constitutional democracy and guarantees of fundamental rights and freedoms. It also provides a forum to promote the equality of all human beings, not only in dignity and honor but rights and liberties as well. That is what makes Muslim community a pluralistic society where people are considered equal citizens, enjoying basic rights and freedoms. The key to this, as An-Na'im puts it, is "to convince Muslims that the other person with whom they must identify and accept as their equal in human dignity and rights includes all other human being, regardless of gender and religion."²⁰⁸

Such a change in Muslim attitudes may help enhance human rights norms. It is only after this change in perceptions that modern human rights will appear compatible with Muslims' religious beliefs.²⁰⁹ Consequently, Muslim intellectuals need to illustrate the prospects of a modern life and to remove the religious and cultural obstacles to success. Democratizing the political structure, implementing fundamental human rights, and protecting freedoms should be their main concern. The problems facing Muslim societies must always be kept in view and new proposals freely examined in an organized manner. Contemporary Muslim authors must also discuss the legal

²⁰⁷ Tibi, "Islamic Law, Human Rights, Universal Morality and International relations" *supra* note 29 at 296-98. Also generally Tibi, *The Crisis of Modern Islam*, *supra* note 97; Arkoun, *Pour une ritique de la raison islamique*, *supra* note 99; and Voll, *Islam: Continuity and Change in the Modern World*, *supra* note 96.

²⁰⁸ *Toward an Islamic Reformism*, *supra* note 24 at 180.

²⁰⁹ See Tibi, "Islamic law, Human Rights, Universal Morality and International relations" *supra* note 29

foundations of international human rights and their parallels in local cultures. In addition, NGOs could highlight those Shari'a laws that legitimize human rights violations. These laws are invoked by the authorities to deny or restrict individuals' rights and freedoms.

* * *

Traditional mechanisms of reform within the framework of Shari'a are inadequate for achieving the necessary degree of reform. They are limited by the restrictions of Shari'a principles and, as An-Na'im notes, "will create extremely serious problems in practice."²¹⁰ The current study, more a 'work-in-progress' than a final or conclusive statement, proposes that any approach to human rights must first seek to establish and demonstrate how the basic human rights derive from, and are directly attributable to, the fundamental characteristics of the human personality. It should locate the objective foundations of human rights in reason, human dignity, and natural law, as noted earlier. From this perspective, human rights are not a religious matter. They are extra-religious and comprise those basic values that deal with all human beings equally, whether they are believers or not.

at 298.

²¹⁰ *Toward an Islamic Reformation*, *supra* note 24 at 34. See also "Human Rights in the Muslim World" *supra* note 44 at 46; *The Second Message of Islam*, *supra* note 175; A. Ahmed An-Na'im, "The Rights of Women and International Law in the Muslim Context" (1987) 9 *Whittier L. Rev.* at 491; An-Na'im, "Islamic Law, International Relations and Human Rights: Challenges and Responses" *supra* note 171 at 17.

This argument relates to both An-Na'im's and Soroush's theories. As An-Na'im's reform methodology, it holds that pragmatic solutions and traditional reform techniques within Shari'a limits would only generate theoretical and practical problems. Muslim scholars should then "call for the establishment of a new principle of interpretation,"²¹¹ in order to make Shari'a laws more compatible with international human rights norms and standards. More importantly, this argument coincides with Soroush's theory that any interpretation of Shari'a is bound by the presuppositions in the scholar's intellectual worldview -- and therefore extra-religious factors should be considered here as well.

Furthermore, this study argues that practical problems have almost always been the cause and motive behind the reform movement in Muslim societies. In other words, the direction of religious reformism has mostly been a movement from the inside towards the outside, from Shari'a's deficiencies towards the realities of the time, towards finding a desirable harmony saving religion in the modern world. The study proposes that a dialogue between what is internal and what is external to religion would result in the compatibility of Shari'a principles with international human rights standards, and may allow Muslim societies to solve their ongoing difficulties. This proposal is not a modern version of Shari'a, nor does it relate to Shari'a at all. It is a rational argument. It provides the intellectual foundations for Islamic thought in the field of human rights, first and foremost.

Notions like justice, freedom, and human rights are generally defined on rational

²¹¹ *Toward an Islamic Reformation, ibid.*

and intellectual grounds and cannot be determined by religious criteria and qualifications alone. Fundamental human rights are intended for the development and full realization of the human personality, which is thought to be the foundation of human dignity -- with all the responsibilities that this implies -- which distinguishes humankind above all other creatures. The human intellect and will are indispensable, and liberty is their most eminent characteristic, the very foundation of human dignity and responsibility. Therefore, human rights are derived from, and are directly attributed to, the fundamental characteristics of human personality.²¹² Human rights are also political and legal standards. As a political means of recognizing human dignity in a legally binding structure, they have to do with political justice, establishing the normative criteria as “genuinely modern safeguards to facilitate human life with dignity. To provide such safeguards is the purpose of human rights.”²¹³

The role of extra-religious issues in understanding and interpreting religious sources helps harmonize what is internal and what is external to religion.²¹⁴ In the Islamic context, it could render Shari’a principles more compatible with the realities of modern time and provide theoretical and practical solutions.

What supports this proposal is that every religion has, in one way or another,

²¹² Freeman, “The Philosophical Foundations of Human Rights” *supra* note 5 at 491-514; Kasper, “The Theological Foundations of Human Rights” *supra* note 12 at 253-69; Perry, “Is the Idea of Human Rights Ineliminably Religious?” *supra* note 1 at 1027; Donnelly, *Universal Human Rights in Theory and Practice*, *supra* note 7 at 16-19; and “Human Dignity, Human Rights, and Political Regimes” *supra* note 52.

²¹³ “An Essay on Islamic Cultural Relativism” *supra* note 33 at 248; and *Universal Human Rights in Theory and Practice*, *ibid.* at 64.

²¹⁴ See generally Martin E. Marty, “Religious Dimension of Human Rights” (1996) 10 *Emory Int’l L. Rev.* at 97-106; Harold J. Berman, *The Interaction of Law and Religion* (New York: Abingdon Press, 1974) at 21 and 107; and Harold J. Berman, *Faith and Order, The Reconciliation of Law and Religion* (Atlanta, Georgia: Scholars Press, 1993) at 1-20.

contributed to the idea of rights, raising the value of mankind and merit of human honor and dignity.²¹⁵ Any religious society can prepare its own laws and legal system based on these general principles as well as its collective rationale, wisdom, and human nature in its own historical context.²¹⁶ Human rights law requires an adequate intellectual framework as well. Muslim scholars should acknowledge human rights as individual entitlements, and promote the idea of equality of all individuals before the law, regardless of gender, religion, etc. In Muslim societies, neither men nor believers should derive their rights from their gender or faith. The idea of human rights assumes that all human beings are autonomous persons, not only components of family or community.²¹⁷ Human rights could be applied only in a society where the concept of the individual has been introduced and well situated in its cultural patterns. In other words,

²¹⁵ See Jeanne Hersch, ed., *Le droit d'être un homme* (UNESCO: 1968); and Louis Henkin, *The Rights of Man Today* (Boulder, CO: Westview Press, 1978) in "Muslim Voices in the Human Rights Debate" *supra* note 4 at 589-90; "Human Rights in the Muslim World" *supra* note 44 at 47-8; and Kasper, "The Theological Foundations of Human Rights" *supra* note 12 at 253-69.

²¹⁶ The philosophy of law stipulates that historicity is a necessary dimension of any law even if one believes that laws should be linked to religious sources. Legal norms are, from this point of view, always conceived within a place and time-bound framework. Laws and regulations are rationally formed and executed according to the needs of society. See T. M. Knox, trans., *Hegel's Philosophy of Rights* (Oxford: The Clarendon Press, 1965) at 14-18; Ronald M. Dworkin, ed., *The Philosophy of Law* (New York: Oxford University Press, 1977) at 1-2. Also generally Ronald M. Dworkin, "Islamic Law, A System of Rules?" in *The Philosophy of Law, ibid.* 38-65; Thomas Morawetz, *The Philosophy of Law, An Introduction* (New York: Macmillan, 1980) at 5-10; Immanuel Kant, *The Philosophy of law, An Exposition of the Fundamental Principles of Jurisprudence As the Science of Right* (1887), trans. by W. Hastie (Clifton, NJ: Augustus M. Kelley, 1974). In Muslim societies, nevertheless, the problem emerged when early jurists considered Shari'a provisions as sacred and eternally fixed laws, and applied them beyond time and circumstances. While, the existence of laws and rules in Shari'a may be necessary or justified, Shari'a laws coincided with the establishment of the first Islamic state by the prophet in Medina, reflecting the needs of that society for laws. The *Qur'an* is not and does not profess to be a code of law or even law book. It establishes certain basic standards of behavior for the Muslim community. It may contain some legal rules, but these pertain only to an earlier phase of Muslim society and its leadership in Medina. They were not meant to govern every Muslim society; although this is how they have been so understood by Muslims. Therefore, those parts of Shari'a which deal with the legal aspects of human life may be considered as time-bounded and not an essential part of religion. See *Toward an Islamic Reformation, supra* note 24 at 20-22; "Human Rights in the Muslim World" *ibid.* at 18-19; and "Muslim Voices in the Human Rights Debate" *ibid.* at 595.

²¹⁷ Needless to say, the individualistic feature of human rights does not deny the social dimensions that

a civil and plural society with democratic political structure is the kind of society in which human rights are appreciated and human freedoms are enjoyed.

human rights contain. See *Islam and Human Rights, Tradition and Politics*, *supra* note 28 at 47.

Chapter Two

Human Rights in Shari'a and Iran's Constitutional and Legal System

Introduction

The first chapter argued that Shari'a principles and standards contradict the principles of international human rights law, and that modern concept of human rights is not established in Shari'a. It then reviewed some of the methodologies of Islamic reformists seeking new interpretations and applications of Shari'a in Muslim societies which are more compatible with the modern world and modern concepts of human rights and freedoms.

In this chapter, the study considers traditional Shari'a from a legal perspective as it has been established and developed by, and received from, Muslim jurists through the centuries, and as a primary source of Iran's legal system. The study does not focus on any particular Shari'a school of thought; rather, it examines general principles and qualifications in the field of human rights common to almost every Shari'a school. Since a detailed examination of Shari'a rules and provisions in both civil and criminal law is beyond the scope of this thesis, this study will be limited to a brief review of Shari'a's general principles and its approach to human rights for a better understanding of Shari'a laws and Iran's legal system in this matter. However, due to the importance

of the principle of equality in human rights issue, and its sensitivity in Shari'a-related discussions, the rights of women and religious minorities will be discussed at length.

The thesis will also briefly review Islamic human rights declarations to demonstrate the influence of Shari'a in Muslim countries. It, then, focuses on Iran's constitutional and legal system, and elaborates its attitudes and views concerning the issue of human rights, and analyzes its constitutional provisions as well as other regulations of legal instruments. Here again, the rights of women and religious minorities will be discussed with respect to both Islamic human rights declarations and Iran's legal system. The subject of freedom of expression will be examined in the second part of this thesis.

I. Human Rights in Shari'a

It is necessary to say a few words on the establishment of Shari'a, its development, characteristics and sources, and on the issue of constitutionalism in Shari'a before the main discussion on human rights.

A. The Development and Sources of Shari'a

Although Shari'a,¹ as the normative tradition, basically refers to Islamic legal provisions (civil and criminal codes) based on its primary sources -- the Qur'an and the *Sunna*,² Shari'a derives its authority from the fact that it generally covers all social, ethical, and spiritual aspects of human life, and regulates the public and private behavior of Muslims. It, therefore, has a great influence on the mentality and intellectual as well as social institutions of Muslim societies.³ It is considered all over

1 To make a distinction between Shari'a and *fiqh* in Islamic tradition, the term *fiqh* (jurisprudence) refers to the opinions and commentaries of *ulama* (Muslim jurists) and religious scholars. This study uses the term Shari'a because it analyzes and criticizes Islamic law as a whole and as understood from its main sources by *ulama*, and not the specific and personal opinions and commentaries of Muslim jurists. Ironically, in Iran, the term *fiqh* is widely used instead of Shari'a. See Abdullahi Ahmed An-Na'im, "Human Rights in the Muslim World: Socio-Political Conditions and Scriptural Imperatives, A Preliminary Inquiry" (1990) 3 Harvard H. R. J. at 13; and Kamal A. Faruki, *Islamic Jurisprudence* (Karachi: Pakistan Publishing House, 1962) at 12.

2 The words and practice of the Prophet. See A. A. An-Na'im, *Toward an Islamic Reformation, Civil Societies, Human Rights and International Law* (New York: Syracuse University Press, 1990) at 21-22; and A. A. Fyzee, *Outlines of Muhammadan Law*, 3rd ed. (Oxford: Oxford University Press, 1964) 104ff. See below for other sources of Shari'a. On the Qur'an, see R. Arhaldez, "La loi musulmane à la lumière des sciences coraniques" (1993) Archives de philosophie du droit 83; and S. Aldeeb Abu Sahlieh, "Introduction à la lecture juridique du Coran" (1988) 65 Revue de droit international et de droit comparé 76.

³ See generally Jacques Waardenburg, "Islam as a Vehicle of Protest" in Ernest Gellner, ed., *Islamic Dilemmas: Reformers, Nationalists and Industrialization* (Berlin: Mouton, 1985) at 22-49; and John L.

the Muslim world to be the divine law and God's command, not subject to the changing views of people. It contains all the necessary rules and regulations needed in every aspect of human life, rules which are granted by God and are applicable to all.⁴ Shari'a laws are believed to manifest God's wisdom for the well-being of mankind. The belief in the divinity of Shari'a has always been the major obstacle to Islamic reformism. The starting point of any religious reformism has been to convince people that Shari'a is not divine law but the interpretation of religious sources by the early jurists.⁵

Shari'a was established and developed during the first two-three centuries of Islam. Its general principles and concepts were constructed by the Prophet himself first in Mecca and then in Medina.⁶ The controversy over who should succeed the Prophet Muhammad gave way to diverse interpretations of the main sources. The vast expansion of Islam resulted in the division of Shari'a into different schools.⁷ Shari'a

Esposito, *Islam and Politics* (New York: Syracuse University Press, 1984).

⁴ Majid Alikhan, "A Comparative Study of Universal Declaration of Human Rights and Declaration of Human Rights in Islam" (1991) 22 *Islam and the Modern Age Quar.* at 174; Abul-A'la Mawdudi, *Human Rights in Islam* (Leicester: Islamic Foundation, 1980) at 19, 23, and 32; and Muhammed Zafrullah Khan, *Islam and Human Rights*, 4th ed. (U. K.: Islamic International Publications, 1989) at 36-59. Also Ahmed E. Souaiaia, *About Law* (Seattle: 2001).

⁵ See generally Vali-Reza Nasr, "Religious Modernism in the Arab World, India, and Iran: The Perils and prospects of a Discourse" (1993) 83 *The Muslim World* at 20-47; Bassam Tibi, *The Crisis of Modern Islam: A Pre-Industrial Culture in the Scientific-Technological Age*, trans. by Judith Von Sivers (Salt Lake City: University of Utah Press, 1988); Heiner Bielefeldt, "Muslim Voices in the Human Rights Debate" (1995) 17 *H. R. Quar.* At 587-617; B. Ghalion, *Islam et politique, la modernité trahie* (Paris: La découverte, 1997); John Voll, *Islam: Continuity and Change in the Modern World* (Boulder, CO: Westview Press, 1982); Fazlur Rahman, *Islam and Modernity: Transformation of an Intellectual Tradition* (Chicago: University of Chicago Press, 1982); and Fazlur Rahman, "Islamic Modernism: Its Scope, Methods and Alternatives" (1970) 1 *J. Middle East Studies* at 317-33.

⁶ *Toward an Islamic Reformation*, *supra* note 2 at 14-19; Robert Gleave & Evgenia Kermeli, eds. *Islamic Law: Theory and Practice* (London: I. R. Tauris, 1997).

⁷ "Human Rights in Muslim World" *supra* note 1 at 17-18; and William M. Watt, *A Short History of Islam* (Oxford: Oneworld Press, 1996).

extended to all aspects of public and private life, and became a unified body of law and jurisprudence in Muslim societies all over the Islamic world.⁸

The first division in Shari'a had its roots in the political differences over the issue of leadership after the Prophet. The Sunni majority accepted and followed the three first caliphs⁹ (leaders of the Islamic world); the Shi'ite minority followed Ali, who became the fourth caliph, and his descendants as the only rightful *imams* (the leaders of Muslim nation). In Shi'ite view, these *imams* were appointed by God himself.¹⁰ This very important political division in Muslim *umma* (nation), and the expansion of *Sunna* to the words and actions of Ali and his descendants by their followers led to the birth of the Shi'ite *Mazhab* (school) in Muslim societies.¹¹

Within the Sunni majority, the development of Islam and the various interpretations of religious sources, resulting in diverse and conflicting opinions, led many jurists to believe that most issues have been covered by the early scholars. Thus they followed the principal jurists and declared that, for the sake of Muslim unity, only four official and geographical schools would be recognized: Maliki,¹² Hanafi,¹³

⁸ Mawdudi, *Human Rights in Islam*, *supra* note 4; and Khan, *Islam and Human Rights*, *supra* note 4.

⁹ Namely Abu Bakr, Umar ibn Khattab, and Uthman. See "Human Rights in the Muslim World" *supra* note 1 at 18; Fazlur Rahman, *Islam* (Chicago: University of Chicago Press, 1979) at 79; T. W. Arnold, *The Caliphate* (New York: Barnes & Noble, 1966); and Rashid Rida, *Le califat dans la doctrine de Rashid Rida*, trans. by Henri Laoust (Paris: Maisonneuve, 1986).

¹⁰ Munawir Sjadzali, *Islamic Governmental System: Teachings, History and Reflections* (Jakarta: INIS, 1991) at 145-48; and Mohammad-Ali Amir Moezzi, *Le guide divin dans le Shi'isme original: aux sources de l'ésotérisme en Islam* (Verdier: Lagrasse, 1992).

¹¹ The vast majority of Iranian people follow Shi'ite school of Islam, and believe in Ali, the prophet's cousin and son-in-law, as the first *Imam* and his descendants from Fatima, the prophet's daughter, as infallible *Imams*. For more on Shi'ite school, see S. Hassan Amin, *Islamic Law and its Implications for Modern World* (U. K.: Royston, 1989) at 31-40; *Toward an Islamic Reformation*, *supra* note 2 at 29-31; "Human Rights in the Muslim World" *supra* note 1 at 18; William M. Watt, *Islamic Philosophy and Theology: An Extended Survey* (Edinburgh: Edinburgh University Press, 1985) at 122-28.

¹² Malik Ibn Anas (710-95 AD) in Medina.

¹³ Abu Hanifa (700-67 AD) in Kufa, Iraq.

Shafi'i,¹⁴ and Hanbali.¹⁵ These schools existed in central parts of the Islamic world.¹⁶ Everyone was then expected to belong to one of these four major schools. Therefore, the door of *ijtihad* (independent juristic reasoning)¹⁷ was declared closed among Sunni majority, thereby preventing the evolution and development of Shari'a according to the needs and necessities of the time.¹⁸

With regard to the sources of Shari'a, apart from the Qur'an and the *Sunna* of the Prophet, who received the revelation, other supplementary sources are used by Muslim jurists, namely *ijma* (consensus among Muslim scholars), *qiyas* (conclusion based on analogy),¹⁹ and *aql* (reason).²⁰ Some other minor subsidiary techniques and

¹⁴ Imam Shafi'i (767-820 AD) in Medina and Egypt.

¹⁵ Ahmed ibn Hanbal (780-855 AD) in Baghdad, Iraq.

¹⁶ Wael Bihjat Hallaq, *A History of Islamic Legal Theories: An Introduction to Sunni Usul al-Figh* (New York: Cambridge University Press, 1997); H. Patrick Glenn, *Legal Traditions of the World, Sustainable Diversity in Law* (Oxford: Oxford University Press, 2000) at 179-80; Dun Can B. MacDonald, *Development of Muslim Theology, Jurisprudence and Constitutional Theory* (Lahore: Premier Book House, 1972); Joseph Schacht, *An Introduction to Islamic Law* (Oxford: Oxford University Press, 1964; Oxford: Clarendon Press, 1982) at 32; J. Schacht, *The Origins of Mohamadan Jurisprudence* (Oxford: Oxford University Press, 1959); S. G. Vesey-Fitzgerald, "Nature and Sources of the Shari'a" in Majid Khadduri & Herbert Liebesny, eds., *Law in the Middle East* (Washington, D. C.: Middle East Institute, 1955) at 85-112.

¹⁷ *Ijtihad* is basically employed to answer new questions when there is no similar case in primary sources by using main principles and concepts given in those sources. See Wael B. Hallaq, "Was the gate of Ijtihad Closed?" (1984) 16 *Int'l J. Middle East Studies* at 3; Wael B. Hallaq, *The Gate of Ijtihad: A Study in Islamic Legal History* (Ph. D. Thesis, University of Washington, 1993); Aryn B. Sajoo, "Islam and Human Rights: Congruence or Dichotomy?" (1990) 4 *Temple Int'l & Com. L. J.* at 31-32; Weiss, "Interpretation in Islamic law: The Theory of Ijtihad" (1978) 26 *Am. J. Com. L.* 199; "Human Rights in the Muslim World" *supra* note 1 at 48-49; *An Introduction to Islamic Law, ibid.* at 69-75; Mohammad Hashim Kamali, *Freedom of Expression in Islam* (Kualalumpur: Berita, 1994) at 46-50; and Glenn, *ibid.* at 175-77 and 186-87.

¹⁸ In Shi'ite school, although the door of *ijtihad* was never closed and it was allowed among Shi'ite jurists, they, too, in practice, followed the previous important and weighty scholars throughout the centuries. See *Toward an Islamic Reformation, supra* note 2 at 27-28, 36, 46-51 and 65; Reza Afshari, "An Essay on Islamic Cultural Relativism in the Discourse of Human Rights" (1994) 16 *H. R. Quart.* At 269; Watt, *Islamic Philosophy and Theology, supra* note 11 at 122-28.

¹⁹ Only in Sunni tradition. See M. Cherif Bassiouni, "Sources of Islamic Law and the Protection of Human Rights in the Islamic Criminal Justice system", in M. C. Bassiouni, ed., *The Islamic Criminal Justice System* (New York: Oceana, 1982) at 9 and 153-57; and Noel James Coulson, *A History of Islamic Law* (Edinburgh: Edinburgh University Press, 1964).

²⁰ Only in Shi'ite school which recognizes *ijtihad*. It is not, however, an independent source; rather, it is used to confirm, or in combination with, other sources. See A. A. Fyzee, "Shi'i Legal Theories" in *Law in the Middle East, supra* note 16 at 115; Joseph Eliash, "The Ithna Ashari Shi'i Juristic Theory of

methods, mainly in Sunni schools, such as *istihsan* or *maslaha* (legal or social preference), *dharura* (necessity), and *urf* (customary law or practice), have also been applied.²¹

Muslim jurists used primary and supplementary sources to develop Shari'a principles of legal obligations and moral duties in every aspect of human life. These became "whole duty of mankind."²² They broke down the fields of human activity into five categories or qualifications as *wajib* (obligatory), *haram*²³ (forbidden), *mandub* (recommended), *makruh* (reprehensible), and *mubah* (indifferent), known as *al-ahkam al-khamsa* (five rulings of Shari'a).²⁴

Shari'a regards human life in its totality, providing guidance in every aspect of life in order to enhance the worship of God.²⁵ The Islamic legal system, therefore, is as a code of religious duties in every public and private fields, and guarantees its authority and the unity of Muslims despite their great diversity. In fact, it is this characteristic of Shari'a as "whole duty of mankind", to be discussed later on in this chapter, that makes

Political and Legal Authority" (1969) 29 *Studia Islamica* at 2-30; Fazlur Rahman, "Concepts of Sunnah, Ijtihad and Ijma' in the Early Period" (1962) 1 *Islamic Studies* at 237-51; Abdur Rahim, *The Principles of Muhammadan Jurisprudence* (Westport, Conn.: Hyperion Press, 1981). Also Glenn, *Legal Traditions of the World*, *supra* note 16 at 159-62 and 172-75.

²¹ In Shi'ite school, the existence and the role of *ijtihad* could theoretically replace many of these techniques used in Sunni tradition. For more on *ijtihad*, see Abula'la Maududi, *Islamic Law and Constitution*, trans. & ed. by Khurshid Ahmed (Lahore: Islamic Publications, 1960) at 79-83; *Toward an Islamic Reformation*, *supra* note 2 at 25-27; Mohammad Hashim Kamali, "Have We neglected the Shari'ah Law Doctrine of Maslahah?" (1988) 27 *Islamic Studies* at 287-304; and Glenn, *ibid.* at 185.

²² *Toward an Islamic Reformation*, *ibid.* at 11.

²³ The opposite of *haram* is *halal* (everything that is not forbidden) with a meaning different from that of *wajib*. See *An Introduction to Islamic Law*, *supra* note 16 at 121.

²⁴ Faruki, *Islamic Jurisprudence*, *supra* note 1 at 166-94; Mohammad H. Kamali, "Fundamental Rights of the Individual: An Analysis of *Haqq* (Right) in Islamic Law" (1993) 10 *Am. J. Islamic Social Sciences* at 347; Rahman, *Islam*, *supra* note 9 at 83-84; Ahmad Hassan, *The Early Development of Islamic Jurisprudence* (Islamabad: Islamic Research Institute, 1970) at 34-39; Coulson, *A History of Islamic Law*, *supra* note 19 at 82-84.

²⁵ M. H. A. Reisman, "Some Reflection on Human Rights and Clerical Claims to Political Power" (1994) 19 *Yale J. Int'l L.* at 511; Mohamed al-Shakankiri, "Loi divine, loi humaine et droit dans l'histoire

it incompatible, in its principles and concepts, with modern human rights theory. A brief review of the idea of constitutionalism in Shari'a may prepare the grounds for this discussion.

B. Shari'a and Constitutionalism

The discussion of human rights and freedoms leads to the public law domain and constitutional system of every country. While a constitution determines the organization of the state, distribution and operation of powers, and regulation and conduct of various state affairs through law and order, more importantly it establishes a reciprocal relationship between state and citizens. It guarantees people's fundamental rights and freedoms to promote the objectives of social justice and their individual liberties within proper frameworks and institutions in the society.²⁶ The study of constitutional principles and methods with respect to people's rights and freedoms reveals the theoretical viewpoints of any system on this subject, and helps us to understand ordinary laws and regulations correctly.²⁷

juridique de l'Islam" (1981) 59 *Studia Islamica* at 161-82.

²⁶ See generally André Tremblay, *Droit constitutionnel : principes* (Montreal: Thémis, 2000); and A. Tremblay, *Précis de droit constitutionnel* (Montreal; Thémis, 1982); Beno Nwabueze, *Constitutionalism in the Emergent States* (Rutherford, NJ: Fairleigh Dickinson University Press, 1973); K. C. Wheare, *Modern Constitutions* (London: Oxford University Press, 1966).

²⁷ Albert Hourani, *Arabic Thought in the Liberal Age, 1798-1939* (Oxford: Oxford University Press, 1967); Abdol-Karim Lahidji, "Constitutionalism and Clerical Authority" in Said Amir Arjomand, ed., *Authority and Political Culture in Shi'ism* (Albany: State University of New York Press, 1988) at 133-58.

The study of human rights and freedoms in Shari'a requires a short review of Islamic constitutional system, which deals with the general principles of sovereignty, legitimate government, and leadership in Muslim communities.²⁸

It should be recalled that constitutionalism with limited power and responsibility before constituents does not exist in Shari'a.²⁹ There are major differences over the concepts of sovereignty, leadership and its legitimacy, legal system and legislation, and citizenship between Shari'a and modern constitutionalism. In order to appreciate constitutionalism in the Islamic legal and political system, we should speak of concepts and principles in Shari'a which relatively correspond to those of the modern theory of constitutionalism.

In Shari'a, ultimate sovereignty is vested in God.³⁰ All power belongs to God; every Muslim must believe in His unity, and surrender himself to His will.³¹ God is lawgiver and determines all the duties and responsibilities of all spheres of human activity in public and private life.³² There is no room for human legislation, and people should only observe the divine laws received directly from God through the Prophet.

²⁸ Mawdudi, *Islamic Law and Constitution*, supra note 21; Henry Siegman, "The State and the Individual in Sunni Islam" (1964) 54 *The Muslim World* 23; Abd al-Karim Zaydan, *Al-Fard we al-Dawlah fi al-Shari'ah al-Islamiyyah* [The Individual and the State in Shari'a] (Gary, Indiana: Al-Ittihad al-Alami li'l Munazzamat al-Tullabiyya, 1970). Also generally Bernard Lewis, *The Political Language of Islam* (Chicago: University of Chicago Press, 1988).

²⁹ Mohamed Salim al-Awa, *On the Political System of the Islamic State* (Indianapolis: American Trust, 1980); Kemal A. Faruki, *The Evolution of Islamic Constitutional Theory and Practice from 610 to 1926* (Karachi: National Publishing House, 1971); and Arnold, *The Caliphate*, supra note 9; William M. Watt, *Islamic Political Thought: The Basic Concepts* (Edinburgh: Edinburgh University Press, 1968), also published as *La pensée politique de l'islam: les concepts fondamentaux*, trans. by Sabine Reungoat (Paris: Presses universitaires de France, 1995); Maxime Radinson, *L'Islam: politique et croyance* (Paris: Fayard, 1993); Ali Abd al-Razzaq, *L'Islam et les fondements du pouvoir*, trans. by Abdou Filali-Ansary (Paris: Éditions la découverte, 1994).

³⁰ *Islamic Law and its Implications for Modern World*, supra note 11 at 19.

³¹ Mawdudi, *Islamic Law and Constitution*, supra note 21 at 145.

³² Bassiouni "Sources of Islamic Law and the Protection of Human Rights in the Islamic Criminal Justice system" supra note 19 at 10.

They interpret and partly analyze those laws based on other sources, and find the proper methods of their application in the society.³³

The observance of divine laws in the public domain necessitates, in the Islamic view, the existence of an Islamic government participated and run only by those who live in *Dar al-Islam* (Islamic territories) and who believe that the Muslim *ummah* (nation) will ultimately be ruled by a universal government for the entire world.³⁴ The Prophet himself established the Medina model of state in 622 AD with absolute authority, on behalf of God, over all branches of government.³⁵ His words and actions (*Sunna*) were considered as state laws and one of the primary sources for the creation and development of Islamic legal codes -- Shari'a. His four successors ran the state in similar manner as the supreme religious and political authorities in Muslim society. While there has been no specific procedure for choosing the leaders, the caliphs were named to power for life in different ways, either by elite councils, direct appointment by predecessor, or popular demand.³⁶ Although, after each selection, there was an act of *bay'at* (oath of allegiance), this did not signify popular support but only mere loyalty

³³ C. G. Weeramantry, *Islamic Jurisprudence: An International Perspective* (New York: St. Martin's Press, 1988) at 116; Faruki, *The Evolution of Islamic Constitutional Theory and Practice*, *supra* note 29 at 4; Noel J. Coulson, "The State and the Individual in Islamic Law" (1957) 6 *Int'l & Com. L. Quar.* 49-60; Abdul-Qadir Audah Shaheed, *Islamic System of Justice*, trans. by S. M. Hasnain (New Delhi: Kitab Bhavan, 1994) at 23 and 44-48.

³⁴ Shari'a is not concerned with the notion of the nation/state in international law. According to Shari'a, universal government belongs to Muslim nation with one universal state ruled by Islamic caliph. See *Toward an Islamic Reformation*, *supra* note 2 at 76-78; Mawdudi, *Human Rights in Islam*, *supra* note 4 at 9-10; and Abd al-Ghani Busyuni Abd Allah, *Nazariyyah al-Dawlah fi al-Islam* [Political Theory in Islam] (Beirut: Dar al-Jamiyyah, 1986).

³⁵ *Islamic Law and Its Implication for Modern World*, *supra* note 11 at 19-28; and Sayed Qutb, *Social Justice in Islam*, trans. by Hardis (Washington, D.C.: American Council of Learned Societies, 1953) at 97.

³⁶ *The Evolution of Islamic Constitutional Theory and Practice*, *supra* note 29 at 16-19; *The caliphate*, *supra* note 9 at 19-22; *Islam and Governmental System*, *supra* note 10 at 17-21; P. M. Holt, Ann K. S. Lambton, & Bernard Lewis, eds., *The Cambridge History of Islam* (New York: Cambridge University Press, 1978); and Anwar G. Chejne, *Succession to the Rule in Islam* (Lahore: Ashraf, 1960).

to the new caliph. There was also no method to restrict or limit his lifetime power nor any mechanisms to withdraw the *bay'at*.³⁷ The caliph was left to his conscience and piety to execute his power on behalf of God without supervision by any council or department. He felt accountability only to God, as the source of legitimacy for his government.³⁸

It is sometimes said that the caliph was limited and controlled by Shari'a, and he has the obligation to operate within the boundaries of Shari'a. However, the caliph enjoyed the authority to interpret Shari'a or preferred one interpretation over others, which may endanger people's rights or corrupt the government -- as happened in the time of the third caliph, resulting in upheavals and his murder.³⁹ Moreover, according to some viewpoints, the Islamic ruler is not bound by Shari'a rules. Expediency, in their opinion, has priority over any law of Shari'a.⁴⁰

Some scholars also expressed the view that the concept of *shura*⁴¹ (the act of consultation of the Islamic ruler with senior members of Muslim society on public affairs) in Shari'a could control the unlimited power of the caliph.⁴² However, this idea,

³⁷ Khadduri, "The Juridical Theory of Islamic State" (1951) 41 *Muslim World* at 184-85; Hamilton A. R. Gibb, "Constitutional Organization" in *Law in the Middle East*, *supra* note 16 at 12; *Towards an Islamic Reformation*, *supra* note 2 at 77.

³⁸ *Islamic Law and Its Implication for Modern World*, *supra* note 11 at 28-40; Tareq Y. Ismael & Jacqueline S. Ismael, *Government and Politics in Islam* (New York: St. Martin's, 1985); Erwin J. Rosenthal, *Political Thought in Medieval Islam: An Introductory Outline* (Cambridge: Cambridge University Press, 1962).

³⁹ Kamali, "An Analysis of *Haqq* in Islamic Law" *supra* note 24 at 342.

⁴⁰ As an example, Ayatollah Khomeini, on several occasions, stated that the absolute guardianship of the Islamic jurist, indicated in the Iranian Constitution and discussed in this chapter, is the most important rule of the Shari'a. It is, he believed, the fundamental principle of the Islamic government and prior to any other fixed and indisputable laws of Shari'a. See Hossein Mehrpoor, *Didgah'ha-e jadid dar Masa'el-e Hoghughi* [New Ideas in Legal Issues] (Tehran: Ettela'at, 1995) at 59.

⁴¹ Qur'an, 3: 159 and 42: 38. Also *Islam and Governmental System*, *supra* note 10 at 12-15; and Abd al-Hamid Isma'il al-Ansari, *Al-Shura wa Atharuha fi al-Dimiqratiyyah* [Shura and Its Role in Democracy] 2nd ed. (Beirut: al-Maktabah al-Asriyyah, 1980).

⁴² Maududi, *Human Rights in Islam*, *supra* note 4 at 13; Mohammad hashim Kamali, "The Limits of

which is neither obligatory nor binding for the ruler,⁴³ was never institutionalized in Shari'a as a political principle nor practiced with a specific procedure within the historical context of Islamic government. This issue will be discussed further in Chapter Three.

One may conclude that, from a legal and constitutional point of view, the Islamic state, according to Shari'a and the practice of the historical Medina model of government, is an ideological state with a universal approach,⁴⁴ the legitimacy of which is not based on popular support; rather, it comes from the God's sovereignty over mankind. Only Muslims enjoy full citizenship and the right to participate in, and run, the government.⁴⁵ The theocratic nature of the Islamic state and the unity of religion and politics therein make Shari'a incompatible with basic concepts and principles of modern constitutionalism, without which one may expect no respect for human rights, and, as Ishtiaq Ahmed indicates, "the establishment of constitutionalism is a precondition for the enjoyment of human rights."⁴⁶ This idea will be examined later in this chapter.⁴⁷

Power in an Islamic State" (1989) 28 *Islamic Studies* 323-53; Abd al-Hamid Mutawali, *Mabadi Nizam al-Hukm fi al-Islam* [The Principles of Political System in Islam] (Alexandria, Egypt: Mansha'at al-Ma'arif, 1974); Zafir al-Qasimi, *Nizam al-Hukm fi al-Shari'ah wa al-Tarikh* [Political System in Shari'a and History] 2nd ed. (Beirut: Dar al-Nafa'is, 1977); M. Abd al-Majid al-Khalidi, *Qawa'id Nizam al-Hukm fi al-Islam* [The Foundations of Political System in Islam] (Kuwait: Dar al-Buhuth al-Ilmiyyah, 1980); and Abd-Allah al-Arabi, *Nizam al-Hukm fi al-Islam* [Political System in Islam] (Cairo: Dar al-Fikr, n.d.).

⁴³ *Shura* has never been considered as a legal and constitutional institution, rather as a moral process and a political preference in nature. See *Towards an Islamic Reformation*, *supra* note 2 at 79.

⁴⁴ Unlike the concept of territorial state in modern international law. See *Islamic Law and Constitution*, *supra* note 21 at 154-55.

⁴⁵ The issue of citizenship and the equality of all citizens in Shari'a will be discussed in the discourse of this chapter. See generally Ishtiaq Ahmed, "Abdullahi An-Na'im on Constitutional and Human Rights issues" in Tore Lindholm & Kari Vogt, eds., *Islamic Law Reform and Human Rights, Challenges and Rejoinders* (Norway: Nordic Human Rights, 1993) at 63-65.

⁴⁶ "An-Na'im on Constitutional and Human Rights Issues" *ibid.* at 64.

⁴⁷ See below, Sec. III.

C. The Concept of Right and Human Rights in Shari'a

Human rights in Shari'a are not recognized in any codified or written law. In fact, as indicated in Chapter One, Shari'a does not acknowledge human rights and freedoms according to modern norms and standards as individual rights applicable to all without any religious or gender-based considerations. Moreover, most general references to human rights in Shari'a's primary sources are of the nature of moral and religious recommendations mixed with other people's duties in this regard.⁴⁸ Although, from both a legal and a religious perspective, Shari'a deals with the concept of right in different public and private fields of human activities, and elaborates its boundaries and extents associated with responsibilities and duties of believers, it uses the term "right" in different and even contradictory meanings. It, therefore, seems necessary to review, in passing, the notion of right and its definition and characteristics in Shari'a before any further discussion on the issue of human rights.

Whereas "right" in the theory of modern international human rights standards is used only in its legal sense to refer to individual entitlement and power to claim a right⁴⁹ which is protected by law -- often even to the point of contradicting the interest

⁴⁸ Kamali, "An Analysis of *Haqq* in Islamic Law" *supra* note 24 at 342-47; Kamali, *Freedom of Expression in Islam*, *supra* note 17 at 8-15; and Sami Awad A. Abu-Sahlieh, *Les Musulmans face aux droits de l'homme: religion, droit et politique, étude et document* (Bochum, Germany: D. Winkler, 1994).

⁴⁹ Ann Elizabeth Mayer, *Islam and Human Rights, Tradition and Politics* (Boulder: Westview Press, 1991) at 66; Jack Donnelly, *International Human Rights, Dilemmas in World Politics*, 2nd ed. (Oxford: Westview Press, 1998) at 19; Alan Gewirth, *Human Rights: Essays on Justification and Applications* (Chicago: University of Chicago Press, 1982) at 1 and 41; John Humphrey, *No Distant Millennium, The International Law of Human Rights* (France: UNESCO, 1989) at 20; Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1978); and R. Dworkin, "What is Equality? Part I: Equality of Welfare" (1981) 10 *Philosophy & Public Affairs* 185-246.

of the community,⁵⁰ its closest meaning in Shari'a, *haqq*, is accorded different legal, moral, and religious meanings limited, of course, to the boundaries of Shari'a. *Haqq*, then, has no comprehensive meaning in Shari'a, and, therefore, Muslim jurists have relied on its literal meanings: establishment, reality, truth, proof of values, reward, benefit, punishment, power, etc.⁵¹

The concept of right in Shari'a is mixed with the concept of duty, so much so that *haqq* has become interchangeable with *taklif* (duty).⁵² In fact, when Shari'a speaks of someone's right, it is generally concerned with the duties of others towards that person. According to Schacht, "Islamic law is a system of duties, of rituals, legal and moral obligations, all of which are sanctioned by the authority of the same religious command."⁵³ In other words, even *haqq* with the meaning of "right" is duty-oriented right, and emphasizes more the system of obligations and duties than right itself.⁵⁴ Siegman commented that "no such abstractions as individual rights could have existed in Islam." He added, "In such a system the individual cannot have rights and liberties ... only the obligation."⁵⁵ It should also be mentioned that both rights and duties are

⁵⁰ Jack Donnelly, *Universal Human Rights in Theory and Practice* (London: Cornell University Press, 1989) at 7. See also Joseph Schacht, ed., *Encyclopedia of Islam*, vol. 3, under *Hakk*, at 82.

⁵¹ "An Analysis of *Haqq* in Islamic Law" *supra* note 24 at 342-47; M. R. Uthman, *al-Huquq fi al-Islam* [Rights and Duties in Islam] (Beirut: Dar al-Iqra'a, 1982) at 13; Kamali, *Freedom of Expression in Islam*, *supra* note 17 at 17-19; Siegman, "The State and Individual in Sunni Islam" *supra* note 28; and Glenn, *Legal Traditions of the World*, *supra* note 16 at 177.

⁵² "An Analysis of *Haqq* in Islamic Law" *ibid.* at 348; Fathi Uthman, *Huquq al-Insan Bayn al-Shari'ah al-Islamiyyah wa al-Fikr al-Qanuni al-Gharbi* [Human Rights in Shari'a and Western Legal Tradition] (Beirut: Dar al-Shuruq, 1982); Abd al-Wahid Wafi, *Huquq al-Insan fi al-Islam* [Human Rights in Islam] (Cairo: Matba'a al-Risala, n.d.); Subhi Mahmassani, *Arkan Huquq al-Insan fi al-Islam* [The Foundations of Human Rights in Islam] (Beirut: Dar al-Ilm li al-Malayin, 1979).

⁵³ Joseph Schacht, "Law and Justice" in *The Cambridge History of Islam*, *supra* note 36 at 541.

⁵⁴ Subhi Mahmassani, *Arkan Huquq al-Insan fi al-Islam* [Fundamentals of Human Rights in Islam] (Beirut: Dar al-Ilm li al-Malayin, 1979); Abd al-Wahid Wafi, *Huquq al-Insan fi al-Islam* [The Rights of man in Islam] (Cairo: Matba'ah al-Risalah, n.d.); and S. Aldeeb Abu-Sahlieh, "Muslims and Human Rights: Challenges and Perspectives" in W. Schmale, ed., *Human Rights and Cultural Diversity* (Goldbach: Keip, 1993).

⁵⁵ Siegman, "The State and Individual in Sunni Islam" *supra* note 28 at 23.

basically discussed under the category of *hukm* (ruling), which has much wider scope than right. While *haqq* is confined to regulating relations among individuals, *hukm* covers all kinds of public and private activities of believers, and regulates relations between an individual and God. Therefore, Islamic law unifies right and duty under the single concept of *hukm*, and balances “orientation of both under the general concept of *adl* (justice).”⁵⁶ For example, one *hadith* (prophetic saying) states that “the blood, property and honor of a Muslim are forbidden to his fellow Muslims.”⁵⁷ The *hadith* apparently conveys a right to protection of life but, in fact, it is only a divine injunction not to kill. All this, along with the fact that the ruler enjoys the authority to interpret Shari’a, could certainly cause the preference of obligations and the interests of political rule over the rights and interests of individuals in Muslim societies, which, in turn, leads to more restrictions in the field of human rights. Hamilton Gibb noted that “the Islamic theory of government gives the citizen as such no place or function except as taxpayer and submissive subject.”⁵⁸

To avoid this process, any reform methodology should first distinguish between *hukm* (ruling) in its moral and religious sense and legal rights and freedoms as individual claims, and, then, shift away from duty-oriented Shari’a laws to a right-centered legal system in which rights are acknowledged and appreciated with a comprehensive and legal meaning in a codified system of law.⁵⁹ This would pave the way for any reform in Shari’a in human rights field.

⁵⁶ “An Analysis of *Haqq* in Islamic Law” *supra* note 24 at 349-50.

⁵⁷ *Ibid.* at 349.

⁵⁸ Gibb, “Constitutional Organizations” *supra* note 37 at 12.

⁵⁹ Bassam Tibi, “Islamic Law/Shari’a, Human Rights, Universal Morality, and International Relations” (1994) 16 H. R. Quar. at 290.

The earliest Muslim jurists also divided *haqq* in its legal sense, into different categories.⁶⁰ In the most important division, there is *haqq al-Allah* (the right or claim of God) and *haqq al-nas* (the right or claim of the individual).⁶¹

The rights of God refer to the duties of people before God in personal and ritual matters, such as daily prayers, but also with respect to the laws and regulations in the public interest, such as the execution of *hudud*⁶² (the major and severe punishments), which are not subject to waiver or compromise. The state, as God's representative, has the duty to strictly enforce those punishments. This, in fact, increases the power of the state over individuals' conduct in the name of *haqq al-Allah* and as the source of legitimacy for the government, especially in the field of *ta'zir* (non-*hudud* punishments), which encompasses all offenses for which no defined punishments are prescribed in Shari'a. It is left to the judge (state) to decide on the severity and form of execution.⁶³ *Ta'zir* could also be applied to any act of individuals which would be considered reprehensible conduct by the judge, the only official to decide on any case and to apply the proper punishment.⁶⁴ It should also be noted that, in Islamic law, the personal knowledge of the judge is acceptable as an evidence against the accused. In other words, the judge can convict anyone to *hudud* or *ta'zir* punishments based only

⁶⁰ "An Analysis of *Haqq* in Islamic Law" *supra* note 24 at 350.

⁶¹ See generally Abd al-Razzaq Sanhoury, *Musadir al-Huquq fi al-Fiqh al-Islami* [The Sources of Right in Shari'a] vol. 1 (Cairo: Dar al-Kitab, n.d.)

⁶² *Hudud* (pl. of *Hadd*) crimes are those prohibited and, under certain conditions, punished with defined mandatory punishments. Although there is no consensus among jurists on the number of *Hudud* offenses, it certainly covers crimes of theft, adultery, defamation (accusing someone of committing adultery), and highway robbery. See Aly A. Mansour, "Hudud Crimes" and Ahmed Abdul-Aziz Al-Alfi, "Punishment in Islamic Criminal Law" both in *The Islamic Criminal Justice System*, *supra* note 19 at 195 and 227 respectively. See also Schacht, *An Introduction to Islamic Law*, *supra* note 16 at 175.

⁶³ For more on *Ta'zir*, see Ghaouti Benmelha, "*Ta'zir* Crimes" in *The Islamic Criminal Justice System*, *ibid.* at 211-225.

⁶⁴ *Toward an Islamic Reformation*, *supra* note 2 at 118-19.

on his personal knowledge of the case concerned.⁶⁵ In fact, Shari'a legal system is a goal-oriented, and not process-oriented system. The judge enjoys "almost unbridled power",⁶⁶ and may act as prosecutor, jury, and judge in an Islamic trial.

The right of individuals (*haqq al-nas*) is, on the other hand, referred to the mutual rights and obligations of people to each other, especially in the field of transactions and issues related to property and goods. The enforcement of individuals' rights is, of course, based on the claim of the individual concerned, who may not demand it. Unlike *haqq al-Allah*, private rights are subject to waiver, reconciliation, or compromise.⁶⁷

It should also be pointed out that some acts or offenses are of the nature of both *haqq al-Allah* and *haqq al-nas*, such as crimes of theft⁶⁸ and defamation⁶⁹ -- where the enforcement of indisputable *hudud* punishments falls in the category of the former, while the claim of ownership (in the case of theft) and honor and reputation (in the case of defamation) rests in the field of the later.⁷⁰

The concepts of rights and obligations in Shari'a, under the general category of *hukm*, cover all public and private aspects of human life. Shari'a, then, expects all believers to comply with its rules and laws and specific procedures in different spheres of their lives, such as family law and criminal law. In contemporary Muslim societies,

⁶⁵ Awad M. Awad, "The Rights of the Accused Under Islamic Criminal Procedure" and Ma'amoun M. Salama, "General Principles of Criminal Evidence in Islamic Jurisprudence" both in *The Islamic Criminal Justice System*, supra note 19 at 91-107 and 109-123 respectively.

⁶⁶ Bassiouni, "Sources of Islamic Law, and the Protection of Human Rights in the Islamic Criminal Justice System" supra note 19 at 42.

⁶⁷ "An Analysis of *Haqq* in Islamic Law" supra note 24 at 350.

⁶⁸ Qur'an, 5:38.

⁶⁹ *Ibid.*, 24:4-5.

⁷⁰ "An Analysis of *Haqq* in Islamic Law" supra note 24 at 350.

Shari'a holds strong in personal and private status, such as family law and simple contracts and transactions. All the Muslim countries apply, to different extents, Shari'a law or its slightly reformed version in the private field, which is more developed than other sections.⁷¹

On the other hand, Shari'a is weak and undeveloped in public law.⁷² In constitutional and administrative areas, the historical Medina model of government, based on the concept of *khilafat*,⁷³ is not observed in Muslim countries. In addition, Shari'a criminal law and *hudud* punishments are abandoned or rarely carried out, leaving Shari'a undeveloped in this field.⁷⁴ Shari'a recognizes the principles of criminal responsibility, non-retroactivity of criminal law, and legality of crimes and punishment, and guarantees "the five essential things" in human life, namely, religion, life, mind, chastity (or posterity in another version), and property.⁷⁵ However, the general concepts of criminal law, such as criminal procedures, are neither defined nor clarified.⁷⁶ There is also "no organized judiciary and law enforcement administration."⁷⁷

No general moral and religious recommendations on human rights in Shari'a sources, to be discussed below, were incorporated into any specific legal sanction and judicial enforcement. The concept of punishment, nevertheless, is well-developed and

⁷¹ *Toward an Islamic Reformation*, *supra* note 2 at 105.

⁷² *Ibid.*

⁷³ The caliphate; leadership of the ruling caliph.

⁷⁴ Iran's criminal law is completely based on Islamic law, and Shari'a laws are practiced. In some other Muslim countries, such as Sudan, Saudi Arabia, Pakistan, and Afghanistan Shari'a criminal law is also observed.

⁷⁵ See Osman Abd al-Malek al-Saleh, "The Rights of the Individual to Personal Security in Islam" in *The Islamic Criminal Justice System*, *supra* note 19 at 56-65.

⁷⁶ The weaknesses in Shari'a practical method to prove some crimes, such as adultery, which makes the proof of those crimes next to impossible, has also had an impact in abandonment of Shari'a criminal law. See "Hudud Crimes" *supra* note 62 at 199.

⁷⁷ *Islamic Law and its Implications for Modern World*, *supra* note 11 at 52.

explained. In fact, in some countries, the enforcement of severe *hudud* punishments, such as amputation, stoning, and whipping, and *qysas* penalties,⁷⁸ is the only sign that Shari'a criminal law is applied. Most of the Muslim countries follow the modern criminal law in their legal system, and have limited the scope of Shari'a laws only to family law.⁷⁹

The recent growth of Islamic fundamentalism in some Muslim countries,⁸⁰ however, has resulted in relatively popular demand for the application of Shari'a in public law, especially the enforcement of *hudud* punishments. The process of Islamization in the field of criminal law in these countries may have a negative impact on the subject of human rights and freedoms in its modern norms and standards.⁸¹

Hudud punishments, An-Na'im notes, "raise serious problems of definition and

⁷⁸ *Quysas*, meaning equivalence or retaliation, is the punishment for murder and bodily harm, which is exact retaliation in the same way and by the same means. *Quysas*, along with *Diya* (monetary compensation to the victim or his family in non-*Quysas* crimes) form *Jinayat* part of criminal law in Shari'a, which deals with homicide and physical injuries. See *Toward an Islamic Reformation*, *supra* note 2 at 105; Cherif M. Bassiouni, "Quesas Crimes" in *The Islamic Criminal Justice System*, *supra* note 19 at 203.

⁷⁹ Bielefeldt, "Muslim Voices in the Human Rights Debate" *supra* note 5 at 612.

⁸⁰ See generally Oliver Roy, *L'Echec de l'Islam politique* (Paris: Seuil, 1992); Gilles Kepel, *Jihad, expansion et déclin de l'islamisme* (Paris: Gallimard, 2000); Antoine Basbous, *L'Islamisme, une révolution avortée?* (Paris: Hachette, 2000); Boubker Jalal Bennani, *L'Islamisme et les droits de l'homme* (Lausanne: L'Aire, 1984); Ali E. Hillal Dessouki, ed., *Islamic Resurgence in the Arab World* (New York: Praeger, 1982); Andalaziz Sachedina, *The Islamic Roots of Democratic Pluralism* (New York: Oxford University Press, 2001) at 51-57; Bassam Tibi, *The Challenge of Fundamentalism: Political Islam and the New World Disorder* (Berkeley: University of California Press, 1998); William M. Watt, *Islamic Fundamentalism and Modernity* (London: Routledge, 1988); Abd al-Hamid Abu-Sulayman, *Towards an Islamic Theory of International Relations: New Directions for Methodology and Thought*, 2nd ed. (Herndon, VA: International Institute of Islamic Thought, 1993); Bruno Étienne, *L'islamisme radical* (Paris: Hachette, 1987); Olivier Carré & Paul Dumont, eds., *Radicalismes islamiques* (Paris: L'Harmattan, 1985); See also Fatima Mernissi, *La peur-modernité: conflit, Islam et démocratie* (Paris: Albin Michel, 1992); Jean-Claude Barreau, *De l'Islam en général et du monde moderne en particulier* (Paris: Le Pré aux clercs, 1991); Bernard Lewis, *Le retour de l'Islam*, trans. by Tina Jolas & Denise Paulme (Paris: Gallimard, 1985); and B. Lewis, *Islam and the West* (New York: Oxford University Press, 1993).

⁸¹ Ann Elizabeth Mayer, "A Critique of An-Na'im's Assessment of Islamic Criminal Justice" in *Islamic Law Reform and Human Rights*, *supra* note 45 at 38.

scope.”⁸² They are not well-defined legally in either the Qur’an or the *Sunna*, and Shari’a gives little guidance as to the definition of each *hadd*. Moreover, the application of *hudud* punishments in mostly undemocratic Muslim states would only give a free hand to the authorities to repress their opponents under the pretext of carrying out Shari’a criminal law.

Shari’a does not address the issue of human rights systematically and in a codified method. The concept of individual rights and freedoms is very much mixed and combined with duties and obligation. The study of Shari’a sources, however, reveals that many fundamental values and qualities concerning human honor and dignity have been indicated in the sources, namely, Qur’an and *Sunna*. As Riffat Hassan states, the Qur’an aims to “free human being from the bondage of traditionalism, authoritarianism, ... or anything else that prohibits or inhibits human beings from actualizing the Qur’anic vision of human destiny embodied in the classic proclamation: ‘Towards Allah is thy limit.’”⁸³ In different Qur’anic verses and *Sunna* traditions and sayings, the humanity of mankind and his fundamental rights have been honored and glorified.⁸⁴

Basic human rights and values, such as the right to life, the right to individual freedoms, the right to justice, and the right to respect, and concepts such as equality of

⁸² *Toward an Islamic Reformation*, supra note 2 at 109.

⁸³ Qur’an, 53:42. Riffat Hassan, “Religious Human Rights and the Qur’an” (1996) 10 *Emory Int’l L. Rev.* at 85.

⁸⁴ See generally S. Hassan Amin, *Islamic Law in the Contemporary World* (Tehran: Vahid, 1985); Mohammed Arkoun, *L’humanisme Arabe au iv/v Siècle: Miskawayh, philosophe et historien* (Paris: J. Vrin, 1970); Marcel Boisard, *L’humanisme de l’Islam* (Paris: Albin Michel, 1979); Joel Kraemer, *Humanism in the Renaissance of Islam, The Cultural Revival During the Buyid Age* (Leiden: Brill, 1986); Hisham Djait, *La personnalité et le devenir arabo-islamique* (Paris: Albin Michel, 1974); Arnold Green, ed., *In Quest of an Islamic Humanism: Arabic and Islamic Studies in Memory of Mohamed al-Newaihi* (Cairo: American University Press, 1984) the introductory section.

human being, security of life and property, protection of honor, standard of life, equality before the law, etc., are generally mentioned and blessed in those sources.⁸⁵ For example, the Qur'an declares: "Surely, we have accorded dignity to the sons of Adam."⁸⁶ Concerning the right to life, it states: "Whoever kills a human being ... it is though he had killed all mankind."⁸⁷ Or "do not take any human being's life which God has declared sacred except through the due process of law!"⁸⁸ Regarding the right to justice, it says: "You who believe! Stand out firmly for justice, as witnesses to God, even as against yourselves, or your parents, or your kin, ..." ⁸⁹ On the issue of equality of all human beings, it mentions: "O mankind, we have created you from a male and female ... Indeed the noblest among you before God are the most heedful of you."⁹⁰ And finally, on the protection of honor and dignity, it states: "You who believe ... do not defame one another, do not insult ..." ⁹¹

All these principles, nevertheless, have remained only general guidelines in Muslim communities, and have been considered as moral and religious values and recommendations. They were never developed into legal provisions in a proper legal and judicial system. Early jurists could have developed these principles to regulate

⁸⁵ Mohammed Arkoun, *Rethinking Islam, Common Questions, Uncommon Answers*, trans. & ed. By Robert D. Lee (Boulder, CO: Westview, 1994) at 106-13; Mawdudi, *Human Rights in Islam*, *supra* note 4 at 17-34; Hassan, "Religious Human Rights and the Qur'an" *supra* note 83 at 85-95; Khalid M. Ishaque, "Human Rights In Islamic Law" (1974) 12 Rev. Int'l Comm. Jurists at 30-39; Sultanhussein Tabandeh, *A Muslim Commentary on the Universal Declaration of Human Rights* (London: F. T. Goulding, 1970); Abdul Aziz Said, "Perception and Practice of Human Rights in Islam" (1979) 1 Universal H. R. at 65; and Sachedina, *The Islamic Roots of Democratic Pluralism*, *supra* note 80 at 102-12.

⁸⁶ Qur'an, 17: 70. See also "Sources of Islamic Law and the Protection of Human Rights in the Islamic Criminal Justice System" *supra* note 19 at 19-20.

⁸⁷ Qur'an, 5: 32.

⁸⁸ *Ibid.* 6: 151.

⁸⁹ *Ibid.* 4: 135 and 5: 8.

⁹⁰ *Ibid.* 49: 13.

⁹¹ *Ibid.* 49: 11-12.

legally defined and protected rights in different sections of Shari'a, and to construct an Islamic legal system with appropriate legal procedures and guarantees for the enforcement of those rights. This could have made the system more compatible and consistent with the modern idea of human rights and freedoms. These principles could, in turn, have been used by Muslim reformists to establish the proper modern system.⁹²

Based on other materials in religious sources, mainly belonging to the Medinan period, Shari'a understood and interpreted the Islamic texts differently. It established and developed very restrictive legal codes which appear to limit human rights and freedoms. Shari'a does not deal comprehensively with the issue of human rights in one section. It deals with the "right" of an individual in different parts with different meanings, depending on the circumstances and conditions of the subject, or the faith and gender of the individual concerned.⁹³ Therefore, there is no inclusive human rights system in Shari'a with the proper philosophical and theoretical foundations, and any attempt to introduce a comprehensive human rights system in the present Shari'a would likely fail because its scattered laws and regulations on rights do not establish a modern doctrine on this subject.⁹⁴ Human rights in Shari'a are not thought to entail the legal guarantees of a social contract and against the state. They are, rather, supposed to be

⁹² Muhammed Al-Ashmawy, *L'islamisme contre l'Islam*, trans. by Richard Jacquemond (Paris: Éditions la découverte, 1989); "Muslim Voices in the Human Rights Debate" *supra* note 5 at 607; Subhi Mahmasani, "Adaptation of Islamic Jurisprudence to Modern Social Needs" in John J. Donohue & John L. Esposito, eds., *Islam in Transition: Muslim Perspectives* (New York: Oxford University Press, 1982) at 183; Mohammed Talbi, "Religious Liberty: A Muslim Perspective" in *Conscience and Liberty* (1991) at 31.

⁹³ See generally Mayer, *Islam and Human rights, Tradition and Politics*, *supra* note 49; Siegman, "State and Individual in Sunni Islam" *supra* note 51; Wafi, *Huquq al-Insan fi al-Islam*, *supra* note 54.

⁹⁴ *Islam and Human Rights, Tradition and Politics*, *ibid.* at 211; Ann Elizabeth Mayer, "Universal Versus Islamic Human Rights: A Clash of Cultures or a Clash with a Construct?" (1994) 15 Michigan J. Int'l L. 320-21; Ann E. Mayer, "Islamic or Human Rights: An Iranian Dilemma" (1996) 29 Iranian Studies at 270; *Toward an Islamic Reformation*, *supra* note 2 at 151.

granted by God, not by treaty or convention⁹⁵ applicable to all.⁹⁶ People are expected to observe them as divine laws, and the state -- as God's representative and ironically the interpreter of Shari'a -- has a duty to enforce them. This system is supposed to reduce any conflict between the people and the state.⁹⁷ The individual becomes part of the state, and both adhere to holy laws. Rights are, then, protected not against the state but only against violation by others. In other words, one's right is another's duty.⁹⁸ Cherif Bassiouni writes that:

The Qur'an emphasizes duties rather than rights. It insists upon the fulfillment of individual obligations before the individual can claim his privileges. The individual is neither apart nor separate from society, and his rights are neither different nor conflicting with those of the community.⁹⁹

This is what makes the concept and scheme of human rights in Shari'a so limited and duty-oriented, which, in turn, make the comparison between Islamic human rights and international human rights standards difficult.¹⁰⁰

Modern human rights theory, which is based on legal and political standards and not on religious or moral recommendations,¹⁰¹ relies on the idea of human dignity.

⁹⁵ Mawdudi, *Human Rights in Islam*, *supra* note 4 at 15. Of course, the problem here is not the source, but the lack of coherence and the limited 'right' granted that are the real problems.

⁹⁶ Majid Alikhan, "A Comparative Study of Universal Declaration of Human Rights and Declaration of Human Rights in Islam" (1991) 22 *Islam and the Modern Age Quar.* at 173-74.

⁹⁷ The state here simply refers to the authorities and the government.

⁹⁸ Even the above-mentioned Qur'anic verses concerning human rights focus mostly on duties. As examples, the right to life does not approach directly the right itself; instead, it prohibits others from killing. Or, the right to freedom is a duty not to enslave unjustly. See Donnelly, *Universal Human Rights in Theory and Practice*, *supra* note 50 at 51.

⁹⁹ Bassiouni, "Sources of Islamic Law and the Protection of Human rights in the Islamic Criminal Justice System" *supra* note 19 at 13.

It attaches human rights to individuals because of their humanness, not for any other reason.¹⁰² In Shari'a, however, what matters is duties. Rights are due to the observance of duties. In other words, the claim to any right is possible only upon the performance of the corresponding duties.¹⁰³ Shari'a admires the conception of human dignity but it falls short of converting that idea into human rights within a judicial system.¹⁰⁴ Instead, it highlights humanistic values and humanitarian conduct in the society.¹⁰⁵ The human rights concept is undeveloped in Shari'a because of the absence of individualism -- which, along with rationalism, are the main pillars of the modern theory of human rights today.¹⁰⁶ The absence of individualism leads us to community-centered human rights. In Muslim societies, Mayer points out, "individuals are situated in a given positions in a social context, and are seen as components of family or community structures, rather than as autonomous and separate persons."¹⁰⁷ In this form of traditional societies, the community's values and interests are always preferred over those of individuals. As duties gain supremacy over rights, the collectivity and collective rights prevail over individuals' rights in this system.¹⁰⁸ In the event of conflict, individuals' rights are cut short in favor of collective interests to meet social

¹⁰⁰ *Islam and Human Rights, Tradition and Politics*, *supra* note 49 at 189.

¹⁰¹ "Muslim Voices in the Human Rights Debate" *supra* note 5 at 601.

¹⁰² Humphrey, *No Distant Millennium, the International Law of Human Rights*, *supra* note 49 at 20.

¹⁰³ Said, "Perception and Practice of Human Rights in Islam" *supra* note 85 at 74; and "Sources of Islamic Law and the Protection of Human Rights in the Islamic Criminal Justice System" *supra* note 19 at 13.

¹⁰⁴ *Universal Human Rights in Theory and Practice*, *supra* note 50 at 52.

¹⁰⁵ Qur'an states: "You who believe, do not let one (set of) people make fun of another set; do not defame one another." Qur'an, 40: 11-12. Shari'a encourages people to loan each other without interest, to give of their wealth to the poor, and to help charities generously. With regard to wars, Shari'a also sets different rules concerning the rights of non-combatants, protection of the wounded, prisoners of war, sanctity of properties and dead bodies, etc. See Mawdudi, *Human Rights in Islam*, *supra* note 4 at 35-39.

¹⁰⁶ *Islam and Human Rights, Tradition and Politics*, *supra* note 49 at 47.

¹⁰⁷ *Ibid.*

¹⁰⁸ Tibi, "Islamic Law, Human Rights, Universal Morality and International Relations" *supra* note 59 at 296.

needs and necessities.¹⁰⁹ As Reisman states, “the scope and the extent of individual rights, then, is conditioned upon the welfare of the community of Muslims.”¹¹⁰

It is evident from the discussions above, as we will see in regard to the rights of women and religious minorities, that the idea of human rights in Shari’a contradicts modern human rights law, theoretically and legally. Their philosophical foundations and theoretical outlooks are different. The roots of modern human rights theory in humanism, individualism, and equality are foreign to Shari’a, which rests on the belief in the superiority of divine revelation, as the source of legitimacy, over man-made laws, and on hostility towards rationalism in Islamic tradition.¹¹¹ Shari’a laws do not construct a settled Islamic human rights theory, and contravene modern human rights norms and standards.¹¹² From practical perspective, they raise critical problems concerning modern constitutionalism in the area of human rights and their legal protection against government interference.

In practice, however, it should be stated that not all restrictions and limitations on human rights in Muslim countries come from Shari’a laws and regulations. They are imposed by undemocratic governments for political expediency as well.¹¹³ Some Muslim states justify their human rights violations, recorded by international

¹⁰⁹ Taymour Kamal, “The principle of Legality and its Application in Islamic Criminal Justice”, in *The Islamic Criminal Justice System*, *supra* note 19 at 169.

¹¹⁰ Reisman, “Some Reflections on Human Rights and Clerical Claims to Political Power” *supra* note 25 at 516.

¹¹¹ *Islam and Human Rights, Tradition and Politics*, *supra* note 49 at 57.

¹¹² For a different view on this issue, see Ali A. Wafi, “Human Rights in Islam” (1967) 11 *Islamic Quar.* at 164-69.

¹¹³ Ann Elizabeth Mayer, “Islam and Human Rights: Different Issues Different Contexts, Lessons from Comparisons” in *Islamic Law Reform and Human Right, Challenges and Rejoinders*, *supra* note 45 at 117-21; “Muslim Voices in Human Rights Debate” *supra* note 5 at 595; “Universal Versus Islamic Human Rights” *supra* note 94 at 402-3; and Lawyers Committee for Human Rights, *Islamic Justice: Debating the Future of Human Rights in the Middle East and North Africa* (New York: Lawyers

organizations, by claiming to be acting “as required by, and consistent with, Islamic law, culture, and values.”¹¹⁴ In this respect, they place more restrictions on people’s rights and freedoms than what Shari’a prescribes. In other words, most Islamic states, being totalitarian by nature, deform the divine characteristic of Shari’a laws to legitimize their actions, and to defend themselves against charges of human rights violations. There is little Islamic rationale behind those violations -- Shari’a does not approve human rights violations, such as torture, arbitrary detention, and suppression of political dissidence.¹¹⁵

These governments also resort to the concept of cultural relativity to depict universal human rights standards as a Western idea and to justify their human rights violations. They hold that there is not one comprehensive system of human rights to be applied universally in every society. They believe that the religious, cultural, political, economic conditions of a society should be considered and acknowledged, and that these conditions differ widely from one country to another.¹¹⁶ These claims reflect the hostility of those states towards the universal application of human rights standards, and serve politically to defend them against charges of human rights violations.

Although this study will not compare cultural relativity with the universality of basic human rights, it should be noted that many Western jurists and scholars have

Committee for Human Rights, 1997).

¹¹⁴ “Some Reflections on Human Rights and Clerical Claims to Political Power” *supra* note 25 at 509. See also above, Chapter One, text accompanying notes 64-68.

¹¹⁵ Bielefeldt, “Muslim Voices in Human Rights Debate” *supra* note 5 at 595.

¹¹⁶ See *supra* Chapter One note 64. Also “Universal Versus Islamic Human Rights” *supra* note 94 at 371-79; “Islamic or Human Rights: An Iranian Dilemma” *supra* note 94 at 280-82; Fred Holliday, Relativism and Universalism in Human Rights: The Case of the Islamic Middle East” (1995) 43 Political Studies at 154; “Islam and Human Rights: Different Issues, Different Contexts, Lessons Comparisons” *supra* note 113 at 119; Najib Ghabbian, *Democratization and the Islamist Challenge in the Arab World* (Boulder, CO: Westview Press, 1997).

opted for the relativity of human rights and are of the opinion that local cultures and other conditions should be considered when human rights are applied in a society.¹¹⁷ In kindred spirit, Muslim jurists advocate the application of Shari'a laws at least in Muslim countries, whether or not these laws contradict international human rights law. The arguments in favor of the relativity of human rights, of course, differ completely from those advanced by undemocratic governments, who seek to defend their political interests and their conducts against charges of human rights violations.

D. The Rights of Women and Religious Minorities in Shari'a

In the last section, the concepts of right and human rights in Shari'a and their characteristics were generally discussed. Because the principle of equality of human beings before the law is important, this section will examine the rights of women and non-Muslims in Shari'a at length.

¹¹⁷ See Rhoda E. Howard, "Dignity, Community, and Human Rights" and Richard Falk, "Cultural Foundations for the International Protection of Human Rights" both in Abdullahi Ahmed An-Na'im, ed., *Human Rights in Cross-Cultural Perspectives, A Quest for Consensus* (Philadelphia: University of Pennsylvania Press, 1992) at 83 and 44-64 respectively; Rhoda E. Howard, "Cultural Absolutism and the Nostalgia for Community" (1993) 15 H. R. Quart. 315-20; Alison Dundes Renteln, *International Human Rights: Universalism Versus Relativism* (London: Sage, 1990) at 61-87; Afshari, "An Essay on Islamic Cultural Relativism in the Discourse of Human Rights" *supra* note 18 at 235-76; Adamantia Pollis & Peter Schwab, "Human Rights: A Western Construct With Limited Application" in A. Pollis & P. Schwab, eds., *Human Rights, Cultural and Ideological Perspectives* (New York: Praeger, 1980) at 1;

1. *The Rights of Women*

The rights of women is an obvious area of conflict between Shari'a and modern international human rights standards. In Shari'a, the equality of rights before the law, regardless of gender, is not recognized, and men and women do not enjoy equal rights.¹¹⁸

Before examining women's rights in Shari'a, a distinction should be made between the approach of Shari'a sources towards the dignity and honor of women and Shari'a laws in this regard. The Qur'an declares the equality of all human beings with equal value in dignity and honor.¹¹⁹ It states that the best person is the one who is the most pious.¹²⁰ Compared to the degraded status of women in the *Jahiliyya* (pre-Islamic traditions), where female infanticide was commonly practiced, "the changes in women's status are in the direction of enhancing their rights and elevating their status

Fernando R. Teson, "International Human Rights Relativism" (1985) 25 *Virginia J. Int'l L.* 870.

¹¹⁸ See generally Fatima Mernissi, *The Veil and the Male Elite: A Feminist Interpretation of Women's Rights in Islam*, trans. by Mary J. Lakeland (Reading, MA: Addison-Wesley, 1991), also published as *Women and Islam: An Historical and Theological Enquiry*, trans. by Mary J. Lakeland (Oxford: Blackwell, 1991), first published as *Le harem politique* (Paris: Albin Michel, 1987); *An Introduction to Islamic Law*, *supra* note 16 at 161; Wiebke Walther, *Women in Islam from Medieval to Modern Time* (1993) at 47-55; W. Walther, *Women in Islam*, trans. from the German by C. S. V. Salt (Montclair, NJ: A. Schram, 1981), also published as *Les femmes en Islam*, trans. by Madeleine Maléfant (Paris: Sindbad, 1981); Yvonne Yazbeck Haddad & John L. Esposito, eds., *Islam, Gender, and Social Change* (Oxford: Oxford University Press, 1998); Riffat Hassan, "Equal Rights Before Allah? Women-Man Equality in the Islamic Tradition" (1988) 7 *Harvard Divinity Bulletin*, no. 2; Barbara Stowasser, *Women in the Qur'an: Traditions and Interpretations* (New York: Oxford University Press, 1994); A. Ahmed An-Na'im, "The Rights of Women and International Law in the Muslim Context" (1987) 9 *Whittier L. Rev.* 491. For a different view on this, see Samih Atef al-Zein, *Islam and Human Ideology*, trans. by M. H. Omran (London: Kegan Paul International, 1996) 286-99.

¹¹⁹ Qur'an, 4: 1 and 124, 49: 13, 33: 35. See also Hossein Mehrpour, *Huquq-e Bashar dar Asnad-e Beinalmelali wa Moze'a Jomhuri-e Islami-e Iran* [Human Rights in International Instruments and the Position of the Islamic Republic of Iran] (Tehran: Ettela'at, 1995) at 218-23.

¹²⁰ Qur'an, 49: 13.

and dignity.”¹²¹ Against the prevailing conditions of the time, the Qur’an removed some abuses to which women were subjected, and guaranteed certain rights which Western women did not even enjoy until recently.¹²² Islam recognized women’s independent legal personality and allowed them to inherit and own property. Historically, this was quite advanced.¹²³

From a legal point of view, however, Shari’a laws on the rights of women were codified through only the legal verses of the Qur’an, not those verses which recognized the equality of men and women in dignity and honor. The laws pioneered by the Qur’an and considered appropriate then,¹²⁴ nevertheless have had a negative impact on women’s rights today.¹²⁵ Early jurists resorted to Qur’anic legal verses to put some disabilities on women and to create a subordinate role for women. This resulted in

¹²¹ *Islam and Human Rights, Tradition and Politics*, supra note 49 at 110.

¹²² The Qur’an prohibited female infanticide, restricted the practice of polygamy, curbed abuses of divorce by husbands, and recognized women’s financial independence. See Fazlur Rahman, “The Status of Women in the Qur’an” in Guity Nashat ed., *Women and Revolution in Iran* (Boulder, CO: Westview Press, 1983) at 38; For a summery of those changes, see also J. N. D. Anderson, *Law Reforms in the Muslim World* (London: Athlone, 1976); Tahir Mahmmod, *Personal Law in Islamic Countries* (New Delhi: Academy of Law and Religions, 1987); Abula’la Mawdudi, *Purdah and the Status of Women in Islam* (Lahore: Islamic Publications, 1981).

¹²³ See al-Saadawi, “Women and Islam” in Azizah al-Hibri, ed., *Women and Islam* (Oxford: Pergamon Press, 1982) 194-202; Naila Minai, *Women in Islam: Tradition and Transition in the Middle East* (New York: Seaview, 1981) 1-24; Jane Smith, “Women, Religion, and Social Change in Early Islam” in Yvonne Y. Haddad & Ellison Findley, eds., *Women, Religion, and Social Change*, (Albany: State University of New York Press, 1985) 19-35; Barbara Stowasser, “The Status of Women in Early Islam” in Freda Hussain, ed., *Muslim Women* (New York: St. Martin’s Press, 1984) 11-43; Mernissi, *Women and Islam: An Historical and Theological Enquiry*, supra note 118; M. Wahibiddin Khan, *Women in Islamic Shariah*, trans. by Farida Khanam (New Delhi: Islamic Centre, 1995); A. Rahman Doi, *Women in the Shari’a* (London: Ta-Ha, 1989); A. R. Doi, *Women in the Qur’an and Hadith* (London: Ta-ha, 1993).

¹²⁴ Rahman, “Status of Women in the Qur’an” supra note 122 at 37.

¹²⁵ Margot Badran & Göle Nilüfer, *The Forbidden Modern: Civilization and Veiling* (Ann Arbor: University of Michigan Press, 1996); Riffat Hassan, “Feminist Theology: The Challenges for Muslim Women” (1996) 9 Critique: J. for Critical Studies of the Middle East 53-65; Camillia Fawzi, El-Solh, & Judy Mabro, eds., *Muslim Women’s Choices: Religious Belief and Social Reality* (Oxford: Berg, 1994); An-Na’im, “The Rights of Women and International Law in the Muslim Context” supra note 118 491; Tabandeh, *A Muslim Commentary on the Universal Declaration of Human Rights*, supra note 85; Yves Linant de Bellefonds, *Traité de droit musulman comparé, le mariage et la dissolution du mariage*, vol. 2 (Paris: Mouton, 1965); Jamal Nasir, *The Islamic Law of Personal Status* (London: Graham & Trotman,

male-oriented discriminatory laws and rules in almost every public and private domain of human life.¹²⁶ Below is a short review of women's Shari'a rights in the public and private spheres.

In personal status laws, while a man has the right to freely marry up to four wives under certain conditions,¹²⁷ a woman, for her first marriage, needs the permission of her legal guardian -- her father or grandfather.¹²⁸

In inheritance, the general rule accords women only half of what men are entitled to with the same relationship to the deceased person.¹²⁹

In family matters, the man, as head of the family, has the authority and *qawama* (guardianship) over the woman.¹³⁰ She has the duty to obey him and to abstain from anything that might contradict his control and guardianship.¹³¹ She also must obtain her

1986).

¹²⁶ See generally Ghassan Ascha, *Du statut inférieure de la femme en Islam* (Paris: L'Harmattan, 1987); Anderson, *Law Reform in the Muslim World*, *supra* note 122; Khawar Mumtaz & Farida Shaheed, *Women in Pakistan, Two Steps Forward, One Step Back* (London: Zed, 1987) at 77-122; Anita Weiss, "Implications of the Islamization Program for Women" in A. Weiss, ed., *Islamic Reassertion in Pakistan* (Syracuse: Syracuse University Press, 1986) 97-114; A. Ahmed An-Na'im, "A Modern Approach to Human Rights in Islam: Foundations and Implications for Africa" in Claude Welch Jr. & Ronald Meltzer, eds., *Human Rights and Development in Africa* (Albany: State University of New York Press, 1984) 82; Glenn, *Legal Traditions of the World*, *supra* note 16 at 167; J. J. Nasir, *The Status of Women Under Islamic Law and Under Modern Islamic Legislation*, 2nd ed. (London: Graham & Trotman, 1994); and D. Pearl & W. Menski, *Muslim Family Law*, 3rd ed. (London: Sweet & Maxwell, 1998).

¹²⁷ Qur'an, 4: 2-3. Although it is claimed that polygamy was partly allowed for the benefit of widows and orphans in Muslim societies, it violates the equality of genders before the law. See *Towards an Islamic Reformism*, *supra* note 2 at 176.

¹²⁸ *An Introduction to Islamic Law*, *supra* note 16 at 161; "The Rights of Women and International Law in the Muslim Context" *supra* note 118; and *Du statut inférieure de la femme en Islam*, *supra* note 126.

¹²⁹ Qur'an, 4:11 and 176. See also S. Tahir Mahmood, *Personal Law in Islamic Countries: History, text and Comparative Analysis* (New Delhi: Academy of Law and Religion, 1987); Stowasser, "The Status of Women in Early Islam" *supra* note 123; Freda Hussain, *Muslim Women*, *supra* note 123; Noel Coulson, *Succession in the Muslim Family* (Cambridge: Cambridge University Press, 1971).

¹³⁰ Qur'an, 4: 34. The discussion of the kinds and extents of *Qawama* in different readings of Qur'an is out of the object of this study. See *Towards an Islamic Reformism*, *supra* note 2 at 90 and 99-100; "Human Rights in the Muslim World" *supra* note 1 at 37.

¹³¹ Mehrpoor, *Human Rights in International Instruments*, *supra* note 119 at 236.

husband's permission to leave the house,¹³² travel,¹³³ or engage in any kind of work or profession. The man could withhold maintenance for her disobedience.¹³⁴

Only a man may initiate divorce -- through a unilateral repudiation. And he need not provide any reason to justify it. On the other hand, the woman must obtain either her husband's consent or a legal order on very specific grounds to get divorced.¹³⁵ The custody of the children also goes to the husband at two years old for boys and seven years old for girls.¹³⁶

Women's rights and positions in personal and family issues have resulted in even more restriction in public life. In fact, the dominant definition of a woman as a daughter, wife, or mother of a male, intrinsic to domestic-oriented laws of Shari'a, has long prohibited women from participating actively in social and public affairs. Moreover, women are disallowed to adjudicate as judges, nor to take part in the leadership of Muslim societies.¹³⁷

¹³² In some interpretations, the permission to leave the house is only for urgent issues, which is an orthodox understanding of the principle of *hijab* (veil) that, according to the majority of jurists, requires women to cover their hair and body except face and hands. See Qur'an, 24: 31 and 33: 33, 53, and 59. Also *Toward an Islamic Reformation*, *supra* note 2 at 99-100; Mawdudi, *Purdah and the Status of Women in Islam*, *supra* note 122.

¹³³ Iranian women willing to travel abroad, should by law secure the permission of their husbands or legal guardians. This issue will be discussed in the discourse of this chapter.

¹³⁴ Bellefonds, *Traité de droit musulman comparé*, *supra* note 125; Nasir, *The Islamic Law of Personal Status*, *supra* note 125. Also Fadela M'rabet, *La femme Algérienne suivi de les Algériennes* (Paris: Maspero, 1969) 143-65; "Human Rights in the Muslim World" *supra* note 1 at 38; Dawoud Sudqi al-Alami, *The Marriage Contract in Islamic Law, in the Shari'ah and Personal Status Laws of Egypt and Morocco* (London: Graham & Trotman, 1992); and Malladi Subbamma, *Islam and Women*, trans. by M. V. Ramamurty (New Delhi: Sterling, 1988).

¹³⁵ Qur'an, 2:226-32; *An Introduction to Islamic Law*, *supra* note 16 at 163-4.

¹³⁶ Ascha, *Du statut inférieur de la femme en Islam*, *supra* note 126; Elizabeth W. Fernea, *Women and the Family in the Middle East: New Voices of Change* (Austin: University of Texas Press, 1985); Nikki Keddie & Beth Baron, eds., *Women in Middle Eastern History: Shifting Boundaries in Sex and Gender* (New Haven: Yale University Press, 1991); Amira el-Azhary Sonbol, ed., *Women and the Family and Divorce Law in Islamic History* (Syracuse: Syracuse University Press, 1996).

¹³⁷ Mehrpoor, *Human Rights in International Instruments*, *supra* note 119 at 228-32; Mohammad Hussein Tabataba'e, *Al-Mizan fi Tafsir al-Qur'an* [al-Mizan Interpretation of Qur'an] vol. 4 (Tehran:

Regarding evidence, the woman's testimony is not accepted at all in serious criminal cases which involve the application of certain *hudud* and *qysas*¹³⁸ punishments. In other cases and civil subjects, the testimony of two women is equal to that of a man.¹³⁹ In other words, if it took the testimony of two males to prove a case, the testimony of four female or a male accompanying two female witnesses would be necessary to prove the same case.¹⁴⁰

In *diya* (monetary compensation paid to surviving blood relatives of a victim), the general rule of Shari'a is that the *diya* of a woman is half that of a man. In other words, a male murderer would not be retaliated (*qysas*) for killing a woman unless her family pays him half a full *diya* (*diya* of a Muslim male) in advance.¹⁴¹

Muslim jurists and Shari'a advocates have always tried to justify Shari'a gender-biased laws by comparing them to women's situation in pre-Islamic period (in case of personal issues); by referring to physical, mental, and emotional differences between men and women (in family matters); and by pointing to women's different social duties and obligations which result in different rights (in public affairs).¹⁴² These

Bunad-e Ilmi wa Fikri-e Allamah Tabataba'i, 1992). Also generally Deniz Kandiyoti, *Women, Islam and the State* (Philadelphia: Temple University Press, 1991); Homa Hoodfar, "The Veil in Their Minds and on Our Heads: The Persistence of Colonial Images of Muslim Women" (1995) 22 *Resources for Feminist Research* 5-18; Barbara Stowasser, "Women's Issues in Modern Islamic Thought" in Judith E. Tucker, *Arab Women: Old Boundaries, New Frontiers* (Bloomington: Indiana University Press, 1993) 3-28.

¹³⁸ See *supra* notes 62 and 78.

¹³⁹ Qur'an, 2: 282.

¹⁴⁰ "Human Rights in the Muslim World" *supra* note 1 at 39; Amina Wadud-Mohsin, *Qur'an and Women* (Kuala Lumpur: Penerbit Fajar, 1992); Khan, *Women in Islamic Shari'ah*, *supra* note 123; and Doi, *Women in the Shari'a*, *supra* note 123.

¹⁴¹ Qur'an, 2: 179, 186; 5: 45; 6: 92, 94, and 135; Bassiouni, "Qesas Crimes" *supra* note 78 at 203-209; and "Human Rights in the Muslim World" *ibid.* at 39.

¹⁴² Fazlur Rahman, "The Status of Women in the Qur'an" *supra* note 122; al-Hibri, *Women and Islam*, *supra* note 123; Nasir, *The Islamic Law of Personal Status*, *supra* note 125; Mawdudi, *The Islamic Law and Constitution*, *supra* note 21 at 287. Mawdudi complained that "the limited and conditional freedom that women had been allowed by Islam in matters other than home science is being used [in the work of

reasons, the discussion of which is beyond the object of this study, fail to justify the great differences between the rights of men and women in Shari'a. The great social, economic, and political changes that occurred in human societies in modern times necessitate an alternative to the traditional male-centered approach of the past; respect for the principle of equality of genders before the law.¹⁴³ Human rights are conferred on individuals because of their humanness, and not as a result of their duties and obligations to the family or social milieu recognized in Shari'a.

One may conclude that women's rights in Shari'a do not comply with, and violate, the principle of equality of rights for all human beings before the law. In fact, Shari'a considers women second-class citizens in Muslim societies. This inferior position affects women from early childhood and places before them many obstacles to proper socialization and active participation in public affairs.¹⁴⁴ Any proper legal system should, first, conceptualize a woman as an independent individual and a person with rights separate from her status in the family. It must also legally guarantee these

Muslim feminists] to encourage the Muslim women to abandon home life and its responsibilities like the European women and make their lives miserable by running after political, economic, social and other activities shoulder to shoulder with men." *Purdah and the Status of Women in Islam*, *supra* note 122 at 24.

¹⁴³ In practice, most Muslim countries, keeping some elements of Shari'a system of personal status, have included many reforms improving the rights of women. See Anderson, *Law Reforms in the Muslim World*, *supra* note 122; *Islam and Human Rights, Tradition and Politics*, *supra* note 49 at 114; "Human Rights in the Muslim World" *supra* note 1 at 2-6; *Shifting Boundaries in Sex and Gender*, *supra* note 136; Herbert L. Bodman & Nayereh Tohidi, eds., *Women in Muslim Societies: Diversity Within Unity* (Boulder, CO: Lynne Rienner, 1998); Shahin Gerami, *Women and Fundamentalism: Islam and Christianity* (New York: Garland, 1996); Freda Hussain, *Muslim Women* (London: Croom Helm, 1984); Sajda Nazlee, *Feminism and Muslim Women* (London: Ta-Ha, 1996); Barbara Stowasser, "Gender Issues and Contemporary Qur'an Interpretation" in *Islam, Gender, and Social Changes*, *supra* note 118 30-44.

¹⁴⁴ See "Human Rights in Muslim World" *ibid.* at 39; Ascha, *Du ststut inférieure de la femme en Islam*, *supra* note 126; Vieille, "Iranian Women in Family Alliance and Sexual Politics" in Lois Beck & Nikki Keddie, eds., *Women in the Muslim World* (Cambridge: Harvard University Press, 1978) 451.

rights and freedoms in private and public life.¹⁴⁵ This study will refer to women's rights in international conventions in the next section of this chapter.¹⁴⁶

2. The Rights of Religious Minorities

Gender and faith are the two main criteria in the entitlement of human rights and freedoms in Shari'a. Like women, religious minorities, too, do not enjoy equal rights in Shari'a system of human rights and, therefore, are treated as second-class citizens in Muslim communities. Not surprisingly, non-Muslim females are subject to more discriminations than their male counterparts.¹⁴⁷

It is worth pointing out that discriminatory laws against religious minorities was common to almost every part of the world, especially where a Christian majority exercised its authority over other minorities.¹⁴⁸ With regard to religious tolerance, it is true that Islam followed the norm, and did not abolish the principle of unequal entitlement among people of different faiths. However, based on the Qur'anic verses,¹⁴⁹

¹⁴⁵ Fedwa Malti-Douglas, *Women's Body, Women's World: Gender and Discourse in Arabo-Islamic Writing* (Princeton: Princeton University Press, 1992); Azadeh Kian, "L'émergence d'un discours féminin indépendant: un enjeu de pouvoir" (1997) 47 *Les Cahiers de l'Orient* 55-72; Yvonne Y. Haddad, "Islam and Gender: Dilemmas in the Changing Arab World" in *Islam, Gender, and Social Change*, *supra* note 118 at 3-29.

¹⁴⁶ Carol E. Lockwood; Daniel B. Magraw; Margaret F. Spring, *et al.*, eds., *The International Human Rights of Women, Instruments of Change* (USA: American Bar Association, 1998); "The Rights of Women and International Law in the Muslim Context" *supra* note 118 491; The 1979 Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, G.A. Res. 34/180, 34 U. N. GAOR Supp. No. 46, at 193, UN Doc. A/34/46 (1979).

¹⁴⁷ *Islam and Human Rights, Tradition and Politics*, *supra* note 49 at 147-52.

¹⁴⁸ *Ibid.* at 148; A. H. Siddiqi, *Non-Muslims Under Muslim Rule and Muslims Under Non-Muslim Rule* (Karachi: Jamiyat al-Falah, n. d.); Benjamin Braude & Bernard Lewis, eds., *Christians and Jews in the Ottoman Empire*, 2 vols. (New York: Holmes & Meier, 1982).

¹⁴⁹ As an example, see Qur'an, 2:256 in which it forbids any compulsion in religion.

Islam reduced the scope of inequality to an acceptable level, according to the standards of the time.¹⁵⁰ As Mayer observes, it is fair to say that “the Muslim world, when judged by the standards of the day, generally showed far greater tolerance and humanity in its treatment of religious minorities than did the Christian West.”¹⁵¹

Shari’a laws with respect to non-Muslims, nevertheless, violate modern human rights standards.¹⁵² Clearly, it is the duty of Muslim jurists to reinterpret Shari’a laws in order to promote the rights of non-Muslims in Islamic countries. The historical fact that religious minorities enjoyed better conditions in Muslim communities, than in other societies, should guide contemporary Muslims to maintain the same level of rights entitlement for non-Muslims, in accordance with modern international human rights standards. This is what Islamic reformism is all about.¹⁵³

Before examining the rights of religious minorities, it should be pointed out that Shari’a divides non-Muslims in two categories.¹⁵⁴ First, *ahl al-kitab* (the people of the book) who believe in one of the divine religious scriptures recognized in Islam. These are the Christians and Jews -- and the Zoroastrians in the Shi’ite school of Shari’a.¹⁵⁵

¹⁵⁰ A. Ahmed An-Na’im, “Religious Minorities Under Islamic Law and Limits of Cultural Relativism” (1987) 9 H. R. Quart. 1-18.

¹⁵¹ *Islam and Human Rights Tradition and Politics*, *supra* note 49 at 148.

¹⁵² “Religious Minorities Under Islamic Law” *supra* note 150 1-18.

¹⁵³ Mahmassani, *Arkan Huquq al-Insan*, *supra* note 54 at 260-64 and 281; S. M. Haider, ed., *Islamic Concept of Human Rights* (Lahore: Book House, 1978) at 213-37; Leonard Binder, *Islamic Liberalism* (Chicago: University of Chicago Press, 1988) at 246-92.

¹⁵⁴ Mawdudi, *Islamic Law and Constitution*, *supra* note 21 at 299.

¹⁵⁵ See Bernard Lewis, *The Jews of Islam* (Princeton: Princeton University Press, 1984); Rudolph Peters, *Islam and Colonialism, The Doctrine of Jihad in Modern History* (The Hague: Mouton, 1979); Majid Khadduri, *War and Peace in the Law of Islam*, (Baltimore: John Hopkins Press, 1955) at 176; Abbas-Ali Amid-Zanjani, *Huquq-e Aghalliyat’ha-ye Dini dar Islam* [The Rights of Religious Minorities in Islam] (Tehran: Islamic Cultural Publications Office, 1988) at 65; A. S. Tritton, *The Caliphs and Their Non-Muslim Subjects: A Critical Study of the Covenant of Umar* (London: Cass, 1970); Antoine Fattal, *Le statut légal des non-Musulmans en pays d’Islam* (Beirut: Imprimerie Catholique, 1958).

The second group, the unbelievers, includes all other non-Muslim minorities.¹⁵⁶ This section of the thesis is concerned with the status of *ahl al-kitab*, whose rights are mentioned in Shari'a in detail. Unbelievers are not considered as permanent residents in *dar al-Islam* (Islamic territories).¹⁵⁷ They may stay -- mainly for security reasons -- in Islamic territories as long as their contract (*aman*) with an Islamic government permits; or they may leave or convert to Islam or another recognized religion and thereby be entitled to live under Shari'a laws according to the faith they choose.¹⁵⁸

Under Shari'a law, recognized religious minorities (*dhimmis*) should also arrange a contract (*dhimma*) with Muslim authority.¹⁵⁹ *Dhimma* contract grants them tolerance within the Muslim community; in this way, security of property and life is guaranteed. They may freely practice their religions among themselves, though without any missionary purpose. They are also exempted from military services.¹⁶⁰ In return, they pay *jizya*¹⁶¹ (a special poll tax), obey Islamic rule, and respect Shari'a laws.¹⁶²

¹⁵⁶ Ibrahim Shihata, "Islamic Law and the World Community" (1962) 4 Harvard Int'l Club J. 101-113; and Khadduri, *War and Peace in the Law of Islam*, *ibid.*

¹⁵⁷ *War and Peace in the Law of Islam*, *ibid.* at 163-69; William M. Watt, *Muhammed, Prophet and Statesman* (Oxford: Oxford University Press, 1971).

¹⁵⁸ Khadduri & Liebesny, *Law in the Middle East*, *supra* note 16 at 361-62; Muhammad Hamidulah, *Muslim Conduct of State* (Lahore: Sh. M. Ashraf, 1966) at 201; Shihata, "Islamic Law and the World Community" *supra* note 156 at 101-13.

¹⁵⁹ *Law in the Middle East*, *ibid.* at 177 and 195; *Islamic Law and Constitution*, *supra* note 21 at 300-303; *Huquq-e Aghalliat 'ha-ye Dini dar Islam*, *supra* note 155 at 84; Tabandeh, *A Muslim Commentary on the Universal Declaration of Human Rights*, *supra* note 85 at 15-18 and 36-37. Also generally Fattal, *Le status légal des non-Musulmans en pays d'Islam*, *supra* note 155; Mawdudi, *Human Rights in Islam*, *supra* note 4 at 21-22.

¹⁶⁰ *Islamic Law and Constitution*, *ibid.* at 312-14; Siddiqi, *Non-Muslims Under Muslim Rule and Muslims Under Non-Muslim Rule*, *supra* note 148 at 1-9.

¹⁶¹ Qur'an, 9: 29.

¹⁶² According to Tabandeh, *ahl al-kitab* deserve respect because of their belief, but "since their faith has not reached the highest level of spirituality, but obeys commands which we believe to have been abrogated, and puts other laws in place of these revealed through Islam by the means of the Prophet and the most righteous judge, therefore [Shari'a] makes certain differences between them and Muslims, treating them as not on the same level." *A Muslim Commentary on the Universal Declaration of Human Rights*, *supra* note 85 at 18.

According to Shari'a laws, religious minorities may enjoy full autonomy and self-administration in personal and family matters. They are free to conduct their personal affairs according to the rules of their own religions, unless a Muslim is involved-- as in marriage and inheritance, in which case Shari'a laws prevail.¹⁶³

In public law, they remain under Shari'a jurisdiction and are less free than they are in personal law.¹⁶⁴ Shari'a prohibits them from taking part in the politics of the Muslim community in order to prevent them from achieving *vilaya* (guardianship) over Muslims.¹⁶⁵ Socially, although a Muslim man, in some schools, may marry a non-Muslim woman, contrary to Article 16 of the UDHR,¹⁶⁶ the marriage of a non-Muslim male with a Muslim female is not allowed. The reason here again, is to avoid non-Muslim's *vilaya* over a Muslim woman in the family and to secure the faith of the children in the marriage.¹⁶⁷ Non-Muslims also face some restriction on home-building and on constructing the places of worship,¹⁶⁸ on transactions,¹⁶⁹ and on travel¹⁷⁰ in Muslim lands.

¹⁶³ Tabandeh, *ibid.* at 15-18; *Human Rights in Islam*, *supra* note 4 at 30; S. D. Goitein, "Minority Self-Rule and Government Control in Islam" (1970) 31 *Studia Islamica* 101-16; and *An Introduction to Islamic Law*, *supra* note 16 at 170.

¹⁶⁴ Goitein, *ibid.*; *War and Peace in the Law of Islam*, *supra* note 155 at 198; Siddiqi, *Non-Muslims under Muslim Rule and Muslims under Non-Muslim Rule*, *supra* note 148 at 1-9.

¹⁶⁵ Qur'an, 3: 28, 5:51, and 61:1.

¹⁶⁶ Article 16 of the UDHR states: "1. Men and women of full age, without any limitation due to race, nationality, or religion, have the right to marry and to found a family. ..." The UDHR, *supra* Chapter One note 20 art. 16.

¹⁶⁷ Qur'an, 4: 141, which forbids a non-Muslim to exercise authority over a Muslim; and since Qur'an entails the husband to exercise authority over his wife, it follows that a *dhimmi* man may never marry a Muslim Woman. See *Toward an Islamic Reformation*, *supra* note 2 at 229. Both men and women are prohibited from marrying an unbeliever, the one who does not believe in any of the recognized religions. See Qur'an, 2:21, 5:5 and 9:10.

¹⁶⁸ *Islamic Law and Constitution*, *supra* note 21 at 309.

¹⁶⁹ According to Shi'ite school of Shari'a, if a non-Muslim purchases a land from a Muslim, he is required to use the equal of one-fifth of the land's value for specific charitable purposes. Amid-Zanjani, *Huquq-e Aghalliat 'ha-ye Dini dar Islam*, *supra* note 155 at 200-202.

¹⁷⁰ Such as entering mosques and holly shrines. *Ibid.* at 173-77.

In criminal law, a *diya*¹⁷¹ is far lower for non-Muslims than for Muslims, their reputation with respect to *gadhf* crime (false accusation of fornication) is less valuable than that of Muslims, and their testimony is accepted rarely and only in specific cases.¹⁷² They face more discrimination in this field as well.¹⁷³

Muslim jurists and scholars have long tried to explain and justify¹⁷⁴ these restrictions and discriminations based on the idea that, in the Islamic ideological state, people are classified according to their faiths; and that people of different faiths enjoy different rights and freedoms in order to assure Muslims' authority to run the state, and their *vilaya* in all public affairs.¹⁷⁵

Evidently religious minorities are not treated with full equality before the law, like Muslims. This conflicts with modern human rights standards. Non-Muslims' status in Shari'a, along with the idea in some schools that they are unclean and filthy (*nijasad*), prohibits them from full socialization with their Muslim counterparts. This, in turn, undermines religious pluralism of Muslim communities.¹⁷⁶ The recognition of full religious freedom for all human beings, regardless of their faiths and religions, with

¹⁷¹ See *supra* note 78.

¹⁷² M. Safwat Safia, "Offenses and Penalties in Islamic Law" (1982) 26 *Islamic Quar.* at 149-59.

¹⁷³ Amid-Zanjani, *Huquq-e Aghalliat 'ha-ye Dini dar Islam*, *supra* note 155 at 170-77 and 201.

¹⁷⁴ Bassiouni, "Sources of Islamic Law and the Protection of Human Rights in the Islamic Criminal Justice System" *supra* note 19 at 21-22.

¹⁷⁵ *Islamic Law and Constitution*, *supra* note 21 at 241 and 295-98.

¹⁷⁶ In practice, with the rise of secular nationalism in Muslim world in the nineteenth century, *de jure* discrimination against non-Muslims diminished in the twentieth century. For example, they gained the legal status of citizenship on a par with Muslims. See *Islam and Human Rights, Tradition and Politics*, *supra* note 49 at 148-49; Hourani, *Arabic Thought in the Liberal Age*, *supra* note 27; Bernard Lewis, *The Emergence of Modern Turkey* (London: Oxford University Press, 1961). For Islam as a political ideology, see P. J. Vatikiotis, *Islam and the State* (London: Croom Helm, 1987); and Ishtiaq Ahmed, *The Concept of an Islamic State: An Analysis of the Ideological Controversy in Pakistan* (New York: St. Martin's Press, 1987).

equal rights before the law would be the right step towards religious pluralism in Islamic states.¹⁷⁷

¹⁷⁷ Many Muslim scholars have embraced the principle that full equality for all citizens is compatible with Islam. Subhi Mahmasani, for example, argued that there can be no discrimination based on religion in an Islamic system. See Mahmasani, *Arkan Huquq al-Islam*, *supra* note 54 at 260-64 and 281. For Tariq al-Bashiri's ideas, see Binder, *Islamic Liberalism*, *supra* note 153 at 246-92. See also Haider, *Islamic Concept of Human Rights*, *supra* note 153 at 213-37; *Islam and Human Rights, Tradition and Politics*, *supra* note 49 at 149-50; "A Modern Approach to Human Rights in Islam" *supra* note 126 at 85; A. Ahmed An-Na'im, "Religious Freedom in Egypt: Under the Shadow of the Islamic Dhimma System" in Leonard Swidler, ed., *Religious Liberty and Human Rights in Nations and in Religions* (Philadelphia: Ecumenical Books, 1986) at 43-59. The articles of the UDHR, the ICCPR, and the declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief will be presented in the next section.

II. A Short Review of Islamic Declarations on Human Rights

Before discussing human rights in Iran's legal and constitutional system, it would be helpful to examine some Islamic declarations on human rights in order to illustrate Islamic states' response collectively to the idea of human rights.

These declarations were originally formulated by Muslim states in response to the concept of human rights as it emerged in the 1970s and 1980s. The idea of human rights itself along with international support for the protection of human rights standards, regulated and codified within the International Bill of Human Rights, were too powerful to ignore or simply reject.¹⁷⁸ This, in fact, indicates the legitimacy of human rights theory, which derives from the notion of human honor and dignity and encompasses everyone.

Moreover, international pressure on some Islamic states, following numerous reports by international organizations, like the United Nations Human Rights Committee and Amnesty International, on their human rights record was also effective. Political interests were a primary motive behind these states' responses.¹⁷⁹

There are a few Islamic proposals on human rights, such as "the Universal Islamic Declaration of Human Rights"¹⁸⁰ and "the Draft of the Islamic Constitution"¹⁸¹

¹⁷⁸ *Islam and Human Rights, Tradition and Politics*, *supra* note 49 at 190-91; "Universal Versus Islamic Human Rights" *supra* note 94 at 402-403; "Islamic Rights or Human Rights: An Iranian Dilemma" *supra* note 94 at 276-77.

¹⁷⁹ See Michael Posner, "Reflections on the Vienna Conference" *Am. Society Int'l L. Newsletter*, Sept.-Oct. 1993, at 19-20; Liesl Graz, "Human Rights: The Vienna Declaration" *Middle East Int'l*, July 9, 1993, 14; "Universal Versus Islamic Rights" *ibid.* at 364; "Islamic Rights or Human Rights: An Iranian Dilemma" *ibid.* at 282-84.

¹⁸⁰ The Universal Islamic Declaration of Human Rights (the 1981 UIDHR) was issued by the Islamic

-- both conceived by Muslim scholars. There is also “the Cairo Declaration on Human Rights,” which was prepared and issued by state members of the Organization of the Islamic Conference (the OIC).¹⁸²

The Cairo Declaration was practically abandoned, and no specific committee supervises the implementation of rights and freedoms guaranteed therein. However, due to the fact that this important document was issued by Muslim states and declares the official position of the Muslim world on the issue of human rights, this section of the study will focus mainly on the Cairo Declaration, and examine the scope and extent of rights it guarantees, particularly the rights of women and religious minorities.

The Cairo Declaration is not an academic work, based on Shari’a sources, in response to the needs of the modern Muslim world. It is a codification of Shari’a laws on human rights as these have been received from the early jurists through the centuries. As discussed below, the influence of Shari’a in this declaration is, therefore, evident; Shari’a restrictions and limitations on this subject are generally reflected therein. The document may be considered a conservative response to the idea of human rights in the international arena, an attempt to justify the human rights situation in Muslim countries by resorting to Shari’a restrictive laws in this matter. Ironically, even

Council for Europe, a non-governmental organization affiliated with the Muslim World League, in 1981, reprinted in (1982) 4 European H.R. Report at 433-41 and in the Appendix of this thesis [hereinafter the 1981 Islamic Declaration]. See also Arkoun, *Rethinking Islam*, *supra* note 85 at 106.

¹⁸¹ Devised by the Islamic Research Academy of Cairo, affiliated with al-Azhar University, and published in (1979) 51 Majallat al-Azhar [Journal of al-Azhar] [hereinafter the 1979 al-Azhar Draft]. See *Islam and Human Rights, Tradition and Politics*, *supra* note 49 at 27.

¹⁸² Prepared in Tehran, Iran in December 1989, and issued by the OIC foreign ministers in Egypt on Aug. 5, 1990, [hereinafter the 1990 Cairo Declaration]. For English translation, see U.N. GAOR, World CONF. on H.R., 4th Sess., Item 5, U.N. Doc. A/CONF. 157/PC/62/Add. 18 (1993); reprinted in the Appendix of this thesis.

Shari'a laws in the social and public spheres, are barely visible in most of these countries.

The Cairo Declaration was inspired by international human rights law, and modeled after the International Bill of Human Rights, especially the Universal Declaration of Human Rights. It employs the format and terminology of international human rights documents but imposes Islamic criteria to restrict the scope and extent of the rights and liberties presented therein. The introduction of international human rights concepts with Shari'a content may be misleading. Subjecting the scope and protection of universal human rights to Shari'a limits contradicts modern theory of human rights, which believes in the non-religious nature of fundamental human rights and liberties.¹⁸³

The idea of modern human rights carries a secular meaning, and applies to all human beings regardless of their gender, religion, race, etc.¹⁸⁴ Furthermore, the concept of human rights reveals theoretical differences which hinder the convergence of different systems. The concept of rights in both Shari'a and the Cairo Declaration does not correspond to any modern theory of human rights enshrined in international human rights documents.¹⁸⁵

Using modern human rights language and Islamic content, the Cairo Declaration attempted to employ and Islamize modern human rights concepts to engage in the human rights movement internationally and to offer a humanitarian gesture by

¹⁸³ Thomas Buergenthal, "To Respect and to Ensure: State Obligations and Permissible Derogations" in Louis Henkin, ed., *The International Bill of Human Rights: The Covenant on Civil and Political Rights* (New York: Columbia University Press, 1981) at 72; "Universal Versus Islamic Human Rights" *supra* note 94 at 328-29; "Islamic Rights or Human Rights: An Iranian Dilemma" *supra* note 94 at 276-80; and *Islam and Human Rights, Tradition and Politics*, *supra* note 49 at 86-90.

¹⁸⁴ The UDHR, *supra* Chapter One note 20 art. 2.

¹⁸⁵ "Universal Versus Islamic Human Rights" *supra* note 94 at 328-29.

Muslim governments to the world. While Muslim jurists have always stressed that Shari'a respected and guaranteed human rights and liberties long before Western societies and international organizations,¹⁸⁶ the Declaration addresses some international human rights concepts, such as freedom of expression¹⁸⁷ and public participation in social and political affairs through general election.¹⁸⁸ These concepts have no equivalent in Shari'a.¹⁸⁹ The characteristics of the Cairo Declaration, therefore, makes it, as Mayer states, "a hybrid of international and Islamic elements, having no exact counterpart in the Islamic legal legacy."¹⁹⁰

In its English version, the Cairo Declaration employs the phrase "according to the law", which indeed refers to Shari'a and implies that all rights are subject to Shari'a restrictions.¹⁹¹ The Declaration itself refers to this fact. In Article 24, it states: "[a]ll the rights and freedoms, mentioned in this Declaration, are subject to the laws of the Islamic Shari'a"; and in Article 25, "[t]he Islamic Shari'a is the only authority (source) to interpret or explain any of the articles of this Declaration."¹⁹² Shari'a qualifications are then applied to all rights and liberties afforded in the Declaration to distort the

¹⁸⁶ Ann E. Mayer, "Current Muslim Thinking on Human Rights" and Bassam Tibi, "The European Tradition of Human Rights and the Culture of Islam" both in Francis M. Deng & A. Ahmed An-Na'im, eds., *Human Rights in Africa: Cross-Cultural Perspectives* (Washington, D. C.: Brookings Institution, 1990) at 133 and 118 respectively.

¹⁸⁷ The 1990 Cairo Declaration, *supra* note 182 art. 22(a).

¹⁸⁸ See *ibid.*, art. 23(b).

¹⁸⁹ Ann E. Mayer, "The Shari'ah: A Methodology or a Body of Substantive Rules?" in Nicholas Heer, ed., *Islamic Law and Jurisprudence: Studies in Honor of Farhat J. Ziadeh* (Seattle: University of Washington Press, 1990) 177-98.

¹⁹⁰ "Islamic Rights or Human Rights: An Iranian Dilemma" *supra* note 94 at 277.

¹⁹¹ As example, see the 1990 Cairo Declaration, arts. 12, 16, 19(d), and 22(b). Also the 1981 Islamic Declaration, Section 12 of the Preamble and arts. 1(b) and 20; and the 1979 al-Azhar Draft, arts. 29 and 43.

¹⁹² See also the 1981 Islamic Declaration (English version) The explanatory notes state that the term law means Shari'a.

modern meanings of those rights, and to restrict their objects and extents intended in international human rights documents.

In addition to theoretical problems, the reference to Shari'a could cause practical difficulties as well. In other words, the vagueness of Shari'a standards, as a body of different and often contradictory views and opinions on any subject even within the same school,¹⁹³ would result in different interpretations and different ways of implementing the rights indicated therein. This, in turn, gives a free hand to Muslim governments to deal with human rights issues arbitrarily by appealing to any desirable interpretation, rendering the protection of human rights practically ineffective, unlike the international human rights standards which enjoy universal characteristics and beyond any religious qualifications.¹⁹⁴ The obscurity, ambiguity, and vagueness of rights presented in the Declaration would certainly cause them to fall far below modern standards and may nullify the protection of those rights in practice. Other characteristics of the Cairo Declaration could be summarized in belief in the supremacy of revelation over reason -- revelation as the source of law "to establish and regulate human institutions and relationships",¹⁹⁵ -- the priority of duties and obligations over rights,¹⁹⁶ and the priority and precedence of social cohesion and interest over individuals' rights and interests.¹⁹⁷

¹⁹³ In fact, Muslim states that adhere to the Cairo Declaration follow different schools of Shari'a.

¹⁹⁴ "Universal Versus Islamic Human Rights" *supra* note 94 at 364, 402-403; and "Islamic Rights or Human Rights: An Iranian Dilemma" *supra* note 94 at 276-77 and 282-84.

¹⁹⁵ The 1981 Islamic Declaration, note 180, the Preamble. See also the 1990 Cairo Declaration, note 182, the preamble.

¹⁹⁶ The Cairo Declaration, art. 1 which refers only to the basic obligations and responsibilities of all people. The Preamble of the Islamic Declaration also indicates that "by the terms of our primeval covenant with God, our duties and obligations have priority over our rights."

¹⁹⁷ The 1990 Cairo Declaration, the Preamble and arts. 1(a) and 22(c); and the 1981 Islamic Declaration, the Preamble.

Rights of Women: The Cairo Declaration restricts the rights of women to the limits of Shari'a. It does not stress the equality of genders in rights before the law and the equal protection by the law.¹⁹⁸ Article 1(a) of the Declaration, while referring to the equality of all human beings in human dignity and basic obligations and responsibilities, falls short of stressing the equality of rights and freedoms for all. Moreover, it only refers to the equality of all people before the law (Shari'a) "without distinction between the ruler and the ruled,"¹⁹⁹ not between men and women.²⁰⁰ Article 6 of the Declaration reads:

(a) Woman is equal to man in human dignity, and has rights to enjoy as well as duties to perform; she has her own civil entity and financial independence, and the right to retain her name and lineage. (b) The husband is responsible for the support and welfare of the family.²⁰¹

Obviously, the equality of genders in dignity does not guarantee the equality of rights and liberties.²⁰² In addition, the article 6 of the Cairo Declaration does not specify women's duties; its reference to the family, however, clarifies that the traditional definition of family in Shari'a would apply here as well. In fact, the article

¹⁹⁸ *Islam and Human Rights, Tradition and Politics*, *supra* note 49 at 103-107.

¹⁹⁹ The Cairo Declaration, art. 19(a).

²⁰⁰ Contrary to article 26 of the International Covenant on Civil and Political Rights which states, "All persons are equal before the law and are entitled without discrimination to the equal protection of the law, ..." The ICCPR, *supra* Chapter One note 20 art. 26.

²⁰¹ The Cairo Declaration, art. 6(a) and 6(b).

²⁰² In contrast, the UDHR stresses that: "[a]ll humans are born free and equal in dignity and rights ..." The UDHR, *supra* Chapter One note 20 art. 1.

regards the man as the provider and maintainer,²⁰³ which in Shari'a corresponds to the duty to obedience by women.²⁰⁴

The Cairo Declaration, in its various articles, refers to other rights of women, such as the right to free movement and choice of residency,²⁰⁵ the right to work,²⁰⁶ and the right to marry.²⁰⁷ These imply Shari'a restrictions on women. In fact, the Declaration affords no right or liberty to women more than what is already contained in traditional Shari'a. Although it employs the format and terminology of international human rights documents, it limits the scope of the principle of equality to Shari'a laws.

The Islamic Declaration only refers to the "rights of married women"²⁰⁸ within Shari'a limits, and provides no provision for the rights of unmarried women. This confirms Shari'a position, where the contours of "an adult woman's life are primarily shaped by her domestic obligations to her husband as his wife and as the mother of his children."²⁰⁹ In contrast, the international human rights law focuses on the rights of individuals, irrespective of their marital status. Of course, some rights provisions deal with marriage, but marital status cannot primarily determine one's rights in international law.²¹⁰

²⁰³ The 1990 Cairo Declaration, art. 6(b).

²⁰⁴ The al-Azhar Draft stresses that the government should provide the means according to which "the wife would obey her husband ..." See the 1979 al-Azhar Draft, note 181 art. 19.

²⁰⁵ The Cairo Declaration, art. 12.

²⁰⁶ *Ibid.*, art. 13; the 1979 al-Azhar Draft, art. 38.

²⁰⁷ The Cairo Declaration, art. 5(a).

²⁰⁸ The 1981 Islamic Declaration, art. 20.

²⁰⁹ *Islam and Human Rights, Tradition and Politics*, *supra* note 49 at 123.

²¹⁰ *Ibid.* at 124.

Rights of Religious Minorities: It should be pointed out that the Cairo Declaration does not address the issue of minority rights. However, Shari'a being its source of reference and interpretation, the Declaration's approach to the rights of religious minorities is limited to Shari'a's restrictive laws. This means that the Cairo Declaration upholds the ideological nature of the Islamic state. Disregarding the realities of modern life in internal and international levels and modern concept of citizenship, it does not address the concept of nation/state, where all citizens are entitled to equal protection by the law regardless of their religious backgrounds.²¹¹

On the contrary, concerning the right to marry, the Cairo Declaration states that:

Men and women have the right to marriage, and no restrictions stemming from race, color, or nationality shall prevent them from enjoying this right²¹²

This article intentionally excludes restrictions on the basis of religion that, as explained, discriminates against both non-Muslims and women.

The Islamic Declaration also states, "Every person is entitled to marry, to found a family, and to bring up children *in conformity with his religion*, tradition and culture."²¹³ Its international counterpart in the Universal Declaration of Human Rights, however, stipulates that: "Men and Women of full age, *without any limitation due to race, nationality or religion*, have the right to marry and to found a family."²¹⁴ The

²¹¹ See the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, proclaimed by the UN General Assembly on Nov. 25, 1981, art. 2(2).

²¹² The 1990 Cairo Declaration, art. 5(a). See also the 1981 Islamic Declaration, art. 19(a).

²¹³ The Islamic Declaration, art. 19(a) [emphasis added].

²¹⁴ The UDHR, *supra* Chapter One note 20 art. 16(1).

qualification “in conformity with his religion” in Article 19(a) of the Islamic Declaration means that Shari’a criteria impose restrictions and judge the validity of a mixed marriage,²¹⁵ while in international law the right to marry is unqualified.

Unlike the Cairo Declaration, the Islamic Declaration expresses the rights of religious minorities, and guarantees their rights in personal and family status and civil matters to be governed either by Shari’a law or their own religious laws based on their choice.²¹⁶ It also provides moral precepts regarding non-Muslims. It prohibits Muslims from holding in contempt or ridiculing the religious beliefs of others and inciting hostility toward religious minorities.²¹⁷ The Islamic declaration, however, does not address the rights of non-Muslims in public or political affairs. Presumably, these rights are limited by Shari’a laws. Therefore, the Islamic Declaration does not provide anything more than what has already been afforded in Shari’a either, except that it, at least, touches the issue.

In summary, it may be said that the mere issuance of several Islamic declarations on human rights should be evaluated as a progress in human rights discourse in Muslim world. This proves the legitimacy of the idea of human rights and enhances the implementation of human rights standards in Muslim countries. The comparison of these declarations and international human rights documents could notify Muslims of fundamental differences in the principles, concepts, and standards of

²¹⁵ Mawdudi, *The Islamic Law and Constitution*, *supra* note 21 at 287; and Nasir, *The Islamic Law of Personal Status*, *supra* note 125 at 63-64.

²¹⁶ The 1981 Islamic Declaration, art. 10(b). According to the Arabic version of the article 10(b), only *ahl al-kitab* (the people of the book) who believe in one of the divine religions enjoy this right. This indicates that the Islamic Declaration endorses Shari’a discriminatory features with regard to unbelievers as well. The international law provides that a neutral and non-discriminatory law should be applied to all citizens of a country.

two system in theory and practice, and increase their awareness of Shari'a restrictions and shortcomings. This may help promote the idea of universal application of modern human rights standards in the Muslim world.

In practice, these declarations are inadequate, and do not respond to discriminatory laws in human rights field that exist in Muslim countries. They are not the product of academic research or analytical studies on Shari'a sources with a view to the needs of contemporary world; rather, they present the reactions of Islamic governments and conservative jurists to international concern over human rights violations in these countries. They reflect their willingness to accompany human rights movements in international arenas. The Islamic governments' appeal to Shari'a may well be a pretext to depart from international human rights law for political reasons.²¹⁸

²¹⁷ *Ibid.* art. 12(e).

²¹⁸ "Universal Versus Islamic Human Rights" *supra* note 94 at 364 and 402-403; "Islamic Law or Human Rights: An Iranian Dilemma" *supra* note 94 at 282-84.

III. Human Rights in Iran's Constitutional and Legal System

Introduction

The Iranian legal system is entirely based on Shari'a, its main source of legislation in constitutional and legal matters. In fact, Shari'a is regarded as the theoretical structure of the country's legal system, and provides the laws and regulations codified by the legislative branch of power and applied by the government.²¹⁹

This section examines how Shari'a theory of human rights is reflected in Iran's constitutional and legal system, in general, and in the rights of women and religious minorities in particular. First, we present a short history of the idea of constitutionalism in Iran and the structure and legitimacy of political power in the Islamic system of government in today's Iran. Then, we focus on the country's human rights law and the theoretical and legal shortcomings and deficiencies of its application. We highlight the system's contradictions in the light of modern human rights standards and international covenants, to which Iran continues to adhere. As a consequence of its adherence, Iran has faced various condemnations from international organizations.

Moreover, this section considers recent developments in the country's stand on human rights, with respect to its domestic and foreign policies-- especially after the 1997 presidential election, which resulted in the election of President Khatami, who

advocates the establishment of civil society and greater freedom in Iran. Although his philosophy has not yet worked its way through the country's legal system, it is reflected somewhat in the conduct of the executive branch and its by-laws, especially with respect to freedom of the press.²²⁰

A. A Brief History of Constitutionalism in Iran

The modern notion of constitutionalism entails a guarantee of equal rights for all citizens, equality before the law without discrimination on the basis of gender and religion, and equal participation in the political life of the country. The strict and impartial rule of law, individual rights and liberties, and social justice are of primary importance.²²¹ This notion of constitutionalism has been introduced relatively recently in the Islamic world.²²² The idea of constitutionalism, with its emphasis on individuals' rights and freedoms, has challenged the duty-oriented principles of Shari'a, and that is why Islamic jurists have often strongly rejected certain elements of constitutionalism, particularly the equality of rights for all citizens before the law.²²³

²¹⁹ "Islamic Rights or Human Rights: An Iranian Dilemma" *ibid.* at 273.

²²⁰ The issue of freedom of the press will be discussed in Chapter Four.

²²¹ Patrick J. Monahan, *Constitutional Law* (Concord, Ontario: Irwin Law, 1997) at 3-6; G. A. Beaudoin, ed., *Vues canadiennes et européennes des droits et libertés* (Cowansville, Quebec: Éditions Yvon Blais, 1989); H. Brun & G. Tremblay, *Droit constitutionnel*, 2nd ed. (Cowansville, Quebec: Éditions Yvon Blais, 1990); and P. W. Hogg, *Constitutional Law of Canada*, 3rd ed. (Toronto: Carswell, 1992).

²²² Hourani, *Arabic Thought in the Liberal Age*, *supra* note 27; Lahidji, "Constitutionalism and Clerical Authority" *supra* note 27 at 133-58; and Farhat Ziadeh, *Lawyers, the Rule of Law, and Liberalism in Modern Egypt* (Stanford: Hoover Institution, 1968).

²²³ Ishtiaq Ahmed, "An-Na'im on Constitutional and Human Rights Issues" *supra* note 45 at 62; Tabandeh, *A Muslim Commentary on the Universal Declaration of Human Rights*, *supra* note 85; Mawdudi, *Human Rights in Islam*, *supra* note 4; and Muhammad Asd, *The Principles of State and Government in Islam* (Berkeley: University of California Press, 1961).

Now that the Muslim *ummah* is divided into nation states, co-existing with a large number of people of other faiths, Muslims are well-advised to reconcile Shari'a laws with the principles of constitutionalism in the interest of respect for all human beings with equal citizenship rights in their countries.²²⁴

One of the major objectives of Islamic reformists, discussed in Chapter One, has been the promotion of the idea of constitutionalism in Muslim countries. This idea, they believe, is in conformity with Islamic principles and values. They seek its employment in the legal system of their countries in the hope of achieving the basic rights and freedoms necessary for bringing Muslim countries up to the level of development that exists in the West. The Constitutional movements of the last century or so, in different Muslim countries, have all served this important purpose.²²⁵

The movement against local despotism and the colonial powers and in favor of the rule of law and social justice flourished in Iran in the late nineteenth century, as it did in Turkey, Egypt, Russia, and Japan.²²⁶ The Iranians had been suffering in different ways from the presence of the colonial and imperialist powers of the time, namely,

²²⁴ See James P. Piscatori, *Islam in a World of Nation-States* (Cambridge: Cambridge University Press, 1986); Rahman, *Islam and Modernity: Transformation of an Intellectual Tradition*, *supra* note 5; Erwin I. J. Rosenthal, *Islam in the Modern National State* (Cambridge: Cambridge University Press, 1965); Voll, *Islam: Continuity and Change in the Modern World*, *supra* note 5; al-Awa, *On the Political System of the Islamic State*, *supra* note 42.

²²⁵ *Islam and Human Rights, Tradition and Politics*, *supra* note 49 at 51; Abu Sulayman, *The Islamic Theory of International Relations: New Directions for Islamic Theory and Thought*, *supra* note 80; Ishtiaq Ahmed, *The Concept of Islamic State: An Analysis of the Ideological Controversy in Pakistan* (New York: St. Martin's Press, 1987); Esposito, *Islam and Politics*, *supra* note 3; John L. Esposito, ed., *Islam and Development: Religion and Sociopolitical Change* (Syracuse: Syracuse University Press, 1980); and *Islam in Transition: Muslim Perspectives*, *supra* note 92.

²²⁶ Abul-Hadi, Hairi, *Shi'ism and Constitutionalism in Iran*, (Leiden: E. J. Brill, 1977); John Foran, *Fragile Resistance: Social Transformation in Iran from 1500 to the Revolution* (Boulder, CO: Westview Press, 1993); Jack A. Goldstone, ed., *Revolutions: Theoretical, Comparative, and Historical Studies* (San Diego: Harcourt Brace Jovanovich, 1986); Avetis Sultanzadeh, "Le mouvement révolutionnaire en Iran" in Cosroe Chaqueri, ed., *La social-démocratie en Iran* (Florence: Mazdak Press, 1979) 68-72.

Great Britain and Imperial Russia, whose support for tyranny they had witnessed.²²⁷ This movement entered a serious stage in the early years of this century, and led quickly to the Constitutional Revolution (1906-1911). A brief review of the events of this revolution, which occurred in two periods, and the position of *ulama* and liberals may be useful.

Popular demand for modernization and for the introduction of a constitution was the principal cause of the Constitutional Revolution.²²⁸ Social and commercial exchanges with other countries, the return of students from abroad, intellectuals and newspapers, writings published abroad and distributed inside the country -- all these allowed Iranians to become familiar with European progress. They were introduced to social and political developments which resulted in democracy and constitutionalism in Western countries. Naturally, they were eager to take their own society in that direction, by overturning despotic rule and autocracy.²²⁹ They had already experienced the Tobacco Movement (1889-1892) against tobacco concession to Major G. F. Talbot, an Englishman, which concession consisted of the right to produce, sell, and export the

²²⁷ Mansour Bonakdarian, *The Left Opposition to Sir Edward Grey's Iranian Policy, 1906-1912*, (Ph. D. thesis, University of Iowa, 1991); M. Bonakdarian, "Iranian Constitutional Exiles and British Foreign Policy Dissenters, 1908-1909" (1995) 27 *Int'l J. Middle East Studies* 177-93; Corroe Chaqueri, *L'Union soviétique et les tentatives des soviets en Iran* (Tehran: L'Institut Sultanzade pour la Recherche Ouvrière, 1983); Firuz Kazemzadeh, *Russia and Britain in Persia, 1864-1914* (New Haven: Yale University Press, 1968); Venessa Martin, "Hartwig and Russian Policy in Iran, 1906-1908" (1993) 29 *Middle East Studies* 1-21.

²²⁸ John Foran, "The Concept of Dependent Development As a Key to the Political Economy of Qajar Iran, 1800-1925" (1989) 22 *Iranian Studies* 5-56; J. Foran, ed., *A Century of Revolution: Social Movements in Iran* (Minneapolis: University of Minnesota Press, 1994); Alvin Y. So, *Social Change and Development: Modernization, Dependency, and World System Theories* (London: Sage, 1990).

²²⁹ Ervand Abrahamian, "The Causes of the Constitutional Revolution in Iran" (1979) 10 *Int'l J. Middle East* 381-414; Cosroe Chaqueri, "The Role and Impact of Armenian Intellectuals in Iranian Politics, 1905-1911" (1988) 41 *Armenian Rev.* 1-51; Foran, *Fragile Resistance*, *supra* note 226; Abdul-Hadi Hairi, "European and Asian Influences on the Persian Revolution of 1906" (1975) 62 *J. the Royal Society for Asian Affairs* 155-64; Mohammad-Reza Afshari, "The Pishavaran and Merchants in Pre-Capitalist Iranian Society: An Essay on the Background and Causes of the Constitutional Revolution" (1983) 15 *Int'l J. Middle East Studies* 133-55; and Nikki R. Keddie, *Roots of Revolution: An Interpretive*

entire tobacco crop of Iran.²³⁰ The movement, with the support of *ulama*, “involved a mass boycott of tobacco products throughout much of the country, marked the first time that the merchants as a class carried their protests to a successful political conclusion.”²³¹

The first phase of the Constitutional Movement started with a series of strikes and protests against the despotism of government officials, with the demand for justice and a parliament. These were followed by asylum-seeking at various shrines in Shahr-e-Ray, Qum, and the British embassy in Tehran. People of different walks of life, including *ulama* and liberal and radical intellectuals, took part in the coalition against the government. It led to Muzaffar al-Din Shah’s acceptance of a constitutional monarchy in August 1906.²³² In the same year, the first Majlis (Parliament) held its first session and soon introduced the 1906 Constitution, which established a secular form of parliamentary government. It redefined the powers of the Shah, the government and their responsibilities before the Majlis. It also granted men the right to vote and guaranteed freedom of the press.²³³

History of Modern Iran (New Haven: Yale University Press, 1981).

²³⁰ Janet Afary, *The Iranian Constitutional Revolution (1906-1911), Grassroots Democracy, Social Democracy, and Origins of Feminism* (New York: Columbia Univ. Press, 1996) at 29-30; Nikki R. Keddie, *Religion and Rebellion in Iran: The Tobacco Protest of 1891-1892* (London: Frank Cass, 1966); Mansoor Moaddel, “Shi’i Political Discourse and Class Mobilization in the Tobacco Movement of 1890-1892” (1992) 7 *Sociological Forum* 447-68.

²³¹ Afary, *The Iranian Constitutional Revolution*, *ibid.* at 30. Also Said Amir Arjomand, *The Shadow of God and the Hidden Imam: Religion, Political Order, and Social Change in Shi’ite Iran From the Beginning to 1890* (Chicago: Chicago University Press, 1984); and Hamid Algar, *Religion and State in Iran, 1785-1906: The Role of the Ulama in the Qajar Period* (Berkeley: University of California Press, 1969).

²³² Edward G. Browne, *The Persian Revolution of 1905-1909* (Washington, D. C.: Mage Press, 1995); John Foran, “The Strengths and Weaknesses of Iran’s populist Alliance: A Class Analysis of the Constitutional Revolution of 1905-1911” (1991) 20 *Theory and Society* 795-823; Hairi, *Shi’ism and Constitutionalism in Iran*, *supra* note 226.

²³³ Janet Afary, “Social Democracy and the Iranian Constitutional Revolution of 1906-19011” in Foran, *A Century of Revolution*, *supra* note 228 at 21-43; and Carl Boggs, *The Two Revolutions* (Boston: South

The movement allowed people to enter the political arena. Soon, numerous political parties and local and provincial associations were formed with modern social and democratic tendencies. Newspapers introduced the principles of modernity, democracy, and constitutionalism, and criticized the social and cultural traditions believed and practiced for a long time in the country.²³⁴

These developments evidently challenged as well the authority of the *ulama*, who had always kept administration of certain aspect of social life -- e. g., education and judiciary -- under their control. Heated debates arose when the Supplementary to the Constitution was introduced, and finally ratified in the following year.²³⁵

On the one hand, progressive liberals tried to ratify the equality of rights for all citizens, freedom of expression and association, and the secular principle of the separation of branches of government. On the other hand, the *ulama* (conservative clerics), led by Sheikh Fazlullah Nuri, who turned against the Revolution when he thought its ideas contradicted Shari'a, resisted the introduction of equality and freedom. They insisted on the supremacy of the Islamic laws. Although they succeeded in ratifying article 2 of the Supplementary to the Constitution which recognized the supreme authority of a committee of *ulama* in the Majlis (the veto power over parliamentary deliberations), they distanced themselves from the revolutionary

End Press, 1984).

²³⁴ Hamid Algar, "An Introduction to the History of Freemasonry in Iran" (1970) 6 *Middle East Studies* 276-98; Ann K. Lambton, "Secret Societies and the Persian Revolution of 1905-1906" in Ann K. Lambton, ed., *Qajar Persia* (Austin: University of Texas Press, 1987) 301-18; Sorour Soroudi, "*Sur-e Esrafil* [Newspaper], 1907-1908: Social and Political Ideology" (1988) 24 *Middle Eastern Studies* 230-43.

²³⁵ Said Amir Arjomand, "The Ulama's Traditionalist Opposition to Parliamentarism: 1907-1909" (1981) 17 *Middle Eastern Studies* 174-90; Mangol Philip Bayat, *Iran's First Revolution: Shi'ism and the Constitutional Revolution of 1905-1909* (New York: Oxford University Press, 1991). See also Michael M. Fischer, *Iran: From Religious Dispute to Revolution* (Cambridge: Harvard University Press, 1980);

movement, and drew closer to Muhammad Ali Shah, the new monarch, and other anti-revolutionary forces.²³⁶

This encouraged the Shah who was hostile to the Revolution from the beginning of his reign. He bombarded the Majlis, suspended the Constitution, and took power in his own hands. These events pushed the country into a phase known as the Lesser Autocracy (June 23, 1908- July 16, 1909), during which many revolutionary figures were executed or forced to flee to exile.²³⁷

Shortly thereafter, resistance flared up again from every corner. After fighting royalist forces in different parts of the country, especially in Tabriz, Azerbaijan, the revolutionary forces conquered Tehran, the capital, in July 1909. There they re-established the constitutional government marking the second period of this movement. The Shah was deposed and sent into exile. In his place, his twelve-year-old son, Ahmad Shah, was crowned, and represented by a regent. Sheikh Fazlollah Nuri, the highest-ranking cleric of Tehran, who had strengthened his position against the Revolution during the Lesser Autocracy, was also tried and executed, after the leading *ulama* of Najaf, Iraq, had confirmed his sentence on July 31, 1909. The Second Majlis was also formed.²³⁸

and Afary, *The Iranian Constitutional Revolution*, *supra* note 230 at 89-115.

²³⁶ Algar, *Religion and State in Iran*, *supra* note 231; Lahidji, "Constitutionalism and Clerical Authority" *supra* note 27; Amir Arjomand, "The Ulama's Traditional Opposition to Parliamentarism, *ibid.*"; Amir Arjomand, *Authority and Political Culture in Shi'ism*, *supra* note 27; Venessa Martin, "Shaikh Fazlallah Nuri and the Iranian Revolution, 1905-1909" (1987) 23 *Middle eastern Studies* 39-53.

²³⁷ Afary, *The Iranian Constitutional Revolution*, *supra* note 230 at 211-27; Hairi, *Shi'ism and Constitutionalism in Iran*, *supra* note 226; Browne, *The Persian Revolution of 1905-1909*, *supra* note 232.

²³⁸ Afary, *The Iranian Constitutional Revolution*, *ibid.* at 228-54; Theda Skocpol, "Rentier State and Shi'a Islam in the Iranian Revolution" (1982) 11 *Theory and Society* 265-304; Pierre Oberling, "The Role of Religious Minorities in the Persian Revolution, 1906-1912" (1978) 12 *J. Asian History* 1-29; Martin, "Shaikh Fazlallah Nuri and the Iranian Revolution" *supra* note 236 at 39-53; Asghar Fathi, "The

The Second Majlis was dominated by former anti-constitutionalists, landowners, tribe leaders with no interest in social and political reforms, and liberals with a radical social agenda that included separation of religion and the state. Moreover, an unsatisfactory handling of social and political affairs, such as the forcible disarmament of the revolutionary forces led by fold heroes like Sattar Khan and Baqir Khan, split the constitutional coalition. It also led to the re-treatment of the leading *ulama* and caused people to fear weak governments. All this prepared the ground for direct intervention by foreign powers, who always backed the deposed Shah and tried to weaken the new constitutional system in Iran.²³⁹

Under pressure from British and Russian troops stationed in the country, the Second Majlis was closed on December 24, 1911, and the Constitutional Revolution was practically brought to an end. The beginning of World War I and the military intervention of the allied powers, followed by the English-led coup d'état of Reza Khan in 1920 and the establishment of the Pahlavi dynasty, delayed the resurgence of the Iranian reform movements for decades.²⁴⁰

Role of the 'Rebels' in the Constitutional Movement in Iran" (1979) 10 Int'l J. Middle East Studies 53-66; Mansour Bonakdarian, "The Persia Committee and the Constitutional Revolution in Iran" (1992) 18 British J. Middle Eastern Studies 186-207; Janet Afary, "On the Origins of Feminism in Early Twentieth-Century Iran" (1981) 1 J. Women's History 65-87; Mangol P. Bayat, "Women and Revolution in Iran, 1905-1911" in Nikki R. Keddie & Lois Beck, eds., *Women in the Muslim World* (Cambridge: Harvard University Press, 1978) 295-308.

²³⁹ Abrahamian, "The Causes of the Constitutional revolution in Iran" *supra* note 229; Martin, "Hartwig and Russian Policy in Iran" *supra* note 227; Foran, "The Strengths and Weaknesses of Iran's Populist Alliance" *supra* note 232 at 795-823.

²⁴⁰ See Mohammad-Reza Afshari, "The Historians of the Constitutional Movement and the Making of the Iranian Populist Tradition" (1993) 25 Int'l J. Middle East Studies 477-94; Bonakdarian, *The Left Opposition to Sir Edward Grey's Iranian Policy*, *supra* note 227; Bonakdarian, "Iranian Constitutional Exile and British Foreign Policy Dissenters" *supra* note 227; Chaqueri, *L'Union soviétique et les tentatives des soviets en Iran*, *supra* note 227.

The Iranian Constitutional Revolution was not only a political movement against autocracy of the Shah and his government; it was also a cultural and social resurrection through ideas based on modernism, reformism, and progress. It had the potential of questioning the old cultural traditions in a religiously dominated society and criticizing the ideology that kept the country lagging behind. In practice, however, it was only the political aspects of the movement and protests against tyranny that had, in the early stages, attracted the *ulama* and grassroots participation into the revolution. The cultural and social aspects of the movement were, therefore, overshadowed, and society could not reach the theories and rationalism behind its demand.²⁴¹

Soon after that the 1906 Constitution was ratified and the intense debate followed over the articles of the Supplementary to the Constitution, people became, to some extent, familiar with modernism and democracy and their effects upon legislation and the conduct of government. The conservative clerics were first to distance themselves from the revolutionary forces over equality, liberties, and freedom of the press.²⁴² Although the three leading great *ulama*,²⁴³ residing in Iraq, continued to support the movement, especially in the Lesser Autocracy period, they were clearly

²⁴¹ Mohamad Tavakoli-Taraghi, "Refashioning Iran: Language and Culture During the Constitutional Revolution" (1990) 23 *Iranian Studies* 77-101; Soroudi, "*Sur-e Esrafil: Social and Political Ideology*" *supra* note 234; Nikki R. Keddie, "Historical Obstacles to Agrarian Change in Iran" in Charles Issawi, ed., *The Economic History of Iran: 1800-1914* (Chicago: University of Chicago Press, 1971) 54-57; Foran, "The Concept of Dependent Development As a Key to the Political Economy of Qajar Iran" *supra* note 228 at 5-56; Juan R. I. Cole, "Iranian Millenarianism and Democratic Thought in the Nineteenth Century" (1992) 24 *Int'l J. Middle East Studies* 1-26; Browne, *The Persian Revolution*, *supra* note 232; Afary, "On the Origins of Feminism in Early Twentieth-Century in Iran" *supra* note 238 at 295-308.

²⁴² Hairi, *Shi'ism and Constitutionalism in Iran*, *supra* note 226; Bayat, *Iran's First Revolution: Shi'ism and the Constitutional Revolution of 1905-1909*, *supra* note 235; Amir Arjomand, "The Ulama's Traditional Opposition to Parliamentarism" *supra* note 235 at 174-90. Also Moaddel, "The Shi'i Ulama and the State in Iran" (1986) 15 *Theory and Society* 519-56; and Skocpol, "Rentier State and Shi'a Islam in the Iranian Revolution" *supra* note 238 at 265-304.

²⁴³ Namely Khurasani, Mazandarani, and Tehrani. See Hairi, *Shi'ism and Constitutionalism in Iran*, *ibid.*

unaware of the philosophical and theoretical principles of constitutionalism and democracy and the rationalism behind them. They were more preoccupied with ridding the country of the Shah and expelling the foreign troops from Muslim lands than constitutionalism as such. Their low profile after the victory of the Revolution in its second phase confirms this.²⁴⁴

Lack of education and proper understanding of the rational principles of constitutionalism lost the people opportunity to safeguard their freedom and revolution, and to build a modern democracy based on human intellect and rationalism. Finally, their distrust of the new government and the Majlis's preoccupation with inter-factional disputes kept them away, putting an end to the Revolution. Foreign occupation of the country and the outbreak of the World War I exacerbated greatly Iran's internal difficulties.²⁴⁵

²⁴⁴ Mirza Muhammad Hussain Na'ini, one of the leading constitutionalist *Ulama*, in his book, *Tanbih al-Ummah wa Tanzih al-Millah*, expresses his approval of the constitutional limitations to autocratic power. He believed that establishing a useful and advantageous regime in parliamentary form meant the disappearance of wicked tyranny, and, thus, the parliamentary regime, in his view, becomes lawful in Islam. He also gives a full explanation of the separation of powers, and argues for the legitimacy of a constitutional regime from Islamic point of view. However, his arguments for freedom as opposed to slavery and not as individual rights and liberties, and freedom of expression as to enlighten ignorant people, clearly indicate that he did not know the meaning of freedom as understood in modern human rights law. Na'ini's view of equality is also derived entirely from an Islamic origin. For him, equality only meant the application of Shari'a laws without any discrimination. He sanctioned the constitution only if it is checked by religion. Na'ini's defense of constitutionalism, nevertheless, was of great importance, because his views were approved in writing by the highest-ranking Shi'a *Ulama* of the time. The first edition of his book appeared in Baghdad in 1909, followed by the second edition published in 1910 in Tehran. The third edition, introduced and annotated by S. Mahmoud Taleghani, was published in 1955 in Tehran. For detailed exposition of Na'ini's views, see Ha'iri, *Shi'ism and Constitutionalism in Iran*, *ibid.*; and Fereshteh Nouraei, "The Constitutional Ideas of a Shi'ite Mujtahid [Religious Scholar]: Muhammad Husayn Na'ini" (1975) 8 *Iranian Studies* 234-47.

²⁴⁵ Tavakoli, "Language and Culture During the Constitutional Revolution" *supra* note 241 at 77-101; Kazemzadeh, *Russia and Britain in Persia*, *supra* note 227; Foran, "The Strengths and Weaknesses of Iran's Populist Alliance" *supra* note 232 at 795-823; Afary, *The Iranian Constitutional Revolution*, *supra* note 230 Chapters 10 and 11; Robert A. McDaniel, "The Shuster Mission and the Persian Constitutional Revolution (Minneapolis: Bibliotheca Islamica, 1974).

Iranian society was theoretically accustomed only to the products of secularism and modernism -- namely, constitutionalism and parliament. In fact, it failed to acknowledge and to appreciate the theoretical foundations and rational principles of modernism. There was no critique of age-old religious, cultural and social traditions; traditional institutions were never questioned.²⁴⁶

Constitutionalist personalities, even when well-informed, mostly refrained from addressing or criticizing the traditional institutions, perhaps for fear of negative public reactions. A few liberals, intellectuals, and outspoken newspapers raised these topics. But they attacked only religious culture and clergy, which was far from intellectually questioning the theoretical and theological foundations of those traditions.²⁴⁷ They failed to elaborate the basic principles of modernism and constitutionalism rationally. The way they dealt with these issues never gained popularity in a highly illiterate society.²⁴⁸

Differences between the conservative *ulama* and the liberal and constitutional forces were never settled in the constitutional era. In fact, the contradictions remain today. It is, however, part of the legacy of the Constitutional Revolution -- i.e. the openness it brought to the country before the challenges of the modern era and the

²⁴⁶ Cole, "Iranian Millenarianism and Democratic Thought in the Nineteenth Century" *supra* note 241 at 1-26; and Afshari, "The Historians of the Constitutional Movement and the Making of the Iranian Populist Tradition" *supra* note 240 at 477-94.

²⁴⁷ Such as the case of *Habl al-Matin* Newspaper that "questioned Muslim-Arab culture in Iran's history and the clergy's passivity and irresponsibility in social affairs", and "spoke of the advent of Islam as an unfortunate event because it brought Arab culture to the nation." The newspaper was then severely criticized, and closed down by the government. See Afary, *The Iranian Constitutional Revolution*, *supra* note 230 at 289 and 116-140. See also Soroudi, "*Sur-e Esrafil*: Social and Political Ideology" *supra* note 234 at 230-43; and Afary, "Social Democracy and the Iranian Constitutional Revolution" *supra* note 233 at 21-43.

²⁴⁸ Foran, "The Strengths and Weaknesses of Iran's Populist Alliance" *supra* note 232 at 795-823; Foran, *A century of Revolution: Social Movements in Iran*, *supra* note 228; and Fischer, *Iran: From Religious*

tolerance of different opinions in the discourse on modernism and democracy. These have thoroughly inspired every social and political movement this century.²⁴⁹

Regarding the articles of the Constitution and the Supplementary to the Constitution, drawn up in 1906-1907, liberal constitutionalists had intended to follow Western models of constitution and bills of rights. They hoped to ratify laws that would limit the powers of authorities and guarantee fundamental rights and freedoms. Politically, they successfully recognized the principle of sovereignty of the nation and the establishment of a powerful parliament, limiting the power of the Shah in the constitution.²⁵⁰

In the area of human rights, the Supplementary to the Constitution offered the concepts of equality and freedom, guaranteeing civil and secular political rights in its provisions. It recognized the equality of all citizens, and protected freedom of the press and association and some other basic rights.²⁵¹ Emerging out of the struggle of modernism and tradition, however, the Constitution failed to institute the principle of separation of religion and state. The persistence of the conservative *ulama*, who demanded “Shari’a constitutionalism,”²⁵² resulted in the ratification of an article in the Supplementary to the Constitution that foresaw a council of clerics to ensure that no

Dispute to Revolution, supra note 235.

²⁴⁹ Even in the 1979 Revolution, the people’s primary demands, such as freedom and independence, as well as their opposition to tyranny and despotism were progressive and modern. What happened after the Revolution that led to the establishment of a theocratic government in Iran is another story. See Ervand Abrahamian, *Iran Between Two Revolutions* (Princeton: Princeton University Press, 1982); and Foran, *A Century of Revolution, ibid.*

²⁵⁰ Afary, *The Iranian Constitutional Revolution, supra* note 230 at 89; Browne, *The Persian Revolution of 1905-1909, supra* note 232; Laurence Lockhart, “The Constitutional Laws of Persia: An Outline of Their Origin and Development” (1959) 13 *Middle East J.* 372-88.

²⁵¹ See, for example, the 1907 Supplementary to the Constitution, arts. 8, 20, and 21.

²⁵² Martin, “Shaikh Fazlallah Nuri and the Iranian Revolution” *supra* note 236 at 39-53; and Ha’iri, *Shi’ism and Constitutionalism in Iran, supra* note 226.

laws passed in Majlis contradicted Shari'a laws.²⁵³ In addition, in several articles, "religious criteria was invoked as justifications for restricting constitutional rights."²⁵⁴ For example, Article 20 of the Supplementary to the Constitution, guaranteeing freedom of the press, excludes heretical books or materials harmful to Islam. Article 21 restricts freedom of associations where this may provoke religious disorders.²⁵⁵ It was these restrictions in the Constitution, in the first year of the Constitutional Revolution, that caused some *ulama* to believe in the compatibility of constitutional rights and freedoms with the Shari'a. These articles, however, never satisfied others who opposed the very notions of equality and freedom, finding them contradictory to Shari'a laws.²⁵⁶

Nevertheless, the secular Pahlavi Shahs did not observe article 2 and other religious criteria; nor did they respect the fundamental human rights and freedoms guaranteed in constitutional provisions. In practice, the Pahlavi regime, backed by Western countries, and the United States in particular, left "a horrendous human rights record",²⁵⁷ which, as Mayer states, proves "the U.S. government's record of hypocrisy and double standards in human rights area."²⁵⁸ Ironically, all this happened in the 1960s and 1970s when the Iranian regime ratified the International Covenant of Civil and Political Rights, and took a leading role at the United Nations in promoting human

²⁵³ The 1907 Supplementary to the Constitution, art. 2.

²⁵⁴ *Islam and Human Rights, Tradition and Politics*, *supra* note 49 at 79.

²⁵⁵ The 1907 Supplementary to the Constitution, arts. 20 and 21.

²⁵⁶ Martin, "Shaikh Fazlallah Nuri and the Iranian Revolution" *supra* note 236 at 39-53; Bayat, *Iran's First Revolution: Shi'ism and the Constitutional Revolution*, *supra* note 235; Amir Arjomand, "The Ulama's Traditional Opposition to Parliamentarianism" *supra* note 235 at 174-90; M. Torkan, ed., *Rasa'el, Elamiyehha, Maktubat, va Ruznameh-e Shahid-e Shahid Fazlallah Nuri* [The Writings and Newspaper of Fazlallah Nuri] 2 vols. (Tehran: 1983/84).

²⁵⁷ "Islam and Human Rights: Different Issues, Different Contexts" *supra* note 113 at 119.

²⁵⁸ *Islam and Human Rights, Tradition and Politics*, *supra* note 49 at 6.

rights laws. And Tehran was selected as the venue for the United Nations International Conference on Human Rights in 1968.²⁵⁹

B. An Overview of the Constitution of the Islamic Republic of Iran

Soon after the victory of the 1979 Islamic Revolution, the provisional government prepared the draft text of the new constitution and submitted it to the Assembly of Experts, consisted of people's representatives, for ratification. The draft text was based on both Islamic principles and secular models borrowed from Western constitutions.²⁶⁰

With the steady increase in power of the conservative clerics, the *ulama*-dominated Assembly of Experts discarded the draft text on the assumption that it was a secular one and therefore incompatible with requirements of the Islamic Republic. The Assembly itself, then, prepared and ratified the final text of the constitution, which was approved in a referendum in December 1979. The constitution upholds Islamic beliefs and criteria in every aspect of legal and political life and in the rights and freedoms of all citizens of the country.²⁶¹

²⁵⁹ *Ibid.*

²⁶⁰ Asghar Schirazi, *The Constitution of Iran, Politics and the State in the Islamic Republic*, trans. by John O'Kane (London: I. B. Tauris, 1997) at 22-33; and *Islam and Human Rights, Tradition and Politics*, *ibid.* at 79.

²⁶¹ See Said Amir Arjomand, "Constitution of the Islamic Republic" (1993) 6 *Encyclopedia Iranica*; Gisbert Flanz, "A Comparative Analysis of the Constitution of the Islamic Republic of Iran" in A. P. Blaustein & G. H. Flanz, eds., *Constitutions of the World* (Dobbs Ferry, NY: Oceana, 1980); Hamid Dabashi, *Theology of Discontent: The Ideological Foundation of the Islamic Revolution in Iran* (New York: New York University Press, 1993).

Like the First Majlis of the Constitutional Era (1906-1907), the Assembly of Experts experienced the same challenges over different articles of the new constitution concerning politics, economy, and fundamental rights and liberties in the Islamic Republic. Once again, the particular challenge of the Constitution was the conflictual relationship between Western concepts and institutions, on the one hand, and Islamic standards, on the other.²⁶² This time, though, the conservatives were in the majority in the Assembly, and succeeded in introducing more religious criteria in the Constitution. Unlike the 1907 Constitution, which limited the power of the shah, the 1979 Constitution vests supreme power in the head of state, and embodies more Islamic norms and standards in its articles.²⁶³

Two unique characteristics of the Constitution of the Islamic Republic -- amended in 1989 in order to further centralize power²⁶⁴ -- differentiate it from constitutional democracies and the Western concept of republicanism.²⁶⁵ These characteristics are: the principle of *vilayat-e faqih*²⁶⁶ (the guardianship of the

²⁶² *Islam and Human Rights, Tradition and Politics*, supra note 49 at 79-80; and Schirazi, *The Constitution of Iran*, supra note 260 at 45-55.

²⁶³ Flanz, "A Comparative Analysis of the Constitution of the Islamic Republic of Iran" supra note 261; and Said Amir Arjomand, "Constitutions and the Struggle for Political Rights: A Study in the Modernization of Political Traditions" (1992) 33 *Archives of European Sociology* 39-82.

²⁶⁴ Mohsen Milani, "The Evolution of the Iranian Presidency: From Bani-Sadr to Rafsanjani" (1993) *British J. Middle Eastern Studies*, no. 2, 82-89.

²⁶⁵ In the sense of being based on the constitutional democracy.

²⁶⁶ For more on this institution, see Hamid Algar, "Islamic Government" in H. Algar, ed. & trans., *Islam and Revolution: Writings and Declarations of Imam Khomeini* (Berkeley: 1981) at 27-166; Roger M. Savory, "Ex Oriente Nebula: An Inquiry into the Nature of Khomeini's Ideology" in Peter J. Chelkowski & Robert J. Pranger, eds., *Ideology and Power in the Middle East: Studies in Honour of George Lenczowski* (Durham: Duke University Press, 1988) at 339-62; Said Amir Arjomand, *The Turban for the Crown: The Islamic Revolution in Iran* (New York: Oxford University Press, 1988); Mohsen Milani, "Shi'ism and the State in the Constitution of the Islamic Republic of Iran" in S. K. Farsoun & M. Mashayekhi, eds., *Iran: Political Culture in the Islamic Republic* (London: 1992) 133-59; Shahrouh Akhavi, "Contending Discourses in Shi'a Law on the Doctrine of Wilayat al-Faqih" (1996) 29 *Iranian Studies* 229-68; Roy Mottahedeh, "Wilayat al-Faqih" (1995) 4 *Oxford Encyclopedia of the Modern Islamic World* 320-22.

jurisprudent) and the supremacy and application of Shari'a laws in every public or private matter.

The system of governance based on the principle of *vilayat-e faqih*, elaborated by the late Ayatollah Khomeini in the 1960s²⁶⁷ and reflected in the 1979 Constitution, is derived from the core belief that authority originates from God, and ultimate sovereignty is affirmed in Him.²⁶⁸ Legitimate government, therefore, represents God on earth, directly or indirectly. According to the *Ithna Ashari* Shi'ite school of Shari'a²⁶⁹ (the official faith in the Constitution),²⁷⁰ after the Prophet Muhammad, leadership of the Muslim *ummah* rests in the institution of the *imamat* (the leadership of infallible Imams) which starts with Ali (the third caliph) and continues through his descendants.²⁷¹ In the view of some Shi'ite *ulama*, after the Greater Occultation of the Hidden Twelfth Imam,²⁷² beginning in 837-839 AD, according to different narrations, the *foqaha* (pl. of *faqih*), or *ulama*, represent the Hidden Imam, and may establish a

²⁶⁷ Ruhollah Khomeini, *Vilayat-e Faqih* (Tehran: 1982).

²⁶⁸ Amin, *Islamic Law and Its Implication for Modern World*, *supra* note 11 at 19.

²⁶⁹ Moojan Momen, *An Introduction to Shi'a Islam: The History and Doctrine of Twelver Shi'ism* (New Haven: Yale University Press, 1985); Yann Richard, *L'Islam Chi'ite: croyances et ideologies* (Paris: Fayard, 1991); Muhammad Husain Tabataba'i, *Shi'ite Islam*, ed. & trans. by S. Hossein Nasr (Albany: State University of New York Press, 1975).

²⁷⁰ The Constitution, art. 12. For the English translation of the Constitution, see Hamid Algar, trans., *Constitution of Islamic Republic of Iran* (Berkeley: Mizan Press, 1980); Blaustein & Flanz, *Constitutions of the Countries of the World*, *supra* note 261; "The Constitution of the Islamic Republic of Iran" (1980) 34 *Middle East J.* at 184-204. Selected articles of the Constitution are reprinted in the Appendix of this thesis.

²⁷¹ Amin, *Islamic Law and Its Implication for Modern World*, *supra* note 11 at 31-40; Moaddel, "The Shi'i Ulama and the State in Iran" *supra* note 242 at 519-56; Skocpol, "Rentier State and Shi'a Islam in the Iranian Revolution" *supra* note 238 at 265-304.

²⁷² Amir Arjomand, *The Shadow of God and the Hidden Imam*, *supra* note 231; Amir Arjomand, *Authority and Political Culture in Shi'ism*, *supra* note 27; Bayat, *Shi'ism and the Constitutional Revolution*, *supra* note 235; Ann Lambton, "A Reconsideration of the Position of the Marja' al-Taqlid [Source of Imitation, Religious Leader] on the Religious Institution" (1964) 20 *Studia Islamica* 115-35; and Hamid Dabashi, "Modern Shi'a Thought" (1995) 4 *Oxford Encyclopedia of the Modern Islamic World* 60-69.

legitimate government on earth on his behalf, i.e. the system of *vilayat-e faqih*.²⁷³ It presupposes a need for a supreme guide in the general conduct of the state. The *faqih* is uniquely qualified to provide such guidance to ensure the compliance of all laws with Shari'a and to enforce the application of Shari'a laws in the country.²⁷⁴

The Constitution of the Islamic Republic, too, vests sovereignty in God,²⁷⁵ not the people, and recognizes the institution of *vilayat-e faqih* as the system of governance to represent legitimately the sovereignty of God on earth. According to articles 5 and 107 of the Constitution, the Assembly of Experts on Leadership,²⁷⁶ composed of only the elected *ulama* by direct vote of people, appoints one of the qualified *foqaha* as the leader of the country for an unlimited period of time.²⁷⁷ The Assembly supervises his performance and could constitutionally remove him anytime. In practice, this is difficult, for the competency of candidates to run for the Assembly's election must be approved by those members of the Guardian Council²⁷⁸ that are appointed by the leader himself. Beyond these legal-technical obstacles, the role of the leader as God's

²⁷³ Roger M. Savory, "The Problem of Sovereignty in an Ithna Ashari (Twelver) Shi'i State" (1979) 11 Middle East Rev. at 5-11; Moaddel, "The Shi'a Ulama and the State in Iran" supra note 242 at 519-56; Abdulaziz Sachedina, *The Just Ruler (al-Sultan al-Adil) in Shi'ite Islam, The Comprehensive Authority of the Jurist in Imamite Jurisprudence* (New York: Oxford University Press, 1988).

²⁷⁴ See Mohammad Soroush, *Din wa Dolat dar Andish-ye Islami* [Religion and State in Islamic Thought] (Tehran: Assembly of Experts, 2000); Middle East Watch Report, *Guardians of Thought, Limits on Freedom of Expression in Iran* (New York: Human Rights Watch, 1993) at 10. The Preamble to the Constitution provides that "the Constitution lays the groundwork for the realization of the leadership of a member of the eminent clergy, who is recognized by the people as their leader ... in order to guarantee that various organizations do not deviate from their Islamic duties." The Constitution, supra note 270, the Preamble. See also Said Saffari, "The Legitimation of the Clergy's Right to Rule in the Iranian Constitution of 1979" (1993) British J. Middle Eastern Studies 64-81.

²⁷⁵ The Constitution, art. 56.

²⁷⁶ Not to be mistaken by the Assembly of Experts of the Constitution, which was dissolved after the ratification of the Constitution in 1979.

²⁷⁷ The Constitution, arts. 5 and 107.

²⁷⁸ See below, text accompanying note 295.

representative, and the common notion of complete obedience to him make his legal and peaceful removal very difficult.²⁷⁹

The leader, according to the Constitution,²⁸⁰ is to exercise governance and all the responsibilities arising therefrom. All three branches of government operate under his supervision.²⁸¹ He appoints the head of the judiciary branch, appoints the jurist members of the Guardian Council to supervise the parliamentary laws, and confirms the president-elect's decree.²⁸² Therefore, unlike Western constitutions, the idea of three separate branches is "not to maintain a system of checks and balances, but simply to facilitate management of affairs."²⁸³ The leader is also the supreme commander-in-chief of the armed forces, with the power to appoint and dismiss the commanders of the armed forces.²⁸⁴ Constitutionally, he enjoys many other powers over state affairs and, in practice, there is no limit to his power. He appoints his representatives in all provinces, foundations, institutions, universities, and other organizations. According to the interpretation of the Guardian Council, the institution of *vilayat-e faqih* and the leader's decrees and words are placed above the Constitution and other laws.²⁸⁵

²⁷⁹ Said Amir Arjomand, "Qavanin-e Asasi-ye Iran dar Chaharchub-e Tarikhi va Tatbiqi" [Iran's Constitutions in a Historical and Comparative Perspective] (1993) 16 *Negah-e Now* [J.] 6-19; Khalil Khalilian, *Qanun-e Asasi-ye Jomhuri-ye Eslami-e Iran* [The Constitution of the Islamic republic of Iran] (Tehran: 1979). See generally Ervand Abrahamian, *Khomeinism: Essays on the Islamic Republic* (Berkeley: 1993).

²⁸⁰ The Constitution, art. 107.

²⁸¹ *Ibid.* art. 57.

²⁸² *Ibid.* art. 110.

²⁸³ Reisman, "Some Reflections on Human Rights and Clerical Claims to Political Power" *supra* note 25 at 514.

²⁸⁴ The Constitution, art. 110.

²⁸⁵ This interpretation is theoretically based on the idea that, as the guardianship of *imam, vali-e faqih* (the qualified jurisprudent) also enjoys guardianship over the lives and properties of the people. This guardianship is exercised based on the principle of *maslaha* (see text accompanying note 21). Therefore, the power of the leader may not be limited to the Constitution or other laws. See the statement by Ayatollah Ali Meshkini, the speaker of the Assembly of Experts on Leadership, *Hamshahri Newspaper*, Tehran, Feb. 13, 2001; and Soroush, *Religion and State in Islamic Thought*, *supra* note 274. The

In sum, the leader unquestionably has the final word in all social and political affairs of the country. The legitimacy of the government, in general, derives from the leader, and obedience to him equals obedience to the Hidden Imam and God.²⁸⁶ It should also be mentioned that the 1989 Amendment to the Constitution, aiming at a more centralized political system, entered the concept of *vilayat-e motlaqeh-e faqih* (absolute guardianship of jurisprudent)²⁸⁷ into the Constitution, which constitutionalized the broad presence of the leader in every affair of the state. It empowered him more than before. It also put three branches of the government under his direct supervision.²⁸⁸

The system of governance based on the principle of *vilayat-e faqih* apparently is not a democratic system, in which the sovereignty is vested in the people, and the legitimacy of the government rests on the will of the people, not divine authority.²⁸⁹

unconstitutional creation of the Special Court for Clerics, to be discussed in Chapter Three, by late Ayatollah Khomeini is an example in this regard. See Schirazi, *The Constitution of Iran*, supra note 260 at 61-81 and 150-57. Also, in August 2000, Ayatollah Ali Khamenei, Iran's Supreme Leader, issued a decree banning the new reformist-dominated Parliament from carrying out plans to amend the country's tough Press law. He said his aim was to keep the press from falling into the hands of "the enemies of Islam, the Revolution and the regime." Agence France Presse, "International Criticism Mounts Over Crackdown on Iran's Press" Nicosia, Aug. 10, 2000.

²⁸⁶ Saffari, "The Legitimation of the Clergy's Right to Rule in the Iranian Constitution of 1979" supra note 274 at 64-81; Flanz, "A Comparative Analysis of the Constitution of the Islamic Republic of Iran" supra note 261; Shaul Bakhash, *The Reign of the Ayatollahs: Iran and the Islamic Revolution* (New York: Basic Books, 1984 and London: 1986); Lahidji, "Constitutionalism and Clerical Authority" supra note 27 at 133-58.

²⁸⁷ The Constitution, art. 5. See also Habibollah Peiman, *Dar Bareh-e Vilayat-e Motlaqeh-e Faqih* [About the Absolute Guardianship of Jurisprudent] (Tehran: 1988).

²⁸⁸ The Constitution, art. 57. Also Roger M. Savory, "Islam and Democracy: The Case of Islamic Republic of Iran" in C.G. Bosworth, Charles Issawi, Roger M. Savory, et al., eds., *The Islamic World from Classical to Modern Times, Essays in Honour of Bernard Lewis* (Princeton: Darwin Press, 1989) at 835-37.

²⁸⁹ It has been admitted by some proponents of this principle that this system is not democratic. They usually refer to Western democracies as "flawed and corrupt system of governments." Savory, "Islam and Democracy: The Case of Islamic Republic of Iran" *ibid.* at 827. See also R. M. Savory, "Muslim Perceptions of the West: Iran" in Bernard Lewis, Edmund Leites, & Margaret Case, eds., *As Others see Us: Muslim Perceptions, East and West* (New York: 1985-86). Ayatollah Mohammad-Taqi Mesbah-Yazdi, a prominent traditionalist figure of *howzah* (religious seminary) and ideologue of the far right, recently said, "The selection of the word 'republic' [in "the Islamic Republic of Iran"] was only to

Moreover, the system of *vilayat-e faqih* is not constitutional, for in a constitutional system the power of the authorities are constitutionally and practically limited, and no person's deeds or words are superior to the constitution or any other law. The system of *vilayat-e faqih*, it seems, is a theocratic system in the sense that the sovereignty and legitimacy of the government are derived from a divine authority, and a totalitarian one with God's spokesman enjoying unlimited power in the conduct of the government.²⁹⁰

The second major principle and characteristic of the 1979 Constitution is the belief in the supremacy of Shari'a over all types of constitutional and other laws, and, thus, the necessity of applying Shari'a laws in every aspect of public and private life. According to the constitution, all branches of law should be based on Shari'a. Article 4 reads:

All civil, penal, financial, economic, administrative, cultural, military, political laws and regulations, as well as any other laws or regulations, should be based on Islamic criteria. This article will, absolutely and generally, prevail over all of the articles of the Constitution, and other laws and regulations as well. Any judgment in regard to this will be made by the jurist members of the Guardian Council.²⁹¹

negate monarchy, and it did not imply the kind of democratic republic where everything is determined by public opinions and caprices." He added, "[“Republic”] meant a kind of republic whose sole aim is Islam. It is not like that we have another goal additional to Islam, meaning the republic, that would mean dualism." Aftab-e Yazd Newspaper, Tehran, February 3, 2001.

²⁹⁰ Houchang Chehabi, "Religion and Politics in Iran: How Theocratic Is the Islamic Republic?" (1991) 120 J. American Academy of Arts & Science 69-91; Suroosh Irfani, *Revolutionary Islam in Iran: Popular Liberation or Religious Dictatorship?* (London: Zed, 1983); and William O. Beeman, *Language, Status and Power in Iran* (Bloomington: Indiana University Press, 1986).

²⁹¹ The Constitution, *supra* note 270 art. 4.

This article provides that Shari'a constitutes the supreme law in Iran, and overrides the constitutional provisions, and the Guardian Council has the power even to declare these provisions, including those related to rights guarantees, contrary to Shari'a and, hence, not enforceable.²⁹² As An-Na'im points out, this "would negate the very concept and essential function of a constitution."²⁹³ The supremacy of Shari'a over the constitutional and other laws has also been emphasized in other articles of the Constitution.²⁹⁴

It should be pointed out that the Guardian Council consists of twelve members, six jurists to be selected by the leader, and six Muslim legal experts to be elected by the Parliament from the names submitted to it by the head of the Judiciary Branch.²⁹⁵ The Council verifies all the laws and regulations passed by the Parliament to make sure that they do not contradict Shari'a. Secular legislation and legal precedents are considered *ipso facto* invalid so far as they contradict Shari'a.²⁹⁶ The Council, which replaces the committee of *ulama* provided in the 1907 Supplementary to the Constitution, certainly has more power and greater scope for supervision.²⁹⁷

This characteristic of the Constitution, too, separates the Iranian political system from Western democracies, where the will of the majority of the people, or their

²⁹² *Islam and Human Rights, Tradition and Politics*, supra, note 49 at 36-37.

²⁹³ A. Ahmed An-Na'im, "Towards an Islamic Reformation: Responses and Reflections" in *Islamic Law Reform and Human Rights*, supra note 45 at 111.

²⁹⁴ As example, see arts. 61 and 72. Also Hosein Modarresi Tabataba'i, "Islamic Legislation and the Majority: A Discussion on the Basis for Validity of the Majority Opinion in Islamic Legislation" Summary of a paper presented at the John Olin Center for Inquiry into the Theory and Practice of Democracy, University of Chicago on May 9, 1985, in Schrazi, *The Constitution of Iran*, supra note 260 at 312; and Mehrpoor, *New Ideas in Legal Issues*, supra note 40 at 17-28.

²⁹⁵ The Constitution, art. 91.

²⁹⁶ Amin, *Islamic Law and its Implications for Modern World*, supra note 11 at 39.

²⁹⁷ Amir Arjomand, "Constitution of the Islamic Republic" supra note 261; Chehabi, "How Theocratic Is the Islamic Republic?" supra note 290 at 69-91; and Milani, "Shi'ism and the State in the Constitution of

representatives, is the source of law, and where no law can override the constitutional provisions.²⁹⁸

The legal system in Iran is entirely based on Islamic principles, and applies Shari'a laws in civil and criminal codes. In other words, the civil and criminal provisions, constitutional rights guarantees, legal protections and safeguards, procedural law, judicial standards, punishments, and the formation of legal courts are all based on Shari'a. All trials and hearings must apply Shari'a laws substantively and procedurally.²⁹⁹ Article 167, furthermore, notes that if a judge could not find the appropriate law to apply in a specific case, he is required to refer to Shari'a, and settle the case, which, at least in criminal cases, is against the principle of legality of crime and punishment for those Shari'a laws that are not codified in Iran's legal codes.³⁰⁰

The constitution, meanwhile, provides major constitutional standards of criminal justice and procedural safeguards for a fair trial and valid determination of guilt or innocence -- such as the principle of legality,³⁰¹ the benefit of legal advice before and during the trial stage,³⁰² the prohibition of arbitrary arrest³⁰³ and torture,³⁰⁴

the Islamic Republic of Iran" *supra* note 266 at 133-59.

²⁹⁸ Modarresi, "Islamic Legislation and the Majority" *supra* note 294.

²⁹⁹ Mehrpoor, *New Ideas in Legal Issues*, *supra* note 40 at 20-25; Khalilian, *The Constitution of the Islamic Republic of Iran*, *supra* note 279; and Schirazi, *The Constitution of Iran*, *supra* note 260 at 161-72.

³⁰⁰ In fact, article 167 contradicts articles 36, 169, and 37 of the Constitution which provide principles of equality, being innocent until proven guilty, and non-retroactivity of criminal laws, respectively, as well as article 15 of the ICCPR which, in part, reads: "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed." See the ICCPR, *supra* Chapter One note 20 art. 15.

³⁰¹ The Constitution, *supra* note 270 arts. 36 and 169.

³⁰² *Ibid.* art. 35.

³⁰³ *Ibid.* art. 32.

³⁰⁴ *Ibid.* art. 38.

the presumption of innocence until proven guilty by a competent court,³⁰⁵ and the inviolability of property.³⁰⁶ The creation of the new General Courts, however, had a negative impact on these safeguards. These courts replace all the existing courts in different fields, and provide for the abrogation of the function of the prosecutor. In other words, the judge acts as investigator, jury, and judge in a single phase study of a case.³⁰⁷ The General Courts and the power a judge enjoys in this system, established to expedite the legal process, definitely harm the rights of defendants and basic fair trial safeguards, especially where the definitions and cases of certain crimes requiring capital punishment -- such as *muharibah* (highway robbery; resorting to arms in order to frighten people) and *ifsad fi al-arz* (corruption on earth) -- are not clear and are left to the judge to decide.³⁰⁸ It should be borne in mind that, according to article 164 of the Constitution and its interpretation, the head of the Judiciary Branch, appointed by the leader, enjoys the power to appoint, remove, and change the position and location of all judges.³⁰⁹

It is noteworthy, in passing, that the two above-mentioned characteristics of Iran's constitutional system may contradict each other. While the principle of the supremacy of Shari'a sets religious limits, and requires the application of Shari'a laws in every issue and conduct, the principle of the absolute guardianship of jurisprudent, as interpreted by Ayatollah Khomeini, recognizes no limit when exercising its power to

³⁰⁵ *Ibid.* art. 37.

³⁰⁶ *Ibid.* art. 22.

³⁰⁷ Mehrpoor, *New Ideas in Legal Issues*, *supra* note 40 at 267-87.

³⁰⁸ *Human Rights World Watch Report* (New York: Human Rights Watch, 1995) at 272 and (1996) at 279.

³⁰⁹ The Constitution, art. 164.

safeguard the Islamic system of the country.³¹⁰ According to him, the preservation of the Islamic state is superior even to Shari'a's principal laws. The leader may suspend or override any Shari'a law indefinitely if he deems that it serves the Islamic system.³¹¹ In this regard, the 1989 Amendment to the Constitution provides that the Council of the Expediency (*maslahat*) of the System be formed by, and under the supervision of, the leader; and to intervene in any dispute between the Parliament and the Guardian Council over Shari'a laws and to prefer one side based on the expediencies of the system.³¹²

Although the principle of the absolute guardianship of jurisprudent, especially with this interpretation of it, places greater restrictions on fundamental human rights and liberties, its preference over Shari'a secularizes the legal system, at least in practice

³¹⁰ See above, text accompanying note 40; and Mehrpour, *New Ideas in Legal Issues*, *supra* note 40 at 59-60.

³¹¹ Mehrpour, *New Ideas in Legal Issues*, *ibid.* Ayatollah Khomeini, in his book, speaks of "putting the Shari'a laws into practice" for all eternity. "Islamic law," he writes, "cannot be annulled or limited by time and space." Any objection to this proposition is "a contradiction to the requirements of belief." He also believed that the application of Shari'a laws are legitimated by their perfection. *Vilayat-e Faqih*, *supra* note 267 at 10-25. After the Revolution, however, this approach encountered obstacles, proved to be unrealistic, and had to be abandoned. In practice, many laws, such as the Labor Law, the Law on Urban Lands, the Rent Law, the Law on Domestic and Foreign trades, were passed out of sheer necessity and state expediency. For detailed discussion on this subject, see Schirazi, *The Constitution of Iran*, *supra* note 260 at 161-220. On January 7, 1988, Ayatollah Khomeini stated that the government was free to undertake any actions that it deemed in the interest of the Islamic system. In his statement, he claimed that the Islamic government was among the most important divine institutions, and had priority over such secondary institutions as prayers, fasting, and the pilgrimage-even though the latter are conventionally seen as fundamental pillars of the Islamic faith. See *Islam and Human Rights, Tradition and Politics*, *supra* note 49 at 228; and Mehrpour, *New Ideas in Legal Issues*, *ibid.*

³¹² The Constitution, art. 112. Prior to 1989, the conservative jurists of the Guardian Council rejected the Parliament bills in several cases on the grounds that they were contrary to Shari'a laws. It was only after direct instructions of Ayatollah Khomeini that the Council approved those bills. The confrontation between the Parliament and the Guardian Council led Ayatollah Khomeini to order - unconstitutionally - the formation of the Council of the Expediency of the System on February 6, 1988. He also specified who would sit on it. Only the 1989 Amendments to the Constitution made the formation of the Council lawful. The Council of the Expediency now exercises more power than before, and contrary to the Constitution, continues to legislate. See Schirazi, *The Constitution of Iran*, *supra* note 260 at 234-36; Mehrpour, *New Ideas in Legal Issues*, *ibid.* at 45-80. Recently, for example, the Council of the Expediency has ruled that the Parliament cannot probe institutions supervised by the Leader. See Associated Press, "Iran Body Bars Parliamentary Probe" Tehran, April 11, 2000.

and in most disputed areas like human rights and *hudud*³¹³ punishments. The exigencies of modern life will eventually prevail, forcing the authorities who place the Islamic system above Shari'a laws to retreat one step at a time. The question that remains is that if the application of Shari'a law is not the first priority of the Islamic government, what is the Islamic system good for then?

C. Human Rights Issue in Iran's Constitutional and Legal System

The principle of the supremacy of Shari'a in the Constitution, which reflects the theoretical stand of the Constitution on the question of law and legality, has been provided in human rights provisions as well. In other words, the Constitution has imposed Islamic standards and qualifications on the rights provisions, restricting their definition, scope, and application in order to accommodate those rights and liberties within an Islamic framework.³¹⁴ In fact, similarly to the Islamic declarations on human rights schemes, the Iranian constitution, employs the modern language and concepts of human rights afforded in Western constitutions and international human rights documents. However, it imparts its own content in conformity with Shari'a requirements.³¹⁵

³¹³ See *supra* note 62.

³¹⁴ Schirazi, *The Constitution of Iran*, *supra* note 260 at 124; and Arjomand, "Constitution of the Islamic Republic" *supra* note 261.

³¹⁵ *Islam and Human Rights, Tradition and Politics*, *supra* note 49 at 80; and Bakhsh, *The Reign of the Ayatollahs*, *supra* note 286.

It may therefore be said that by using Islamic criteria to circumscribe human rights, the Iranian constitution violates, as Shari'a does, basic human rights standards. Its modern veneer scarcely justifies these restrictions. International human rights standards, intended to protect humanity and the dignity of individuals, do not allow the violation of human rights based on divine revelation.³¹⁶ Any claim concerning the entitlement of the Muslim majority to implement Shari'a in an Islamic country could be considered only after modern standards of basic human rights for minorities have been met. The principle of majority rule, in fact, is "conditional upon complete and effective protection of fundamental rights of not only the majority or minorities, but also of all individual citizens."³¹⁷

Any government should basically provide effective constitutional safeguards to secure constitutionalism, according to which the constitutional law is the only supreme law in the country and applicable to all citizens equally.³¹⁸ By accepting the supremacy of Shari'a law, Iran's constitution contradicts the principle of constitutionalism and, therefore, distances itself from democratic governance. Resorting to Shari'a laws contradicts Iran's adherence to international human rights law.³¹⁹ Although Iran continues to be a member of the United Nations Organization, and has never nullified its ratification of the International Bill of Human Rights -- consisting of the 1948

³¹⁶ Reisman, "Some Reflections on Human Rights and Clerical Claim to Political Power" *supra* note 25 at 510; Abdul-Karim Lahidji, "Mavared-e Tanaqoz-e Qanun-e Asasi-ye Jomhuri-ye Eslami-ue Iran ba Elamiyeh-e Jahani-e Hoquq-e Bashar" [The Instances of Contradiction of the Constitution of the Islamic Republic of Iran With the Universal Declaration of Human Rights] (1985) 5 *Alefba* 19-41.

³¹⁷ An-Na'im, "Towards an Islamic Reformation: Responses and Reflections" in *Islamic Law Reform and Human Rights*, *supra* note 45 at 111-12.

³¹⁸ Monahan, *Constitutional Law*, *supra* note 221 at 3-6; and Nwabveze, *Constitutionalism in the Emergent States*, *supra* note 26.

³¹⁹ Lahidji, "Constitutionalism and Clerical Authority" *supra* note 27 at 133-58; Flanz, "A Comparative Analysis of the Constitution of the Islamic Republic of Iran" *supra* note 261; Amir Arjomand,

UDHR, the 1966 ICCPR, and the 1966 ICESCR -- it has often stressed that it is not bound by international human rights at the expense Shari'a laws. In a paraphrased record, Saeed Raja'e Khorasani's speech (Iran's then-ambassador to the United Nations) announced that:

Conventions, declarations and resolutions or decisions of international organizations, which were contrary to Islam, had no validity in the Islamic Republic of Iran. ... The Universal Declaration of Human Rights, which represented secular understanding of the Judeo-Christian tradition, could not be implemented by Muslims and did not accord with the system of values recognized by the Islamic Republic of Iran; his country would therefore not hesitate to violate its provisions, since it had to choose between violating the divine law of the country and violating secular conventions.³²⁰

These statements have been explicitly or implicitly reiterated by Iran's officials throughout the post-revolutionary years. Therefore, it is not surprising that the Assembly of Experts of the constitution in 1979 rejected the proposal of some human rights movements that the Universal Declaration of Human Rights be incorporated in the Constitution.³²¹

The substitution of Islamic criteria and Shari'a qualifications for international human rights have prepared the legal groundwork for the denial and violation of international human rights norms, and have restricted the scope and extent of

"Constitutions and the Struggle for Political Rights" *supra* note 263 at 39-82.

³²⁰ UN Doc. A/C.3/39/SR.65, Para. A5, cited in "Islamic Rights or Human Rights: An Iranian Dilemma" *supra* note 94 at 270-71.

³²¹ Bakhash, *The Reign of the Ayatollahs*, *supra* note 286 at 77.

fundamental human rights and freedoms in Iran.³²² Besides, since the vague Islamic human rights standards and principles presented in the Constitution, to be reviewed below, have never been defined, and the scope of these rights have not been clarified, the government could end or restrict at will rights and liberties approved even by Shari'a. The vagueness of Islamic qualifications would serve the government only to justify its conduct.³²³

Article 20 of the Constitution clearly states that human rights are subordinate to Islamic criteria. It reads:

All citizens of the nation, whether men or women, are equally protected by the law, and they enjoy human, political, economic, and social and cultural rights according to Islamic standards.³²⁴

The article provides that Shari'a determines what human rights are to be granted to people.³²⁵

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

The people of Iran, regardless of their ethnic or tribal origins, shall enjoy equal rights; color, race, language and the like shall not be a cause for privilege.³²⁶

³²² Lahidji, "The Instances of Contradiction of the Constitution of Iran With the UDHR" *supra* note 316 at 19-41; Schirazi, *The Constitution of Iran*, *supra* note 260 at 124-46. Also generally Hurst Hannum, "Human Rights" in Christopher C. Jayner, ed., *The United Nations and International Law* (Cambridge: Cambridge University Press, 1997) at 131-54.

³²³ *Islam and Human Rights, Tradition and Politics*, *supra* note 49 at 81-86; and Human Rights Watch, "As Fragile As a Crystal Clear: Press Freedom in Iran" (Human Rights Watch, October 1999) Sec. IV at 1-4. The cases of human rights violations in Iran will be discussed in the Second Part of the thesis.

³²⁴ The Constitution, *supra* note 270 art. 20 [emphasis added].

³²⁵ *Islam and Human Rights, Tradition and Politics*, *supra* note 49 at 80; and "Islamic Rights or Human Rights: An Iranian Dilemma" *supra* note 94 at 273.

This article, analyzed below, deliberately excludes the equality of rights regardless of gender or religion. Because of the phrase “and the like”, the article is not exclusive. However, based on Shari’a qualifications, it certainly does not cover gender or religion. As pointed out, this could constitute grounds for denying equality in Shari’a.³²⁷ Article 3.14 provides that the government has the duty of “securing the comprehensive rights of all citizens, both women and men, and the establishment of judicial security for all as well as the equality of all before the law.”³²⁸ While it appears to guarantee the equality of rights unconditionally, it should be borne in mind that the supremacy of article 4 (discussed above) overrides all other provisions of the constitution. Therefore, the issue of equality of rights protection before the law, too, is to be subordinated to Islamic criteria.

Other rights provisions in the Constitution are also subject to Islamic restrictions. For example, Article 21 states that: “The government shall guarantee the rights of women in all areas *according to Islamic standards*.”³²⁹ Article 24 reads:

Publication and the press may express all matters freely
except those that are detrimental to *the fundamental*
principles of Islam or the rights of the public ...³³⁰

Article 26 also provides that:

³²⁶ The constitution, art. 19.

³²⁷ In contrast, art. 8 of the 1907 Supplementary to the Constitution, like the stipulation of most Western constitutional instruments, enunciated that “the people of the Persian Empire are to enjoy equal rights before the law.” See also “Islamic Rights or Human Rights: An Iranian Dilemma” *supra* note 94 at 273.

³²⁸ The Constitution, art. 3.14.

³²⁹ *Ibid.* art. 21 [emphasis added].

³³⁰ *Ibid.* art. 24 [emphasis added].

Parties, groups, political and professional associations ... are permitted, provided they do not violate principles of independence, freedom, and national unity, or which are *contrary to the principles of Islam* or the Islamic Republic.³³¹

Articles 27, 28, and 168, dealing with the right to assembly, the right to choose a profession, and the definition of political crimes, respectively, are other examples of rights provisions subject to Shari'a limitations and requiring that rights guarantees comply with Shari'a standards.³³²

The supremacy of Shari'a principles evidently covers all the laws other than the constitution as well. The Civil and Criminal Codes, for example, in articles dealing with human rights and the equality of rights before the law, require the observance of Shari'a laws and apply Shari'a limitations accordingly. Family law and personal status in the Civil Code and crimes and punishments in the Criminal Code are subject to more Shari'a restrictions.³³³ Due to the importance of women's and religious minorities' rights, the study discusses this issue at length. The subject of freedom of speech, freedom of religion, and freedom of the press will be specifically reviewed in the Second Part of the thesis.

It may be concluded that the structure and legitimacy of the political system of the country, together with the principles of absolute guardianship of jurisprudent and the supremacy of Shari'a laws have overshadowed the rights guarantees and

³³¹ *Ibid* art. 26 [emphasis added].

³³² *Ibid.* arts. 27, 28, and 168.

³³³ The Civil Code, vol.2: Persons, arts. 956-1256; and the Criminal Code, Crimes and Punishments (*Hudud, Ta'zir'at, Qisas, and Diyat*).

protections in the Constitution or elsewhere. The latter are subordinated to Shari'a and subjected to its limitations and restrictions. Rights provisions have been formulated in a secular legal framework, but only to carry out Shari'a qualifications. This has resulted in a denial of international human rights standards and deprived the people their fundamental rights and liberties.³³⁴

The vagueness of Shari'a qualifications, the lack of legal precedents and guidelines, and the lack of a strong and independent judiciary system have led to the assumption that Shari'a standards are, in practice, used only to justify the government's conduct and restrictions upon rights for political expediency.³³⁵ Article 8 of the Constitution also provides that, based on a Qur'anic phrase, it is the duty of all citizens and the government in all aspects of life "to enjoin the good and forbid the evil."³³⁶ Apart from mixing the issues of rights and duties, as it is the case in Shari'a, the article is another example that the government and pressure groups acting independently have used vague qualifications to restrict human rights and freedoms.³³⁷

D. The Rights of Women and Religious Minorities

Like the previous section of this chapter and due to the importance of the principle of the equality of all citizens before the law, regardless of gender or religion,

³³⁴ Lahidji, "The Instances of Contradiction of the Constitution of Iran With the UDHR" *supra* note 316 at 19-41; Savory, "Islam and Democracy: The Case of the Islamic Republic of Iran" *supra* note 288 at 831-34; "Islamic Rights or Human Rights: An Iranian Dilemma" *supra* note 94 at 269-70 and 272-76.

³³⁵ "Universal Versus Human Rights" *supra* note 94 at 328-29; and *Islam and Human Rights, Tradition and Politics*, *supra* note 49 at 82-86.

³³⁶ The Constitution, art. 8.

the study reviews the rights of women and religious minorities in Iran's constitutional and legal system in order to clarify the country's stand in this regard.

1. The Rights of Women

The discussion on women's rights and the equality of men and women in Iran's legal system presupposes theoretical standpoints on specific issues that need to be addressed. First, however, a short review of some articles on the equality of genders and the equal protection of rights before the law is necessary.

Article 3.14, mentioned in the "Generalities Section" of the Constitution, guarantees the equality of genders before the law and corresponds to modern human rights standards. It should not be understood or interpreted in isolation but in relation to other contradictory and prevailing articles, especially article 4 and those mentioned in "People's Rights Section" of the Constitution. Article 19 addresses the principle of equality for all people regardless of their color, race, and language. But it does not refer to gender, since the principle of equality would violate Shari'a.³³⁷ Article 20 guarantees equal protection for men and women before the law but, immediately, makes that

³³⁷ The case of pressure groups will be discussed in Chapters Three and Four.

³³⁸ In contrast, see article 2 of the UDHR, which guarantees to all people all the rights and freedoms without distinction of any kind, such as gender. See the UDHR, *supra* Chapter One note 20 art. 2.

principle subject to Shari'a standards.³³⁹ In this way, then the constitutional articles have been formulated in a way that accommodates Shari'a restrictions; any article must be interpreted according to these standards.

Muslim jurists and the proponents of Iran's legal system, however, believe that Shari'a laws and their system do respect the principle of equality and guarantee equal protection under the law. The reason is that Shari'a theoretically acknowledges the rights of both men and women with regard to their social and family positions. In other words, it is the people's role and position in the family and society that determines their specific rights and duties.³⁴⁰ In this system, men and women are equal in dignity and honor. This is derived from a philosophical view to human beings; but equal dignity does not lead to the equal rights. Therefore, men and women do not enjoy the equal rights.³⁴¹ Muslim jurists believe that because of their physical, psychological, and emotional differences, men and women bear different responsibilities and duties in the family and society. This implies different rights.³⁴² In this system, duties come first.

³³⁹ It does not seem accurate to claim that article 20, in its first clause which refers to equal protection before the law means secular law, and, therefore, guarantees the principle of equal rights protection, as opposed to Shari'a laws which determine the scope and extent of human rights and liberties in the Constitution. See *Islam and human Rights, Tradition and Politics*, supra note 49 at 80-1. Although the term *qanun* (law) has been taken from the Greek word of *kanon* (normally employed to refer to secular law), it refers, in Iran's legal system, to any law, including Shari'a laws, which is in force whether it is a constitutional article or a bill passed by the Parliament. All the laws, of course, are subject to Shari'a qualifications.

³⁴⁰ Abdollah Javadi-Amoli, *Zan dar A'ineh-ye Jalal va Jamal* [Women in the Mirror of Glory and Beauty] (Tehran: Reja' Cultural Press, 1993); A. Javadi-Amoli, *Falsafeh-ye Hoquq-e Bashar* [The Philosophy of Human Rights] (Qum, Iran: Isra, 1996) at 235-36; Khan, *Women in Islamic Shari'ah*, supra note 123; Riffat Hassan, "Equal Before Allah? Women-Man Equality in the Islamic Tradition" supra note 118; Bodman & Tohidi, *Women in Muslim Societies: Diversity Within Unity*, supra note 143.

³⁴¹ Doi, *Women in the Shari'ah*, supra note 123; Doi, *Women in the Qur'an and Hadith*, supra note 123; Mohammad-Taqi Mesbah Yazdi, et al., *Status of Women in Islam* (Tehran: Islamic Propagation Organization, 1985); Mernissi, *Women and Islam: An Historical and Theological Enquiry*, supra note 118.

³⁴² Maududi, *Purdah and the Status of Women in Islam*, supra note 122 at 113-22; Mehrpoor, *Human Rights in International Instruments*, supra note 119 at 39 and 276; Murtada Mutahhari, *The Rights of Women in Islam* (Tehran: World Organization of Islamic Service, 1981); Farida Shaheed, *Controlled or*

Rights are granted to allow people to fulfill their duties in society; they enjoy rights as much as the society they live in can accommodate. For example, the inequality of the rights to inherit between men and women and the major role of man in the family are simply justified by the claim that the male gender has the duty to look after family needs.³⁴³

This system, therefore, does not regard a woman individually but as someone attached to a man, be it her father, her husband, etc. It is the kind of relation to a man that determines a woman's rights and requires the performance of her duties concerned. This is why this system does not advocate discrimination against women through its general laws.³⁴⁴

The reality, nevertheless, is that this theoretical consideration of human rights ignores a major philosophical point: Human rights are attributed to human beings individually and only because of their humanness, "as autonomous and separate persons, and not as components of family or community structure in a social context."³⁴⁵ The modern theory of human rights considers rights prior to duties and responsibilities, regardless of family position or social status. It does not consider

Autonomous: Identity and the Experience of the Network Women Living Under Muslim Laws (Grabels, France; Women Living Under Muslim Laws, 1994); Sonbol, *Women and the Family and Divorce Laws in Islamic History*, *supra* note 136.

³⁴³ Barbara Stowasser, "Women's Issues in Modern Islamic Thought" *supra* note 137; Tucker, *Arab women: Old Boundaries, New Frontiers*, *supra* note 137; B. Stowasser, *Women in the Qur'an: Traditions and Interpretations*, *supra* note 118; B. Stowasser, "Gender Issues and Contemporary Qur'an Interpretation" in Haddad & Esposito, *Islam, Gender, and Social Change*, *supra* note 118 at 30-44.

³⁴⁴ Amina Wadud-Muhsin, *Qur'an and Women* (Kuala Lumpur: Penerbit Fajar Bakti, 1992); Khan, *Women in Islamic Shari'ah*, *supra* note 123; Freda Hussain, *Muslim Women*, *supra* note 123; Hoodfar, "The Veil in Their Minds and on Our Heads" *supra* note 137 at 5-18; Riffat Hassan, "Feminist Theology: The Challenges For Muslim Women" (1996) 9 *J. for Critical Studies of the Middle East* 53-65.

³⁴⁵ *Islam and Human Rights, Tradition and Politics*, *supra* note 49 at 47. See also A. J. M. Milne, *Human Rights and Human Diversity: An Essay in the Philosophy of Human Rights* (New York: State University of New York Press, 1986) at 1-3; Jack Donnelly, *The Concept of Human Rights* (London: Croom Helm,

women's rights conditional upon their family or social relations with men; nor does it consider physical and emotional differences between the sexes. It addresses the duties of human beings only after recognizing their basic and fundamental rights and freedoms.³⁴⁶

One theoretical problem is that Shari'a laws and any system based on it cannot picture females out of their family or social contexts. They fall short of acknowledging and appreciating the philosophical foundations of modern human rights theory and standards, which ascribe human rights to individuals unconditionally.³⁴⁷

In Shari'a and in Iran's legal order, men and women are considered as two creatures who complete each other even in the field of human rights. They enjoy balanced rights, not equal rights, to fulfill their duties together.³⁴⁸ This understanding contains a theoretical flaw from the perspective of the modern theory of human rights. It identifies women as second-class citizens,³⁴⁹ and deprives them from their

1985) at 1 and 9; and Peter Jones, *Rights* (New York: St. Martin's Press, 1994) at 81.

³⁴⁶ Alan Gewirth, *Human Rights: Essays on Justification and Applications* (Chicago: University of Chicago Press, 1982) at 1 and 41; Jack Donnelly, *Universal Human Rights in Theory and Practice* (London: Cornell University Press, 1989) at 9; and Warren Lee Holleman, *Human Rights Movement, Western Values and Theological Perspectives* (New York: Praeger, 1987).

³⁴⁷ Fernea, *Women and the Family in the Middle East: New Voices of Change*, *supra* note 136; Gerami, *Women and Fundamentalism: Islam and Christianity*, *supra* note 143; Kian, "L'émergence d'un discours féminin indépendant: un enjeu de pouvoir" *supra* note 145 at 55-72; Malti-Douglas, *Women's Body, Women's World*, *supra* note 145.

³⁴⁸ Javadi-Amoli, *The Philosophy of Human Rights*, *supra* note 340 at 235-35; Mesbah-Yazdi, *Status of Women in Islam*, *supra* note 341; Mawdudi, *Human Rights in Islam*, *supra* note 4 at 21-22; Khan, *Women in Islamic Shari'ah*, *supra* note 123; and Nazlee, *Feminism and Muslim Women*, *supra* note 143.

³⁴⁹ Ayatollah Mohammed-Taghi Mesbah-Yazdi (*supra* note 289) recently, at Tehran Friday prayer service, stated, "We do not have first class and second class human beings; but, we can have second class citizens." Further, he added that "it is incorrect to say that since all human beings are equal in their humanity, consequently we do not have second class citizens." Cited in Iran Daily Newspaper, January 17, 1999. Although the ayatollah did not elaborate on whom these second class citizens might be, the mere believe in this division supports the proposition that Shari'a and Iran's legal system recognize the notion of inequality of citizens before the law. Mesbah-Yazdi is also reported to have said that: "Believing in equal rights for all citizens is worse than worshipping cows. If this is right, then Jews and Zoroastorians can become president. ... The idea of tolerance is thousand times more dangerous than AIDS." See also Javadi-Amoli, *Women in the Mirror of Glory and Beauty*, *supra* note 340; and

internationally-recognized rights and liberties. Below, we will briefly highlight women's rights in Iran's legal system, where unlike what the Preamble of the Constitution claims, women do not "enjoy their rights proportionately more"³⁵⁰ than before. Of course, the detailed examination of these rights is beyond the scope of this study.

Article 21 of the Constitution enjoins on the government "the creation of an environment favorable to the personal growth of women, and to the restoration of their material and spiritual rights"³⁵¹ according to Shari'a criteria. It also provides legal and social protection and welfare for mothers, widows, and old women. Article 10 repeats the family theme stressed in the Preamble³⁵² and stipulates:

The family being the fundamental unit of the Islamic society, all laws, regulations, and programs which pertain to it shall facilitate the establishment of the family. They shall safeguard the sanctity of the family and the stability of family relationships, based on Islamic laws and moral concepts.³⁵³

Taken in isolation, these articles may well provide social and legal protection for families and women, in particular. The overemphasis on the family and motherhood, nevertheless, leads one to think that, failing to acknowledge women's individual rights, this system considers women only as mothers to bear children and

Mehrpoor, *Human Rights in International Instruments*, *supra* note 119 at 39 and 276.

³⁵⁰ The Constitution, *supra* note 270, the Preamble.

³⁵¹ *Ibid.* art. 21.

³⁵² The Preamble on women and the Constitution reads: "... with the restitution of the noble and respected duty of motherhood, to raise faithful persons, women will be in the vanguard and, in fact, the comrade of men in all aspects of active life..." *ibid.* the Preamble.

³⁵³ *Ibid.* art. 10.

wives to look after the family,³⁵⁴ not as active members in social and political life, particularly with regard to inequality of rights between men and women in public and private law domains.³⁵⁵

Concerning civil law and personal status, the moderately-formulated Family Protection Act of 1967, amended in 1975, was nullified after the Revolution, and Shari'a laws were closely reflected in the Civil Code. This represented a major setback for women's rights.³⁵⁶ A woman, in general, needs her father's permission to get married.³⁵⁷ After marriage, the husband heads the family³⁵⁸ and decides on the location of residency.³⁵⁹ He may prohibit his wife from pursuing any profession he considers harmful to the interests of the family.³⁶⁰ A woman also has to secure her husband's

³⁵⁴ Adele K. Ferdows, "The Status and Rights Women in Ithna Ashari Shi'i Islam" in Asghar Fathi, ed., *Women and the Family in Iran* (Leiden: E. J. Brill, 1985) 13-36; Haleh Esfandiari, "The Majlis and Women's Issues in the Islamic Republic of Iran" in Mahnaz Afkhami & Erika Friedl, eds., *In the Eye of the Storm: Women in Post-Revolutionary Iran* (Syracuse: Syracuse University Press, 1994) 61-79; H. Esfandiari, *Reconstructed Lives: Women and Iran's Islamic Revolution* (London: John Hopkin's University Press, 1997); Shirin Mahdavi, "The Position of Women in Shi'a Iran: Views of the Ulama" in Fernea, *Women and the Family in the Middle East: New Voices of Change*, *supra* note 136 at 255-68.

³⁵⁵ Guity Neshat, "Women in the Ideology of the Islamic Republic" in G. Neshat, ed., *Women and Revolution in Iran*, *supra* note 122 at 195-216; Ziba Mir-Hosseini, "Women and the Shari'a in the Islamic Republic of Iran: A Changing Relationship" paper presented at the Carsten Niebuhr Institute of Near Eastern Studies Conference "Women, Culture and Modernity" (Copenhagen, February 18-21, 1996); Nahid Yeganeh & Nikki R. Keddie, "Sexuality and Shi'a Sexual protest in Iran" in Juan R. I. Cole & N. R. Keddie, eds., *Shi'ism and Social Protest* (New York: Yale University Press, 1982) 108-36; Fariba Adelkhah, *La révolution sous le voile* (Paris: Karthala, 1991).

³⁵⁶ Nouchine Yavari-d'Hellencourt, "Discours islamique, actrices sociales et rapports sociaux de sexe" in N. Yavari-d'Hellencourt, ed., *Les femmes en Iran: pressions sociales et stratégies identitaires* (Paris: Harmattan, 1998) 190-229; Azar Tabari, "Islam and the Struggle for Emancipation of Iranian Women" in A. Tabari & Nahid Yeganeh, eds., *In the Shadow of Islam* (London: Zed, 1982) 5-25; Sohila Shahshahani, "Religion, Politics and Society: A Historical Perspective on the Women's Movement in Iran" (1984) 1-2 *Samya Shakti* 100-20; Eliz Sanasarian, "Politics of Gender and Development in the Islamic Republic of Iran" (1992) 8 *J. Developing Societies* 56-68; and Tamilla F. Godsi, "Tying a Slipknot: Temporary Marriage in Iran" (1994) 15 *Michigan J. Int'l L.* 645.

³⁵⁷ The Civil Code of Iran, art. 1043. It should be mentioned that she is considered an adult and mature at the age of 9, and can get married under certain conditions. In November 2000, the Guardian Council (*supra* text accompanying notes 95-97) labeled "un-Islamic" a recent bill by the Parliament necessitating court approval for boys under 18 or girls under 15 to get married. Islamic Republic News Agency (IRNA), November 11, 2000.

³⁵⁸ *Ibid.* art. 1105.

³⁵⁹ *Ibid.* art. 1114.

³⁶⁰ *Ibid.* art. 1117. This is on the fault basis that since the husband provides the family needs, he heads

permission to travel abroad.³⁶¹ The Civil Code, however, recognizes her financial independence and her legal entity.³⁶²

Despite some amendments in the marriage contract, the husband could easily initiate divorce unilaterally, and repudiate his wife without just cause; while the wife must apply for divorce in specific cases and through the court.³⁶³ Custody of the children also reverts to the father after age two for boys and seven for girls, automatically.³⁶⁴ A woman generally inherits only half the share of a man with the same relation to the deceased person.³⁶⁵ In addition, the husband can inherit from his deceased wife more than what his wife can inherit from him.³⁶⁶

the family and she has the duty to obey him, meets his emotional and sexual needs, and refrain from any action or profession that may contradict these duties.

³⁶¹ The Passport Act, art. 18(3). In January 2001, the Guardian Council rejected a parliamentary bill allowing young women to travel abroad alone for academic purposes. The Parliament then had to amend the bill in order to meet Shari'a qualifications. Iranian Students New Agency (ISNA), January 22, 2001.

³⁶² The Civil Code, art. 1118.

³⁶³ *Ibid.* arts. 1133, 1129, and 1130.

³⁶⁴ *Ibid.* art. 1169 and 1180.

³⁶⁵ *Ibid.* art. 907 and 920.

³⁶⁶ *Ibid.* art. 946. For more on Women's rights on personal status, see Fatemeh E. Moghadam, "Commodification of Sexuality and Female Labor Participation in Islam: Implication for Iran" in *In the Eye of the Storm*, *supra* note 354 at 80-97; Ziba Mir-Hosseini, *Marriage on Trial: A Study of Islamic Family Law: Iran and Morocco Compared* (London: I. B. Tauris, 1993); Z. Mir-Hosseini, "Divorce, Veiling and Feminism in Post-Khomeini Iran" in Haleh Afshar, ed., *Women and Politics in the Third World* (London: Routledge, 1996) 142-70; Firouzeh Khalatbari, "L'inégalité des sexes sur le marché du travail: une analyse des potentiels économiques de croissance" in *Les femmes en Iran*, *supra* note 356 at 95-118; Homa Hoodfar, "Devices and Desires: Population Policy and Gender Roles in the Islamic Republic" (1994) 190 *Middle East Report* 11-17; Shahla Haeri, *Law of Desire: Temporary Marriage in Iran* (London: I. B. Tauris, 1989); S. Haeri, "Temporary Marriage: An Islamic Discourse on Female Sexuality in Iran" in *In the Eye of the Storm*, *supra* note 354 at 98-114; S. Haeri, "Obedience Versus Autonomy: Women and Fundamentalism in Iran and Pakistan" in M. E. Marty & R. S. Appelby, *Fundamentalism and Society: Reclaiming Science, the Family, and Education* (Chicago: University of Chicago Press, 1993) 181-213; Haleh Afshar, "Women, Marriage and the State in Iran" in H. Afshar, ed., *Women, State and Ideology: Studies From Africa and Asia* (London: Macmillan, 1987) 70-86; H. Afshar, "Women and Reproduction in Iran" in Nira Yural-Davis & Floya Anthias, eds., *Women-Nation-State* (London: Macmillan, 1989) 110-25; Ibrahim Amini, *Principles of Marriage: Family Ethics* (Qum, Iran: Ansariyan, n. d.); Homa Hoodfar, "Bargaining With Fundamentalism: Women and the Politics of Population Control in Iran" (1996) 8 *Reproductive Health Matters*, 30-40.

In criminal matters, too, Iran's Criminal Code applies Shari'a laws entirely. The testimony of a woman, if accepted,³⁶⁷ is worth only half of a man's.³⁶⁸ In other words, the testimony of two women is equal to that of a single man. As already discussed, in the cases of *qysas* and *diya*, a woman is worth only half the value of a man.³⁶⁹

Family duties and responsibilities leave women little opportunity to participate in public or political life.³⁷⁰ Due to some openness in the political sphere, however, Iranian women have become more active in social unions and the political arena. Legally, women are prohibited from participating in the leadership of the country, and the Constitution implicitly deprives women from running for presidential office.³⁷¹ Although women have recently been welcomed by the Judiciary Branch, they are barred from serving as judges and are still not accepted to adjudicate or preside over a court.³⁷² Women are deprived of employment in the army except in health-related work that requires women.³⁷³

³⁶⁷ In serious criminal cases which involve *Hudud* and *Qysas* punishments (see *supra* note 62 and 78), the testimony of women is not recognized. The Criminal Code of Iran, arts. 76, 119, 170, 189(2), 99(1), and 237(1).

³⁶⁸ *Ibid.* arts. 74, 75, and 172.

³⁶⁹ *Ibid.* arts. 209, 258, 300, and 301. See also Patricia Higgins, *Women in the Islamic Republic of Iran: Legal, Social and Ideological Changes* (1995) 10 *Signs* no. 3 at 477-95.

³⁷⁰ Kian, "La formation d'une identité sociale féminine post-révolutionnaire: un enjeu de pouvoir" *supra* 135-58; A. Kian, "Gendered Occupation and Women's Status in Post-Revolutionary Iran" (1995) 31 *Middle Eastern Studies* 407-21; A. Kian, "Women and Politics in Post-Islamist Iran: the Gender Conscious Drive to Change" (1997) 24 *British J. Middle Eastern Studies* 75-96; and Valentine Moghadam, "Public Life and Women's Resistance" in Saeed Rahnema & Sohrab Behdad, *In Iran After the Revolution* (London: I. B. Tauris, 1995) 251-67.

³⁷¹ The constitution, *supra* note 270 art. 115.

³⁷² The Act of the Selection of the Judges (1983), amended in 1995. Article 163 of the Constitution also stipulates that the conditions for the selection of judges are determined by Shari'a in which only men could serve as judges.

³⁷³ The Islamic Republic Army Act, art. 32; The Employment Act of the Islamic Revolutionary Guards Corps, art. 20. For more on women's rights in public and political areas, see Parvin Paidar, *Women and the Political Process in Twentieth-Century Iran* (Cambridge: Cambridge University Press, 1995); Nesto Ramazani, "Women in Iran: The Revolutionary Ebb and Flow" (1993) 47 *Middle East J.* 409-28; Eliz Sanasarian, *The Women's Rights Movement in Iran* (New York: Praeger, 1982); Nayereh Tohidi, "Gender and Islamic Fundamentalism: Feminist Politics in Iran" in Chandra Mohanty, Ann Russo, &

All these articles in the Constitution, Civil and Criminal Codes, and other laws clearly contradict modern standards of human rights for women, as codified in different international covenants and documents -- including the 1948 Universal Declaration of Human Rights (articles 1 and 2 on the equality of rights, article 7 on equal protection before the law without gender discrimination, and article 16 on the equal rights of men and women in marriage and its dissolution) and the 1966 International Covenant on Civil and Political Rights (article 2 on the guarantee against discriminatory treatment, article 3 on equality, article 12 on the freedom to leave any country including one's own, and article 26 on equal protection). Iran is signatory to most of these international documents. The constitutional and legal provisions also contradict various articles of the Convention on the Elimination of All Forms of Discrimination Against Women³⁷⁴ of which Iran is not a member.³⁷⁵

Although Iran's constitutional and legal provisions, in their present form, are hard to reconcile with international human rights standards on women's rights, this study proposes that even a brief review of Shari'a laws to find the proper method to

Laurdes Torres, eds., *Third World Women and the Politics of Feminism* (Bloomington: Indiana University Press, 1991) 251-67; Haideh Moghissi, "Women in the Resistance Movement in Iran" in Haleh Afshar, ed., *Women in the Middle East: Perceptions, Realities and Struggles for Liberation* (London: Macmillan, 1993) 158-71; and Chahla Chafiq, *La femme et le retour de l'Islam: l'expérience iranienne* (Paris: Le Félin, 1991).

³⁷⁴ Convention on the Elimination of All Forms of Discrimination Against Women (the CEDAW), Dec. 18, 1979, G.A. Res., 34/180, 34 UN GAOR Supp. (no. 46), at UN Doc. A/34/46 (1979), entered into force in 1981.

³⁷⁵ Many Muslim countries that signed or ratified the CEDAW have entered several reservations to various articles, such as those that provide for the equality of men and women in all matters -- i.e., marriage and family relations, during the marriage, and upon its dissolution. See "Human Rights in the Muslim World" *supra* note 1 at 265-67. Ayatollah Nasser Makarem-Shirazi, a leading conservative cleric, has recently denounced Iran's ratification of a UN document that encourages more sex education for girls and condemns violence against women. He said: "I say it very clearly that it is religiously forbidden to adhere to these documents." The document was adopted in the UN Conference in New York, in June 2000, held to review progress made since the 1995 Beijing Conference. See Agance France Presse, "Influential Cleric Opposes UN Document on Women" Tehran, June 24, 2000.

apply Islamic standards would indicate great changes in most of those provisions. A more profound study of Shari'a sources, armed with a modern understanding, would probably suggest changing Shari'a public and private laws beyond recognition. It may result in a different, yet Islamic, constitutional and legal system in the country.³⁷⁶

This thesis argues that many Shari'a laws are unreliably based on the main sources. Most are derived from a few traditions or single narrations, or from the consensus (*ijma'*) of the early *ulama* centuries ago. The proper methodology of deriving Shari'a laws from the major sources, therefore, must shift away from unverified and non-authentic narrations and outdated consensus towards a direct reference to main sources, with modern conditions in mind. More importantly, it must turn to the consensus of contemporary jurists and intellectuals who seek to reconcile Shari'a laws with modern life.³⁷⁷

It should also be pointed out that, besides the legality of women's rights and freedoms, there are historical and cultural factors that, in practice, have restricted women's activities. Some of these are supported by legal provisions. The notion of *hijab*³⁷⁸ is one example. Although it seems a purely religious or personal matter, it has

³⁷⁶ Ziba Mir-Hosseini, "Stretching the Limits: A Feminist Reading of the Shari'a in Iran Today" in Mai Yamani, ed., *Feminism and Islam: Legal and Literary Perspectives* (London: Ithaca, 1996) 284-320; Z. Mir-Hosseini, *Islam and Gender. The Religious Debate in Contemporary Iran* (Princeton, NJ: Princeton University Press, 1999); Afsaneh Najmabadi, "Hazards of Modernity and Morality: Women, State and Ideology in Contemporary Iran" in Kandiyoti, *Women, Islam and the State*, *supra* note 137 at 48-76; A. Najmabadi, "Feminism in an Islamic Republic: Years of Hardship, Years of growth" in *Islam, Gender, and Social Change*, *supra* note 118 at 50-84; Hisae Nakanishi, "Power, Ideology, and Women's Consciousness in Post-Revolutionary Iran" in *Women in Muslim Societies*, *supra* note 143 at 83-100.

³⁷⁷ Parvin Paidar, "Feminism and Islam in Iran" in Deniz Kandiyoti, ed., *Gendering the Middle East: Emerging Perspectives* (London: I. B. Tauris, 1996) 51-68; Azar Tabari, "The Women's Movement in Iran: A Hopeful Prognosis" (1986) 12 *Feminist Studies* 342-60; Farah Azari, "The Post-Revolutionary Women's Movement in Iran" in F. Azari, ed., *Women of Iran: The Conflict With Fundamentalist Islam* (London: Ithaca, 1983) 190-225; Fariba Adelkhah, *Être moderne en Iran* (Paris: Karthala, 1998); Haleh Afshar, *Islam and Feminism: An Iranian Case Study* (London: Macmillan, 1998).

³⁷⁸ The veil. According to Shari'a interpretation of the Qur'anic verses, the principle of *hijab* requires

been used to deprive Muslim women of social activities like sports.³⁷⁹ The law in Iran compels women to comply with a narrow-minded interpretation of Shari'a dress requirements.³⁸⁰ Consequently, women risk arrest, prosecution, and punishment like flogging for not observing *hijab* regulations. Although the majority of Iranian Muslim women freely wear *hijab*, the use of force to ensure compliance seems to contradict the official claim that it is merely reinforcing national cultural norms, and that "the ultimate purposes of these regulations are to preserve society's order."³⁸¹

Based on the theoretical deficiencies of Shari'a human rights law in Iran's legal system, one may conclude that men and women, as Reisman points out, "symbolize different aspects of human life and have separate rights and obligations."³⁸² This system recognizes neither equality of rights nor the equal protection of men and women before the law; whereas the natural equality of all human beings leads to the equality of all before the law, and any discrimination on the basis of religion or sex runs against the administration of justice and equality of all under the rule of law.³⁸³ The discriminatory treatment of women results from Shari'a qualifications formulated in

women to cover their bodies and hair. The face and hands are generally excluded. See also generally Adele K. Ferdows & Amir H. Ferdows, "Women in Shi'a Fiqh: Images Through the Hadith" in Nashat, *Women and Revolution in Iran*, *supra* note 122 at 55-68; and Farah Azari, "Islam's Appeal to Women in Iran: Illusions and Reality" in Azari, *Women of Iran: The Conflict With Fundamentalist Islam*, *ibid.* 1-71.
³⁷⁹ *Human Rights Watch World Report*, (1995) at 271. Also Farzaneh Milani, *Veils and Words: The Emerging Voices of Iranian Women Writers* (Syracuse: Syracuse University Press, 1992); and Azar Tabari, "The Enigma of the Veiled Iranian Women" (1982) 103 MERIP 22-27.

³⁸⁰ The authorities in public departments and schools even limit the colour of *hijab* to mostly dark ones.

³⁸¹ The statement by the government representative at the United Nations, see UN GAOR, H.R. Comm., 46th Sess., 1195th Mtg., no. 15, at UN Doc. CCPR/C/SR. 1195 (1992). See also Ann H. Betteridge, "To Veil or Not to veil: A Matter of Protest or Policy" in Nashat, *Women and Revolution in Iran*, *supra* note 122 at 109-28; Zahra Kamalkhani, *Women's Islam: Religious Practice Among Women in Today's Iran* (London: Kegan Paul International, 1998); Haleh Afshar, "Why Fundamentalism? Iranian Women and Their Support for Islam" (Working paper no. 2, Dept. of Politics, University of York, 1994).

³⁸² Reisman, "Some Reflection on Human Rights and Clerical Claim to Political Power" *supra* note 25 at 519.

³⁸³ Nwachukwu S. S. Iwe, *The History and Contents of Human Rights, A Study of the History and Interpretation of Human Rights* (New York: Peter Lang, 1986) at 360.

vague legal provisions which restrict women's rights and freedoms in public and private life. These restrictions are in clear contradiction with international human rights standards.³⁸⁴

2. The Rights of Religious Minorities

Article 12 of the Constitution stipulates that the official religion of Iran is Islam and the Twelver Shi'ite school of thought.³⁸⁵ According to this article, the adherents of other Islamic faiths, mostly Sunni schools, who are not defined as religious minorities, are "to be accorded full respect."³⁸⁶ They enjoy the right to perform their own religious rites and apply their own Shari'a in personal status. Moreover, municipal laws in areas where the adherents of any of these school are in the majority are subject to the standards of that specific Shari'a as well.³⁸⁷ In the public domain, however, they face certain limitations and may not hold certain posts, such as that of leader or president.³⁸⁸

Based on Shari'a standards, the Constitution observes the principle of religious tolerance only towards the adherents of monotheistic religions (*ahl al-kitab*). Article 13 states that:

³⁸⁴ Mahdavi, "The Position of Women in Shi'a Iran" *supra* note 354 at 255-68; Mir-Hosseini, *Marriage on Trial*, *supra* note 366; Mir-Hosseini, "Women and the Shari'a in the Islamic Republic of Iran" *supra* note 355; Stowasser, *Women in the Qur'an: Traditions and Interpretations*, *supra* note 118; Nayereh Tohidi, "Modernity, Islamization, and Women in Iran" in Valentine Moghadam, ed., *Gender and National Identity: Women and Politics in Muslim Societies* (London: Zed, 1994) 110-47; Camillia Fawzi, El-Solh, & Judy Mabro, eds., *Muslim Women's Choices: Religious Belief and Social Reality* (Providence: Berg, 1994); and Haleh Afshar, "Khomeini's Teachings and Their Implications for Iranian Women" in *In the Shadow of Islam*, *supra* note 356 at 75-90.

³⁸⁵ The Constitution, *supra* note 270 art. 12.

³⁸⁶ *Ibid.*

The Iranian Zoroastrians, Jews, and Christians are the only recognized religious minorities. They are free, within the limits of the law, to perform their religious rites, and may exercise their religious regulations in personal status.³⁸⁹

However, inter-religious marriage with Muslims is prohibited and missionary work to convert Muslims punishable.³⁹⁰

Although Iran's legal system does not address Shari'a concept of *dhimis*³⁹¹ for non-Muslims, it applies Shari'a laws in public areas like criminal law.³⁹² In other words, non-Muslims are subject to the Shari'a discriminatory treatment and face many limitations as second-class citizens.³⁹³ In political matters, they are prohibited from holding high public posts or serving in the army ranks.³⁹⁴ The Constitution, however, provides for separate representation for religious minorities in the Parliament.³⁹⁵

³⁸⁷ *Ibid.*

³⁸⁸ *Ibid.* arts. 12 and 115.

³⁸⁹ *Ibid.* art. 13.

³⁹⁰ Article 1059 of the Civil Code states that the marriage of a Muslim woman with a non-Muslim man is prohibited.

³⁹¹ See above text accompanying note 159.

³⁹² The Criminal Code does not mention Shari'a qualifications with respect to the rights of non-Muslims in criminal matters; they are applied in practice though. Motamed, the sole Jewish representative in the Parliament, criticized the treatment of non-Muslims in the country. He said: "I call on the Muslim religious leaders and the officials of the judiciary to pay more attention to the rights of non-Muslim families as far as issues such as blood money and the verdicts of the courts are concerned." Associated Press, "Treatment of Non-Muslims Questioned" Tehran, December, 29, 2000.

³⁹³ *Islam and Human Rights, Tradition and Politics*, *supra* note 49 at 155-58; and Bakhsh, *The Reign of Ayatollahs*, *supra* note 286 at 226. For Mawdudi discrimination against persons who did not share the official Islamic ideology in Muslim countries seemed perfectly reasonable. See *Islamic Law and Constitution*, *supra* note 21 at 188-89 and 274-76.

³⁹⁴ As Mayer suggests, a close reading of article 144 reveals that *ahl al-kitab* are excluded from army ranks, just as *dhimis* were in early Islam. See *Islam and Human Rights, Tradition and Politics*, *ibid.* at 156. The article provides: "The Army of the Islamic Republic of Iran shall be an Islamic army. It must be an ideologically-oriented and people's army, and it must accept competent people who will be faithful to the goals of the Islamic Revolution and will be self-sacrificing in the attainment of these goals." The Preamble of the Constitution also provides that the goal of the army is "accomplishing an ideological mission, that is, the jihad for the sake of God as well as for struggling to open way for the sovereignty of

It may be said that although religious minorities are granted religious liberty and enjoy constitutional protection to practice their religious laws in personal subjects, the Constitution upholds “the official religion” and accords people's rights based on religious affiliation. In fact, minorities' rights are limited to what the official religion permits. In theory and practice, they are relegated to second-class status.³⁹⁶ This thesis, however, contends that human rights are a secular issue, irrelevant to religion and the like.

Religious minorities other than those mentioned above are not accorded the status of recognized minorities by the Constitution and do not enjoy specific rights or freedoms. They are, therefore, subject to the general laws of the country and the provisions of article 14 of the constitution, which reads:

...The government of the Islamic Republic of Iran and Muslims shall treat non-Muslims according to virtue and public morals and Islamic justice, and to honor their civil rights. This principle will be applied only to those who do not become involved in conspiracies and activities which are against Islam and Islamic Republic of Iran.³⁹⁷

Religious minorities other than *ahl al-kitab*, therefore, can claim no constitutional protection. The Constitution does not grant them religious freedom and

the word of God throughout the world.” The Constitution, *supra* note 270 art 144 and the Preamble. A religious minority leader criticized discrimination against Zoroastrians, and said that the biggest problem in his community is that government organizations avoid employing the Zoroastrians. IRNA, January 13, 2001.

³⁹⁵ The Constitution, art. 64.

³⁹⁶ See generally An-Na'im, “Religious Minorities Under Islamic Law and Limits of Cultural Relativism” *supra* note 150 at 1-18; and Tabandeh, *A Muslim Commentary on the Universal Declaration of Human Rights*, *supra* note 85 at 18.

³⁹⁷ The Constitution, art. 14.

they are not allowed to practice their faith publicly. Doing so would invoke the vague concept of anti-Islam or activities against the Islamic Republic -- mentioned in article 14. As this article stipulates, Shari'a standards govern their status. The issue of freedom of religion and religious tolerance will be addressed in second part of this study.³⁹⁸

³⁹⁸ The example of the Baha'i faith will be also mentioned in Chapter Three. See *Islam and Human Rights, Tradition and Politics*, *supra* note 49 at 157-58; Roger Cooper, *The Baha'is of Iran, Minority group Rights Report 51* (London: Minority Rights Group, 1982); and Douglas Martin, "The Persecution of the Baha'is of Iran, 1844-1984" (1984) 12-13 *Baha'i Studies*.

Conclusion

The flaws and shortcomings of Shari'a in the area of human rights are all present, and fully reflected, in Iran's constitutional and legal system. The country's human rights law lacks consistency in theory and practice. From a theoretical point of view, it does not recognize the philosophical foundation of modern human rights. This foundation calls for the attribution of rights based on humanity. Iran's laws subject human rights to religious restrictions. In practice, they are discordant with the requirements of modern life based on equality for all citizens. The legal provisions, "limited to style and rhetoric,"³⁹⁹ are vague, restrictive, and open to different interpretations. Modeled on Western constitutions, they are nevertheless subject to Shari'a restrictions.⁴⁰⁰

Furthermore, the principle of absolute guardianship of the jurisprudent and the supremacy political expediency to state laws have led to more restrictiveness.⁴⁰¹ All these conflict with human rights norms and standards codified in international covenants on ideas like the equality of men and women and ban on discrimination based on gender and religion. Iran's legal approach, however, affords a higher level of

³⁹⁹ "Islamic Rights or Human Rights: An Iranian Dilemma" *supra* note 94 at 269.

⁴⁰⁰ See Lahiji, "The Instances of Contradiction of the Constitution of Iran With the UDHR" *supra* note 316 at 19-41; Bakhash, *The Reign of Ayatollahs*, *supra* note 286; Amir Arjomand, "Constitutions and the Struggle for Political Rights: A Study in the Modernization of Political Traditions" *supra* note 263 at 39-82.

⁴⁰¹ Chehabi, "Religion and Politics in Iran: How Theocratic Is the Islamic Republic?" *supra* note 290 at 69-91; Milani, "Shi'ism and the State in the Constitution of the Islamic Republic of Iran" *supra* note 266 at 133-59; Peiman, "About the Absolute Guardianship of Jurisprudent" *supra* note 287; Saffari, "The Legitimation of the Clergy's Right to Rule in the Iranian Constitution of 1979" *supra* note 274 at 64-81; Amir Arjomand, *The Turban for the Crown*, *supra* note 266; and Homa Omid, *Islam and Post-Revolutionary State in Iran* (London: Macmillan, 1994).

protection than that of the Cairo Declaration with respect to democratic and participatory government, fundamental constitutional protections, and the rights of women and religious minorities.⁴⁰²

In practice, even limited constitutional protection and rights guarantees have not been fully observed, if not ignored. The application of law has been selective and inconsistent. In recent years, many publications have been ordered to close down; both individuals and groups have been banned from academic or political activities which the government deemed improper. Moreover, vigilantes and pressure groups, linked to certain political factions, have violated rights provisions, attacking meetings, threatening or beating individuals, destroying the equipment of bookstores, publications, and the press -- all of which they considered anti-revolution.⁴⁰³

Legal problems and deficiencies, on the one hand, and the violation of constitutional guarantees by mobs, on the other, have led to the condemnation of the Islamic Republic's policies on human rights and freedoms. International observers like the United Nations Commission on Human Rights, the United Nations Human Rights Committee, and Amnesty International, and several human rights watch groups have raised concern over human rights violations in Iran. The United Nations Human Rights Committee has also passed several resolutions condemning human rights violation in Iran.⁴⁰⁴

⁴⁰² The 1990 Cairo Declaration, *supra* note 182; and "Universal Versus Islamic Human Rights" *supra* note 94 at 348-9.

⁴⁰³ Numerous examples in this respect will be mentioned in the Second Part of the thesis. See *Guardians of Thought*, *supra* note 274; *Human Rights Watch World Report*, (1993-2000); Human Rights Watch, "As Fragile As Crystal Clear: Press Freedom in Iran" *supra* note 323.

⁴⁰⁴ See, as example, Reports on Human Rights in Iran by the United Nations Special Rapporteurs, Reynaldo Galindo Pohl and Maurice Copithorne, (1993-2001); *Human Rights Watch World Report*,

These reports and resolutions have forced Iran to play a more active role on the international scene to improve its image on the human rights issue. Iran has at least rhetorically dropped the claim that “conventions, declarations, and resolutions or decisions of international organizations which were contrary to Islam had no validity in the Islamic Republic of Iran.”⁴⁰⁵ It now either denies human rights violations and condemns the reports and resolutions of international organizations as politically motivated or resorts to the idea of cultural relativism and national cultural values to justify its human rights violations.⁴⁰⁶

Iran has begun also to co-operate with international organizations in the area of human rights. Based on article 40 of the ICCPR, Iran submitted its periodic report to the United Nations Human Rights Committee in 1992, and sent a mission to explain the human rights situation in the country and to answer the committee members’ numerous question on basic human rights, discriminatory laws, inequality, legal procedure, the number of executions, etc.⁴⁰⁷ It also allowed the United Nations special rapporteurs to visit the country on a few occasions. The rapporteurs were generally banned from entering the country each time they published their reports though.

(1995) at 269-72, (1996) at 276-80, (1997) at 281-89, and (1998) at 329-33. In December 2000, the United Nations General Assembly also adopted a resolution calling on the Iranian government to end the use of torture and other forms of cruel, inhuman and degrading punishment, in particular the practice of amputation. Reuters, the United Nations, December 4, 2000. Iran has appeared on the agenda of the annual meeting of the UN Commission on Human Rights for the past eighteen years, making it the subject of regular reports on its human rights record. In April 2001, Iran asked the Commission to acknowledge its improved record on human rights and to drop Iran from the agenda of the current annual meeting. See Agence France Presse, Geneva, April 13, 2001.

⁴⁰⁵ The statement by Iran’s then representative at United Nations. See *supra* note 320.

⁴⁰⁶ See Chapter One, text accompanying notes 64-68; and the statement by Ayatollah Mohammad Yazdi, then the head of the Judiciary, *supra* Chapter One note 144.

⁴⁰⁷ Mehrpoor, *Human Rights in International Instruments*, *supra* note 119 at 52-98. Mehrpoor has been engaged in preparing the periodic report, and was present at the United Nations Human Rights Committee to address the Committee’s concerns.

Moreover, Iran has seized opportunities in recent international conferences on human rights to elucidate its theoretical positions on human rights to the world. Its active participation in the 1993 Vienna World Conference on Human Rights⁴⁰⁸ and the 1995 Fourth International Women Conference in Beijing⁴⁰⁹ are two typical examples.

It has hosted some international conferences on human rights, basically to introduce and elaborate the Islamic version of human rights. It has also established the Islamic Human Rights Commission, affiliated to the Judiciary Branch of the government, to supervise human rights situation, and to investigate any human rights violation reported to the Commission.⁴¹⁰

Apart from human rights violations, the major obstacle for Iran to compliance with international norms for human rights has been its official commitment, as a religious duty, to apply Shari'a, which contradicts these norms. The authorities and some legal research groups are already preoccupied with this problem, and try to balance between the state's commitment to international covenants and the observance of Shari'a laws.⁴¹¹ This is a difficult, if not impossible, task. Although they have succeeded in some minor practical areas,⁴¹² it was the negative social impact that

⁴⁰⁸ Iran was one of the leading countries in this conference to challenge the principle of universality of human rights, and to promote the idea that diversity of societies and local cultural and religious values should be taken into account in definition and application of human rights. See Chapter One notes 63-66; "Islamic Rights or Human Rights: An Iranian Dilemma" *supra* note 94 at 280-81; and "Universal Versus Islamic Human Rights" *supra* note 94 at 372-73.

⁴⁰⁹ For full coverage of the activities of the Iranian mission to this conference, see Mehrpoor, *Human Rights in International Instruments*, *supra* note 119 at 287-322.

⁴¹⁰ The Commission has no role nor power in the judiciary system of the country. In practice, the Commission is not active either. Its work is only limited to issue an statement or new release from time to time.

⁴¹¹ Mehrpoor, *Human Rights in International Instruments*, *supra* note 119 at 77-81 and 178-79.

⁴¹² As an example, in the Note 17 of the Act of the First Economic, Social, and Cultural Development Plan of the Islamic Republic of Iran, Shari'a flogging punishment for almost all non-*Hudud* crimes has now been mostly replaced by fine and imprisonment. However, Ayatollah Shahroudi, the head of the Judiciary, recently urged Shari'a-based legislation for all punishable offenses. Facing the problem of

rendered the application of actual Shari'a laws impossible. Flogging for minor offenses, for example, could easily backfire against the government. Only a modern approach to human rights and fundamental change in understanding and interpreting of Shari'a sources may lead to better results.

Despite continuous and unchecked vigilante attacks, the demand has grown for the respect of human rights and for the improvement of constitutional protections and legal guarantees. The public debate has become free. The press is concerned with issues like democratic government, political freedom, and human rights.⁴¹³ It also dares to criticize the government's domestic and foreign policies in different areas.⁴¹⁴

Elected in May 1997, President Mohammad Khatami is a moderate cleric, who campaigned on a platform of civil society and fundamental rights and freedoms. He obtained 70% of the votes in a huge turnout. He gave the movement for reform new dimension within Iran's social and political context.

The president himself advocates fundamental rights and freedoms. Since his election, his famous slogans "dialogue of civilizations"⁴¹⁵ in foreign policy and the rule of law in domestic affairs have impressed the world and the nation. He has improved Iran's image internationally and developed the country's foreign relations. Internally, he advocates the compatibility of religion and freedom,⁴¹⁶ and continues to back

crowded prisons in the country, he said that Islamic criminal system relies less on imprisonment and more on other forms of punishment. IRNA, December 8, 2000.

⁴¹³ The issue of the press and press freedom in Iran will be discussed in length in Chapter Four.

⁴¹⁴ *Guardians of Thought*, *supra* note 274 at 2.

⁴¹⁵ His September 1998 address at the United Nations General Assembly, which led the United Nations to declaring the year 2001 as the year for worldwide dialogue of civilizations, as well as his lecture at the United Nations Millennium Summit in September 2000 gave additional weight to the country's international prestige.

⁴¹⁶ It should however be mentioned that, theoretically speaking, although he rightfully refers to the

political freedoms and the observance of constitutional protections and guarantees.⁴¹⁷ The dynamic public debate, numerous political meetings, mostly led by university students, and large presence of the press -- which, in the absence of political parties, have become quite political -- have changed the social, political, and even religious culture of the country.⁴¹⁸

Conservative and traditionalist forces, however, continue to hold power and oppose any reform whatsoever. They use religious and revolutionary rhetoric and the pretext of public security to close down or fine independent newspapers and magazines, arresting publishers, editors, and other intellectuals on criminal charges. Pressure groups, on their behalf, attack any individual or group they consider a threat to the system. These attacks have claimed many lives so far.⁴¹⁹ It seems that hardline conservatives have chosen to ignore overwhelming votes and roll back any moves toward reform.

Almost a century after the Constitutional Revolution and two decades after the Islamic, in which the secularists and the traditionalists dominated, respectively, Iran is witnessing the rise of a new political movement, which seeks a moderate democratic

recognition of human dignity and honor and freedom by the religion, he falls short to differentiate between that philosophical recognition and legal definition of human rights theory, and wrongfully concludes the confirmation of modern human rights and freedoms by the religion. As discussed, that recognition may not be necessarily translated into human rights and freedoms in legal and political context. Of course, this theoretical deficiency in his argument does not harm his advocacy for human rights and political freedoms.

⁴¹⁷ On November 29, 1997, he also formed the Constitutional Watchdog Committee, comprising of five member to supervise the observance of the Constitution by all institutions and organizations in the country, and to report to the President. See IRNA, November 29, 1997. Constitutionally however, his power is only limited to the Executive Branch of the government. He does not enjoy enough power to put his ideas and decisions into effect.

⁴¹⁸ Many examples in this regard will be brought forward in Chapters Three and Four. See lao Fariba Adelkhah, *Être moderne en Iran*, *supra* note 377.

⁴¹⁹ This subject will be discussed more in the Secont Part of this study. See Robin Wright, "Islam and Liberal Democracy: Two Visions of Reformations" (1996) 7 J. Democracy 64-75; and Shahrourh

government that benefits from each revolution and avoids the extremism of both. This movement may eventually lead to religious, constitutional and legal reforms. These reforms stand a better chance of establishing constitutional protections, rights guarantees, and the equality of all citizens, based on a modern view of human rights.

Part II

The Scope of the Right to Freedom of Expression in Shari'a and Iran's Constitutional and Legal System

Introduction

Freedom of Expression in International Human Rights Law Theory

In Part I, this study discussed the theoretical and structural aspects of the question of human rights in Shari'a and Iran's legal and constitutional system. It analyzed the meaning, characteristics, and general principles of human rights therein. It also elaborated the concepts, attitudes, and criteria of human rights in that legal tradition. Based on the theoretical, legal and practical problems and deficiencies identified, Part I concluded that Shari'a and Iran legal system, depending on the theoretical foundation and outlook, contradict the basic norms and principles of modern international human rights standards.

This part of the thesis takes up the scope of freedom of expression in Shari'a and in Iran's legal system as a case study. The unique role of freedom of expression in modern democratic cultures and its deep political implications make Iran an interesting case study. The repression of expression, as an instrument of state policy, challenges the idea that human rights are upheld in Iran. In practice, restrictive laws and provisions and vague qualifications are used as a pretext to limit the scope of free expression, and have resulted in the closure of publications, the punishment of editors and writers, and the banning of individuals and groups from social and political activities.

On the other hand, the reform movement, discussed in Chapter Two, is making steady progress. In particular, the demand for democracy, fundamental rights, and freedom of expression is having a significant impact on public debate. Since freedom of expression partly covers other important human rights and freedoms, such as freedom of religion and the right to participate in political life, this study will examine the idea of freedom of religion and political speech in Shari'a and Iran's legal system. The following introduction illustrates the principles and foundations of freedom of expression, as recognized in international human rights law. It will allow us to make a theoretical comparison between international norms and the norms of Shari'a and Iran's legal system in the field of human rights.

Freedom of expression,¹ as an individual entitlement, is one of the supreme values of a free and democratic society, and an extremely important aspect of human life.² It could also be considered the cornerstone of many other important freedoms -- freedom of religion and freedom of assembly and association -- which may lose their full significance in the absence of freedom of expression.³ The French Declaration of the Rights of Man (1789) states that freedom of expression and opinions is "one of the

¹ In our view, "freedom of expression" is more commonly used than similar terms like freedom of speech, freedom of opinion, free speech, and free expression. In this study, it will be used to cover freedom of speech, freedom of the press, and other related freedoms, such as freedom of religion, freedom of communication, freedom of access to information, etc.

² Eric Barendt, *Freedom of Speech* (Oxford: Clarendon Press, 1987) at 1-2; D. F. B. Tucker, *Law, Liberalism and Free Speech* (Totowa, NJ: Rowman & Allanheld, 1985) at 1; and P. Garant, "La Charte constitutionnelle de 1982 et la démocratie électorale canadienne" (1990-91) 21 *Revue de droit de l'Université de Sherbrooke* 429.

³ Kent Greenawalt, "Free Speech in the United States and Canada" (1992) 55 *L. & Contemporary Problems*, at 5.

most precious rights of man.”⁴ Since then, it has been considered as an independent principle in political philosophy.⁵

Freedom of expression in debate and the exchange of ideas is essential for a healthy development of a free society. It has been central to democracy and civil liberties since the eighteenth and nineteenth centuries. Freedom of expression provides the opportunity for citizens to develop their personality in any way they see fit; it is especially important in an era of multiculturalism and globalization.⁶ The right to a free exchange of ideas and debate is essential for public education, being the rule rather than the exception.⁷ Voltaire believed that democracy must uphold freedom of expression of all citizens, even when the opinion appears subversive or obnoxious to some.⁸ Freedom

⁴ Article 11 of the 1789 French Declaration of the Rights of Man reads: “La libre communication des pensées et des opinions est un des droits les plus précieux de l’homme tout citoyen peut donc parler, écrire, imprimer librement, ...” Freedom of expression in the United States is grounded in the First Amendment, which specifically mentions the liberties of speech, press, assembly, and petition, in addition to no establishment of religion. See Philip S. Cook, ed., *Liberty of Expression* (Washington, D.C.: Wilson Center Press, 1990) at 30. See also Franklyn S. Haiman, *Speech and Law in a Free Society* (Chicago: University of Chicago Press, 1981) at 3. In Canada, see the Canadian Charter of Rights and Freedoms, Constitution Act, 1982, Sec. 2. Also Robert A. Sedler, “The Constitutional Protection of Freedom of Religion, Expression, and Association in Canada and the United States: A Comparative Analysis” (1988) 20 *Case Western Reserve J. Int’l L.* 577; and C. F. Beckton, “Liberté d’expression” in Gérald A. Beaudoin & Edward Ratushny, eds., *Charte canadienne des droits et libertés* (Montreal: Wilson & Lafleur, 1989).

⁵ Although freedom of expression could be studied as a component of a broader principle of liberty, it can be justified by independent arguments; arguments derived from distinct or special characteristics of expression that justify its particular protection. See Frederick Schauer, *Free Speech: A Philosophical Enquiry* (London: Cambridge University Press, 1982) at 5. Also Henri Brun & Pierre Brun, *Chartes des droits de la personne, législation jurisprudence et doctrine*, 13th ed. (Montreal: Wilson & Lafleur, 2000) at 113-50.

⁶ Haiman, *Speech and Law in a Free Society*, *supra* note 4; Gerry Maher, ed., *Freedom of Speech: Basis and Limits* (Stuttgart: Franz Steiner Verlag Wiesbaden GmbH, 1986) at 9.

⁷ Archibald Cox, *Freedom of Expression* (Cambridge: Harvard University Press, 1981) at 1. See J.-F. Gaudreault-DesBiens, *La liberté d’expression entre l’art et le droit* (Montreal: Liber/Les Presses de l’Université Laval, 1996); and A. Tremblay, “La liberté d’expression au Canada: le cheminement vers le marché libre des idées” in Daniel Turp & G.-A. Beaudoin, eds., *Perspectives canadiennes et européennes des droits de la personne* (Cowansville, Que.: Éditions Yvon Blais, 1986) 281.

⁸ P. B. Gajendragadkar, *Law, Liberty, and Social justice* (1965) at 90 in C. K. N. Raja, *Freedom of Speech and Expression Under the Constitutions of India and the United States* (Dharwad, India: Karnatak University Press, 1979) at 5. William O. Douglas also observed that full and free discussion,

of expression, as Thomas Paine wrote, is “one of the natural rights of man always retained.”⁹ If free will is the foundation of human rights theory, then thoughts and opinions should be exchanged freely. It is natural for human beings to communicate with each other about matters of public concern. This may take place either among the citizenry at large or politically between citizens and their representatives.¹⁰ The proper operation of parliamentary institutions in a democratic society depends mostly on the existence of freedom of expression, which, as Karpen states, “through the free competition of opinions in the marketplace of ideas, safeguards diversity of opinions in political life.”¹¹

A constitution should protect every opinion on a private or public matter without distinguishing between valuable and worthless opinions. It is not up to the government, but the people, to make this distinction. From this point of view, freedom of expression is a defensive right against state propaganda (or suppression), and guarantees “the institutions of speech, public opinions, press, and broadcasting due to their impact on society and democracy.”¹²

even of ideas we hate, encourages the testing of our own prejudices and preconceptions. Full and free discussion keeps a society from becoming stagnant and unprepared for the stresses and strains that work to tear all civilizations apart. See Raja, *ibid.*

⁹ Thomas Paine, *The Rights of Man* (Heritage Press, 1961; Indianapolis: Hackett, 1992) at 58. See also C. E. Baker, “Scope of the First Amendment: Freedom of Speech” (1978) 25 *UCLA L. Rev.* 964; and M. Bullinger, “Freedom of Expression and Information: An Essential Element of Democracy” (1985) 6 *H. R. L. J.* 339.

¹⁰ Cass R. Sunstein, *Democracy and the Problem of Free Speech* (New York: The Free Press, 1993) at 19; Thomas Emerson, “Communication and Freedom of Expression” (September 1972) *Scientific American* 163; and Glenn Tinder, “Freedom of Expression: The Strange Imperative” (1980) 69 *Yale Rev.* 162.

¹¹ Ulrich Karpen, “Freedom of Expression As a Basic Right: A German View” (1989) 37 *Am. J. Com. L.*, at 395. See also A. Wayne MacKay, “Freedom of Expression: Is It All Just Talk?” (1989) 68 *Can. Bar Rev.*, at 715.

¹² Karpen, “Freedom of Expression As a basic Right” *ibid.* at 397. See also G. Rutherglen, “Theories of Free Speech” (1987) 7 *Oxford J. Legal Studies* 115; Robert F. Ladenson, *A Philosophy of Free*

Nowadays, what is more important than the principle of freedom of expression itself is its scope and meaning in the legal system of a society. Shari'a and Iran's legal and constitutional system praise freedom of expression as a general principle, but when it comes to the meaning and extent of freedom of expression they fall short. Free expression is subject to Shari'a restrictions and criteria. This thesis takes the term "freedom of expression" to mean the liberty of all citizens to form and express their beliefs and opinions, through any medium -- be it speech, writing, art, or music -- on any subject, such as the function of their government; to undertake action or to entertain any idea, individually or in peaceful gatherings for the purpose of exchanging their views or listening to the views of others; and to communicate ideas and information.¹³ Of course, when freedom of expression is as restricted as in Iran, many of the fine debates of Western societies on the precise content of the right to freedom of expression are simply not relevant. But it might be useful to agree on some parameters for why the topic is of importance in this research and to trace out some theories of freedom of expression.

Freedom of expression works as a system. It may be considered from the perspective of the speaker (or writer, artist, etc.), the audience (or recipient of the publication), and the public interest, and covers a set of rights which, of course, includes the right to be silent, the right to inquire, access to information, and the right to

Expression (Totowa, NJ: Powman & Littlefield, 1983); and Pierre Béliveau, *Les garanties juridiques dans les chartes des droits*, 2 vols. (Montreal: Édition Thémis, 1992).

¹³ Stanley Kleinberg, "How Sacred Is Free Speech?" in Maher, *Freedom of Speech: Basis and Limits*, *supra* note 6 at 37.

assemble and form associations.¹⁴ From this point of view, as Emerson set forth, the basic goals of freedom of expression are:

- 1) assuring individual self-fulfillment;
- 2) advancing knowledge and discovering the truth;
- 3) providing for participation in decision-making by all members of society; and
- 4) achieving a more adaptable and hence a more stable community ... maintaining the precarious balance between healthy cleavage and necessary consensus.¹⁵

Freedom of expression provides the citizens with the opportunity to develop their views in their own ways and languages.¹⁶ From a broader perspective, this benefits the society at large, because it protects criticism and criticism leads to progress.¹⁷ For people who bear thoughts and ideas, there is a need to express them.¹⁸ Freedom of expression must then be guaranteed and maintained. Since many rights are conditional upon freedom of expression, the concept of rights and responsibility in a society like Iran, where freedom of expression is restricted, is self-contradictory. Any restriction leads to excommunication, and, as Roy Harris notes, “the antithesis of freedom of

¹⁴ Thomas I. Emerson, *The System of Freedom of Expression* (New York: Random House, 1970) at 3. It should be mentioned, in passing, that expression is different from any action. While the expression is fully protected and guaranteed for every individual, the action is controlled by the state, which can prohibit or compel it. As Emerson writes, “[a] majority of one has the right to control action, but a minority of one has the right to talk.” *The System of Freedom of expression, ibid.* at 8. See generally Peter Desbarats & Michèle Paré, *Liberté d’expression et nouvelles technologies* (Montreal: IQ, 1998); and Ithiel de Sola Pool, *On Free Speech in an Electronic Age: Technologies of Freedom* (Cambridge: Harvard University Press, 1983).

¹⁵ Emerson, *The System of Freedom of Expression, ibid.* at 6-7.

¹⁶ MacKay, “Freedom of Expression: Is It All Just Talk?” *supra* note 11 at 724.

¹⁷ *Ibid.*

¹⁸ These phrases may refer to different theories of freedom of expression -- e.g., the instrumental and the

expression is not censorship but excommunication: the denial of the right to participate.”¹⁹

The state should undertake the positive promotion and encouragement of freedom of expression. Zechariah Chafee, Jr. believes that “[w]e must do more than remove the discouragements to open discussion. We must exert ourselves to supply active encouragement,” and “to take affirmative steps to improve the methods by which discussion is carried on.”²⁰ Individuals need to learn, and should know the concepts, principles, and extent of their rights and legal guarantees and protections while exercising them. This is how the full benefit of freedom of expression can be realized. As Emerson put it, “the principles should be precise and clear. Any doubt or uncertainty negates the process.”²¹ Any compulsion to subscribe to a particular belief, any compulsory disclosure of belief, or any punishment or imposing sanctions for holding a belief should also be avoided.²²

The idea of protecting and promoting freedom of expression should also consider the interests of poor people who, due to the time and costs of judicial claims, are unable to avail themselves of rights guarantees or charters and bills to make claims against management at the workplace or against the government at large. Unlike the

intrinsic-- which will be noted as the discussion proceeds.

¹⁹ Roy Harris, “On Freedom of Speech” in John E. Joseph & Talbot J. Taylor, eds., *Ideologies of Language* (London: Routledge, 1990) at 159. Also Franklyn S. Haiman, ed., *Freedom of Speech* (Skokie, Ill.: National Textbook, 1976); Paul Chevigny, “Philosophy of Language and Free Expression” (1980) 55 *New York University L. Rev.* 157.

²⁰ Zachariah Chafee Jr., *Free Speech in the United States* (Cambridge, Massachusetts: Harvard University press, 1942) at 559.

²¹ Emerson, *The System of Freedom of Expression*, *supra* note 14 at 12.

²² See generally Nicole Duplé, “Les libertés d’opinion et d’expression: nature et limites” (1987) 21 *Revue Juridique Thémis* 541; and Yves De Montigny, “The Difficult Relationship Between Freedom of Expression and Its Reasonable Limits” (1992) 55 *Law & Contemporary Problems* 35.

corporate media or business giants, the “poor cannot afford freedom of expression in either the political or economic sense.”²³ In a country like Iran, where the judiciary is not independent and corruption is widespread,²⁴ the poor and ordinary people cannot afford the cost of any lawsuit against the government, and risk even being charged with anti-Islamic or anti-government activities. Making a claim, litigation, or simply speaking out may cost the loss of job or livelihood.²⁵ The promotion of the principle of freedom of expression ensures immunity from government coercion, but it does not guarantee citizens an equal ability to speak.²⁶ The promotion of self-actualization then should not be restricted to individuals but open to communities of people. To achieve the objectives of freedom of expression, a set of rights and principles must be linked to practice and institutions. This notion should be considered in judicial interpretations by judges as well.²⁷

The contemporary notion of freedom of expression is said to have developed from tolerance which, according to Ethel Groffier, had been at the center of legal, philosophical, and religious controversies caused by religious persecution in the Europe

²³ MacKay, “Freedom of Expression: IS It All Just Talk?” *supra* note 11 at 763.

²⁴ In December 2000, the head of the Judiciary said that some 40 judges and secretaries had been found guilty of various crimes, including bribes and graft, adding “a number of gangs linked to the judiciary departments have also been busted.” Islamic Republic News Agency (IRNA), Dec. 31, 2000.

²⁵ MacKay, *supra* note 11 at 763.

²⁶ Schauer, *A Philosophical Enquiry*, *supra* note 5 at 125-26.

²⁷ MacKay, *supra* note 11 at 763. Also generally Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986); Chantal Sauriol, *Les abus de la liberté d'expression: l'encadrement juridique du rôle du critique* (Cowansville, Que.: Édition Yvon Blais, 1993); Beckton, “Liberté d'expression” in Beaudoin & Ratushny, *Charte canadienne des droits et libertés*, *supra* note 4; C. Beaulieu, *L'application de la Charte canadienne des droits et libertés au pouvoir judiciaire* (Montreal: Édition Thémis, 1995); and M. A. Drumbl, I. Lee, & M. Rafuse, “La liberté d'expression et la dignité de la personne devant la Cour suprême du Canada” (1994) 5 Windsor Rev. Legal & Social Issues 109.

of the seventeenth and eighteenth centuries.²⁸ The publication of John Milton's *Areopagitica*²⁹ in 1644, and later the works of renowned writers like John Locke and Bayle, paved the way for religious tolerance and the subsequent blossoming of freedom of thought, opinion, press, and speech.³⁰ These freedoms were enshrined in the French Déclaration des droits de l'homme et du citoyen and the American Bill of Rights and the First Amendment of the Constitution.³¹

Since these documents were first written, and because of the importance of freedom of expression in liberal thought and in a democratic society, philosophers and jurists have developed several philosophical doctrines and theories by which they sought to define the meaning, characteristics, role, and goal of freedom of expression in society.³² The study and full examination of these theories are beyond the scope of this

²⁸ Ethel Groffier, "Les aspects juridiques de la tolérance: essai de terminologie" in E. Groffier & Michel Paradis, *The Notion of Tolerance and Human Rights* (Carleton: Carleton University Press, 1991) at 68. See also generally M. Paradis, "Les fondements de la tolérance universelle chez Bayle: la séparation de l'église et l'état" in *The Notion of Tolerance and Human Rights, ibid.*; John Humphrey, "Political and Related Rights" in Theodor Meron, ed., *Human rights in International Law* (Oxford: Clarendon Press, 1984) at 183.

²⁹ John Milton, *Areopagitica*, ed. by J. C. Suffolk (London: University of Tutorial Press, 1968).

³⁰ Humphrey, "Political and Related Rights" *supra* note 28; Groffier, "Les aspects juridiques de la tolérance" *supra* note 28 at 69. Also H. Kamen, *The Rise of Toleration* (London: Weidenfeld & Nicolson, 1967); Harry Bracken, "Toleration Theories: Bayle v. Locke" in *The Notion of Tolerance and Human Rights, supra* note 28; Cox, *Freedom of Expression, supra* note 7; and Morris Ernst, *The First Freedom* (New York: The Macmillan 1946).

³¹ H. H. Wellington, "On Freedom of Expression" (1979) 88 Yale L. J. 1105; Robert Bork, "Neutral Principles, Some First Amendment Problems" (1979) 47 Indiana L. J. 47; Lillian BeVier, "The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle" (1978) 30 Stanford L. Rev. 299; Steven Shiffrin, "Defamatory Non-Media Speech and First Amendment Methodology" (1978) 25 UCLA L. Rev. 915; Fred Berger, ed., *Freedom of Expression* (Belmont, CA: Wadsworth, 1980). In Canada, see C. Becton, "Freedom of Expression in Canada -- 13 years of Charter Interpretation" in G.-A. Beaudoin & E. P. Mendes, eds., *Charte canadienne des droits et libertés*, 3rd ed. (Montreal: Wilson & Lafleur, 1996) 169; G.-A. Beaudoin, "Comparaison entre la Charte canadienne des droits et libertés et le Bill of Rights américain" (1983) Cambridge Lectures 52; L. B. Tremblay, "Le Canada de la Charte: Une démocratie libérale neutre ou perfectionniste?" (1995) 40 McGill L. J. 487; and R. Vandycke, "La Charte constitutionnelle et les droits économique, sociaux et culturels" (1989-90) *Annuaire canadien des droits de la personne* 167.

³² G. Rutherglen, "Theories of Free Speech" (1987) 7 Oxford J. Legal Studies 115; and Bruno Leoni, *Freedom and the Law*, 3rd ed. (Indianapolis: Liberty Fund, 1991).

thesis; however, a brief reference to some of the most important theories will contribute to a critical analysis of freedom of expression in Shari'a and Iran's constitutional and legal system. The issue of freedom of expression in international instruments will be noted in the second section of this chapter and in Chapter Four.³³

In his "truth arguments" which dominates the literature of free speech,³⁴ John Stuart Mill believes that the truth can only be discovered through public debate, and, since the government does not hold all the truth to make the right decisions, it should promote general citizen participation in the exercise of free public debate and free enquiry on any subject and without imposing any limit, which may obstruct the achievement of truth and knowledge.³⁵ He also believed that the truth, in the marketplace of ideas, will eventually prevail in open discussion (through trial and error)³⁶ and that the truth is a good thing.³⁷ In his view, false ideas should also be tolerated. In fact, the truth emerges only when confronted with false opinions through a dynamic public debate on subjects.³⁸ In other words, the truth cannot be attained if beliefs "are to be protected from the criticism of opponents."³⁹

³³ Roger Pinto, *La liberté d'information et d'opinion en droit international* (Paris: Economica, 1984).

³⁴ Schauer, *A Philosophical Enquiry*, *supra* note 5 at 15.

³⁵ John Stuart Mill, *On Liberty* (1859), ed. by Gertrude Himmelfarb (London: Penguin Publications, 1987); J. S. Mill, "On Liberty" in *Utilitarianism, On Liberty, and Considerations on Representative Government*, ed. by H. B. Acton (London: Dent, 1972). See also Cox, *Freedom of Expression*, *supra* note 7 at 2; Jeremy Bentham, *Bentham's Political Thoughts* (New York: Barnes & Noble, 1973); and Harris, "On Freedom of Speech" *supra* note 19 at 155.

³⁶ Cox, *ibid.*

³⁷ Fred R. Berger, *Happiness, Justice and Freedom: The Moral Philosophy of John Stuart Mill* (Berkeley: University of California Press, 1984); John Gray, *Mill on Liberty: A Defense* (London: Routledge & Kegan Paul, 1983); and Ladenson, *A Philosophy of Free Expression*, *supra* note 12.

³⁸ Barendt, *Freedom of Speech*, *supra* note 2 at 8.

³⁹ Stanley Kleinberg, "How Sacred Is Free Speech?" in *Freedom of Speech: Basis and Limits*, *supra* note 6 at 38. See also Gerry Maher, "Freedom of Speech As a Problem in Legal and Social Philosophy" in *Freedom of Speech: Basis and Limits*, *ibid.* at 87.

In the United States, the argument for democracy and self-government, presented by Alexander Meiklejohn, emphasizing the political aspect of freedom of expression, rests on the right of the citizens to be informed, to analyze the information they receive, and to use the information to take active part in government. Therefore, all citizens enjoy equal rights in the process of forming a democratic government.⁴⁰ The theory which requires the *a priori* acceptance of democratic principles for the organization of the state, where the population at large is sovereign, focuses mostly on the audience's interest; but, it seems, the right to be informed covers the speaker's interest as well.⁴¹ This easy-to-understand theory, Barendt claims, "has been the most influential theory in the development of twentieth-century free speech law."⁴² Freedom of expression, according to this theory, provides the sovereign electorate with the information it needs to exercise its sovereign power, but also the freedom to criticize government officials and hold them accountable to the population.⁴³

Based on Scanlon's "autonomy theory" (or "Millian principle" as he himself refers to it), in order to achieve autonomy individuals need unlimited freedom of expression. This allows them to analyze all the opinions and arguments and to determine what course of action to take. In order to prevent the formation of harmful

⁴⁰ See generally Alexander Meiklejohn, *Political Freedom: The Constitutional Powers of the People* (Westport, Conn.: Greenwood Press, 1979); A. Meiklejohn, "The First Amendment Is an Absolute" in Philip B. Kurland, ed., *Free Speech and Association: The Supreme Court and the First Amendment* (Chicago: University of Chicago Press, 1975); Barendt, *Freedom of Speech*, *supra* note 2. For a critique of Meiklejohn's view, see Thomas M. Scanlon, "A Theory of Freedom of Expression" in Ronald M. Dworkin, ed., *The Philosophy of Law* (Oxford: Oxford University Press, 1977) 153-71; T. M. Scanlon, "Freedom of Expression and Categories of Expression" (1979) 40 *University of Pittsburgh L. Rev.*, at 519-24.

⁴¹ William Brennan, "The Supreme Court and the Meiklejohn Interpretation of the First Amendment" (1965) 79 *Harvard L. Rev.* 1.

⁴² Barendt, *Freedom of Speech*, *supra* note 2 at 23.

beliefs, government should simply refrain from imposing any kind of restriction on the freedom of expression. Scanlon even believed that certain harms caused by the acts of expression cannot justify legal restrictions.⁴⁴ He later revised this idea and accepted certain limitations on freedom of expression.⁴⁵

Like other liberal theories, Schauer's self-development theory stresses the need for freedom of expression to attain one's spiritual and intellectual development (or self-fulfillment) through public debate and criticism, even at the expense of the development of the community.⁴⁶ Also, the Emersonian Summary refers to some of the above-mentioned theories, and states that freedom of expression is necessary due to the fact that it is a method of ensuring individual self-fulfillment; a means of attaining the truth; a method of securing participation by the members of society in social and political decision-making; and a method of balancing stability against change in society.⁴⁷

Besides the libertarians, there are egalitarians, like Catherine MacKinnon and Owen Fiss, who hold that equality provides the answer. They rely on the principle of

⁴³ Schauer, *A philosophical Enquiry*, *supra* note 5 at 36.

⁴⁴ See generally Scanlon, "A Theory of Freedom of Expression" *supra* note 40 at 153-71; Scanlon "Freedom of Expression and Categories of Expression" *supra* note 40 at 519-24; and T. Scanlon, "Rawls' Theory of Justice" (1973) 21 *Pennsylvania L. Rev.* 1020.

⁴⁵ Barendt, *Freedom of Speech*, *supra* note 2 at 19; Allen Buchanan, "Atonomy and Categories of Expression: A Reply to Professor Scanlon" (1979) 40 *University of Pittsburgh L. Rev.*, at 551.

⁴⁶ See generally Schauer, *A Philosophical Enquiry*, *supra* note 5; F. Schauer, "Speech, Speech-Obscenity, and Obscenity" (1979) 67 *Georgetown L. J.*, at 889; F. Schauer, "Social Foundations of the Law of Defamation: A Comparative Analysis" (1980) 1 *J. Media L. & Practice* 3; Barendt, *Freedom of Speech*, *ibid.* at 14; F. Schauer, "Categories and the First Amendment: A Play in Three Acts" (1981) 34 *Vanderbilt L. Rev.* 265-307; and F. Schauer, "Free Speech and the Paradox of Tolerance" in B. Leiser, ed., *Values in Conflict* (New York: Macmillan, 1981) 228.

⁴⁷ Thomas Emerson, *Toward a General Theory of the First Amendment* (New York: Vintage Books, 1966) at 3. Also Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977) at 259. Also F. C. Decoste, "The Separation of State Powers in Liberal Polity: *Vriend v. Alberta*" (1999) 44 *McGill L. J.* 231.

affirmative action by the state to limit freedom of expression in racist/hate speech and pornography. They believe that the state should not be seen as the “enemy” but as a “parliamentarian”.⁴⁸

Some of the theories discussed here -- e.g., Mill’s and Meiklejohn’s -- are instrumentalist, and consider freedom of expression as a means to an end. Others -- such as Schauer’s self-fulfillment theory -- are neither utilitarian nor consequentialist, and take freedom of expression as an end and value in itself.⁴⁹ Each of them has advantages and weaknesses, but they all strongly advocate the protection of freedom of expression and the promotion of diversity in expressed opinions and choices -- valued by liberal doctrine.⁵⁰ Every member of a community would have the opportunity to express his thoughts and needs, and the community comes together as such so that the thoughts are heard and the needs met.

It should be noted that this study does not deal with the philosophical and theoretical foundations of the principle of freedom of expression; nor is it a conceptual analysis and clarification of freedom of expression in philosophy of law or political and

⁴⁸ Catherine MacKinnon, *Only Words* (Cambridge: Harvard University Press, 1993); C. MacKinnon, “Pornography, Civil Rights, and Speech” (1985) 20 *Harvard Civil Rights-Civil Liberties L. Rev.* 1; Owen Fiss, “The Silencing Effect of Speech” paper presented at Legal Theory Seminars on January 19, 1995, Law Faculty, McGill University. Also C. Feasby, “*Libman v. Quebec (A.G.)* and the Administration of the Process of democracy under the Charter: The Emerging Egalitarian Model” (1999) 44 *McGill L. J.* 5.

⁴⁹ Schauer, *A Philosophical Enquiry*, *supra* note 5 at 47-9.

⁵⁰ Sanford Levinson, “Freedom of Expression in Contemporary American Constitutional Law” and A. E. Dick Howard, “Legal and Constitutional Protections of Freedom of Speech in the United States” both in Cook, *Liberty of Expression*, *supra* note 4 at 45 and 79 respectively; Haiman, *Freedom of Speech*, *supra* note 19; Frede Castberg, *Freedom of Speech in the West* (London: George Allen & Unwin, 1960); Judith Lichtenberg, “Foundations and Limits of Freedom of the Press” in J. Lichtenberg, ed., *Democracy and the Mass Media, A Collection of Essays* (New York: Cambridge University Press, 1990) at 108-10; Robert A. Sedler, “Constitutional Protection of Individual Rights in Canada: The Impact of the New Canadian Charter of Rights and Freedoms” (1984) 59 *Notre Dame L. Rev.* 1191; Chevigny, “Philosophy of Language and Free Expression” *supra* note 19 at 157; D. W. Haslett, “The General Theory of Rights” (1980) 5 *Social Theory & Practice* 427; and R. F. Devlin, “Some Recent Developments in Canadian

social theories. Instead, it considers freedom of expression a question of law, and examines the legal aspects and protection of freedom of expression in a particular legal system. It analyzes the structure and characteristics of freedom of expression in Shari'a and Iran's legal system with reference to the application of this freedom in different activities -- which are mainly illustrative, not exhaustive. The examples we present highlight the problems and shortcomings of the system in question.⁵¹

As noted, freedom of expression is an individual entitlement. By definition however, it is not an individualistic freedom. It has also a social dimension that unfolds only in communication with fellow persons. In fact, any expression affects others -- directly or indirectly, in the short or the long term -- and this, indeed, is the whole purpose of expression.⁵² Some expressions, however, may cause harm to other individuals or groups, society, government, or even the person himself. An expression, therefore, needs to be somehow regulated in order to protect others' rights and freedoms.⁵³ Freedom of expression is not an absolute and unqualified value; other

Constitutional Theory with Particular Reference to Beatty and Hutchinson" (1996) 22 Queen's L. J. 81.

⁵¹ Many of these arguments may seem irrelevant in present-day Iran, but they illustrate how far Iran's legal system is from international standards of freedom of expression.

⁵² De Montigny, "The Difficult Relationship Between Freedom of Expression and Its Reasonable Limits" *supra* note 22 at 35; Duplé, "Les liberté d'opinion et d'expression: nature et limites" *supra* note 22 at 541; Beckton, "Liberté d'expression" *supra* note 27; and Joel Feinberg, "Limits to the Free expression of Opinion" in J. Feinberg & H. Gross, eds., *Philosophy of Law*, 2nd ed. (Encino, CA: Dickenson, 1980) 191. Also C. Sauriol, "Liberté d'expression: grandeurs et misères" in Formation permanente du Barreau du Québec, *Développements récents en droit administratif et constitutionnel (1999)* (Cowansville, Que.: Édition Yvon Blais, 1999) 171; and E. Foster, "La Charte canadienne des droits et libertés: pour la protection des droits de la personne humaine ou instrument d'évolution de la société?" (1989) 30 Cahiers de Droit 237.

⁵³ Stephen Norris, "Being Free to Speak and Speaking Freely" in T. Honderich, ed., *Social Ends and Political Means* (London: Routledge & Kegan Paul, 1976) 13; D. H. Munro, "Liberty of Expression: Its Grounds and Limits" (1970) 13 Inquiry 238; Schauer, "Free Speech and the Paradox of Tolerance" *supra* note 46 at 228; L. C. Bollinger, *The Tolerant Society: Freedom of Speech and Extremist Speech in America* (New York: OUP, 1986); and Raz, *The Morality of Freedom*, *supra* note 27 at 170. Also D. Dyzenhaus, "Regulating Free Speech" (1991) 23 Ottawa L. Rev. 289.

values and principles must be weighed with it. Different interests must be carefully balanced.⁵⁴

Apart from self-restraint and self-discipline, necessary to maintaining the system of freedom of expression,⁵⁵ the law should require some limitations and regulations in areas such as public order and national security, defamation, obscenity and pornography. These limitations should be applied with respect to inflammatory speech that encourages crimes and violence or provokes racial hatred and discrimination against any social group, such as women.⁵⁶ However, a limitation is appreciated only when its purpose outweighs that of freedom of expression. The government needs a strong justification, such as a compelling state interest, to restrict freedom of expression or to withhold information in its possession from the citizens. In contrast, the vague rights qualifications in Shari'a and Iran's legal provisions not only provide no guarantee for freedom of expression, they are invoked by the government to restrict more individual rights and freedoms. Moreover, Iran has no law providing the

⁵⁴ Barendt, *Freedom of Speech*, *supra* note 2 at 193-94; Castberg, *Freedom of Speech in the West*, *supra* note 50 at 429; and Y. De Montigny, "Les rapports difficiles entre la liberté d'expression et ses limites raisonnables" (1991) 22 *Revue générale de droit* 129.

⁵⁵ Emerson, *The System of Freedom of Expression*, *supra* note 14 at 10.

⁵⁶ Duplé, "Les libertés d'opinion et d'expression: nature et limites" *supra* note 22 at 541; Lichtenberg, "Foundations and Limits of Freedom of the Press" *supra* note 50 at 102-35; Karpen, "Freedom of Expression As a Basic Right" *supra* note 11 at 398-400; and Sedler, "The Constitutional Protection of Freedom of Religion, Expression, and Association in Canada and the United States" *supra* note 4 at 590-611. Also D. A. Alderson, "The Constitutionalization of Defamation: American and Canadian Approaches to the Constitutional Regulation of Speech" (1993) 15 *The Advocates' Quart.* 385; D. Buron, "Liberté d'expression et diffamation de collectivités: quand le droit à l'égalité s'exprime" (1988) 29 *Cahiers de Droit* 491; Irwin Cotler, "Hate Speech, Equality and Harm under the Charter: Towards a Jurisprudence of Human Dignity for a Free and Democratic Society" in Beaudoin & Mendes, *Charte canadienne des droits et libertés*, *supra* note 31 at 215; Y. Denault, "La diffamation: même en politique, il y a des limites à la liberté d'expression" in *Formation permanente du Barreau du Québec, Développement récents en droit municipal (1999)* (Cowansville, Que.: Édition Yvon Blais, 1999) 107; and A. Vincent, "La liberté d'expression et les limitations imposées par l'État" in *Formation permanente du Barreau du Québec, Développement récents en droit criminel (1994)* (Cowansville, Que.: Édition

right to access to information. In practice, people have no access to government decisions or economic treaties and contracts with foreign countries and companies. Many government bodies, such as the Guardian Council and the Council of Expediency of the Islamic System,⁵⁷ hold their meetings behind closed doors. They only briefly provide the topics discussed. The Assembly of Experts for Leadership⁵⁸ provides no information whatsoever about its meetings. Ironically, its members are elected by direct popular vote. How people can evaluate the performance of the Assembly's members as well as cast their vote in the next election remains a key question. A free and democratic society, as Emerson notes, can properly function only when "it rests upon the strongest possible commitment to the positive rights and the narrowest possible basis for exceptions" which should be "clear-cut, precise, and readily-controlled."⁵⁹

Freedom of expression requires no prior restraints, or censorship, as contrasted with subsequent limitations and punishment.⁶⁰ The common forms of prior restraints, such as the licensing of books and newspapers by the government body, the ban of a publication from further printing or distribution, and the judicial injunctions, will be discussed in Chapter Four. In general, the prohibition of expression that has not been approved by the government should be considered illegal.⁶¹ And the subsequent

Yvon Blais, 1995) 15.

⁵⁷ See Chapter Two, text accompanying notes 295-297 and 312.

⁵⁸ See Chapter Two, note 276.

⁵⁹ Emerson, *The System of Freedom of Expression*, *supra* note 14 at 10. See also Susan A. Wolfson, "Freedom of Information and the Right to Curiosity" in *Freedom of Speech: Basis and Limits*, *supra* note 6 at 67.

⁶⁰ Schauer, *A Philosophical Enquiry*, *supra* note 5 at 148.

⁶¹ M. Redish, "The Proper Role of the Prior Restraint Doctrine in First Amendment Theory" (1984) 70 *Virginia L. Rev.* 53; V. Blasi, "Toward a Theory of Prior Restraint: The Central Linkage" (1981) 66 *Minn. L. Rev.* 11; W. P. Murphy, "The Prior Restraint Doctrine in the Supreme Court: A Reevaluation" (1976) 51 *Notre Dame Lawyer* 898.

punishment should be serious, considerable, and quick, in order to protect the individual rights and freedoms and to make it clear that people should be responsible for their own behavior. The long judicial process and light sentences for serious crimes like defamation, slander, and obscenity seem to contradict the main purpose of the idea of subsequent punishment presented in the system of freedom of expression and may encourage the abuse of the system.⁶² In a free society, the only remedy for expressions which threaten to cause precise harms is more speech -- the law should enrich and expand communication among citizens.⁶³

Freedom of expression implies a set of rights and freedoms, including freedom of speech, freedom of the press, right to form and hold beliefs and opinions, as well as a wide range of human activities and physical demonstration, such as strikes, boycott, picketing, public meetings, and demonstrations and processions.⁶⁴ Due to their significance and importance, freedom of speech and freedom of the press will be discussed with respect to their structure, general principles, and characteristics in Shari'a and Iran's legal and constitutional system.

⁶² Wayne MacKay, "Judging and Equality: For Whom Does the Charter Toll?" in Christine L. M. . Boyle; W. MacKay; E. McBride, *et al.*, eds., *Charterwatch: Reflections on Equality* (Toronto: Carswell, 1986) at 62-87; Sheila Block & Zarah Walpole, "Application of Charter Values to Defamation Actions" in Institut Canadien d'Administration de la Justice, *Les droits de la personne au 21^{ème} siècle: perspectives et modes de protection* (Montreal: Édition Thémis, 1997) 77-95; Cox, *Freedom of Expression*, *supra* note 7; Sauriol, *Les abus de la liberté d'expression*, *supra* note 27; Kent Greenawalt, "Speech and Crime" (1980) 4 *Am. Bar Foundation Research J.* 733; Feinberg, "Limits to the Free Expression of Opinion" *supra* note 52 at 191; Frederick Schauer, "Can Rights be Abused?" (1981) 31 *Philosophical Quart.* 225-30.

⁶³ Haiman, *Speech and Law in a Free Society*, *supra* note 4 at 426.

⁶⁴ Raja, *Freedom of Speech and Expression*, *supra* note 8; Cook, *Liberty of Expression*, *supra* note 4; Schauer, *Free Speech: A Philosophical Enquiry*, *supra*, note 5; A. E. Bayle, "Political Broadcasting, Fairness and Administrative Law" (1986) *Public L.* 562; Pool, *Technologies of Freedom*, *supra* note 14; Ladenson, *A Philosophy of Free Expression*, *supra* note 12; Emerson, *The System of Freedom of Expression*, *supra* note 14; Haslett, "The General Theory of Rights" *supra* note 50 at 427. Also C. Marcouiller, *La Charte canadienne des droits et libertés et le domaine constitutionnel de l'expression*

It is generally understood that freedom of speech refers to oral speech. This study, however, will focus on the issue of political speech -- i. e., participation in public life and the right to form public and political meetings and associations. Moreover, since freedom of expression and, to some extent, freedom of speech partly cover freedom of conscience, thought, and religion,⁶⁵ the study will also discuss freedom of religion. Although belief is not precisely expression, as Emerson puts, "it is the first stage in the process of expression, and it tends to progress into expression."⁶⁶ In fact, the protection and promotion of freedom of religion is essential to maintaining a system of freedom of expression in a free society where the government is prohibited from interfering with the individual's religious beliefs and practices, and maintains its neutrality toward religion.⁶⁷ Finally, this study regards freedom of the press as a right and liberty to produce and publish by ways of newspapers, books, pamphlets, radio and television, and arts in general, including music, film, and other signs and visible representations.⁶⁸

commerciale (Ottawa: Bibliothèque nationale du Canada, 1995).

⁶⁵ Of course, this is not meant to underestimate the essence of freedom of religion as an independent and individual freedom whose fundamental principles are universally applicable, nor its vital function in a multi-religious societies. See Ninan Koshy, *Religious Freedom in a Changing World* (Geneva: World Council of Churches, 1992) at ix-2. Also Brun, *Charte des droits de la personne*, *supra* note 5 at 104-113.

⁶⁶ Emerson, *The System of Freedom of Expression*, *supra* note 14 at 21.

⁶⁷ Jay Newman, *On Religious Freedom* (Ottawa: University of Ottawa Press, 1991); J. Newman, *Foundations of Religious Tolerance* (Toronto: University of Toronto Press, 1982); John Gray, *Liberalism* (Milton Keynes, UK: Open University Press, 1986); William Hare, *In Defence of Open-Mindedness* (Montreal: McGill-Queen's University Press, 1985); Michael Novak, *Freedom With Justice: Catholic Social Thought and Liberal Institutions* (San Francisco: Harper & Row, 1984); and Anthony Arblaster, *The Rise and Decline of Western Liberalism* (Oxford: Basil Blackwell, 1984).

⁶⁸ See William Ernest Hocking, *Freedom of the Press: A Framework of Principle, A Report from the Commission on Freedom of the Press* (New York: Da Capo Press, 1972); Raja, *Freedom of Speech and Expression*, *supra* note 8; Haiman, *Speech and Law in a Free Society*, *supra* note 4; and Lee Bollinger, "Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media" (1976) 75 Michigan L. Rev. 1.

Chapter Three

Freedom of Speech in Shari'a and Iran's Constitutional and legal System

The constitutional right to freedom of speech⁶⁹ implies liberty to discuss publicly all matters of concern without previous restraint or fear of persecution, and covers “all issues about which information⁷⁰ is needed or appropriate to enable members of society to cope with the exigencies of their period.”⁷¹ It protects not only the conventional ideas shared by the majority but the advocacy of unpopular opinions.⁷² Freedom of speech embraces not only verbal speech, whether on a public platform, in a classroom, over the radio, and the like, but symbolic speech (non-verbal forms of expression) by way of visible representations, such as protest rallies and marches, picket signs, and strikes.⁷³ Freedom of speech also partly covers the right to freedom of

⁶⁹ As Harris puts it, Speech is “the external manifestation of our mental judgment”. Harris, “On Freedom of Speech” *supra* note 19 at 154. And as Thomas Paine wrote, freedom of speech is “one of the natural rights of man always retained.” Paine, *The Rights of Man*, *supra* note 9 at 58.

⁷⁰ Access to the information is needed if the citizens want to make their speeches more than empty words. See Haiman, *Freedom of Speech*, *supra* note 19 at 42.

⁷¹ Raja, *Freedom of Speech and Expression*, *supra* note 8 at 83.

⁷² Haiman, *Speech and Law in a Free Society*, *supra* note 4; Castberg, *Freedom of Speech in the West*, *supra* note 50; Maher, *Freedom of Speech: Basis and Limits*, *supra* note 6; and Barendt, *Freedom of Speech*, *supra* note 2.

⁷³ Baker, “Scope of the First Amendment: Freedom of Speech” *supra* note 9 at 964; Rutherglen, “Theories of Free Speech” *supra* note 32 at 115; C. E. Baker, “Commercial Speech: A problem in the Theory of Freedom” (1977) 62 Iowa L. Rev. 1; Lillian BeVier, “The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle” (1978) 30 Stanford L. Rev. 299.

conscience, thought, and religion and freedom of association.⁷⁴ In this chapter, our focus is on verbal speech, particularly political (including the right to participate in public life), and the freedom of religion and association -- due to their impact in contemporary Iran's social and political discourse.

Political speech, the very essence of self-government, is accorded special protection against government interference and suppression.⁷⁵ It plays a great role in democratic process and covers certain political freedoms, such as the right to vote and the right to political parties.⁷⁶ Freedom of assembly and association,⁷⁷ too, are necessary in a constitutional democracy. It allows the effective and collective expression by a group of people "who share common problems or advocate common course of action."⁷⁸ The state should permit demonstrations in the streets and parks.⁷⁹ This unique form of communication protects the individual's right to belong to an organization and engage in group activities free from government sanctions or prohibitions.⁸⁰ Of course, the freedom of assembly and association is also subject to

⁷⁴ See generally Brun, *Charte des droits de la personne*, supra note 5 at 151-59.

⁷⁵ Barendt, *Freedom of Speech*, supra note 2 at 145.

⁷⁶ As Castberg observed, the purpose of political speech is "to provide the best solutions in any conflict arising within the community, as well as providing the most valuable legislation." Castberg, *Freedom of Speech in the West*, supra note 50 at 422. For American constitutional jurisprudence on political speech, see Barendt, *ibid.* at 147.

⁷⁷ The right to assembly is historically regarded as a by-product of the right of petition, especially in English constitutional history (Magna Carta). See David Fellman, "Constitutional Rights of Association" in *Free Speech and Association*, at 27-29; and Kenneth Karst, "The Freedom of Intimate Association" (1980) 89 Yale J. 624.

⁷⁸ Haiman, *Speech and Law in a Free Society*, supra note 4 at 9.

⁷⁹ See generally Kent Greenwalt, "Free Speech in the United States and Canada" (1992) 55 L. & Contemporary Problems, at 30-31; Schauer, *A Philosophical Enquiry*, supra note 5 at 95-96; and *Freedom of Speech in the West*, supra note 50 at 232.

⁸⁰ Barendt, *Freedom of Speech*, supra note 2 at 280; Nwachukwu S. S. Iwe, *The History and Contents of Human Rights, the Study of the History and Interpretation of Human Rights* (New York: Peter Lang, 1986) at 213; and Sedler, "The Constitutional Protections of Freedom of Religion, Expression, and Association in Canada and the United States" supra note 4 at 612.

restrictions and “demonstrably justifiable reasonable limits,”⁸¹ in order to protect the state from “destruction” or from “serious injury, political, economic, or moral.”⁸² Because “the message is controversial or unpopular,”⁸³ any restriction is considered unconstitutional in many Western democracies.⁸⁴

With respect to freedom of religion, as described in the Universal Declaration of Human Rights,⁸⁵ the study submits that every human being should be at liberty to express, practice, and promote publicly his faith and creed, free from any social or legal coercion in religious matters. Every person should enjoy the right to religious association.⁸⁶ The subject of apostasy in Shari’a, discussed in the course of this chapter, raises some difficult issues relating to these rights.

Contrary to the legal philosophy of the West and due to cultural, social, and historical factors, the philosophical foundations and legal theories of freedom of speech

⁸¹ The Canadian Charter, Sec. 1. See generally S. Gaudet, “La règle de droit au sens de l’article premier de la Charte canadienne des droits et libertés: Commentaires sur l’affaire *Slaight Communications Inc. c. Davidson*” (1989-90) 20 *Revue de Droit de l’Université de Sherbrooke* 447; A. Binette, “La mise en oeuvre judiciaire de l’article 1 de la Charte canadienne et le droit de la preuve” (1986) 27 *Cahiers de Droit* 939; A. Bigenwald, “L’évaluation des objectifs législatifs en vertu de l’article premier de la Charte canadienne des droits et libertés” (1994) 35 *Cahiers de Droit* 779; L. Huppé, “Quelques objectifs législatifs suffisamment importants aux fins de l’article 1 de la Charte” (1991) 51 *Revue du Barreau* 294; and J. Woehrling, “L’obligation d’accommodement raisonnable et l’adaptation de la société à la diversité religieuse” (1998) 43 *McGill L. J.* 325. Also J. Murdoch, “The Right of Public Assembly and Procession” in T. Cample, *et al.*, eds., *Human Rights: From Rhetoric to Reality* (Oxford: Oxford University Press, 1986).

⁸² Fellman, “Constitutional Rights of Association” *supra* note 77 at 33. See also K D. Ewing, “Freedom of Association in Canada” (1987) 25 *Alberta L. Rev.* 437; K. Norman, “Freedom of Peaceful Assembly and Freedom of Association” in Beaudoin & Mendes, *Charte canadienne des droits et libertés*, *supra* note 31 at 297; and M. Bendel, “La liberté d’association dans l’optique de la Charte canadienne des droits et libertés” in Gérald A. Beaudoin & Daniel Turp, *Perspectives canadiennes et européennes des droits de la personne* (Cowansville, Que.: Éditions Yvon Blais, 1986) 321.

⁸³ Greenwalt, “Free Speech in the United States and Canada” *supra* note 79 at 31.

⁸⁴ Redish, “The Proper Role of the Prior Restraint in First Amendment Theory” *supra* note 61 at 53.

⁸⁵ The UDHR, *supra* Chapter One note 20 art. 18.

⁸⁶ Koshy, *Religious Freedom in a Changing World*, *supra* note 65 at 22; and H. Brun, “Un aspect crucial mais délicat des libertés de conscience et de religion des articles 2 et 3 des Charte canadienne et québécoise: l’objection de conscience” (1987) 28 *Cahiers de Droit* 185.

in Shari'a and Iran's legal system are not well developed. Many Western arguments and questions about freedom of speech, affecting areas like national security, public order, defamation, obscenity and pornography, and hate speech,⁸⁷ simply are not considered in Iran.

I. Freedom and Freedom of Speech in Shari'a

In Chapter Two, we discussed the theoretical structure of human rights in Shari'a, and its foundations, principles, and characteristics. We concluded that the theoretical foundations of human rights in Shari'a, such as duty-based rights, contradict the basic norms of modern international human rights standards.⁸⁸ Shari'a limitations and qualifications certainly apply to the concept and scope of freedom of speech as well. In this section, the study analyzes the idea of freedom in Shari'a, and focuses mainly on freedom of speech, the right to participate in public life, and freedom of thought, conscience, and religion.

⁸⁷ For discussion on these issues, see Schauer, *A Philosophical Enquiry*, *supra* note 5 at 89, 167, 178, and 197; Haiman, *Speech and Law in a Free Society*, *supra* note 4 at 426; Barendt, *Freedom of Speech*, *supra* note 2 at 192, 199, and 244; MacKay, "Freedom of Expression: Is It All Just Talk?" *supra* note 11 at 733; and Greenwalt, "Freedom of Speech in the United States and Canada" *supra* note 79 at 11 and 15. See also Shiffrin, "Defamatory non-Media Speech and First Amendment Methodology" *supra* note 31 at 915; Ian Brownlie, *Law of Public Order and National Security*, 2nd ed. (London: Woburn, 1981); Ronald M. Dworkin, "Is There a Right to Pornography?" (1981) 1 *Oxford J. Legal Studies* 177; S. Kappeler, *The Pornography of Representation* (Cambridge: Cambridge University Press, 1986); A. W. B. Simpson, *Pornography and Politics: The Williams Committee in Retrospect* (London: Woburn, 1983); Roger A. Shiner, "Pornography and Freedom of Speech" and Richard Bellamy, "Liberty, Morality, Community - A Comment on Shiner's 'non-Speech' Approach to Pornography" both in *Freedom of Speech: Basis and Limits*, *supra* note 6 at 11-28 and 29-36 respectively; Kurt Baier, "Response: The Liberal Approach to Pornography" (1979) 40 *University of Pittsburgh L. Rev.* 619.

A. The Concept of Freedom in Islamic Thought

The meaning of freedom in Islamic thought, particularly in Shari'a is fundamentally different from that of modern international human rights theory. Theologically, the Islamic meaning of freedom, in the traditional view of man⁸⁹ contradicts the structural and conceptual aspects of freedom in modern human rights law, which is based on individualism and natural law traditions, epitomized by the idea of the inherent dignity of the human person. Despite its widespread use in different branches of Islamic learning, including Islamic philosophy, Islamic theology, and Shari'a, the word freedom has no precise meaning, much less defined in the same way as contemporary international human rights law.⁹⁰

A principle outline in Islamic theology informs most Islamic thought on freedom. According to the Islamic worldview, human beings are created in the image of God as His representatives (*khalifah*) on earth. As Seyyed Hossein Nasr puts in, since God is pure freedom and pure necessity, man, too, participates in both this freedom and this necessity.⁹¹ In other words, pure freedom belongs to God alone. He is the One who *is* in the absolute sense. The more man *is* by purifying himself, the more he is free. He

⁸⁸ Abdullahi Ahmed An-Na'im, "Human Rights in the Muslim World: Socio-Political Conditions and Scriptural Imperatives, A Preliminary Inquiry" (1990) 3 Harvard H. R. J. 22.

⁸⁹ Ignaz Goldziher, *Introduction to Islamic Theology and Law*, trans. by Andras and Ruth Hamori (Princeton: Princeton University Press, 1981).

⁹⁰ Franz Rosenthal, *The Muslim Concept of Freedom Prior to the Nineteenth Century* (Leiden, the Netherlands: E. J. Brill, 1960) at 1; and Muhammad-Khidr Husayn, *Al-Hurriyyah fi al-Islam* [Freedom in Islam] (Cairo: Dar al-Itisam, n. d.).

⁹¹ Seyyed Hossein Nasr, "The Concept and Reality of Freedom in Islam and Islamic Civilization" in Alan S. Rosenbaum, ed., *The Philosophy of Human Rights; International Perspectives* (Westport, Connecticut: Greenwood Press, 1980) at 96.

must liberate himself from all external conditions in order to achieve his freedom, which lies in surrendering to the divine will. Of course, since man enjoys only the lower level of existence, his powers and rights are limited in relation to God, nature, and other human beings. Therefore, his freedom is also conditional.⁹² This freedom is basically the freedom “to be”, not the freedom to do or to act, as in modern human rights theory. This concept, in all its forms, has influenced most theologians, philosophers, sufis, and jurists.

Theologians are concerned mainly with free will (*ikhtiyar*) and determinism (*jabr*) in human life -- a debate central to Islamic theology (*kalâm*). They seek to determine the scope of human will with respect to divine will.⁹³ The Ash’arite school of thought rejects free will almost completely; but the Mu’tazilite school (an influential rationalist current in the ninth century) and most Shi’a scholars believe in the individual’s free will and deny the determinism of the Ash’arites.⁹⁴ The Ash’arite tenet of ethical voluntarism is suspicious of human reason and has failed to prove its value. Ash’arites believe that God’s will must be considered as just and human beings are not

⁹² Nasr, *ibid.* at 96-7. See also Mohammad Hashim Kamali, *Freedom of Expression in Islam* (Kuala Lumpur: Berita, 1994) at 141-45; Mahmoud Shaltut, *Al-Islam, Aqidah wa Shariah* [Islam, Belief and Shari’a] (Kuwait: Dar al-Qalam, n. d.); Ziauddin Sardar, *The Future of Muslim Civilization* (London: Groom Helm, 1979); Louis Gardet, “God in Islam” in *The Encyclopedia of Religion*, vol. 6 (New York: Macmillan, 1987); Ahmad Amin, *Fajr al-Islam* [The Dawn of Islam] 14th ed. (Cairo: Maktabah al-Nahdah al-Misriyyah, 1986); Abu Hamid Muhammad al-Ghazali, *Al-Munqidh min al-Dalal*, trans. by R. J. McCarthy (Boston: Twayne, 1980); Muhammad Abduh, *Risalah al-Tawhid* [The Book of Monotheism] 6th ed. (Cairo: Dar al-Manar, 1973).

⁹³ See Qur’an, 6:59 and 25:2. Also Kamali, *Freedom of Expression In Islam*, *ibid.* at 145-46; al-Mahad al-Alami, *Lil Fikr al-Islami, Islamiyyah al-Marifah* [On Islamic Thought and Islamic Knowledge] (Herndon, VA: 1981); H. Patrick Glenn, *Legal Traditions of the World, Sustainable Diversity in Law* (Oxford: Oxford University Press, 2000) at 171-72; and William M. Watt, *Free Will and Pre-Destination in Early Islam* (London: Luzac, 1948).

⁹⁴ Nasr, *supra* note 91 at 97-8. Also generally George Hourani, *Islamic Rationalism: The Ethics of Abd al-Jabbar* (Oxford: Clarendon Press, 1971); Majid Khadduri, *The Islamic Conception of Justice*

entitled to make independent judgments about justice through the exercise of their reason.⁹⁵ Thus, human reason, they argue, cannot be relied on for just laws, and believers must submit to God's commands.⁹⁶ On the other hand, al-Farabi (d. 950 AD) and Ibn Rushd (Averroes, d. 1198 AD) believed that it is reason that determines what is true and what is not, and that the religion should conform to its dictates. To many, this view seemed heretical.⁹⁷ Although most theologians, specially Shi'i, believe in free will, the general religious and cultural concern for total submission and the need to conform to the divine will (fatalism in extreme cases) is intrinsic to Shari'a view of human freedoms.⁹⁸ In Islamic intellectual history, the struggle between the proponents of reason and the proponents of revelation has had important consequences for both Muslim politics (the relationship of ruler and ruled) and Shari'a laws, which stresses not rights and freedoms but human responsibilities and duties before God.⁹⁹ Therefore, the demands for human rights and individual freedoms always seemed subversive to the orthodox mind and the political elite.¹⁰⁰

(Baltimore: Johns Hopkins University Press, 1984) at 41-53; and Kamali, *Freedom of Expression In Islam*, *ibid.* at 145-46.

⁹⁵ Khadduri, *The Islamic Conception of Justice*, *ibid.* at 78-105; Ann Elizabeth Mayer, *Islam and Human Rights, Tradition and Politics* (Boulder: Westview, 1991) at 48.

⁹⁶ Farhang Rajaei, *Islamic Values and Worldview: Khomeyni on Man, the State, and International Politics* (Lanham, Md.: University Press of America, 1983) at 42-5; Taqi al-Din Ibn Taymiyyah, *Iqtida al-Sirat al-Mustaqim li-Mukhalafah al-Ashab al-Jahim*, annotated by Nasir Abd al-Karim al-Aql (n. p.: 1984); Abd al-Hakim Hassan al-Ili, *Al-Hurriyyah al-Ammah* [Public Freedoms] (Cairo: Dar al-Fikr, 1983); Rashid al-Ganusi, *Al-Hurriyyat al-Ammah fi al-Dawlah al-Islamiyyah* [Public Freedoms in the Islamic State] (Beirut: Markaz Dirassa al-Arabiyyah, 1993); Abu Hamid Muhammad al-Ghazali, *Ihya al-Ulum al-Din* [The Revival of Religious Knowledge] 2nd ed. (Cairo: dar al-Fikr, 1980) vol. 1 at 50; Abd al-Karim Zaydan, *Majmuah Buhuth Fiqhiyyah* [The Collection of Shari'a Discussions] (Baghdad: Maktabah al-Quds, 1975).

⁹⁷ Khadduri, *The Islamic Conception of Justice*, *supra* note 94 at 78-105.

⁹⁸ Nasr, *supra* note 91 at 98.

⁹⁹ See generally A. J. Arberry, *Revelation and Reason in Islam* (London: Allen & Unwin, 1957); Mohamed al-Shakankiri, "Loi divine, loi humaine et droit dans l'histoire juridique de l'Islam" (1981) 59 *Studia Islamica*, at 161-82.

¹⁰⁰ Abdulaziz Sachedina, *The Just Ruler (al-Sultan al-Adil) in Shi'ite Islam, The Comprehensive*

Unlike theologians, Muslim philosophers proposed a view based on human freedom and, under the influence of Greek philosophers, such as Plato and Aristotle, were even interested in political philosophy.¹⁰¹ Nevertheless, they, too, followed Shari'a principles with respect to the question of freedom in the Muslim community and linked the legitimacy of the political rule to the source of revelation. This clearly reflected the authority of Shari'a and jurists at the time. In fact, the reality of Shari'a and the tendency to Islamize political philosophy prevented the Muslim philosophers from following purely Greek terms and considering the issue of freedom from a secularist humanism point of view.¹⁰² For them, too, the necessity to conform to divine will preceded human rights and freedoms. None of those philosophical arguments advocacy of free will had any effect on Shari'a laws and Muslim communities.¹⁰³

Sufis are concerned with the issue of freedom more than any other group in Islamic cultures. Sufism, Islamic mysticism, concentrates on dissolving the individual and achieving spiritual oneness and union with God, the One who is both absolute and

Authority of the Jurist in Imamite Jurisprudence (New York: Oxford University Press, 1988); Noel Coulson, "The State and the Individual in Islamic Law" (1957) 6 Int'l 7 Comp. L. Quart. 49-60; and *Islam and Human Rights, Tradition and Politics*, supra note 95 at 49.

¹⁰¹ Nasr, supra note 91 at 98; Goldziher, *Introduction to Islamic Theology and Law*, supra note 89; al-Alami, *Lil Fikr al-Islami*, supra note 93; Shaltut, *Aqidah wa Shariah*, supra note 92; Mohamed Arkoun, *Pour une critique de la raison islamique* (Paris: Maisonneuve et Larose, 1984); UNESCO, *L'Islam: la philosophie et les sciences* (Paris: 1981); Julien Ries, *L'Islam: sa formation, son expansion, ses doctrines, sa communauté* (Louvain-la-Neuve: Centre d'histoire des religions, 1985); Mian Mohammad Sharif, ed., *A History of Muslim Philosophy, With Short Accounts of Other Disciplines and the Modern Renaissance in Muslim Lands* (Wiesbaden: O. Harrassowitz, 1963).

¹⁰² Nasr, *ibid.*; Husayn, *Al-Hurriyyah fi al-Islam*, supra note 90; Abduh, *Risalah al-Tawhid*, supra note 92; al-Ili, *Al-Hurriyyat al-Ammah*, supra note 96; Henry Corbin, *The Voyage and the Messenger: Iran and Philosophy* (Berkeley: North Atlantic Books, 1998).

¹⁰³ See generally Henry Siegman, "The State and Individual in Sunni Islam" (1964) 54 *The Muslim World* 23; Abdulaziz Said, "Precept and Practice of Human Rights in Islam" (1979) 1 *Universal Human Rights*, no. 1; Subhi Mahmasani, *Arkan Huquq al-Insan fi al-Islam* [The Foundations of Human Rights in Islam] (Beirut: Dar al-Ilm lil Malayin, 1979).

infinite.¹⁰⁴ Sufis focus on the perfection of the individual soul in its personal journey (*tariqah*) toward God, who is the ultimate destination of this journey.¹⁰⁵ For Sufis, freedom means deliverance (*najat*) from all bondage and the world's affairs in order to gain inner detachment.¹⁰⁶ Ann Mayer believes that, because of Sufis' concentration on the perfection of the individual soul and their common disregard for Shari'a laws, Sufism has elements of individualism that challenge authorities and support individual freedoms.¹⁰⁷ For Sufis, however, as Nasr points out, "freedom does not mean individualism, for their whole aim is to integrate the individual into the universal."¹⁰⁸ It is true that because Sufi's journey is a personal one, Sufism has been the most tolerant form of Islam; however, individualism occurs in a spiritual sense, and Sufis are often indifferent toward worldly authority. Freedom for Sufis is only an honorable level of human being, not a status to do or to act according to one's will.¹⁰⁹ As Mayer notes herself, the individualism is an established feature neither in Islamic culture nor in Muslim traditional societies, where the concept of individual known in modern

¹⁰⁴ Nasr, *supra* note 91 at 99. Also generally Leonard Lewisohn, ed., *The Heritage of Sufism*, vol. I: *The Legacy of Medieval Persian Sufism (1150-1500)* and vol. II: *Classical Persian Sufism from Its Origins to Rumi (700-1300)* (1999); A. J. Arberry, *Sufism: An Account of the Mystics of Islam* (New York: Macmillan, 1950); Institut de lettre orientales de Beyrouth, *Exégèse coranique et langage mystique: nouvel essai sur le technique des mystique musulmans* (Beirut: Dar al-Mashreq, 1970); Louis Massiggnon, *La passion de Husayn Ibn Mansur Hallaj: martyr mystique de l'Islam, exécuté à Bagdad le 26 mars 922; étude d'histoire religieuse*, 4 vol. (Paris: Gallimard, 1975).

¹⁰⁵ Sufis refer to some Qur'anic verses, such as 2: 186, 50: 16, which state that God is closer to believers than their jugular veins, and listens to their prayers. See also Qur'an, 34: 50 and 56: 85; and Martin Lings, *What is Sufism?* (London: Allen & Unwin, 1975).

¹⁰⁶ Hourani, *Islamic Rationalism*, *supra* note 94; Khadduri, *The Islamic Conception of Justice*, *supra* note 94; Michel Chodkiewicz, *Un océan sans rivage: Ibn Arabi, le livre et la loi* (Paris: Seuil, (1992).

¹⁰⁷ See Mayer, *Islam and Human Rights, Tradition and Politics*, *supra* note 95 at 222.

¹⁰⁸ Nasr, *supra* note 91 at 99.

¹⁰⁹ Christian Bonaud, *Le soufisme: al-tassawwuf et la spiritualité islamique* (Paris: Institut du monde arabe, 1991); and John Spencer Trimingham, *The Sufi Orders in Islam* (London: Oxford University Press, 1973).

philosophy does not exist, and family and community values have priorities over personal freedoms.¹¹⁰

The foregoing discussion demonstrates that all Islamic schools of thought have emphasized the attainment of freedom in its absolute and unconditional sense (inner freedom) and complete detachment from everything but God, and the duty to conform to divine law.¹¹¹

Jurisprudents regard freedom from a juridical point of view; but there is a metaphysical dimension in Shari'a as well. In this dimension, human rights and freedoms are granted "as a result of personal surrender to the Divine Will rather than as an innate personal right."¹¹² Man owes his being to God, and, therefore, can only receive what is given to him by God alone. Khadduri claims that "human rights in Islam are the privilege of Allah, because authority ultimately belongs to Him."¹¹³ In Shari'a, human rights and freedoms are outlined and defined in the context of a divine law. They are the consequence of individuals' obligations toward God, nature, and each other.¹¹⁴ In other words, freedom is granted to human beings to fulfill their obligations; no legitimate right or freedom is thus granted to those who do not fulfill their obligations and responsibilities even toward themselves.¹¹⁵ An individual's value is in

¹¹⁰ Mayer, *Islam and Human Rights, Tradition and Politics*, *supra* note 95 at 47.

¹¹¹ See Evade Vitray-Meyerovitch, *Islam, l'autre visage: entretiens avec Rachel et Jean-Pierre Cartier* (Paris: Albin Michel, 1995).

¹¹² Nasr, *supra* note 91 at 97. See also Rosenthal, *The Muslim Concept of Freedom Prior to the Nineteenth Century*, *supra*, note 90.

¹¹³ Majid Khadduri, "Human Rights in Islam" (1946) 243 *The Annals*, at 78. See also al-Alami, *Lil Fikr al-Islamiyyah*, *supra* note 93; al-Ili, *Al-Hurriyyat al-Ammah*, *supra* note 96.

¹¹⁴ Goldziher, *Introduction to Islamic Theology and Law*, *supra* note 89; Mahmassani, *Arkan Huquq al-Insan*, *supra* note 103; and Siegman, "The State and the Individual in Sunni Islam" *supra* note 103 at 23.

¹¹⁵ In Shari'a, a man is not free to do whatever he wants to himself or his life. For example, suicide is strongly forbidden because it is against the right of God, who brings one's life into being and not himself.

his faith and creed. Therefore, unbelievers have no value and are only “accidentally human.”¹¹⁶ Freedom is worshipping God and obeying His commands.¹¹⁷ All limitations and boundaries are set by Shari’a to guide and direct human beings to achieve greater inner freedom, and to prevent them from committing evil.¹¹⁸ From this perspective, social and political freedoms are considered excessive and unnecessary, for Shari’a requires individuals to act and behave in precise forms and manners. Any openness toward freedom of thought and expression may result in criticism or even rejection of those forms. Freedom of expression may question the eternal nature of those arrangements, and provide new patterns. This, in turn, may weaken the authority of the traditional forms and cause a crisis in the religious identity of Muslim communities.¹¹⁹

Islamic sources generally praise free will and human freedom, together with the value and importance of freedom and humanistic principles in the society.¹²⁰ The Qur’an states that “we guided and directed the man to the way, be him grateful or unthankful.”¹²¹ Imam Ali (the fourth caliph) also said: “Do not be the slave of anyone

See Nasr, *supra* note 91 at 97; and Taqi al-Din Ibn Taymiyyah, *Public Duties in Islam: The Institution of Hisbah*, trans. by Muhtar Holland (Licester, UK: Islamic Foundation, 1982).

¹¹⁶ Nasr, *ibid.*

¹¹⁷ Qur’an, 50: 56.

¹¹⁸ Said, “Percept and practice of Human Rights in Islam” *supra* note 103; Ann E. Mayer, “Universal Versus Islamic Human Rights: A Clash of Cultures or a Clash With a Construct?” (1994) 15 Michigan J. int’l L. at 317.

¹¹⁹ See generally Hamid Enayat, *Modern Islamic Political Thought* (London: Macmillan, 1982); Muhammad Salim Ghazawi, *Al-Hurriyyat al-Ammah fi al-Islam* [Public Freedoms in Islam] (Alexandria: Mu’assasah Shabab al-Jami’ah, n. d.); and Jeffrie G. Murphy, *An Introduction to Jurisprudence* (Totowa, NJ: Rowan & Allenheld, 1984).

¹²⁰ S. Hassan Amin, *Islamic Law in the Contemporary World* (Tehran: Vahid, 1985); Mohammad Arkoun, *L’humanisme Arab au iv/v siècle: Miskawayh, philosophe et historien* (Paris: J. Vrin, 1970); Marcel Boisard, *L’humanisme de l’Islam* (Paris: Albin Michel, 1979); Joel Kraemer, *Humanism in the Renaissance of Islam, The Cultural Revival During the Buyid Age* (Leiden: Brill, 1986).

¹²¹ Qur’an, 76: 3. Also 90: 10, 3:64, 17:70.

else; for God has created you free.”¹²² However, these principles remained only general guidelines and, at most, moral and religious values and recommendations. They were not developed or translated into legal provisions and rights guarantees for social and political freedoms. Instead, Shari’a developed a very restrictive legal code, which limits individuals’ freedoms in every aspect of human life. Nevertheless, It was believed that Shari’a laws embodied God’s will, and were necessarily just. Believers were, then, expected to submit to God’s command.¹²³

Stressing individuals’ obligations and responsibilities as well as their duties to obey divine law, Shari’a seeks to keep people away from evils, to guide them to the right path -- in order to achieve inner freedom and salvation personally and perfect justice socially. One’s freedom is not only limited by others’ freedoms and the expediencies of the society, but by one’s own interests as well.¹²⁴ This has also affected the relationship of ruler and ruled.¹²⁵ Islamic governments have always tried to control social and political liberties, in the hope of leading their subjects to the right path.¹²⁶

¹²² Seyyed Razi, *Nahj al-Balaqah* [The Collection of the Sermons and Letters of Imam Ali] interpreted by Muhammad Baqir Khurasani (Tehran: Madrasat Chihil Sutun, n.d.) letter 31.

¹²³ A. Ahmed An-Na’im, *Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law* (Syracuse: Syracuse University Press, 1990) at 170-72; An-Na’im, “Human Rights in the Muslim World” *supra* note 88 at 22-25; Mayer, *Islam and Human Rights, Tradition and Politics*, *supra* note 95 at 73-78; Mayer, “Universal Versus Islamic Human Rights” *supra* note 118 at 327-47.

¹²⁴ Husayn, *Al-Hurriyyah fi al-Islam*, *supra* note 90; al-Ili, *Al-Hurriyyat al-Ammah*, *supra* note 96.

¹²⁵ Shari’a’s idealistic nature militates against an institutional mechanism to deal with government oppression. See generally Myres McDougal; Harold Lasswell; & Lung-Chu Chen, eds., *Human Rights and World Order: The Basic Policies of an International Law of Dignity* (New Haven: Yale University Press, 1980) at 68-71; Mayer, *Islam and Human Rights, Tradition and Politics*, *supra* note 95 at 49; and Erwin J. Rosenthal, *Political Thought in Medieval Islam: An Introductory Outline* (Cambridge: Cambridge University Press, 1962).

¹²⁶ Abdulkarim Zaydan, *Al-Fard wa al-Dowlah fi al-Shariah al-Islamiyyah* [The Individual and the State in Shari’a] (Gary, Indiana: Al-ittihad al-Alami lil Munazzamat al-Tullabiyah, 1970); Siegman, “The State and the Individual in Sunni Islam” *supra* note 103 at 23.

Political authorities, basing themselves on the idea of *khilafat*,¹²⁷ have always felt the responsibility to discourage evil acts, superstition, and polytheism.

In reality human liberties, especially political freedoms, were never realized in Muslim communities.¹²⁸ Finally, what has been understood as freedom in Shari'a and what is known as freedom in international human rights law are two different concepts with two different legal implications.

B. Slavery in Shari'a

The issue of slavery does not directly pertain, of course, to our discussion of freedom of speech in Shari'a. However, from a legal standpoint, freedom (*hurriyya*)¹²⁹ in Shari'a relates chiefly to the question of slavery. Therefore, it is doctrinally important to briefly discuss the subject. Before we go on, let us consider a few preliminary issues. First, it must be pointed out that the Qur'an does not decree slavery. On the contrary, it emphasizes the equality of all human beings in honor and dignity, regardless of race,

¹²⁷ See Chapter Two under "Shari'a and Constitutionalism".

¹²⁸ See Roger M. Savory, "Islam and Democracy: The Case of the Islamic Republic of Iran" in C. E. Bosworth, Charles Issawi, Roger Savory, *et al.*, *The Islamic World from Classical to Modern Times, Essays in Honor of Bernard Lewis* (Princeton: Darwin Press, 1989) 821-43; and Heiner Bielefeldt, "Muslim Voices in the Human Rights Debate" (1995) 17 H. R. Quart. 587-617.

¹²⁹ *Hurriyya*, as a legal term in Shari'a, means descended from noble ancestry, and *hurr* (free man) is the opposite of slave. See *The Encyclopedia of Islam* (Leiden: E. J. Brill, 1965); *The Encyclopedia of Religion, supra* note 92 under *hurriyya*. See also generally A. A. Arawi, *Mafhum al-Hurriyah* [The Conception of Freedom] (Casablanca: Al-Murkaz al-Thagafi Al-Arabi, 1983); *The Muslim Concept of Freedom, supra* note 90.

religion, or gender. It reads: “The best person among you is the one who is most pious.”¹³⁰ The Prophet Muhammad once said:

There are three categories of people against whom I shall myself be a plaintiff on the judgment. Of these three, one is he who enslaves a free man, then sells him and eats this money.¹³¹

Imam Ali also said, “People are your brothers, whether by faith or by race.”¹³² In fact, Islamic literature is full of stories about the life of the Prophet and the four caliphs¹³³ that indicate their “humility, their egalitarian spirit, and their human concern for the rights and welfare of all of their subjects.”¹³⁴

Second, Islam did not introduce slavery. It was the norm and prevalent all around the world at the time.¹³⁵ Muslims perhaps had no choice but to recognize it and

¹³⁰ Qur’an 49: 13. Apart from these general guidelines, other Qur’anic verses imply the recognition of slavery, and provide several rules and regulations in this respect, which were later developed by Shari’a. See Majid Khadduri, *Islamic Law of Nations: Shaybani’s Siyar* (Baltimore: John Hopkins University Press, 1966) at 80ff.

¹³¹ Abul A’la Mawdudi, *Human Rights in Islam* (Leicester, UK: Islamic Foundation, 1980) at 19.

¹³² See *Nahj al-Balaqah*, *supra* note 122.

¹³³ See Chapter Two, text accompanying notes 9-10.

¹³⁴ Muhammad Isma’il al-Bukhari *Jawahir Sahih al-Bukhari* [Sahih of Bukhari] ed. by Izz al-Din Sirwan (Beirut: Dar al-Ihya, 1987); Abu Dawud, *Sunan Abu Dawud* [Sunan of Abu Dawud] trans. by Ahmad Hassan, 3 vol. (Lahore: Ashraf Press, 1984); Muhammad Imarah, *Al-Islam wa Huquq al-Insan, Darurat al-Huquq* [Islam and Human Rights] (Cairo: Dar al-Shuruq, 1989); and *Islam and Human rights, Tradition and Politics*, *supra* note 95 at 93.

¹³⁵ See *Toward an Islamic Reformation*, *supra* note 123 at 172; Riffat Hassan, “Religious Human Rights and the Qur’an” (1996) 10 *Emory International L. Rev.* at 89; R. Brunshwig, “Abd” in *The Encyclopedia of Islam*, *supra* note 129 vol. I at 24-40; *The Encyclopedia of Islamic Jurisprudence* (Kuwait: Ministry of Awqaf, 1969); Reuben Levy, *The Social Structure of Islam* (Cambridge: Cambridge University Press, 1957) at 73-85.

to do their best to improve slaves' conditions.¹³⁶ Islam discouraged slavery, and restricted its practice. It tried to limit sources of supply of slaves,¹³⁷ improved the quality of their lives, and encouraged the emancipation of slaves through different methods, e.g., it was prescribed as an act of private charity, expiation, etc.¹³⁸

Third, the study on slavery in Shari'a has no practical effect, for it is now agreed that slavery, even among orthodox Muslims and conservative *ulama*, is unacceptable. All the laws in this respect have been practically discarded. Although the Qur'anic recommendations helped the emancipation of many slaves at the time,¹³⁹ it must be admitted that only through time, and secular law, has slavery been abolished in many traditional Muslim and African countries.¹⁴⁰

Despite these facts, Shari'a did not prohibit slavery. The institution of slavery is still lawful under Shari'a, and all its regulations in this respect remain in force.¹⁴¹ In other words, as Tabandeh points out, "should the legal conditions for the enslavement of anyone be proven ... Islam would be bound to recognize such slavery as legal...in this modern age."¹⁴² Throughout the centuries, Shari'a has developed, formulated, and reinforced its hierarchical features of Islamic social order, where a free Muslim male

¹³⁶ Majid Khadduri, *War and Peace in the Law of Islam* (Baltimore: John Hopkins Press, 1961) at 130; Fazlur Rahman, *Islam* (Chicago: University of Chicago Press, 1979) at 38.

¹³⁷ For the possibilities through which a person might be brought into slavery, see M. Fathi Uthman, *Huquq al-Insan Bayn al-Shari'a al-Islamiyya wa al-Fikr al-Qanoni al-Qarbi* [Human Rights in Shari'a and the Western Legal Tradition] (Cairo: Dar al-Shuruq, 1982) at 72-3; and M. Khadduri & Herbert Liebesny, *Law in the Middle East* (Washington, D. C.: Middle East Institute, 1955) at 355-56.

¹³⁸ Qur'an, 2: 177, 4: 36 & 92, 9: 60, 58: 3, 24: 33, and 90: 11-13. See also *War and Peace in the Law of Islam*, *supra* note 136 at 130.

¹³⁹ Mawdudi, *Human Rights in Islam*, *supra* note 131 at 20.

¹⁴⁰ C. W. W. Greenidge, "Slavery in the Middle East" (December 1956) *Middle Eastern Affairs* 439 in *Toward an Islamic Reformation*, *supra* note 123 at 173.

¹⁴¹ Sultanhussein Tabandeh, *A Muslim Commentary on the Universal Declaration of Human Rights* (London: F. T. Goulding, 1970) at 27.

and a non-Muslim female slave enjoy the most and the least rights and freedoms, respectively.¹⁴³ Although Shari'a introduced many positive regulations promoting the emancipation of slaves and their treatment, a slave (*abd*) is considered property and subject to ownership and trade. Shari'a elaborated rules according to which slaves enjoyed only partial legal capacity in matters.¹⁴⁴ For example, the testimony of a slave does not constitute a legal proof for most *hudud* punishments; the owner of a female slave does not need a marriage contract to engage in sexual relations with her; and while a slave can be executed for killing a free man, the converse is not the case, i.e., a free man will not be executed for killing a slave.¹⁴⁵

A study of the Qur'anic recommendations in the historical context of early Islam indicates that Islam favored the total emancipation of slaves and elimination of the institution of slavery in due course; but, this original intention was never realized through Shari'a.¹⁴⁶ Throughout the centuries, the institution of slavery has had many socio-political implications which negatively affected the relations -- especially in Africa, where most of the slaves were brought from -- among Muslims and with non-Muslims as well. In the current historical context and with new principles of interpretations, Muslim jurists ought to argue for the prohibition of slavery and the

¹⁴² *Ibid.*

¹⁴³ Ann Elizabeth Mayer, "Stratification, Authority, and Justice in the Law of the Islamic Middle East" (1977) 4 BRISMES Bulletin at 82-91 and (1978) 5 BRISMES Bulletin at 3-19; and *Toward an Islamic Reformation*, *supra* note 123 at 172-74.

¹⁴⁴ Joseph Schacht, *An Introduction to Islamic Law* (Oxford: Clarendon Press, 1964) at 127-30 and 162-93.

¹⁴⁵ *Ibid.*; and Brunschwig, "Abd" *supra* note 135 at 24-40.

¹⁴⁶ "Human Rights in the Muslim World" *supra* note 88 at 22-23; See generally Imarah, *Al-Islam wa Huquq al-Insan*, *supra* note 134; and Hassan, "Religious Human Rights and the Qur'an" *supra* note 135 at 89-90.

abolition of the institution itself.¹⁴⁷ This would be a step forward in acknowledging the present necessities and bringing Shari'a into conformity with the modern era.

C. Freedom of Speech in Shari'a

Human rights in Shari'a are defined in the context of divine law and with regard to man's relationship with God. Human freedoms and liberties are granted as a result of personal surrendering to the divine law, rather than as an innate personal right.¹⁴⁸ Therefore, freedom of expression and speech, too, are limited by Shari'a criteria; they do not correspond to what modern international human rights law recognized as freedom of speech.¹⁴⁹ Shari'a possesses many legal concepts in the field of human rights and freedoms; but, as Joseph Schacht states, they are "broad and lacking in positive content; they are derived not from the concrete realities of legal life but from abstract thought."¹⁵⁰ A different attitude about man and his obligations and duties in this world has resulted in a different approach toward the concepts of citizenry, human

¹⁴⁷ See *Toward an Islamic reformation*, *supra* note 123 at 175; and "Human Rights in the Muslim World" *ibid.* at 23.

¹⁴⁸ Mohammad Hashim Kamali, "Fundamental Rights of the Individual: An Analysis of *Haqq* (Right) in Islamic Law" (1993) 10 *Am. J. Islamic Social Sciences* 340-66; Mahmassani, *Arkan Huquq al-Insan*, *supra* note 103; Abd al-Wahib Wafi, *Huquq al-Insan fi al-Islam* [Human Rights in Islam] (Cairo: Matba'ah al-Risalah, n. d.); Siegman, "The State and the Individual in Sunni Islam" *supra* note 103 at 23.

¹⁴⁹ Bassam Tibi, "Islamic Law/Shari'a, Human Rights, Universal Morality and International Relations" (1994) 16 *H. R. Quart.* at 290; Hamilton Gibb, "Constitutional Organizations" in *Laws in the Middle East*, *supra* note 137 at 12; and Joseph Schacht, "Law and Justice" in P. M. Holt, Ann K. S. Lambton, & Bernard Lewis, eds., *The Cambridge History of Islam* (Cambridge: Cambridge University Press, 1970) at 541.

¹⁵⁰ Schacht, *An Introduction to Islamic Law*, *supra* note 144 at 205.

rights, and freedom of expression. In practice, the emphasis has always been on how limitations should be placed on individuals' rights and liberties.¹⁵¹

It should be pointed out that, in the early years of the Islamic tradition, many views on various theological or legal issues were expressed, taught, and tolerated. The Islamic heritage was thus rich in ideas.¹⁵² Any disagreement was accepted as an integral feature of the tradition, and, as Mayer observes, "Islam has historically been a very decentralized religion hosting a wide range of dissimilar opinions and competing schools of law, and one could say that the Islamic legal tradition has historically been a culture of argument."¹⁵³ The existence of rationalist currents, especially in the minority Shi'a tradition, manifested humanistic elements which anticipated even some modern issues. This signified political freedom and democracy in the earliest period of Islamic history.¹⁵⁴ For example, the Khawarij¹⁵⁵ believed that the successors of the Prophet (the

¹⁵¹ Kamali, *Freedom of Expression in Islam*, *supra* note 92 at 8-17; Sami Awad Aldeeb Abu-Sahlieh, *Les Musulmans face aux droits de l'homme: religion, droit et politique; étude et document* (Bochum, Germany: D. Winkler, 1994).

¹⁵² See *The Muslim Concept of Freedom*, *supra* note 90 at 100-1, 105, and 144; Arkon, *L'humanisme Arabe au iv/v siècle*, *supra* note 120; Kraemer, *Humanism in the Renaissance of Islam*, *supra* note 120; Glenn, *Legal Traditions of the World*, *supra* note 93.

¹⁵³ *Islam and Human Rights, Tradition and Politics*, *supra* note 95 at xiii. See also Fazlur Rahman, *Islam and Modernity: Transformation of an Intellectual Tradition* (Chicago: University of Chicago press, 1982); Amin, *Islamic Law in the Contemporary World*, *supra* note 120; Boisard, *L'humanisme de l'Islam*, *supra* note 120; Hisham Djait, *La personnalité et le devenir arabo-islamique* (Paris: Albin Michel, 1974); and al-Ili, *Al-Hurriyyat al-Ammah*, *supra* note 96.

¹⁵⁴ See generally Arnold Green, ed., *In Quest of an Islamic Humanism: Arabic and Islamic Studies in Memory of Mohamed al-Nowaihi* (Cairo: American University Press, 1984); Rahman, *Islam and modernity*, *ibid.*; Arkon, *L'humanisme Arabe au iv/v siècle*, *supra* note 120; Kraemer, *Humanism in the Renaissance of Islam*, *supra* note 120; Boisard, *L'humanisme de l'Islam*, *ibid.*; and Djait, *La personnalité é et le devenir arabo-islamiques*, *ibid.*; Mohammad Arkoun, *Rethinking Islam: Common Questions, Uncommon Answers*, trans. and ed. by Robert D. Lee (Boulder: Westview Press, 1994) at 106-13; Khalid M. Ishaque, "Human Rights in Islamic Law" (1974) 12 Rev. Int'l Comm. Jurists at 30-39; Muhammed Said al-Ashmawy, *L'islamisme contre l'Islam*, trans. by Richard Jacquemond (Paris: Éditions la découverte, 1989); Said, "Precepts and Practice of Human Rights in Islam" *supra* note 103.

¹⁵⁵ See *infra* note 206.

caliphs) had to be always elected by the community of Muslims.¹⁵⁶ The Qur'an praises those who "listen to the words and follow the best."¹⁵⁷ It also recommends that argumentation should be conducted with courtesy and tolerance, and recognizes the right of protection from slander, defamation, sarcasm, and backbiting.¹⁵⁸

The tradition of tolerance and debate was, nevertheless, short-lived. The culture of different opinions and ideas was repudiated by many *ulama* in the eighth and ninth centuries, under the impression that Shari'a was well-equipped to answer the needs of Muslim society in every public and private affair, and that any new interpretation might result in misguiding people and *fitna* (upheaval).¹⁵⁹ As a result, the door of *ijtihad* was closed.¹⁶⁰ The application of *hudud* crime of *ridda* (apostasy) also put an end to the tradition of different opinions and culture of argument.¹⁶¹ Freedom of speech was limited to Shari'a qualifications, and subject to many restrictions.

¹⁵⁶ Khaduri, *The Islamic Conception of Justice*, *supra* note 94 at 20-3; and Elie Adib Salem, *Political Theory and Institutions of the Khawarij* (Baltimore: John Hopkins University Press, 1965).

¹⁵⁷ Qur'an 39: 17-18. This Qur'anic verse is general. Some conservative *ulama* believe that, although the Qur'an encourages Muslims to listen to different ideas and follow the best, it does not allow people to decide by themselves, and, in other verses, such as 41: 33, it points to what the best is. See Abdullah Javadi Amuli, *Falsafeh-e Huquq-e Bashari* [The Philosophy of Human Rights] (Qum, Iran: Isra Publication Center, 1996) at 191.

¹⁵⁸ See Qur'an 49: 11-12. Also 6: 108, which enjoins Muslims not to revile those who call for the worship of something other than God, and establishes a theology of tolerance and mutual respect by human community of belief. See Roy P. Mottahedeh, "Toward an Islamic Theology of Toleration" in Tore Lindholm & Kari Vogt, eds., *Islamic Law Reform and Human Rights, Challenges and Rejoinders* (Norway: Nordic Human Rights, 1993) at 31.

¹⁵⁹ The issue of *fitna* will be discussed below. See Mohammad H. Kamali, "Freedom of Expression in Islam: An Analysis of *Fitna*" (1993) 10 *Am. J. Islamic Social Sciences* 178-200; and Noel Coulson, *History of Islamic Law* (Edinburgh: Edinburgh University Press, 1964) at 80-1.

¹⁶⁰ See Chapter One text accompanying notes 103-105 and Chapter Two text accompanying note 17-18. The door of *ijtihad* was officially closed in Sunni tradition. The minority Shi'a followed this only in practice. See Wael Bahjat Hallaq, "Was the Gate of Ijtihad Closed?" (1984) 16 *International J. of Middle Eastern Studies* at 3; W. Hallaq, *The Gate of Ijtihad: A Study in Islamic Legal History* (Ph. D. Thesis, University of Washington, 1993); Aryn B. Sajoo, "Islam and Human Rights: Congruence or Dichotomy?" (1990) 4 *Temple Int'l Comp. L. J.* at 31-32; and Weiss, "Interpretation in Islamic Law: The Theory of Ijtihad" (1978) 26 *Am. J. Comp. L.* 199.

¹⁶¹ The issue of freedom of religion and apostasy in Shari'a will be discussed as the discussion proceeds.

In Shari'a, *hurriyyat al-ra'y* (freedom of speech) is recognized in matters that are not regulated in the Qur'an, *Sunna*, or *ijma* (consensus of jurists).¹⁶² *Ra'y*, or personal opinion, is respected so long as it does not fall in the categories of blasphemy or sedition, both discussed below. Only *ra'y al-sahih* (praiseworthy opinion) is considered a valid opinion.¹⁶³ Others, i.e., *ra'y al-batil* (void opinion) and *ra'y al-madhmum* (blameworthy or objectionable opinion), which are in discord with "authoritative precedent and the approved opinion of past *ulama*" are denounced in Shari'a.¹⁶⁴ Therefore, *ra'y* has a very limited role *vis-à-vis* the ordinances of the Qur'an and *Sunna*.¹⁶⁵

Hurriyyat al-ra'y is also a liberty bounded by duty. It is granted to human beings to enable them to fulfill their obligation to truth,¹⁶⁶ a duty which a Muslim may not disclaim even in the face of danger or difficulty.¹⁶⁷ In fact, here, as Donnelly puts in, "the 'right' is not even an obligation of others, but an obligation of the alleged right-holder."¹⁶⁸ Indeed, it is not a right, but a privilege of God. According to Khadduri, it is "the privilege only of persons of full legal status...a living human being of mature age,

¹⁶² Kamali, *Freedom of Expression in Islam*, *supra* note 92 at 61-71; Ibn Qayyim al-Jawziyyah, *I'lam al-Muwaqqi'in an Rabb al-Alamin*, ed. by Muhammad Munir al-Dimashqi, vol. I (Cairo: Idarah al-Taba'ah al-Muniriyyah, n. d.) at 55; Ahmad Hassan, *The Doctrine of Ijma in Islam* (Islamabad: Islamic Research Institute, 1984).

¹⁶³ Abu dawud, *Sunan*, *supra* note 134 vol. III at 1013, *hadith* no. 3567.

¹⁶⁴ Ibn Qayyim, *I'lam*, *supra* note 162 vol. I at 55.

¹⁶⁵ Kamali, *Freedom of Expression in Islam*, *supra* note 92 at 62; Mohammad H. Kamali, "The Approved and Disapproved Varieties of Ra'y (personal Opinion) in Islam" (1990) 7 AJISS 39-64.

¹⁶⁶ As noted earlier, the term "freedom" also means a duty not to enslave others unjustly.

¹⁶⁷ Qur'an, 4: 135. See Tibi, "Islamic Law, Human Rights, Universal Morality and International Relations" *supra* note 149 at 290; Gibb, "Constitutional Organization" *supra* note 149 at 12; Kamali, *Freedom of Expression in Islam*, *supra* note 92 at 8-17.

¹⁶⁸ Jack Donnelly, *Universal Human rights in Theory and Practice* (London: Cornell University Press, 1989) at 51.

free, and of Moslem faith.”¹⁶⁹ Freedom of speech is guaranteed to the extent that it does not contradict Shari’a principles or any provisions from Qur’an and *Sunna*.¹⁷⁰ Muslims are allowed to express their views on social and political subjects and the conduct of the government within the boundaries of Shari’a.¹⁷¹

It should also be pointed out that freedom of speech in Shari’a is permitted within the Qur’anic principle of commanding the good and prohibiting the evil (*amr bi al-ma’ruf wa al-nahy an almunkir*).¹⁷² It is the duty of every Muslim and Islamic government to try to persuade people along the path of righteousness and away from evil; because, it is believed that the propagation of profanity and impiety contradict the dignity of human beings, and should not be then allowed.¹⁷³ The Qur’an states that “they enjoin what is proper and forbid what is improper.”¹⁷⁴ Mawdudi indicates that the aim and purpose of the Islamic state is “the establishment, maintenance, and development of those virtues, which the Creator wishes human life to be enriched by,

¹⁶⁹ Khadduri, “Human Rights in Islam” *supra* note 113 at 79.

¹⁷⁰ Abd al-Hamid Mutawalli, *Mabadi Nizam al-Hukm fil Islam ma’a al-Muqarana bi-Mabadi al-Dustoriyya al-Haditha* [The Principles of Islamic Political System Compared to Modern Constitutional Principles] (Alexandria, Egypt: Munsha’at al-Ma’arif, 1974) 280-87; and Abd al-Wahhab Khallaf, *Al-Siyasah al-Shariyyah* [Islamic Political System] (Cairo: Dar al-Ansar, 1977) at 37-38.

¹⁷¹ Mohammad Selim al-Awa, *On the Political System of the Islamic State* (Indianapolis: American Trust, 1980) at 88; and C. G. Weeramantry, *Islamic Jurisprudence: An International Perspective* (London: Macmillan Press, 1988) at 124; Zaydan, *Al-Fard wa al-Dowlah*, *supra* note 126; Abul A’la Mawdudi, *Islamic Law and Constitution* (Lahore: Islamic Publications, 1979); Imarah, *Al-Islam wa Huquq al-Insan*, *supra* note 134; Husayn, *Al-Hurriyyah fi al-Islam*, *supra* note 90; Ahmad Jalal Hammad, *Hurriyyah al-Ra’y fi al-Maydan al-Siyasi* [Freedom of Opinion in Political Sphere] (Cairo: Dar al-Wafa lil Taba’ah wa al-Nashr, 1987).

¹⁷² Qur’an, 22: 41 and 7: 157.

¹⁷³ See *Toward an Islamic Reformation*, *supra* note 123 at 79-80.

¹⁷⁴ Qur’an, 9:71.

and prevention and eradication of those evils in human life, which he finds abhorrent.”¹⁷⁵

The principle of commanding good and prohibiting evil, also known as *hisbah*, entitles citizens to speak and act for a good cause or against a bad one only in accord with Shari’a law. The *ulama* regard *hisbah* as a collective obligation (*fard kafa’i*) which, as Ibn Qayyim states, everyone must participate in to the extent of his or her ability.¹⁷⁶ *Hisbah* does not constitute a right of an individual or the community as a whole.¹⁷⁷

As Mawdudi notes, “the right to freedom of expression to propagate virtue and righteousness is not only a *right*, but an *obligation*.”¹⁷⁸ Freedom of speech is then equally a right of, and an obligation on, every Muslim to enjoin the good and prohibit evil. Muslims are expected to try to stop evil, whether perpetrated by a person or a group of people, by any means -- physically or verbally.¹⁷⁹

Clearly, Shari’a qualifications restrict the scope and extent of freedom of speech in Muslim societies. Any criticism or unorthodox opinion concerning Shari’a laws

¹⁷⁵ Mawdudi, *Human Rights in Islam*, *supra* note 131 at 11. Qur’an (22: 41) states that “if we give authority to these men on earth, they will keep up prayers, offer welfare due, and bid what is proper and forbid what is improper.”

¹⁷⁶ Ibn Qayyim al-Jawziyyah, *Al-Turuq al-Hukmiyyah fi al-Siyasah al-Shariyyah* [Political System in Shari’a] ed. by Muhammad Jamil Ghazi (Cairo: Al-Mu’assasah al-Arabiyyah lil Taba’ah wa al-Nashr, 1961) at 278; Kamali, *Freedom of Expression in Islam*, *supra* note 92 at 30-35; Mustafa al-Siba’i, *Ishtirakiyyah al-Islam* [Political System of the Islamic Society] 2nd ed. (Damascus: Dar al-Qawmiyyah lil Taba’ah wa al-Nashr, 1960) at 52; Hammad, *Hurriyyah al-Ra’y*, *supra* note 171 at 221; Zaydan, *Majmu’ah Bohuth Fiqhiyyah*, *supra* note 96 at 128; Ibn Taymiyyah, *The Institution of Hisbah*, *supra* note 115.

¹⁷⁷ Kamali, *Freedom of Expression in Islam*, *ibid.* at 31-32.

¹⁷⁸ Mawdudi, *Human Rights in Islam*, *supra* note 131 at 28 [emphasis added].

¹⁷⁹ *Ibid.* at 29.

would result in severe punishment.¹⁸⁰ The involvement of the government in “prohibiting evil” is also equally harmful, for it should not be up to the government to decide what is right and what is not, especially in political matters. This approach leads to despotism and suppression.¹⁸¹ The government is expected to stay impartial and neutral toward the people and their various ideas concerning any private or public issue. Muslims should be able to voice their opinions freely in public and political matters.¹⁸² Below we examine Shari’a laws on freedom of speech with respect to two important issues-- namely, the right to participate in public life and freedom of religion.

D. The Right to Participate in Public Life

The subject of politics in Islam has produced a vast literature. However, there has been no consensus among Muslim scholars on the form of government in Islamic law.¹⁸³ As discussed in Chapter Two, under Medina model of state, a caliph is the

¹⁸⁰ See “Human Rights in the Muslim World” *supra* note 88 at 23; *Islam and Human Rights, Tradition and Politics*, *supra* note 95 at 163-70; Ahmad Fathi Bahnasi, *Al-Jara’im fi al-Fiqh al-Islami, Darasah Fiqhiyyah Muqaranah* [Crimes in Shari’a, Comparative Studies] 5th ed. (Beirut: Dar al-Shuruq, 1983). Also generally Abd al-Qadir Awdah, *Al-Tashri al-Jina’i al-Islami Muqarinan bi al-Qanun al-Wad’i* [Shari’a Criminal Law, Comparative Studies] (Cairo: Matba’ah al-Madani, n. d.); and Hammad, *Hurriyyah al-Ra’y*, *supra* note 171.

¹⁸¹ See Schauer, *Freedom of Speech: A Philosophical Enquiry*, *supra* note 5 at 39; and Karpen, “Freedom of Expression As a Basic Right” *supra* note 11 at 397.

¹⁸² Bielefeldt, “Muslim Voices in the Human Rights Debate” *supra* note 128 at 597-601; and Kamali, *Freedom of Expression in Islam*, *supra* note 92 at 50-71.

¹⁸³ See generally Enayat, *Modern Islamic Political Thought*, *supra* note 119; John Esposito, *Islam and Politics*, 2nd ed. (Syracuse: Syracuse University Press, 1991); Edward Mortimer, *Faith and Power: The Politics of Islam* (New York: Vintage Books, 1982); Sami Zubaida, *Islam, the People, and the State* (London: Routledge, 1989); Shahrough Akhavi, “Islam, Politics, and Society in the Thought of Ayatollah Khomeini, Ayatollah Taliqani, and Ali Shariati” (1988) 24 *Middle East Studies* 404-31; Leonard Binder, *Islamic Liberalism: A Critique of Development Ideologies* (Chicago: University of Chicago Press, 1988); Abu Habib Sa’di, *Darasah fi Minhaj al-Islam al-Siyasi* [A Study in Political Islam] (Beirut: Mu’assasah

ultimate authority. He delegates power through God, and discharges the executive, legislative, and judicial functions of the government.¹⁸⁴ In addition, Islam and the clerical community are closely associated with political rule. There is no separation between religion and politics. Political authority has, to some extent, been made sacred.¹⁸⁵ Besides leading to the abuse of power, corruption, and political oppression, all this makes difficult the involvement of the average person, as opposed to the elite, in government and public life.¹⁸⁶

Shari'a deals with the right to participate in public life under the principle of *shura* (consultation), on the basis of which the ruler may consult with the *ulama* and the

al-Risalah, 1985); al-Awa, *On the Political System of the Islamic State*, *supra* note 171; Muhammad Asad, *Principles of State and Government in Islam* (Berkeley: University of California Press, 1966); Abdallah al-Arabi, *Nizam al-Hukm fi al-Islam* [Political System in Islam] (Cairo: Dar al-Fikr, n. d.); Ibrahim Ahmad, "Principles of an Islamic Constitution and the Constitution of Malaysia" (1989) 1 *IIU L. J.* 1-11; and Mohammad H. Kamali, *Principles of Islamic Jurisprudence* (Cambridge: Islamic Text Society, 1991).

¹⁸⁴ Javid Iqbal, "The Concept of State in Islam" in Mumtaz Ahmand, ed., *State, Politics, and Islam* (Washington, D. C.: American Trust, 1986) 39; Hassan al-Turabi, "Islam, Democracy, the State, and the West" summary of a lecture and roundtable discussion with Hassan al-Turabi, Prepared by L. Cantori & A. Lowrie (1992) 49 *Middle East Policy* 1: 3 at 53; H. al-Turabi, "The Islamic State" in John Esposito, ed., *Voices of Resurgent Islam* (New York: Oxford University Press, 1983) 241; Anwar G. Chejne, *Succession to the Rule in Islam* (Lahore: Muhammad Ashraf, 1960); A. K. S. Lambton, *State and Government in Medieval Islam* (Oxford: Oxford University Press, 1981); Mawdudi, *Islamic Law and Constitution*, *supra* note 171 at 225; Mohammad H. Kamali, "The Limits of Power in an Islamic State" (1989) 28 *Islamic Studies* 323-53; Sayyed Qutb, *Social Justice in Islam*, trans. by Hardis (Washington, D. C.: American Council of Learned Societies, 1953) at 97.

¹⁸⁵ Gibb, "Constitutional Organization" *supra* note 149; Mawdudi, *Islamic Law and Constitution*, *ibid.*; Muhammad Shahhat al-Jundi, *Ma'alim al-Nizam al-Siyasi fi al-Islam* [Political System in Islam] (Cairo: Dar al-Fikr, 1986); M. H. Kamali, "Siyasah Shar'iyyah or the Policies of Islamic Government" (1989) 6 *Am. J. Islamic Social Sciences* 39-81; Muhammad Abd al-Majid al-Khalidi, *Qawaid Nizam al-Hukm fi al-Islam* [The Foundations of Political System in Islam] (Kuwait: Dar al-Buhuth al-Ilmiyyah, 1980); and William M. Watt, *Islamic Political Thought: The Basic Concepts* (Edinburgh: Edinburgh University Press, 1968).

¹⁸⁶ F. M. Al-Najar, *The Islamic State* (Darien: Monographic Press, 1967) at 3; Mohammad Arkon, "The Concept of Authority in Islamic Thought: La Hukma Illa Lillah" in *The Classical and Medieval Islamic World: Essays in Honour of Bernard Lewis* (Princeton: Princeton University Press, 1989) at 38; Hammad, *Hurriyyah al-Ra'y*, *supra* note 171; and Imarah, *Al-Islam wa Huquq al-Insan*, *supra* note 134.

leading members of the community on public affairs of the state.¹⁸⁷ Evidently, the ordinary Muslims, women, and religious minorities are excluded from this process.¹⁸⁸ The consultation is carried out on matters that do not contradict Shari'a principles or any Qur'anic provision for that matter.¹⁸⁹ Moreover, it is generally understood that *shura* has no binding effect on the ruler; nor is he under any obligation to seek the consultation of the *ulama*.¹⁹⁰ According to the Qur'anic verses in question, the ruler is enjoined to consult the believers in public affairs;¹⁹¹ but, then, he must rely on God to proceed and execute his decision.¹⁹² In other words, the consultation itself is sufficient, and the ruler would act according to his best judgment. According to Sunna, too, although the Prophet consulted his companions many times, often deciding on the basis of their views and not his, it was never understood in a way that he was bound to accept and follow the advice he received.¹⁹³ In Shari'a, political rule is limited only by

¹⁸⁷ al-Awa, *On the Political System of the Islamic State*, *supra* note 171 at 86-97; Abd al-Qadir Awda, *Al-Islam wa Awda'una al-Siyasiya* [Islam and Our Political Condition] (Beirut: Mu'assasat al-Risalah, 1980) at 120-61; Muhammad Rashid Rida & Muhammead Abduh, *Tafsir al-Manar* [Al-Manar Qur'anic Interpretation] vol. 4 (Cairo: Dar al-Manar, 1947) at 45; Zaydan, *Al-Fard wa al-Dawlah*, *supra* note 126; Ibn Taymiyyah, *The Institution of Hisbah*, *supra* note 115; and Fathi Uthman, *Huquq al-Insan Bayn al-Shari'ah al-Islamiyyah wa al-Fikr al-Qanuni al-Gharbi*, *supra* note 137. Also Maxime Rodinson, *L'Islam: politique et croyance* (Paris: Fayard, 1993); and Ali Abd al-Raziq, *L'Islam et les fondements du pouvoir*, trans. by Abdou Filali-Ansary (Paris: Éditions la découverte, 1994).

¹⁸⁸ Mutawalli, *Mabadi Nizam al-Hukm fi al-Islam*, *supra* note 170 at 254-60; Siegman, "The State and the Individual in Sunni Islam" *supra* note 103 at 23; Mawdudi, *Islamic Law and Constitution*, *supra* note 171; and Mawdudi, *Human Rights in Islam*, *supra* note 131 at 12-13.

¹⁸⁹ Mutawalli, *Mabadi Nizam al-Hukm*, *ibid.* at 253.

¹⁹⁰ Abd al-Hamid Isma'il al-Ansari, *Al-Shura wa Atharuha fi al-Dimiqratiyyah* [Shura and Its Role in Democracy] 2nd ed. (Beirut: Al-Maktabah al-Asriyyah, 1980); Mohammad Al-Tusi, *Tafsir al-Tibyan* [Tibyan Qur'anic Interpretation] vol.3 (Najaf, Iraq: Maktabat al-Amin, n. d.) at 32; Muhammad Ibn Jarir Tabari, *Tafsir al-Tabari* [Tabari Qur'anic Interpretation] 3rd ed. (Cairo: Mustafa al-Babi al-Halabi, 1968); Fazlur Rahman, "A Recent Controversy Over the Interpretation of Shura" (1981) *History of Religion* 291-301; Mutawalli, *Mabadi Nizam al-Hukm*, *ibid.* at 245-48.

¹⁹¹ This has generally been interpreted by jurists as the *ulama*, not ordinary people. See Mutawalli, *ibid.* at 256; Ansari, *Al-Shura*, *ibid.*

¹⁹² Qur'an, 3: 159 and 42: 38. See al-Arabi, *Nizam al-Hukm*, *supra* note 183.

¹⁹³ Mutawalli, *supra* note 170 at 88-89; Weeramantry, *Islamic Jurisprudence: An International Perspective*, *supra* note 171 at 124; and Asad, *Principles of State and Government in Islam*, *supra* note 183.

conscience and piety, which are not publicly ascertainable. The opinion of the *ulama* is also of a consultative nature with no binding effect.¹⁹⁴

This thesis submits that the Qur'an and *Sunna* provide no system of government or political organization for Muslim society. The *Shura* is a limited and restrictive principle with no genuine procedure or mechanism for consultation. It could only be understood in its historical context. It is not comprehensive in scope; nor does it construct a modern constitutional principle. There is no possibility that the majority view might prevail.¹⁹⁵ *Shura* is the obligation of the ruler to God, not to his human subjects.¹⁹⁶ It provides no safeguards against the ruler who enjoys unlimited power and has the authority to interpret Shari'a laws, which, as An-Na'im points out, "dampens freedom of speech and creates a sense of intellectual and political impotence."¹⁹⁷ Based on *shura*, there can be no opposition parties; nor is the effective participation of people in government assured. Constitutionalism implies legal limitations on the powers of the political rule and its accountability to people. It also implies popular sovereignty, equal citizenship for all members of society, and protection of minorities.¹⁹⁸ A constitution to

¹⁹⁴ A. Ahmed An-Na'im, "Islamic Law, International Relations, and Human Rights: Challenges and Responses" (1987) 20 Cornell Int'l L. J. at 321; Ansari, *Al-Shura*, *supra* note 190; Enayat, *Modern Islamic Political Thought*, *supra* note 119.

¹⁹⁵ Not to mention the right of minorities to participate in public life. See al-Tusi, *Tafsir al-Tibyan*, *supra* note 190 vol. IX at 168; and Muhammad al-Tabari, *Jami al-Bayan an Ta'wiyul Ayya al-Qur'an* [Al-Bayan Qur'anic Interpretation] vol. XXV (Cairo: Mustafa al-Baki, 1954) at 37; al-Awa, *On the Political System of the Islamic State*, *supra* note 171; and Noel J. Coulson, "The State and the Individual in Islamic Law" (1957) 6 Int'l & Comp. L. Quart. 49-60.

¹⁹⁶ *Toward an Islamic Reformation*, *supra* note 123 at 79; Lambton, *State and Government in Medieval Islam*, *supra* note 184; Zaydan, *Al-Fard wa al-Dawlah*, *supra* note 123; Kamali, "The Limits of Power in an Islamic State" *supra* note 184 323-53.

¹⁹⁷ "Islamic Law, International Relations, and Human Rights" *supra* note 194 at 330.

¹⁹⁸ *Toward an Islamic Reformation*, *supra* note 123 at 76; Ishtiaq, "An-Na'im on Constitutional and Human Rights Issue" in *Islamic Law Reform and Human Rights*, *supra* note 158 at 65. See also G.-A. Beaudoin, ed., *Vues canadiennes et europeennes des droits et libertés* (Cowansville, Que.: Édition Yvon

enhance the legitimacy of the state should guarantee the right of people to take part in public life by forming political parties and associations, for, as Iwe notes, “the human person can not be turned into a passive instrument of state power.”¹⁹⁹ The denial of the right to participate leads to excommunication as well as political tyranny and corruption.

It should also be pointed out that Shari’a grants people *hurriyyat al-mu’aradah* (freedom to criticize) in order to “monitor government activity by means of sincere advice, construction criticism, and ultimately by refusal to obey the government which is guilty of violating the law.”²⁰⁰ Under Shari’a, freedom to criticize is, in fact, a corollary of the principle of commanding the good and prohibiting evil. As Afifi writes, it entitles individuals “to tell the truth and expose transgression even when this entails opposing the ruling authorities.”²⁰¹ Freedom to criticize may take place only within Shari’a limits. Its characteristics are not clearly defined, and it could easily fall into the category of *fitna* discussed below.

Blais, 1990); P. W. Hogg, *Constitutional Law of Canada*, 3rd ed. (Toronto: Carswell, 1992); Patrick J. Monahan, *Constitutional Law* (Concord, Ontario: Irwin Law, 1997).

¹⁹⁹ Nwachukwu S. S. Iwe, *The History and Contents of Human Rights, A Study of the History and Interpretation of Human Rights* (New York: Peter Lang, 1986) at 365.

²⁰⁰ Kamali, *Freedom of Expression in Islam*, *supra* note 92 at 50. See also Zahir al-Qasimi, *Nizam al-Hukm fi al-Shari’ah wa al-Tarikh* [Political System in Shari’a and History] 2nd ed. (Beirut: Dar al-Nafa’is, 1977) at 101.

²⁰¹ Muhammad al-Sadiq Afifi, *Al-Mujtama al-Islami wa Usul al-Hukm* [Islamic Community and Political System] (Cairo: Dar al-I’tisam, 1980) at 93. See also al-Siba’i, *Ishtirakiyyah al-Islam*, *supra* note 176 at 50.

E. The Concept of Fitna and Its Significance on Freedom of Speech Under Shari'a

The notion of *fitna* in Islamic jurisprudence greatly influences the scope and substance of freedom of speech. *Fitna* has several meanings-- temptation, misguidance, sedition, confusion, trial, etc.²⁰² It also appears in the Qur'an with different meanings, such as trial and test, disbelief, oppression that denies believers the right to practice their faith, and as a moral concept in the sense of temptation and enticement.²⁰³ In the *Sunna*, the word *fitna* (pl. *fitan*) generally refers to waging of war, either by a corrupt ruler who oppresses the society or a group that challenges his legitimacy.²⁰⁴

From a judicial point of view, Shari'a covers, and deals with, different types of *fitna*. From one perspective, *fitna* is divided into two categories. One refers to those who take up arms against authority, and attempt to overthrow the government. They renounce the political rule, initiate hostilities, and, having access to arms, threaten to confront the authority.²⁰⁵ These people are classified as *bughat* (armed political

²⁰² *Al-Mu'jam al-Wasit* [Al-Wasit Arabic Dictionary] vol. II, 3rd ed. (Cairo: Sharikat al-I'Lanat al-Sharqiyah, 1985) at 698; Thomas P. Hughes, *A Dictionary of Islam* (Lahore: Book House, n. d.) at 129; al-Tahir Ahmad al-Zawi, ed., *Tartib al-Qamus al-Muhit* [al-Qamus Arabic Dictionary] vol. III, 3rd ed. (Beirut: Dar al-Fikr, n. d.) at 446; Muhammad Muhsin Khan, *The Translation of the Meanings of Sahih al-Bukhari*, vol. IX (Lahore: Kazi, 1979) at 13.

²⁰³ Qur'an, 29: 3, 9:49, and 44: 17; 8: 28 and 39; 2: 191; and 8: 28 and 64: 15 respectively. See Rida & Abduh, *Tafsir al-Manar*, *supra* note 187 vol. V at 644 and 666.

²⁰⁴ Kamali, *Freedom of Expression in Islam*, *supra* note 92 at 185; Kamali, "An Analysis of *Fitna*" *supra* note 159 at 180; Khan, *The Translation of the Meaning of Sahih Bukhari*, *supra* note 202 vol. IX at 143ff; Hughes, *A Dictionary of Islam*, *supra* note 202 at 129.

²⁰⁵ Awdah, *Al-Tashri al-Jina'i al-Islami*, *supra* note 180 vol. I at 104-105; al-Awa, *On the Political System of the Islamic State*, *supra* note 171; Yahya Isma'il, *Manhaj al-Sunnah fi al-Alaqah Bayn al-Hakim wa al-Mahkum* [The Relationship Between the Ruler and the Ruled in *Sunna*] (Cairo: Dar al-

criminals), and, of course, must be fought.²⁰⁶ The study of this type of *fitna* and of the *muharibun* (apolitical rebels) is, however, beyond the scope of this work.²⁰⁷

The other category of *fitna*, which relates to peaceful speech, refers to two groups. The first group is mainly concerned with verbal and behavioral passions or impulses (*fitna al-shahawat*). It promotes obscenity and leads to corruption.²⁰⁸ In Shari'a view, this type of *fitna* implies the commission of sinful deeds (*fisq al-amal*) which originate in lust and passion and "result in either belief in falsehood, or indulgence in corrupt activity, or both."²⁰⁹ *Fitnat al-shahawat* conflicts with Shari'a moral standards. Its punishment is harsh that some obscene behavior, such as adultery

Wafa, 1986); Lambton, *State and Government in Medieval Islam*, *supra* note 184; Kamali, "The Approved and Disapproved Varieties of Ra'y" *supra* note 165 at 39-64; and Asad, *Principles of State and Government in Islam*, *supra* note 183.

²⁰⁶ A much debated example of this type of *fitna* is the Khawarij (literally, outsiders, because they separated themselves from the community). Once followers of Ali, the fourth caliph, they disagreed with the proposed arbitration between Ali and Mua'wiya (the founder of the Umayyah dynasty) under the impression that, according to the Qur'an (6: 57), the prerogative of command belongs only to God. They asserted some unorthodox views as well. For instance, they believed that the Muslim community could administer its own affairs, and that the caliph could be, if necessary, elected by all community members from any Muslim tribe. Ali acted moderately, and did not fight the Khawarij merely over differences of opinions until they committed a violation, and killed his representative. They were consequently fought and defeated in the battle of Nahrawan. See generally Awdah, *Al-Tashri al-Jina'i*, *ibid.*; Khadduri, *The Islamic Law of Nations: Al-Shaybani's Siyar*, *supra* note 130; Ibn Abd al-Karim al-Shahristani, *Al-Milal wa al-Nihal* [The Nations and Faiths] vol. VII (Cairo: Mustafa al-Babi al-Halabi, 1968); Muhammad S. al-Jundi, *Ma'alim al-Nizam al-Siyasi fi al-Islam* [The Study of the Islamic Political System] (Cairo: Dar al-Fikr al-Arabi, 1986); Mutawalli, *Mabadi Nizam al-Hukm*, *supra* note 170; Hammad, *Hurriyat al-Ra'y*, *supra* note 171; Salem, *Political Theory and Institutions of Khawarij*, *supra* note 156; and Kamali, "An Analysis of Fitna" *supra* note 159 at 184-87.

²⁰⁷ For more on *bughat* and *muharibun*, see Muhammad Hassan Najafi, *Jawahir al-Kalam fi Sharh Shara'e al-Islam* [Shari'a Book] 7th ed. (Beirut: Dar al-Ihya al-Turath al-Arabi, n.d.) vol. XXI at 324-34; *Tazkirah al-Fuqaha*, vol. I at 554-57; Mohammad al-Awa, *Punishment in Islamic Law* (Indianapolis: American Trust, 1982); Awdah, *Al-Tashri al-Jina'i*, *ibid.* vol. I at 104-105; Bahnasi, *Al-Jara'im fi al-Fiqh al-Islami*, *supra* note 180.

²⁰⁸ Kamali, *Freedom of Expression in Islam*, *supra* note 92 at 193-97; Ibn Qayyim Al-Jawziyyah, *Iqhathah al-Lahfan min Makayid al-Shaytan*, ed. by Muhammad Anwar al-Baltaji, vol. I (Cairo: Dar al-Turath al-Arabi, 1983) at 130; Ibn Taymiyyah, *The Institution of Hisbah*, *supra* note 115.

²⁰⁹ *Freedom of Expression*, *ibid.* at 196.

and sodomy, fall under the category of *hudud* crimes.²¹⁰ The study of this type of *fitna* is also beyond the view of this work.²¹¹

The second group, which is more extensive in scope and significance, is related to seditious speech (*fitnat al-shubahat*).²¹² It has to do with both words and acts that “incite dissension and controversy among people with the effect that the righteous and the wrongdoer can no longer be distinguished from one another.”²¹³ According to Shari’a, seditious speech spreads doubt among Muslims with regard to their knowledge and view of religion. Or, it attacks the legitimacy of the government, perhaps in pursuit of political power.²¹⁴

As indicated, Islam and the state are closely associated with each other, and Shari’a emphasizes solidarity and the duty to obey the authority.²¹⁵ Any personal opinion (*ra’y*)²¹⁶ on Shari’a principles might be considered not only innovation (*bid’a*) but political rebellion as well; vice versa, any criticism of the authority could be

²¹⁰ Shari’a blocks the path or instruments of criminality and evil and prevents indulgence in this type of *fitna*. It forbids, for example, gazing or intimate proximity (*khalwa*) between members of the opposite sexes. See Ibn Qayyim, *Ighathat al-Lahfan*, *supra* note 208 vol. I at 130. It has been reported that Umar Ibn al-Khattab, the second caliph, once banished a man from Medina because he was unusually handsome, and, according to the caliph, a source of temptation to the women. See al-Ghazali, *Ihya Ulum al-Din*, *supra* note 96 vol. VIII at 18, 185, 188, and 190. Shari’a authorizes the ruler to penalize any offense or sin (*ma’siya*) even, according to some, in suspicious circumstances. See Awdah, *Al-Tashri al-Jina’i*, *supra*, note 180 at 138ff; and “The Limits of Power in an Islamic State” *supra* note 184 at 223-53.

²¹¹ Awdah, *Al-Tashri al-Jina’i al-Islami*, *ibid.*; and al-Awa, *On the Political System of the Islamic State*, *supra* note 171.

²¹² See Hughes, *A Dictionary of Islam*, *supra* note 202; Ibn Qayyim, *Ighath al-Lahfan*, *supra* note 208 vol. II at 129.

²¹³ *Freedom of Expression in Islam*, *supra* note 92 at 186.

²¹⁴ Ghazawi, *Al-Hurriyyat al-Ammah fi al-Islam*, *supra* note 119 at 43; Isma’il, *Manhaj al-Sunnah*, *supra* note 205 at 141; and “Analysis of *Fitna*” *supra* note 159 at 189-90.

²¹⁵ Ibn Qayyim, *Ighathat al-Lahfan*, *supra* note 208 vol. II at 123; and Abdallah al-Khatib al-Tabrizi, *Mishkat al-Masabih*, ed. by Muhammad Nasir al-Din al-Albani, vol. II, 2nd ed. (Beirut: al-Maktab al-Islami, 1979) *hadith* no. 3678.

²¹⁶ “The Approved and Disapproved Varieties of *Ra’y* in Islam” *supra* note 165 at 39-64.

interpreted to be disbelief and contradictory to Islamic principles.²¹⁷ This fact makes defining the scope of this kind of *fitna* difficult and easy to manipulate in the abuse of power by Muslim rulers, who may imprison and persecute their opponents on charges of seditious *fitna*, ill-intent (*fasad al-qasd*), and the pursuit of passion (*hawa*).²¹⁸ According to Shari'a, the subjection of believers to unorthodox and unofficial views that incite controversy in society is *fitna* and an abuse of freedom of speech. These views threaten the legitimacy of government and may lead to the collapse of public order.²¹⁹ They are also considered corrupt opinions that violate Islamic principles and may be penalized.²²⁰ The punishment for seditious *fitna* generally falls under the category of *ta'zir* punishment,²²¹ which ranges from a few lashes to the death penalty.²²²

²¹⁷ It should be pointed out that whereas seditious *fitna* is dominantly political concept, *bid'a* tends to have religious overtones. See *Freedom of Expression in Islam*, *supra* note 92 at 196; "Varieties of Ra'y" *ibid.* 39-64; and "An Analysis of Fitna" *supra* note 159 at 188-97.

²¹⁸ In Islamic history, many scholarly opinions or political criticisms have been considered *fitna*, and answered with severe punishment. Abu Dharr al-Ghaffari, a great companion of the Prophet, was exiled for criticizing the government of Uthman Ibn Affan, the third Caliph. The persecution of many jurists who held different opinions on Islamic theology during the reign of the Abbasid caliph Ma'mun are well documented. Two renowned Muslim scholars, namely, Ibn Sina (Avicenna, d. 1037 AD) and Nasir al-Din Tusi (d. 1294 AD) also came under sharp criticism and were charged with holding views that were considered contrary to the accepted principles of Islam. See Muhammad Abu Zahrah, *Al-Jarimah wa al-Uqubah fi al-Fiqh al-Islami* [Crimes and Punishments in Shari'a] (Cairo: Dar al-Fikr al-Arabi, n. d.); Ibn Qayyim, *Ighath al-Lahfan*, *supra* note 208 vol. II at 109, 114, 129, 144, and 211; and *Freedom of Expression in Islam*, *supra* note 92 at 194-95.

²¹⁹ Ghazawi, *Al-Hurriyyat al-Ammah*, *supra* note ? at 43; Isma'il, *Manhaj al-Sunnah*, *supra* note ? at 141; and *Freedom of Expression in Islam*, *supra* note ? at 185- 86.

²²⁰ Shams al-Din Muhammad al-Sarakhsi, *Al-Mabsut*, vol. I (Beirut: Dar al-Ma'rifah, n. d.) at 125; Abu Zahrah, *Al-Jarimah wa al-Uqubah fi al-Fiqh al-Islami*, *supra* note 218 at 159; and "An Analysis of Fitna" *supra* note 159 at 180.

²²¹ See Chapter Two, text accompanying note 63-64.

²²² Amin, *Fajr al-Islam*, *supra* note 92; Awdah, *Al-Tashri al-Jina'i*, *supra* note 180 vol. I at 138ff; "The Limits of Power in an Islamic State" *supra* note 184 at 323-53; Abu Ishaq Ibrahim al-Shatibi, *Al-I'tisam*, vol. II (Beirut: Dar al-Ma'rifah, 1982) at 293; Bahnasi, *Al-Jara'im*, *supra* note 180; and al-Awa, *Punishment in Islamic Law*, *supra* note 207.

Needles to say, the punishment of all types of *fitna* also fall under the Qur'anic command of "enjoining good and forbidding evil."²²³ Therefore, as Kamali writes,

[Confronting *fitna*] does not require adjudication prior to enforcement, nor does it depend upon the prior decision of authorities. When a person sees a sinful act being committed he is entitled [as both his right and duty] to intervene and change it to the extent of his ability to do so.²²⁴

In fact, this person is not even responsible for compensation for any loss in this respect if he acts within Shari'a limits.²²⁵

Shari'a's concern for the stability of political rule as well as the unity of the Muslim *umma* clearly overrides the citizens' basic rights and liberties. It contradicts the principles of popular representation and a clear commitment to human rights -- the necessary foundations of political legitimacy of the government in modern times. All the regulations and provisions are directed at limiting the scope and extent of freedom of speech, and exclude citizens from involvement in the decision-making process. Shari'a denies individuals' right to express freely their opinions and ideas on any subject, and justifies suppressing a view simply on the ground that it is false, although truths can be tested only by setting them against falsehoods.²²⁶ Shari'a does not recognize the opposition's right to promote its views through peaceful means. Its

²²³ Muhammad Amin Ibn Abidin, *Hashiyah Radd al-Mukhtar ala al-Durr al-Mukhtar*, vol. IV (Cairo: Dar al-Fikr, 1979) at 65; and *Freedom of Expression in Islam*, *supra* note 92 at 203.

²²⁴ "An Analysis of *Fitna*" *supra* note 159 at 196 [emphasis added].

²²⁵ *Ibid.*; and Ibn Abidin, *Hashiyah*, *supra* note 223 vol. IV at 65-67.

²²⁶ Schauer, *Free Speech: A Philosophical Enquiry*, *supra* note 5 at 39.

injunctions and qualifications greatly restrict the scope of freedom of speech.²²⁷ Since the pursuit of many freedoms and liberties is conditional on freedom of speech, the restrictions and criteria on this freedom leave society unfree. They violate individuals' fundamental rights and freedoms.

It should be added that Shari'a does not consider freedom of association. Some Muslim scholars are even of the opinion that the formation of political parties is forbidden in an Islamic state. Kamal Wasfi, for example, believes that "Islam does not subscribe to any alliance other than unity in faith which is sufficient for the Muslims. When a section of the Muslim community enters a partisan alliance, it is bound to isolate others, and this would consequently lead to disunity."²²⁸ These scholars invoke Qur'anic verses to support their position.²²⁹ In addition, freedom of association may seem contrary to the *bay'at*, the oath of allegiance which Muslims publicly perform to show their loyalty to the new caliph.²³⁰

However, one may quote the principles of *hisbah* (commanding the good and forbidding evil), *shura* (consultation), and *nasihah* (sincere advice) as the relative recognition of freedom of association within the limits of Shari'a.²³¹ Thus, it is at most

²²⁷ *Toward an Islamic Reformation*, *supra* note 123 at 78-80; and "Islamic Law, International Relations and Human Rights" *supra* note 194 at 330.

²²⁸ Mustafa Kamal Wasfi, *Al-Nizam al-Dusturi fi al-Islam Muqarinan bi al-Nuzum al-Asriyyah* [Political System in Islam in Comparison With Modern Systems] (Cairo: Maktabah Wahbah, 1974) at 76.

²²⁹ See, for example, Qur'an, 3: 103, 6:159, and 8:46. See also Abul A'al Mawdudi, *Al-Hukumah al-Islamiyyah* [Islamic State] trans. by Ahmad Idris (n. p.: Al-Mukhtar al-Islami, 1977) at 217; Abd al-Ghani Busyuni Abdallah, *Nazariyyah al-Dawlah fi al-Islam* [Political Theory in Islam] (Beirut: dar al-Jamiyyah, 1986) at 153.

²³⁰ See Chapter Two, text accompanying note 37.

²³¹ Qur'an, 5:2, 11:118, 49:13, 58:9, 11, 19, and 22, 3:104, 35:32, 9:122, 4:114, and 24:63. See also *Freedom of Expression in Islam*, *supra* note 92 at 72-85; Asad, *Principles of State and Government in Islam*, *supra* note 183 at 6; al-Arabi, *Nizam al-Hukm*, *supra* note 183 at 92; al-Ansari, *Al-Shura*, *supra* note 190 at 432.

a collective obligation of the community as a whole to associate and communicate with one another in commanding the good and forbidding evil within the boundaries of Shari'a restrictions. This is by far different from the right to freedom of association as recognized in international human rights law.²³²

F. Freedom of Religion under Shari'a

Freedom of thought, conscience, and religion is one of the oldest and the deepest of the rights embedded in international human rights law, and, yet, it is a freedom permanently at risk.²³³ This freedom needs to be expressed and practiced, and thus is closely allied with freedom of speech. The study of freedom of religion in Shari'a reveals further aspects of freedom of speech, or lack thereof. Under Shari'a rules, the application of *hudud*²³⁴ crime of *ridda* (apostasy) represents an absolute limit on tolerance, and has great implications for freedom of religion and freedom of expression.²³⁵ Based on Shari'a law of apostasy, every Muslim who renounces his faith

²³² We will refer to international documents in this respect in the next section of this chapter.

²³³ Noel B. Reynolds & W. Cole Durham Jr., eds., *Religious Liberty in Western Thought* (Atlanta, Georgia: Scholars Press, Emory University, 1996) at 9; W. C. Durham Jr., "Perspectives on Religious Liberty: A Comparative Framework" in Johan D. Vander Vyver & John Witte, eds., *Religious Human Rights in Global Perspective: Legal Perspectives* (The Hague: Martinus Nijhoff Publishers, 1996) at 1; Arcot Krishnaswami, *Study of Discrimination in the Matter of Religious Rights and Practices* (New York: The United Nations, 1960) no. 60, xiv.2; Elizabeth Odio Benit, *Study of the Current Dimensions of the Problems of Intolerance and Discrimination Based on Religion or Belief* (UN Doc. E/CN.4/sub.2/1987/26).

²³⁴ See Chapter Two, text accompanying note 62.

²³⁵ Abdulaziz Sachedina, "Freedom of Conscience and Religion in the Qur'an" in David Little, John Kelsay, & A. Sachedina, *Human Rights and the Conflicts of Culture: Western and Islamic Perspectives on Religious Liberty* (Columbia: University of South Carolina Press, 1988) 53-90; Fathi Uthman, *Huquq al-Insan, supra* note 137 at 97; Rajab Muhammad Abd al-Halim, *Al-Riddah fi Daw' Mafhum Jadid* [The

in Islam, either expressly or through any view or action deemed to contravene the principles of Islam, is considered apostate -- generally punishable by death.²³⁶

The law of apostasy was developed in the early years of Islamic rule in Medina, when Muslim society was a fragile political entity. As Allen Crown puts it, "religion was a matter of war and peace to the state, and of life and death to individuals."²³⁷ Speaking ill of the established religion was a crime against the rule of Islam, and was considered an act of betrayal warranting the death penalty.²³⁸ The law of apostasy, which violates fundamental and constitutional freedom of religion and belief, has now been abandoned in almost all contemporary penal codes of Muslim nation-states.²³⁹ However, the law remains in Shari'a, and demand for its application, along with other *hudud* punishments, has recently increased in some Muslim countries.²⁴⁰ On the other

New Concept of Apostasy] (Cairo: Dar al-Nahdah al-Arabiyyah, 1985); Glenn, *Legal Traditions of the World*, supra note 93 at 191; and Abdulaziz Sachedina, *The Islamic Roots of Democratic Pluralism* (New York: Oxford University Press, 2001) at 63-70 and 98-101.

²³⁶ al-Awa, *Punishment in Islamic Law*, supra note 207 at 43; S. Abdur Rahman, *The Punishment of Apostasy in Islam*, 2nd ed. (Lahore: Institute of Islamic Culture, 1978); Mutawalli, *Mabadi Nizam al-Hukm*, supra note 170; al-Ili, *Al-Hurriyyat al-Ammah*, supra note 96; Abd al-Halim, *Al-Riddah*, *ibid.* Other similar issues in Shari'a, such as blasphemy (reviling God and insulting the Prophet Muhammad -- *sabb Allah wa sabb al-rasul* -- and contemptuous rejection of their injunctions), disbelief (*kufr*), and heresy (*zandaqah*) has generally been subsumed and treated under apostasy. See al-Samara'i, *Ahkam al-Murtad*, at 43-46, 99, and 116; Salim al-Bahnasawi, *Al-Hukm wa Qadiyyah Takfir al-Muslim* [Attribution of Disbelief to a Muslim] 3rd ed. (Kuwait: Dar al-Buhuth al-Ilmiyyah, 1985) at 62; Abu Zahrah, *Al-Jarimah wa al-Uqubah*, supra note 218 at 196; and *Freedom of Expression in Islam*, supra note 92 at 206-28.

²³⁷ Allen Crown, "Blasphemy and Freedom of Speech" (1989) 22 *Australian J. of Forensic Sciences* at 12.

²³⁸ Sachedina, "Freedom of Conscience and Religion in the Qur'an" supra note 235? at 76.

²³⁹ With the exception of a few countries, such as Sudan and Iran. The issue of apostasy under Iran's criminal law will be discussed in this chapter.

²⁴⁰ See generally al-Ashmawy, *L'islamisme contre l'Islam*, supra note 154; Oliver Roy, *L'echec de l'Islam politique* (Paris: Seuil, 1992); Gilles Kepel, *Jihad, expansion et declin de l'islamisme* (Paris: Gallimard, 2000); Antoine Basbous, *L'islamisme, une révolution avortée?* (Paris: Hachette, 2000); Boubker Jalal Bennani, *L'islamisme et les droits de l'homme* (Lausanne: L'Aire, 1984); Ali E. Hillal Dessouki, ed., *Islamic Resurgence in the Arab World* (New York: Praeger, 1982); Mohammad Talbi, "Religious Liberty: A Muslim Perspective" in *Conscience and Liberty* (1991); Bruno Étienne, *L'islamisme radical* (Paris: Hachette, 1987); Olivier Carré & Paul Dumond, eds., *Radicalismes islamiques* (Paris: L'Harmattan, 1985); and Sami Awad Aldeeb Abu-Sahlieh, *Les mouvements islamistes*

hand, the restriction on non-Muslims to seek converts among Muslims remains in effect in most Muslim states.

Since apostasy undermines the integrity of Muslim society and the security of the state, the reasoning goes, any deviation from the ideology of the state which could result in disobedience must be prohibited.²⁴¹ This line of reasoning is false because even private apostasy is punishable by death under Shari'a.²⁴²

Although the Qur'an strongly condemns apostasy,²⁴³ it does not provide a punishment for it, and even stipulates that: "There shall be no compulsion in religion."²⁴⁴ Therefore, some jurists either do not consider apostasy as a *hudud* crime; at most, they regard *ridda* a doubtful *hadd*.²⁴⁵ Nevertheless, the early jurists referred to *Sunna* to classify apostasy as a *hadd* punishable by death.²⁴⁶

Shari'a provides for change of faith only toward Islam -- it forbids Muslims to convert from Islam. In an Islamic context, freedom of religion implies only that non-

et droit de l'homme (Bochum, Germany: D. Winkler, 1998).

²⁴¹ al-Mubarak, *Nizam al-Islam fi al-Hukm wa al-Dawla* [Islamic Political System] (Beirut: Dar al-Fikr, 1981) at 24-8, 100, and 117; and Tabandeh, *A Muslim Commentary*, *supra* note 141 at 70-72.

²⁴² Khadduri explains that "all the commentators [on the Qur'an] agree that a believer who turns back from his religion (*irtadda*), openly or secretly, must be killed if he persists in disbelief." Majid Khadduri, *War and Peace in the Law of Islam*, *supra* note 136 at 150. See *Toward an Islamic Reformation*, *supra* note 123 at 87 and 211.

²⁴³ As example, see Qur'an, 2: 217, 47: 25, and 5: 54.

²⁴⁴ *Ibid.* 2: 256 and 10:99. See Fathi Uthman, *Huquq al-Insan*, *supra* note 137 at 91; Sachedina, *The Islamic Roots of Democratic Pluralism*, *supra* note 235 at 83-91.

²⁴⁵ Rida & Abduh, *Tafsir al-Manar*, *supra* note 187 vol. V at 327; Abdur Rahman, *Punishment of Apostasy in Islam*, *supra* note 236 at 163; and *Toward an Islamic Reformation*, *supra* note 123 at 109.

²⁴⁶ It is recorded that the Prophet once said: "Whoever changes his religion, kill him." *Jawahir Sahih al-Bukhari*, *supra* note 134; Khan, *The Meanings of Sahih al-Bukhari*, *supra* note 202. Apostasy is also sanctioned by *Ijma* (the consensus; see Chapter Two, text accompanying note 19). See also Rahman, *Punishment of Apostasy in Islam*, *ibid.* at 63-64; al-Ili, *Al-Hurriyyat al-Ammah*, *supra* note 96 at 339; Kamali, *Freedom of Expression in Islam*, *supra* note 92 at 91. For another hadith in *Sunna*, see Ibn al-Hajjaj al-Nishapuri Muslim, *Mukhtasar Sahih Muslim*, ed. by Muhammad Nasir al-Din al-Albani, 2nd ed. (Beirut: Dar al-Maktab al-Islami, 1984) at 271 *hadith* no. 1023: al-Awa, *Punishment in Islamic Law*,

Muslims are not compelled to convert to Islam.²⁴⁷ A Muslim who repudiates his faith in Islam, or advocates the rejection of any principle of Islam, by a conclusive act or opinion, is defined as an apostate, guilty of a capital offense punishable by death. Repudiation of the creed of Islam could result from different acts or omissions, such as denial of the existence of God, the Prophet, rejecting any part of Qur'an and its principle teachings, and advocating drinking or committing adultery.²⁴⁸ According to some scholars, for the application of *ridda* punishment, criminal intention, i.e., the awareness of the heretical nature of the view or act, is also required.²⁴⁹

A male apostate who was born Muslim (*murtad al-fitri*)²⁵⁰ is generally punished by death without any chance to repent; someone who was not born Muslim but converted to Islam and then leaves it (*murtad al-mili*) is given three days to return to Islam.²⁵¹ If the offender fails to repent in three days, *hadd* punishment is imposed.²⁵²

supra note 207; and Muhammad Hamidullah, *Muslim Conduct of State*, 5th ed. (Lahore: M. Ashraf, 1966) at 172.

²⁴⁷ Muhammad Abu Zahrah, *Tanzim al-Islam lil Mujtama* [Political System in Islam] (Cairo: Matba'ah Mukaymar, n. d.) at 190; al-Ili, *Al-Hurriyyat al-Ammah*, *supra* note 96 at 330.

²⁴⁸ Awdah, *Al-Tashri al-Jina'i*, *supra* note 180 vol. II at 707-13; and Aly A. Mansour, "Hudud Crimes" in M. Cherif Bassiouni, ed., *The Islamic Criminal Justice System* (New York: Oceana, 1982) at 197.

²⁴⁹ Awdah, *ibid.* at 706 and 719-20; *Toward an Islamic Reformation*, *supra* note 123 at 86; and A. Ahmed An-Na'im, "The Islamic Law of Apostasy and Its Modern Applicability: A Case from the Sudan" (1986) 16 *Religion* at 213.

²⁵⁰ If one of the parents is Muslim, the child is also considered Muslim at birth.

²⁵¹ In some schools, the length of period of grace is left to the ruler's discretion. See Mansour, "Hudud Crimes" *supra* note 248 at 197.

²⁵² *Ibid.* The ban on apostasy could even affect people who were born, and still are, non-Muslims but whose parents or grand-parents had been converted from Islam. In fact, they are punished as apostate by virtue of their ancestors' defection from Islam. See Awdah, *Al-Tashri al-Jina'i*, *supra* note 180 vol. II at 707-13; al-Awa, *Punishment in Islamic Law*, *supra* note 207; and Rahman, *Punishment of Apostasy in Islam*, *supra* note 236.

Female apostates are not executed. They are imprisoned in severity until they change their minds.²⁵³

Apostasy also constitutes civil death -- it carries harsh consequences in civil law.²⁵⁴ For example, an apostate's marriage is automatically dissolved.²⁵⁵ An apostate will lose the right to inheritance from Muslim relatives as well as the custody of children.²⁵⁶

In several Muslim countries, the law of apostasy has become an oppressive tool exploited by a politically corrupt ruling elite to silence, imprison, or punish political opponents who adhere to doctrines other than the official view of Shari'a, and to label Muslim reformists as heretics and apostates.²⁵⁷ Freedom of religion requires official neutrality toward religion.²⁵⁸ Muslims should be able to exercise their right to express their opinions and ideas concerning any issue in Shari'a without fear of government prosecution. Furthermore, self-professed Muslims should be protected from conviction as apostates by a government that classifies their beliefs as unorthodox or heretical.²⁵⁹

²⁵³ Najafi, *Jawahir al-Kalam*, *supra* note 207 vol. XXI at 393; *Tazkira al-Fuqaha*, vol. I at 457; Samara'i, *Ahkam al-Murtad*; and Abu Zahrah, *Al-Jarimah wa al-Uqubah*, *supra* note 218.

²⁵⁴ Khadduri, *The Islamic Law of Nations*, *supra* note 130 at 145-209.

²⁵⁵ A. Muhammad ibn Idris al-Shafi'i, *Kitab al-Umm*[Al-Umm Book] vol. 8 (Cairo: Maktaba al-Kuliya al-Azhariya, 1961) at 5:57 and 6:160-61; Rudolph Peters & Gert J. J. De Vries, "Apostasy in Islam" (1976-77) 17 *Diewelt des Islam* at 7-9; "The Islamic Law of Apostasy and Its Modern Applicability" *supra* note 249 at 212.

²⁵⁶ Najafi, *Jawahir al-Kalam*, *supra*, note 207 vol. XXI at 393; *Tazkira al-Fuqaha*, vol. 1 at 457; and "The Islamic Law of Apostasy and Its Modern Applicability" *ibid*.

²⁵⁷ Ustadh Mahmoud Mohamed Taha of Sudan is a well-known example of this. See Chapter One, note 175.

²⁵⁸ Complete neutrality toward religion is the official position in the United States. In Canada, government provides funds for religious education. The Canadian Constitution also refers to God as supreme. See Sedler, "The Constitutional Protection of Freedom of Religion, Expression, and Association in Canada and the United States" *supra* note 4 at 583; and A. F. Carrillo De Albornoz, *The Basis of Religious Liberty* (London: SCM Press, 1963).

²⁵⁹ See *Islam and Human Rights, Tradition and Politics*, *supra* note 95 at 186.

Shari'a law of apostasy clearly runs contrary to democratic values and the notion of free society, and conflicts with freedom of conscience and religion. It is also out of keeping with the Qur'anic principle of "no compulsion in religion"²⁶⁰ and the principle of tolerance of religious differences practiced throughout Islamic history.²⁶¹ Based on different interpretations of the *Sunna*, the law of apostasy could easily be extended to include a wide range of acts and opinions. This clearly curbs the religious freedom of Muslims.

Thus, the law of apostasy has been criticized by many Muslim scholars on various grounds. Subhi Mahmassani asserts that Shari'a law on apostasy has not been taken as a definitive interpretation of the Islamic sources. He points out that it was not meant to apply to a simple change of faith but to an act of political betrayal of the community, treason, etc.²⁶² Khadduri believes that the death penalty was imposed only on certain tribes that renounced Islam after the Prophet's death in a specific historical context, but it was never imposed on an individual who changed his religion.²⁶³ Abdur Rahman, too, argues that the death penalty should not be applied to peaceful apostasy, i.e. a simple and individual change of faith.²⁶⁴ Since the Qur'an is silent on the death penalty for apostasy and the evidence in the *Sunna* is open to different interpretations,

²⁶⁰ Qur'an, 2: 256.

²⁶¹ Aldeeb Abu-Sahlieh, "Les droits de l'homme et l'Islam" at 644; Abu Zahrah, *Tanzim al-Islam*, *supra* note 247 at 192; Mutawalli, *Mabadi Nizam al-Hukm*, *supra* note 170 at 287ff; and Kamali, *Freedom of Expression in Islam*, *supra* note 92 at 85-90.

²⁶² Mahmassani, *Arkan Huquq al-Insan*, *supra* note 103t 123-24; *Islam and Human Rights, Tradition and Politics*, *supra* note 95 at 170; Shabbir Akhtar also states that apostasy is punishable by death if it is aggravated by treachery in a military context. Shabbir Akhtar, *Be Careful With Muhammad, The Salman Rushdie Affair* (London: Bellew, 1989) at 71. Also Sachedina, *The Islamic Roots of Democratic Pluralism*, *supra* note 235 at 51-57.

²⁶³ Khadduri, *The Islamic Conception of Justice*, *supra* note 94 at 238; and *Islam and Human Rights, Tradition and Politics*, *ibid.*

Selim al-Awa argues, “there is an urgent need to reinterpret the principles contained in the Qur’an and Sunnah.”²⁶⁵ Moreover, some Muslim scholars advocate the complete suspension of the *hudud* crime of *ridda*, which conflicts with basic human rights standards. Based on his reform methodology,²⁶⁶ An-Na’im states that “to remove all constitutional and human rights objections, the legal concept of apostasy and all its civil and criminal consequences must be abolished.”²⁶⁷

Freedom of expression and religion require the complete suspension and abrogation of Shari’a law of apostasy. This law promotes intolerance toward religious differences and encourages violence in Muslim societies. It also gives priority to faith and belief over human life. Since faith or profession out of reluctance and fear of punishment has little religious value, the application of the law of apostasy only results in hypocrisy in Muslim communities. Any modern interpretation of the Islamic sources would certainly result in the restriction of *ridda* punishment, to say the least, and would leave room for the concept of religious liberty in Shari’a.

²⁶⁴ Abdur Rahman, *The Punishment of Apostasy in Islam*, *supra* note 236; and *Toward an Islamic Reformation*, *supra* note 123 at 87.

²⁶⁵ al-Awa, *Punishment in Islamic Law*, *supra* note 207 at 55. See also Yahya b. Ali al-Shawkani, *Nayl al-Awtar*, vol. VII (Cairo: Mustafa al-Babi al-Halabi, n. d.) at 218.

²⁶⁶ See Chapter One, under “An-Na’im’s Reform Methodology”.

²⁶⁷ *Toward an Islamic Reformation*, *supra* note 123 at 109.

II. Freedom of Speech and Islamic Declarations of Human Rights

As elaborated in Chapter Two, the rights and freedoms mentioned in all Islamic human rights declarations do not correspond to the rights and freedoms recognized under international human rights law. Although they are modeled after the International Bill of Human Rights, even in language and format, Islamic declarations qualify human rights principles. The pattern of restrictions and the vagueness of the formulations distinguish them from international human rights documents.²⁶⁸ Islamic human rights declarations borrow substantive rights from international human rights covenants but rely on Shari'a principles to limit the context and scope of the rights. They are more concerned with the idea of limiting the rights and freedoms, and do not provide established standards for protection of individuals' rights and liberties.²⁶⁹

The subjection of human rights to the unspecified and vague limits of Shari'a leaves unlimited power to the government to decide what the scope of rights and freedoms should be. Moreover, it contradicts the international doctrine that fundamental human rights may not be subject to limitations by reference to the requirements of a particular religion.²⁷⁰ In other words, although international human rights law, too, recognizes that many human rights and freedoms, such as freedom of speech, are not absolute, and may be qualified for reasons of preserving national

²⁶⁸ The Cairo Declaration provides that: "All the rights and freedoms stipulated in this Declaration are subject to the Islamic Shari'a." The 1990 Cairo Declaration, *supra* Chapter Two note 182 art. 24.

²⁶⁹ See "Universal Versus Islamic Human Rights" *supra* note 118 at 327-50.

²⁷⁰ Mayer, *Islam and Human Rights, Tradition and Politics*, *supra* note 95 at 76 and 86-91.

security, public order, morals, etc. in a democratic society,²⁷¹ it seeks to balance the needs and interests of individuals and the society against each other.²⁷² Islamic human rights schemes, however, are distinctive in that they reduce right protections to reinforce Shari'a standards and restrictions. For example, although slavery was practically abolished decades ago, the 1981 Islamic Declaration takes an ambivalent position, and deals with this issue only in its preamble where it states that, in an Islamic order, "slavery and forced labor are abhorred."²⁷³ Interestingly enough, the Arabic equivalent for abhorred is *mukrooh* which denotes a moral prohibitions, not a legal one.²⁷⁴ This position might be due to the fact that slavery remains technically lawful in Shari'a.

As for freedom of speech, the 1990 Cairo declaration states that:

Every human being has the right to express his opinions freely in such manner *as would not be contrary to the principles of Shari'a*.²⁷⁵

²⁷¹ Of course, some rights, such as the right to freedom of thought, conscience, and religion and equality before the law, are treated as absolute and unqualified in international human rights documents, which allows no justification to restrict them.

²⁷² *Islam and Human Rights, Tradition and Politics*, *supra* note 95 at 73. See also Rosalyn Higgins, "Derogations Under Human Rights Treaties" (1976-77) 48 *British Yearbook of Int'l L.* at 281; and Myres McDougal; Harold Lasswell; & Lung-Chu Chen, "The Aggregate Interest in Shared Respect and Human Rights: The Harmonization of Public Order and Civil Order" (1977-78) 23 *New York Law School L. Rev.* at 23.

²⁷³ The 1981 Universal Islamic Declaration of Human Rights, *supra* Chapter Two note 180, the preamble Sec. G (iii).

²⁷⁴ The Cairo Declaration, however, provides that: "... no one has the right to enslave human beings." The 1990 Cairo Declaration, art. 11 (a).

²⁷⁵ *Ibid.*, art. 22 (a) [emphasis added]. The al-Azhar Draft also guarantees freedom of expression within Shari'a limits. See the 1979 al-Azhar Draft, *supra* Chapter Two note 181 art. 29.

Again, the principles of Shari'a are not defined, and it is effectively left to the authorities to decide freely what Islamic principles to apply.²⁷⁶ In the Islamic Declaration, too, Shari'a determines the meaning and scope of the right to liberty and freedom of expression.²⁷⁷ Article 12 (a) of the 1981 Islamic Declaration reads that:

Every person has the right to express his thoughts and beliefs *so long as he remains within the limits prescribed by the law.* ...²⁷⁸

When one realizes that "law" in this article stands for Shari'a, it is not difficult to conclude that it is Shari'a rules which set the limits on freedom of expression and speech. The article continues:

No one, however, is entitled to disseminate falsehood or to circulate reports that may outrage public decency, or to indulge in slander, innuendo, or to cast defamatory aspersions on other persons.²⁷⁹

The Arabic version of this part of the article, however, reveals otherwise. It states that it is not permitted to spread falsehood (*batil*), disseminate that which involves encouraging abomination (*fahisha*), or forsake the Islamic community (*takhdhil lil-*

²⁷⁶ *Islam and Human rights, Tradition and Politics*, *supra* note 95 at 89; and "Universal Versus Islamic Human Rights" *supra* note 118 at 337-39.

²⁷⁷ Salim Azzam, ed., *Universal Islamic Declaration of Human Rights* (London: Islamic Council of Europe, 1981).

²⁷⁸ The 1981 Islamic Declaration, art. 12(a) [emphasis added].

²⁷⁹ *Ibid.*

umma). The obscure and vague terms in this article have no settled meaning, and are open to different interpretations and speculations, which can hardly benefit individuals in respect of their freedom of speech. It allows the government to interpret the scope of restrictions and to deny rights and freedoms.²⁸⁰ The International Bill of Rights, on the other hand, guarantees freedom of opinion and expression for everyone, without any restriction or qualification based on the rules of any particular religion.²⁸¹

Moreover, the principle of “commanding the good and prohibiting evil,” as noted, overrides freedom of speech in Islamic human rights declarations. Freedom of speech is guaranteed on the condition that “it should be used for the propagation of virtue and truth, and not for spreading evil and wickedness.”²⁸² The Cairo Declaration reads:

Everyone shall have the right to advocate what is right, and propagate which is good, and warn against what is wrong and evil *according to the norms of Islamic Shari'a*.²⁸³

It also prohibits the exploitation or misuse of information that may “violate sanctities and the dignity of prophets, undermine moral and ethical values, or disintegrate, corrupt, or harm society or weaken its faith.”²⁸⁴ Vague and value-laden

²⁸⁰ *Islam and Human rights, Tradition and Politics*, *supra* note 95 at 173-74.

²⁸¹ See the UDHR, *supra* Chapter One note 20 art 19; the ICCPR, *supra* Chapter One note 20 art. 19 (10) & 19 (2).

²⁸² Majid Alikhan, “A Comparative Study of Universal Declaration of Human Rights and Declaration of Human Rights in Islam” (1991) 22 *Islam & the Modern Age Quart.* at 186.

²⁸³ The 1990 Cairo Declaration, art. 22 (b) [emphasis added].

²⁸⁴ *Ibid.* art. 22 (c).

terms like sanctities and values could easily be used to censor speech and other forms of expression, and, as Mayer states, “suit the political purposes of governments, albeit using ostensibly religious criteria.”²⁸⁵ This could result in suppression and punishment for expression as well.

Concerning freedom of thought, conscience, and religion -- a prerequisite for freedom of speech -- it should be mentioned that Islamic human rights schemes consider Islam the true faith and adherence to it natural. Therefore, they provide either no guarantee for freedom of religion or a guarantee only for Muslims; they recognize that religious minorities (*ahl al-kitab*) may practice their beliefs within Shari’a limits. The Cairo Declaration, for example, affords no guarantee of freedom of religion, and only states that:

Islam is the religion of unspoiled nature, and any form of compulsion on man or to exploit his poverty or ignorance in order to convert him to another religion or to atheism is prohibited.²⁸⁶

The article is obviously concerned with the compulsion and exploitation used to convert Muslims to another religion but not when it is used to convert others to Islam.²⁸⁷ The 1981 Islamic Declaration also provides that “[e]veryone has the right to

²⁸⁵ “Universal Versus Islamic Human Rights” *supra* note 118 at 335.

²⁸⁶ The 1990 Cairo Declaration, art. 10.

²⁸⁷ See “Universal Versus Islamic Human Rights” *supra* note 118 at 333-35.

freedom of conscience and worship in accordance with his religious belief.”²⁸⁸ This certainly limits Muslims and religious minorities to their respective religions, and does not guarantee freedom of religion for other faiths and beliefs. The lack of support for freedom of religion in these Islamic declarations distinguishes them from the International Bill of Human Rights, which treats freedom of religion as an unqualified right.²⁸⁹

The fact that Shari’a rules set limits on freedom of thought and belief contradicts the doctrine of international human rights law. According to article 18 of the Universal Declaration of Human Rights, describing several elements of freedom of religion, “[e]veryone has the right to freedom of thought, conscience, and religion”²⁹⁰ without any limitations on any ground, which includes, among others, “freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.”²⁹¹

Moreover, Islamic human rights schemes are evasive on the protection for freedom of religion, and intentionally do not address the real question, namely, the much debated right to freedom to change religion. According to the Universal Declaration of Human Rights, freedom of religion extends to “freedom to change

²⁸⁸ The 1981 Islamic declaration, art. 13. See also Azzam, *Universal Islamic Declaration of Human Rights*, *supra* note 277 at 11.

²⁸⁹ *Islam and Human Rights, Tradition and Politics*, *supra* note 95 at 186-87.

²⁹⁰ The UDHR, *supra* Chapter One note 20 art. 18.

²⁹¹ *Ibid.* See also the ICCPR, art. 18. For a list of what is included in the right to freedom of thought, conscience, and religion or belief, see the 1981 UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, art. 6. For more on this Declaration, see Theo Van Boven, “Advances and Obstacles in Building Understanding and Respect Between People of Divers Religion and Beliefs” (1991) 13 H. R. Quart. at 439.

religion or belief.”²⁹² The absence of freedom to change religion in Islamic human rights schemes is clearly due to the fact that, under Shari’a, Muslims are not allowed to change their faith, since this would constitute the crime of apostasy punishable by death.²⁹³

During discussions on the draft of article 18 of the Universal Declaration of Human Rights at the United Nations, the Saudi Arabian delegate rejected this provision on the grounds that Islamic law does not recognize the change of religion for Muslims.²⁹⁴ A similar objection was raised by the Iranian delegate in discussions on the 1981 United Nations’ Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.²⁹⁵ Due to these objections and the reservations of some Islamic governments, the ICCPR proposed a different wording which, although similar to article 18 of the UDHR, did not mention freedom to change religion. Article 18.1 of the ICCPR states that the right to freedom of thought, conscience, and religion “shall include freedom to have or to adopt a religion or belief of his choice, ...”²⁹⁶ The 1981 UN Declaration on the Elimination of All Forms of

²⁹² The UDHR, *ibid.* art. 18.

²⁹³ al-Awa, *Punishment in Islamic Law*, *supra* note 207; Rahman, *The Punishment of Apostasy in Islam*, *supra* note 236; Mutawali, *Mabadi Nizam al-Hukm*, *supra* note 170; and Abd al-Halim, *Al-Riddah*, *supra* note 235.

²⁹⁴ See UNGA, Official Records, 3rd Session, 1948-49, 3rd Committee, Pt. 2, at 49 & 120. Interestingly enough, Pakistan’s representative, from Islamic Ahmadi Minority, spoke in defense of the proposition, and stated that: “It must equally yield to other faiths the free right of conversion. It would be most unreasonable to claim (for oneself) the right of conversion and deny it to others.” Quoted in Theo Van Boven, “Religious Liberty in the Context of Human Rights” (1985) 37 *The Ecumenical Rev.* at 348. See also John Kelsay, “Saudi Arabia, Pakistan, and the Universal Declaration of Human rights” in *Human Rights and the Conflict of Culture: Western and Islamic Perspectives on Religious Liberty*, *supra* note 235 at 35-37; and *Islam and Human Rights, Tradition and Politics*, *supra* note 95 at 164.

²⁹⁵ Aldeeb Abu Sahlieh, “Les droits de l’homme et l’Islam” at 636-37.

²⁹⁶ The ICCPR, art. 18 (1).

Intolerance and of Discrimination Based on Religion or belief also replicates article 18.1 of the ICCPR in its first article.²⁹⁷

Articles 12(a) and 13 of the Islamic Declaration on freedom of expression and speech and freedom of thought, conscience, and religion, respectively, reveal that, according to this Declaration, Shari'a rules, including the law of apostasy, set the limits on the meaning and scope of these freedoms. The al-Azhar Draft, while guaranteeing "the natural basic rights of religious and intellectual beliefs within Shari'a limits,"²⁹⁸ clearly provides for the death penalty for apostasy from Islam.²⁹⁹

The application of Shari'a law on apostasy contradicts the right to freedom of religion, and has practical implications for Muslims charged with this crime.³⁰⁰ In many Muslim countries, Islamic minority groups could be subjected to pressure and discrimination on the grounds of apostasy, direct or otherwise.³⁰¹ Any critical perspective on religion or challenge of Shari'a laws could be considered apostasy and lead to the death penalty. Shari'a criteria and restraints imposed under these provisions are vague and uncertain, and, in practice, employed to curtail individuals' rights and freedoms.

In addition, the 1990 Cairo Declaration states, "There shall be no crime or punishment except as provided for in Shari'a."³⁰² Apart from the fact that this provision

²⁹⁷ The 1981 UN Declaration on the Elimination ..., *supra* note 291 art. 1 (a) and 1 (b).

²⁹⁸ The 1979 al-Azhar Draft, art. 29. The article does not mention freedom of religion.

²⁹⁹ *Ibid.* art. 71.

³⁰⁰ *Toward an Islamic Reformation*, *supra* note 123 at 87; and Khadduri, *War and Peace in the Law of Islam*, *supra* note 136 at 150.

³⁰¹ For several examples in this respect, see "Universal Versus Islamic Human Rights" *supra* note 118 at 334.

³⁰² The 1990 Cairo Declaration, art. 19 (d).

may contrast with the principle of legality set forth in article 15 of the ICCPR, the Cairo Declaration endorses *hudud* and *ta'zir* crimes and punishments,³⁰³ such as death penalty for apostasy. This, in turn, contradicts another international human rights standard that prohibits cruel, inhuman, and degrading punishments.³⁰⁴ This might be the reason why the 1981 Islamic Declaration provides only for the right to protection against torture,³⁰⁵ and does not consider the right to protection against cruel, inhuman, and degrading treatments and punishments.³⁰⁶

With regard to the right to participate in public life, Islamic human rights schemes replicate Shari'a principles. There is no consensus among Muslim scholars on the Islamic form of government.³⁰⁷ In view of this fact, the Cairo Declaration vaguely states that:

A. Authority and guardianship [*wilaya*] is a trust, and abuse or malicious or exploitation of authority is prohibited, so that fundamental human rights may be guaranteed.

B. Everyone shall have the right to participate, directly or indirectly, in the administration of his country's public

³⁰³ See Chapter Two, text accompanying notes 62-64.

³⁰⁴ The UDHR, art. 5; and the ICCPR, art. 7. Punishments like flogging, amputation, and crucifixion have been classified as cruel, inhuman, and degrading punishments in international human rights law. See A. Ahmed An-Na'im, "Toward a Cross-Cultural Approach to Defining International Standards of Human Rights: The Meaning of Cruel, Inhuman, and Degrading Punishments" in A. An-Na'im, ed., *Human Rights in Cross-Cultural Perspective: A Quest for Consensus* (Philadelphia: University of Pennsylvania Press, 1990) 9-43.

³⁰⁵ The 1981 Islamic Declaration, art. 7.

³⁰⁶ Azzam, *Universal Islamic Declaration of Human Rights*, *supra* note 277.

³⁰⁷ See generally Enayat, *Modern Islamic Political Thought*, *supra* note 119; Esposito, *Islam and Politics*, *supra* note 183; Mortimer, *Faith and Power: The Politics of Islam*, *supra* note 183; Zubaida, *Islam, the People, and the State*, *supra* note 183; Binder, *Islamic Liberalism*, *supra* note 183; al-Awa, *On the Political System of the Islamic State*, *supra* note 171; and Asad, *Principle of State and Government in Islam*, *supra* note 183.

affairs. He shall also have the right to assume public office *in accordance with the provisions of Shari'a*.³⁰⁸

This article has limited scope and appears obscure.³⁰⁹ It does not consider democratic principles and free elections, set forth in international human rights documents; nor does it recognize the will of the people as the basis of the authority of government.³¹⁰ The provisions for “freely chosen representatives”³¹¹ and equality of access to public service³¹² are absent from this article of the Cairo Declaration. On the contrary, as Mayer argues, this article accommodates “the use of Islamic criteria to bar persons from public office, thereby opening the door to discrimination based on sex and religion.”³¹³ This contradicts the right to equal participation by all citizens, regardless of gender or religion, in public affairs.

The 1981 Islamic Declaration, too, subjects the right of individuals to assume public office to Shari'a³¹⁴ and, in this respect, endorses Shari'a discriminatory laws. However, it provides for the right to protection against harassment by official agencies,³¹⁵ which appears to be a step forward, especially since historically the Muslim rulers, at least in practice, have had few constraints. It also recognizes Shari'a principle of *shura* as “the basis of the administrative relationship between the government and

³⁰⁸ The 1990 Cairo Declaration, art. 23 (a) and 23 (b) [emphasis added].

³⁰⁹ See “Universal Versus Islamic Human Rights” *supra* note 118 at 337-39.

³¹⁰ Article 21 (3) of the UDHR reads: “The will of the people shall be the basis of the authority of the government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.” The UDHR, *supra* Chapter One note 20.

³¹¹ *Ibid.* art. 21 (a); and the ICCPR, art. 25 (a).

³¹² The UDHR, *ibid.* art. 21 (b); and the ICCPR, *ibid.* art. 25 (c).

³¹³ “Universal Versus Islamic Human Rights” *supra* note 118 at 338.

³¹⁴ The 1981 Islamic Declaration, art. 11 (a).

people,”³¹⁶ and adds that “people also have the right to choose and remove their rulers in accordance with this principle.”³¹⁷ In this respect, this article seems more advanced than the provisions of the Cairo Declaration. Its scope though differs from that of “the will of people” provided for under the UDHR and the ICCPR.

Concerning the right to freedom of assembly and association, it is not surprising that, because undemocratic governments rule in many Muslim countries, the Cairo declaration offers no provision here. In practice, there are many restrictive laws and regulations for assembly and association, making the formation of any independent social group or political party difficult, if not impossible. Even individuals face pressure, threat, and punishment as a consequence of their political activities. The right to freedom of assembly and association is guaranteed in the International Bill of Human Rights. Article 20 of the Universal Declaration of Human Rights states, “Everyone has the right to freedom of peaceful assembly and association.”³¹⁸ The Islamic Declaration, in article 14 (English version) provides for freedom of association with distinctive Shari’a qualification.³¹⁹ In its Arabic counterpart, however, the article actually offers only the “right” to propagate Islam.³²⁰ The al-Azhar Draft also guarantees freedom to form and join associations and unions, within the limits of Shari’a.³²¹

³¹⁵ *Ibid.* art. 6.

³¹⁶ *Ibid.* art. 11 (b).

³¹⁷ *Ibid.* See also Azzam, *Universal Islamic declaration of Human Rights*, *supra* note 277.

³¹⁸ The UDHR, art. 20 (1). See the ICCPR, arts. 21 and 22. See “Universal Versus Islamic Human Rights” *supra* note 118 at 337.

³¹⁹ The 1981 Islamic Declaration, art. 14.

³²⁰ *Islam and Human Rights, Tradition and Politics*, *supra* note 95 at 88.

³²¹ The 1979 al-Azhar Draft, art. 29.

III. Freedom of Speech in Iran's Constitutional and Legal System

Introduction

In the past century, Iran has seen a few historical opportunities to build a civil society based on the modern notion of constitutionalism, and to institutionalize and develop the concepts of freedom, democracy, and the protection of basic human rights.³²² Because of the long history of despotism and tyranny and the fact that the conception of law and the idea of legitimate government were not highly developed, tensions and conflicts among the segments of the population have easily erupted. Despite preliminary achievements, one short period of freedom was replaced by another period of despotic rule, oppressive government, and restrictive provisions and regulations on individuals' freedoms and liberties.³²³ People did not acknowledge these opportunities in a collective and rational way; nor did they realize their great responsibility to protect freedom and to appreciate earlier achievements.³²⁴ Each time,

³²² John Foran, ed., *A Century of Revolution: Social Movements in Iran* (Minneapolis: University of Minnesota Press, 1994); Ervand Abrahamian, *Iran Between Two Revolutions* (Princeton: Princeton University Press, 1982); Carl Boggs, *The Two Revolutions* (Boston: South End Press, 1984); Nikki R. Keddie, *Iran: Religion, Politics, and Society* (London: Frank Cass, 1980); Avetis Sultanzadeh, "Le mouvement révolutionnaire en Iran" in Cosroe Chaqueri, ed., *La social-démocratie en Iran* (Florence: Mazdak Press, 1979) 68-72.

³²³ See Nikki R. Keddie, *Roots of Revolution: An Interpretive History of Modern Iran* (New Haven: Yale University Press, 1981); Mohammad Reza Afshari, "The Historians of the Constitutional Movement and the Making of the Iranian Populist Tradition" (1993) 25 *Int'l J. Middle East Studies* 477-94; Michael M. Fischer, *Iran: From Religious Dispute to Revolution* (Cambridge: Harvard University Press, 1980).

³²⁴ See generally John Foran, *Fragile Resistance: Social Transformation in Iran from 1500 to the Revolution* (Boulder: Westview Press, 1993); and Sima Bahar, "A Historical Background to the Women's Movement in Iran" in Farah Azari, ed., *Women of Iran: The Conflict with Fundamentalist Islam* (London: Ithaca Press, 1983). Also Jack A. Goldstone, *Revolutions: Theoretical, Comparative,*

events and changes took place rapidly, allowing people little chance to absorb new concepts and ideas. People simply preferred security and stability over freedom and democracy.³²⁵

During the Constitutional Revolution (1906-1911), a popular movement established a parliament and responsible government, rights guarantees for all citizens before the law, the formation of associations and parties, and freedom of the press.³²⁶ However, the *ulama*'s hostile opposition to the liberal-radical forces helped bring the Revolution to an end.³²⁷ On the one hand, many *ulama* opposed the notions of constitutionalism, equality, and freedom, having assumed that they contradicted Shari'a principles.³²⁸ On the other hand, the liberal intellectuals did not realize the capacities of a traditional society, and advocated a rapid Westernization of society and secularization

and Historical Studies (San Diego: Harcourt Brace Jovanovich, 1986); and Y. Alvin, *Social Change and Development: Modernization, Dependency, and World System Theories* (London: Sage, 1990).

³²⁵ David Menashri, *Education and the Making of Modern Iran* (Ithaca: Cornell University Press, 1992); Naser Irani, "Ba Azadi-e Bayan cheh Kardim?" [What We Did to Freedom of Expression?] (1996) 6 *Kiyan*, no. 32, 17-22; Juan R. I. Cole, "Iranian Millenarianism and Democratic Thought in the Nineteenth Century" (1992) 24 *Int'l J. Middle East Studies* 1-26.

³²⁶ The qualifications on civil and political rights provision were mostly secular, and Shari'a criteria were placed on some liberties in only a few articles, such as articles 20 and 21, with respect to freedom of the press and freedom of assembly and associations, respectively. See the 1907 Supplementary to the Constitution, arts. 8 and 20. Also Said Amir Arjomand, "Constitutions and the Struggle for Political Rights: A Study in the Modernization of Political Traditions" (1992) 33 *Archives of European Sociology* 39-82; Laurence Lockhart, "The Constitutional Laws of Persia: An Outline of Their Origin and Development" 91959) 13 *Middle East J.* 372-88.

³²⁷ See Chapter Two: A Brief History of Constitutionalism in Iran. Also John Foran, "The Strengths and Weaknesses of Iran's Populist Alliance: A Class Analysis of the Constitutional Revolution of 1905-1911" (1991) 20 *Theory & Society* 795-823; Mohammad Tavakoli-Targhi, "Refashioning Iran: Language and Culture During the Constitutional Revolution" (1990) 23 *Iranian Studies* 77-101.

³²⁸ See Abdul-Hadi Hairi, *Shi'ism and Constitutionalism in Iran* (Leiden: E. J. Brill, 1977); Said Amir Arjomand, "The Ulama's Traditionalist Opposition to Parliamentarism: 1907-1909" (1981) 17 *Middle Eastern Studies* 174-90; Mangol Philip Bayat, *Iran's First Revolution: Shi'ism and the Constitutional Revolution of 1905-1909* (New York: Oxford University Press, 1991); Venessa Martin, "Shaikh Fazlallah Nuri and the Iranian Revolution, 1905-1909" (1987) 23 *Middle Eastern Studies* 39-53; V. Martin, *Islam and Modernism: The Iranian Revolution of 1906* (London: I. B. Tauris, 1989); Mansour Moaddel, "The Shi'i Ulama and the State in Iran" (1986) 15 *Theory & Society* 519-56; Theda Skocpol, "Rentier State and Shi'a Islam in the Iranian Revolution" (1982) 11 *Theory & Society* 265-304; and Muhammad

of the state.³²⁹ The outcome was the closure of the Constitutional Era in Iranian contemporary history, followed by a repressive regime.³³⁰

Again, after the withdrawal-dismissal of Reza Shah, the founder of Pahlavi dynasty (1926-1979), from power in 1941 under the pressure of the Allies, the Iranian people had another opportunity in the early years of the reign of his son, Mohammad Reza Shah, to develop a democratic society and civil institutions, and to reactivate the Parliament, which after the Constitutional Era existed only in name.³³¹ The free press and the formation of political parties began, and fairly free elections for the Parliament were held.³³² The government and the Shah himself were not in a position to hinder this process. However, intellectuals, political parties, and the press, preoccupied as they were with mutual rivalries and political intrigue, forgot their main responsibility to inform people about free and democratic society, and to work hand-in-hand to protect freedom at this critical historical juncture.³³³ At one stage, the Parliament even

Hussain Na'ini, *Tanbih al-Umma wa Tanzih al-Milla*, introduced and annotated by Mahmoud Taleqani, 3rd ed. (Tehran: 1955).

³²⁹ Janet Afary, "Social Democracy and the Iranian Constitutional Revolution of 1906-1911" in Foran, *A Century of Revolution*, *supra* note 322 at 21-43; J. Afary, *The Iranian Constitutional Revolution, 1906-1911: Grassroots Democracy, Social Democracy, and the Origins of Feminism* (New York: Columbia University Press, 1996); and Sultanzadeh, "Le mouvement révolutionnaire en Iran" *supra* note 322 at 68-72.

³³⁰ Chaqueri, *La social-démocratie en Iran*, *supra* note 322; Firuz Kazemzadeh, *Russia and Britain in Persia, 1864-1914* (New Haven: Yale University Press, 1968); and Venessa Martin, "Hartwig and Russia Policy in Iran, 1906-1908" (1993) 29 *Middle Eastern Studies* 1-21.

³³¹ See generally Amin Banani, *The Modernization of Iran: 1921-1941* (Stanford: Stanford University Press, 1961); Sussan Siavoshi, *Liberal Nationalism in Iran: The Failure of a Movement* (Boulder: Westview Press, 1990); and Mostafa Vaziri, *Iran As Imagined Nation: The Constitution of National Identity* (New York: Paragon House, 1993).

³³² Richard W. Cottam, *Nationalism in Iran: Updated Through 1978* (Pittsburgh: University of Pittsburgh Press, 1979); and Sepehr Zabih, *The Mossadegh Era: Roots of the Iranian Revolution* (Chicago: Lake View Press, 1982).

³³³ Banani, *The Modernization of Iran*, *supra* note 331; Nikki R. Keddie, "Religion and Irreligion in Early Iranian Nationalism" (1962) 4 *Comparative Studies in Society & History* 266-95; Minoos Derayah, *Religion and Nationalism in Iran, 1951-1953: Dr. Mohammad Musaddiq and Ayatollah Abul-Qasim Kashani* (Master Thesis, McGill University, 1995); and Mohammad Mosaddeq, *Mosaddiq's Memoirs*,

succeeded in nationalizing the oil industry, and elected Mohammad Mosaddegh, a leading nationalist figure, as prime minister.³³⁴ However, as soon as the coalition of nationalist-religious forces broke apart over political differences, the CIA-orchestrated coup d'état in 1953 put an end to the prospects of freedom in Iran.³³⁵ People did not support Mosaddegh's government as they did a year before when the Shah had dismissed him. Thanks to mass demonstration in his support, however, the Shah was forced to reinstate Mosaddegh immediately.³³⁶ By then, people were fed up with political opposition and rivalries. In this hostile environment, they again exchanged freedom for security and social stability.³³⁷

Another occasion to institutionalize freedom and civil liberties came up in the first year after the 1979 Islamic Revolution under the Provisional Government of Prime Minister Mehdi Bazarghan. However, with several political parties and the press taking advantage of the prevailing freedom, the main preoccupation of the day was gaining

ed. and introduced by Homa Katouzian, trans. by S. H. Amin & H. Katouzian (London: JEBHE, 1988).

³³⁴ Homa Katouzian, *Mussadiq and the Struggle for Power in Iran* (London: I. B. Tauris, 1999); Farhad Diba, *Mohammad Mossadegh: A Political Biography* (London: Dover, 1986); James A. Bill & Wm. Roger Louis, eds., *Musaddiq, Iranian Nationalism and Oil* (London: Tauris, 1988); Mostafa Elm, *Oil, Power, and Principle: Iran's Oil Nationalization and Its Aftermath* (Syracuse: Syracuse University Press, 1992).

³³⁵ James F. Goode, *The United States and Iran: In the Shadow of Musaddiq* (New York: St. Martin's Press, 1997); Derayeh, *Religion and Nationalism in Iran*, *supra* note 333; Zabih, *The Mossadegh Era*, *supra* note 332; and Keddie, "Religion and Irreligion in Early Iranian Nationalism" *supra* note 333 at 266-95.

³³⁶ Banani, *The Modernization of Iran*, *supra* note 331; Katouzian, *Mussadiq and the Struggle for Power in Iran*, *supra* note 334; Goode, *In the Shadow of Musaddiq*, *ibid.*; Siavoshi, *Liberal Nationalism in Iran*, *supra* note 331; Cottam, *Nationalism in Iran*, *supra* note 332; Zabih, *The Mossadegh Era*, *ibid.*; Bill & Louis, *Musaddiq, Iranian Nationalism and Oil*, *supra* note 334; and Elm, *Oil, Power, and Principle*, *supra* note 334.

³³⁷ Foran, *A Century of Revolution*, *supra* note 322; Abrahamian, *Iran between Two Revolutions*, *supra* note 322; Keddie, *Iran: Religion, Politics, and Society*, *supra* note 322; and Vaziri, *Iran As Imagined Nation*, *supra* note 331.

political power before the new regime was established. Political differences changed to factional animosity and dynamic public debate into resentment.³³⁸

Soon after the resignation of the Provisional Government in protest over the seizure of the United States embassy in Tehran, the hard-liners seized power, banned all independent press and political parties, and suppressed social and political freedoms.³³⁹ Restrictive rules and regulations were introduced. These laws containing Islamic criteria and Shari'a qualifications laid the legal groundwork for the denial of fundamental rights and liberties, contrary to international human rights law.³⁴⁰ The 1979 Constitution of the Islamic Republic was also drafted according to Shari'a. It accommodated human rights within an Islamic framework and satisfied none of the requirements of international norms and standards.³⁴¹

³³⁸ See generally Donald Newton Wilber, *Iran, Past and Present: From Monarchy to Islamic Republic* (Princeton: Princeton University Press, 1981); John W. Limbert, *Iran: At War With History* (Boulder: Westview Press, 1987); William H. Forbis, *Fall of the Peacock Throne: The Story of Iran* (New York: Harper & Row, 1980); Sepehr Zabih, *Iran's Revolutionary Upheaval: An Interpretive Essay* (San Francisco: Alchemy Books, 1979); Foran, *A Century of Revolution*, *supra* note 322; Boggs, *The Two Revolutions*, *supra* note 322; Said Amir Arjomand, ed., *From Nationalism to Revolutionary Islam* (Albany: State University of New York Press, 1984).

³³⁹ Said Amir Arjomand, *The Turban for the Crown: The Islamic Revolution in Iran* (New York: Oxford University Press, 1988); S. K. Farsoun & M. Mashayekhi, eds., *Iran: Political Culture in the Islamic Republic* (London: 1992).

³⁴⁰ See *Islam and Human rights, Tradition and Politics*, *supra* note 95 at 78-79.

³⁴¹ The Constitution, arts. 4 and 20. See also Asghar Schirazi, *The Constitution of Iran, Politics and the State in the Islamic Republic*, trans. by John O'kane (London: I. B. Tauris, 1997) at 22-33; Amir Arjomand, "Constitutions and the Struggle for Political Rights" *supra* note 326 at 39-82; Said Amir Arjomand, "Constitution of the Islamic Republic" (1993) 6 *Encyclopedia Iranica*; Gisbert H. Flanz, "A Comparative Analysis of the Constitution of the Islamic Republic of Iran" in A. P. Blaustein & G. H. Flanz, eds., *Constitutions of the World* (Dobbs Ferry, NY: Oceana, 1980); Hamid Dabashi, *Theology of Discontent: The Ideological Foundations of the Islamic Revolution in Iran* (New York: New York University Press, 1993).

A. The Problematic of Freedom of Speech in Iran

In practice, even Shari'a's restrictive provisions have been used to confine the scope of freedom of speech. Limited constitutional rights guarantees -- such as individual immunity against arbitrary arrest, the presumption of innocence until proven guilty by a competent court, and prohibition of torture -- have been ignored, denied, and violated.³⁴² Laws are applied selectively and inconsistently, without any effective protection of individual freedoms and liberties the denial of which have been documented by international human rights organizations.³⁴³ The boundaries and parameters of what is permitted are unknown, and it is never clear what can be said and who can say it. The limits of discourse and freedom of expression defy simple definition, and the means of control are "more subtle and indirect."³⁴⁴ Some non-governmental organizations enjoy *de facto* power, and do not operate under government supervision. Hardline militants and vigilantes take advantage of the ineffectiveness of the anarchic judiciary system, and attack rallies and political meetings and assault individuals. Members of radical pressure groups linked to certain political and religious

³⁴² Amnesty International, *Annual Report 2000* (London: Amnesty International, 2000); Human Rights Watch, *World Report 1999* (New York: Human Rights Watch, 1999). Also Savory, "Islam and Democracy: The Case of the Islamic Republic of Iran" *supra* note 128 at 833.

³⁴³ See Human Rights Watch, *Guardians of Thought, Limits on Freedom of Expression in Iran* (New York: Middle East Watch, 1993) at 2, 5, and 114; *Amnesty International Annual Reports, 1988-1999*; The Report of the Committee on the Elimination of Racial Discrimination, U. N. GAOR, 48th Sess., 18th Mtg, UN Doc. A/48/18 (1993), at 57-62; and the Final Report on the Situation of Human rights in the Islamic Republic of Iran by the Special Representative of the Commission on Human Rights (1988-2000). See, for example, U. N. ESCOR, 49TH Sess., Agenda item 12, UN Doc. E/CN. 4/1993/91 (1993); and E/CN. 4/1997/63 (1997).

³⁴⁴ *Guardians of Thought, ibid.* at 5.

factions within the establishment harass “government critics, burning property, beating individuals, and disrupting gatherings with impunity.”³⁴⁵

The judiciary -- supervised by the leader -- has become one of the main instruments of repression of reformists and intellectuals in recent years. Under the present judiciary system, individuals are indicted under broad charges, such as moral corruption and “siding with global arrogance”, and are subject to indefinite pre-trial detentions and solitary confinement, torture, arbitrary imprisonment, and political arrest³⁴⁶ -- contrary to the articles of the Constitution³⁴⁷ and without any judicial sanctions. Prisoners of conscience are detained and rarely brought to trial.³⁴⁸ Efforts

³⁴⁵ *Human Rights Watch World Report* (1997) at 283. The cases of concern are numerous and keep increasing. Pressure groups, for example, have on different occasions prevented philosopher Abdul Karim Soroush from lecturing (see *ibid.*; Ann E. Mayer, “Islamic Rights or Human Rights: An Iranian Dilemma” (1996) 29 *Iranian Studies* at 292; Robin Wright, “Dateline Tehran: A Revolution Implodes” (1996) 103 *Foreign Policy* at 171). They have attacked the commemoration ceremonies of nationalist figures Mehdi Bazarghan and Karim Sanjabi (see *Human Rights Watch World Report* [1998] at 329 and [1996] at 277); disrupted several rallies and meetings organized by student groups, injuring many people (see, for example, Agence France Presse, Tehran, May 25, 1998); stormed a medical conference, assaulting surgeons and demanding that “the surgeons retract their criticism of a parliamentary proposal to segregate the health service by sex” (BBC World Service, May 12, 1998); and attacked reformist ministers of the Cabinet (Associated Press, Tehran, September 4, 1998) and the campaign headquarters of the centerist Executives of Construction Party (Islamic Republic News Agency [IRNA] Tehran, February 25, 1999). In December 2000, hard-liners also attacked students, marking the annual Students Day, in Bu-Ali Sina University in the city of Hamedan. Agence France Presse, Tehran, Dec. 7, 2000.

³⁴⁶ Amnesty International, *Iran: Violations of Human Rights, 1987-1990* (New York: Amnesty International, 1990) at 35-8; and *Amnesty International Report* (1993-1999). In November 2000 and in a letter to the judges throughout the country, Ayatollah Mahmoud Shahroudi, the head of the Judiciary, blasted torture of prisoners, keeping them in solitary confinement, and denying defendants visits by their families and relatives. He regretted over the reports of mistreatment by certain judges. Islamic Student News Agency (ISNA), Tehran, Nov. 28, 2000.

³⁴⁷ See, for example, the Constitution, art. 32.

³⁴⁸ *Iran: Violations of Human rights*, *supra* note 346 at 38-41. A number of cases remain before the Islamic Revolutionary Courts. These courts were instituted as a temporary measure to process the large numbers of people arrested in the aftermath of the 1979 Revolution. They have since become permanent feature of the Iranian legal system. The Revolutionary Courts are notorious for their disregard of international standards of due process and for their harsh sentences. See *Guardians of Thought*, *supra* note 343 at 12 and 26-27; and Lawyers Committee for Human Rights, *The justice System of the Islamic Republic of Iran* (New York: Lawyers Committee for Human Rights, 1993) at 31.

have been made to silence political dissent,³⁴⁹ to dissolve or refuse to accord legal recognition to political parties and associations,³⁵⁰ and to suppress any public protest against the Islamic system.³⁵¹ Even members of the Parliament have been summoned, and often temporarily detained, by the court on the charges of inciting public opinion and insulting the judiciary. Contrary to the stipulation of the Constitution, the judiciary denies parliamentary immunity.³⁵²

As noted in Chapter Two, since the election of President Khatami in 1997, the public debate has become more free and dynamic, and numerous publications and political parties have emerged. However, conservatives who wish to suppress freedom of speech still control key positions and institutions. On their behalf, pressure groups continue to assault individuals and groups with impunity.³⁵³

Neither the legal system nor the politicized judiciary have provided adequate safeguards for political activists facing unfair trials. The new Criminal Code (1996) defines some crimes, such as espionage, so broadly as to criminalize the passing on of

³⁴⁹ In 1990, ninety members of the liberal Freedom Movement of Iran were imprisoned after they “signed a petition criticizing governmental repression and demanding respect for the rights and freedoms set forth in the Iranian Constitution.” Mayer, “Universal Versus Islamic Human Rights” *supra* note 118 at 369.

³⁵⁰ *Ibid.* Members of the Association for the Defense of Freedom and the Sovereignty of the Iranian Nation, established by nationalist-religious figures in 1986 to promote human rights and the rule of law but failed to obtain official permit, have repeatedly been imprisoned and their offices ransacked for the non-violent expression of their opinions. *Guardians of Thought*, *supra* note 343 at 114.

³⁵¹ See, for example, *Human Rights Watch World Report* (1996) at 278. Moreover, the possession of satellite television dishes is banned. See *ibid.*

³⁵² IRNA, February 27 and March 5, 2001. Moreover, Mostafa Tajzadeh, the Deputy Minister of Interior and the head of the election headquarters, was put on trial for alleged complicity in fraud and polling irregularity in the February 2000 general election. According to IRNA, he had gone to the Civil Service Court believing he had been summoned to answer some questions but found himself on trial behind the closed doors. The Court then sentenced him to one year in prison and a lengthy suspension from overseeing elections on charges of vote-rigging in the above-mentioned election which gave reformists a sweeping victory in the Parliament. See IRNA, January 23, 2001; and Agence France Presse, Tehran, March 5, 2001.

³⁵³ *Amnesty International Annual Report*, 1998-2000; and *Human Rights Watch World Report*, 1998-

almost any type of information about the country's conditions to foreigners -- perhaps human rights information to international organizations.³⁵⁴ Moreover, the judiciary recently proposed a restrictive bill on the definition of political crime. The examples of such crimes, attached to the draft which goes before the Cabinet, are ill-defined, and could render almost any criticism of the state illegal, any exchange of information with even foreign media a political crime.³⁵⁵

In addition, Iran's Special Court for Clergy stands outside of the Constitution, and is independent of the country's judiciary system. Its judges and prosecutor, all hard liners, are appointed by the supreme leader, and are accountable only to him. The court considers itself competent in any case in which a cleric is involved, even if by law certain cases should be tried in special tribunals -- press courts and jury for press offenses. The cleric court has been subjected to harsh criticisms by both reformists and international bodies as an illegal, arbitrary, and secretive tribunal that supports the arrest and jailing of outspoken and reformist clerics.³⁵⁶

2000.

³⁵⁴ See the Islamic Criminal Code (1996) arts. 500 and 501; and *Human Rights Watch World Report* (1997) at 285.

³⁵⁵ President Khatami's government also proposed a moderate bill on political crimes to the Parliament but, under the pressure of hardliners and the Judiciary, had to withdraw it. Agence France Presse, Tehran, August 3, 1999.

³⁵⁶ In his report on the situation of human rights in Iran, the UN Special Representative of the Commission on Human Rights, Canadian Maurice Copithorne, recommended the suppression of the cleric court. See AFP, Geneva, February 26, 1999. The Special Court for Clergy recently tried Abdullah Nouri, a leading reformist figure and close ally of Ayatollah Khomeini, sentencing him to five years in prison. It ordered the shut-down of his newspaper for, among other things, insulting Islamic sanctities and the founder of the Islamic Republic, publishing lies, promoting political dissent, and favoring the resumption of ties with the United States. In fact, he only published some articles on social and political issues written by reformists. The trial was a clear example of the inquisition on thought. The Court also tried reformist cleric Mohsen Kadivar, and sentenced him to 18 months for spreading false information and lies about the Islamic system, confusing public opinion in order to undermine the Islamic Republic, and helping the sworn enemies of the Islamic Revolution. In reality, he had published a few articles on the theories of the Islamic government advocating the idea of freedom, and had criticized some

The denial of fundamental rights and liberties is not limited to the judiciary and the legal system. The hardliners' bid to wipe out moderates has also resulted in an arbitrary ban on reformist candidates and political parties as well as restrictions on freedom of speech and assembly for opposition candidates in the presidential and parliamentary elections.³⁵⁷ Operating almost independently of the government, the Ministry of Intelligence was also involved in a series of crackdowns on leading opposition figures in recent years. Since the Fall of 1998, there has been considerable outrage over the wave of murders and disappearances of intellectuals and political dissidents -- including secular nationalist opposition leader Darioush Foruhar and his wife Parvaneh, who were stabbed to death in their Tehran home, and two other writers, Mohammad Mokhtari and Jafar Pouyandeh.³⁵⁸ Under pressure from President Khatami, the Intelligence Minister was forced to resign after an historic admission and disclosure that rogue agents in his ministry had killed those dissidents and intellectuals. It seems that the killers had already secured a religious decree (*fatwa*) from some hardline *ulama*, who charged the victims with the crime of apostasy.³⁵⁹ Only rogue elements were tried and convicted.³⁶⁰

governmental policies. See IRNA, Tehran, April 21, 1999; and Tehran Times Newspaper, Tehran, April 8, 1999. For more cases, see Reuters, Tehran, October 25, 1999; and *infra* note 369.

³⁵⁷ *Human Rights Watch World Report, 1996-2000*; and *Amnesty International Annual Report, 1996-2000*. In October 1998, the Human Rights Commission's Special Representative for Iran stated that although many of the country's leaders wish to move toward a more tolerant and peaceful society, significant human rights violations continue in Iran. See Reuters, The United Nations, October 21, 1998.

³⁵⁸ See AFP, Tehran, December 12, 1998.

³⁵⁹ The investigation was limited to rogue elements. It failed to identify those who sanctioned the killings. The head of Iran's Revolutionary Guard Corps had already said that his forces would bide their time before moving against reform-minded opponents. "We will go after them when the time is ripe," Brig. Gen. Yahya Rahim Safavi was quoted, adding, "We cut the necks and tongues" of opponents. See Reuters, Tehran, June 4, 1998. Hardline Ayatollah Mesbah-Yazdi (see Chapter Two notes 289 and 349) has repeatedly condemned reformists and intellectuals, and emphasized the resort to violence if necessary. IRNA, Jan. 12, 2001. Amnesty International called upon the Iranian authorities to undertake

We should also mention the week-long unrest and student demonstrations in July 1999 in Tehran. The protests were called one day after the Parliament, dominated then by the conservatives, passed the outline of a bill that would amend the Press Law and institute tough new curbs on the press.³⁶¹ Also a leading pro-reform newspaper, Salam, was banned by the Special Court for Clergy.³⁶² As the students staged demonstrations, the situation deteriorated when the Islamic vigilantes, supported by security forces, stormed a Tehran University dormitory and assaulted students. In the days that followed, students took to the streets and confrontation continued. Police and mobs beat students with batons and stones, and lobbed tear gas.³⁶³ Moderate student organizations called for peace and calm and demanded broader reforms.³⁶⁴ The unrest was followed by hundreds of arrests of students, some of whom were later sentenced to long prison terms while no effort was made to identify the vigilantes.³⁶⁵ Many nationalist opposition leaders were also arrested.³⁶⁶ Some high-ranking hardline clerics

independent investigations into these events, in accordance with the United Nations "Principles on the Effective Prevention and Investigation of Extra-Legal Arbitrary and Summary Executions," and to make public the findings of any such investigations. See Amnesty International, Public Statement, News Service: 238/98, AI, INDEX: MDE 13/23/98, October 3, 1998.

³⁶⁰ The trial was held behind closed doors. In January 2001, a military court sentenced three intelligence agents to death and others to terms up to life in prison. The families of slain dissidents opposed the death sentences and demanded to know who ordered the murders. Human Rights watch and reformists sharply criticized the sentences. IRNA, Jan. 30, 2001 ; and Human Rights Watch, Jan. 29, 2001. The judiciary opposed a parliamentary investigation into the trial. IRNA, February 27, 2001.

³⁶¹ This draft legislation will be discussed in Chapter Four.

³⁶² Reuters, Tehran, July 9 and 12, 1999.

³⁶³ *Ibid.*; and the Christian Science Monitor, Tehran, July 22, 1999.

³⁶⁴ The students also accused hardliners of orchestrating the riots in a bid to topple President Khatami's government. See Reuters, Tehran, July 12, 1999.

³⁶⁵ BBC World News: Middle East, July 15, 1999. Many international bodies, such as the International Federation of Human Rights Leagues (FIDH) and Amnesty International, voiced concern over the secret trials of students arrested in connection with the events. See Reuters, Paris, September 15, 1999; and Amnesty International, Public Statement, September 16, 1999. Not surprisingly, in July 2000, the military court acquitted Farhad Nazari, then Tehran's chief police, who was tried for forcibly and illegally entering the dormitory complex. See IRNA, Tehran, July 11, 2000.

³⁶⁶ BBC World News, *ibid.* Top military commanders in the Islamic Revolutionary Guard Corps warned the President that they were running out of patience with the reform agenda. Associated Press, Dubai

like Ayatollah Mesbah Yazdi theorized the use of violence. Mesbah Yazdi stated that when government loses control and Islam is threatened, there is no other way but to use force.³⁶⁷

In another development, Tehran's Islamic Revolutionary Court³⁶⁸ tried seventeen political activists, in the Fall 2000, who attended a controversial conference in Berlin organized by Germany's Heinrich Boll Foundation in April 2000. Focusing on Iran's reform movement, the conference was disrupted by unruly members of radical opposition groups in exile.³⁶⁹ Retaining their strong grip over the Judiciary, hardliners attempted to tarnish reform movement, the reformist participants in particular. Some of the latter were arrested and kept in solitary confinement.³⁷⁰ They were charged with, among other things, anti-Islamic activities, endangering state security, and opposing the Islamic government. In fact, these individuals were on trial for their political beliefs and writings.³⁷¹ The Islamic Revolutionary Court sentenced ten reformist participants to

(UAE), July 20, 1999; and AP, Tehran, April 16, 2000. Islamic militants also issued a call to arms to protect the Islamic system and to finish off "liberals who questioned the supreme rule of the clergy." Reuters, Tehran, July 24, 1999.

³⁶⁷ See Iran News Newspaper, Tehran, August 21, 1999. On his ideas, see also Chapter Two notes 289 and 349.

³⁶⁸ See *supra* note 348.

³⁶⁹ The event outraged Iran's conservatives after state television broadcast "anti-Islamic" footage from the conference, showing a man disrobing in protests and a woman dancing with bare arms. Reformists charged that the conservative-run television had shown the footage to discredit the reform movement of President Khatami. IRNA, Tehran, November 2, 2000; and AFP, Tehran, November 16, 2000.

³⁷⁰ The Special Court for Clergy arrested Hassan Yusefi-Eshkevari, a clergy who participated in the conference. Among charges brought up against him are publication of defamatory articles, activities against national security, and questioning certain practices and sanctities of Islam. IRNA, Aug. 2000.

³⁷¹ See AFP, *ibid.*; IRNA, Tehran, October 31 and November 19, 2000; and Financial Times, Tehran, October 31, 2000. Reportedly, they were also forced to write a letter expressing repentance and regret. See Hambastegi Newspaper, Tehran, November 21, 2000. In October 2000, Hassan Yosefi Eshkevari (note 369) was arrested and tried by the Special Court for Clergy behind the closed doors. He was charged with apostasy and "waging war with God." He faces the death penalty. IRNA, *ibid.*

lengthy prison terms.³⁷² The arrest of nationalist-religious activists continued in March and April 2001.

B. Freedom of Speech and the Right to Participate in Public Life

Freedom of expression is dealt with in Iran's Constitution, Press Code, Activities of (Political) Parties Act, and Criminal Code. The criminal regulations deal with issues like defamation, verbal insult and slander, pornography, etc., and are beyond the focus of this work. The Press Code will be discussed in Chapter Four of this study. This section concentrates on freedom of speech and the right to participate in the conduct of public life as stipulated in the Constitution of the Islamic Republic.

We have already argued that the idea of constitutionalism and the rules defining the structure and functioning of the government are not fully reflected in the Iranian constitutional system.³⁷³ The Constitution affords little safeguards for civil and political rights and liberties. The legal framework, institutions, and mechanisms for protection of human rights and freedoms are insignificant.³⁷⁴

³⁷² Journalist Akbar Ganji who had exposed the network behind the 1998 serial murders of intellectuals and political dissidents received 10 years jail plus 5 years exile. IRNA, Jan. 16, 2001. Human Rights Watch condemned the arbitrary and harsh sentences.

³⁷³ Iran's supreme leader, Ayatollah Ali Khamenei, recently said that "freedom in the West has its own meaning, which is different from freedom in Islam." He also added that "Western freedom should not find its way into the Iranian community." IRNA, Tehran, October 2, 2000.

³⁷⁴ See Schirazi, *The Constitution of Iran*, *supra* note 341; Flanz, "A Comparative Analysis of the Constitution of the Islamic Republic of Iran" *supra* note 341; Said Amir Arjomand, "Qavanin-e Asasi-e Iran dar Chaharchub-e Tarikhi va Tatbiqi" [Iran's Constitutions in a Historical and Comparative Framework] (1993) 16 *Negah-e No* 6-19; Savory, "Islam and Democracy, the Case of the Islamic Republic of Iran" *supra* note 128 at 831-37. Also Shahrough Akhavi, "Iran: Implementation of an Islamic

The fact that human rights guarantees are subordinate to Shari'a criteria and that Islamic qualifications could override international human rights norms and standards reduces the strength of human rights protections.³⁷⁵ Shari'a laws are not amply developed, and the vague and unspecified qualifications on rights and freedoms could be misused by the state, especially in the absence of an independent judiciary or settled jurisprudence to "limit the circumstances in which Islamic principles can be invoked to justify restrictions or denials of rights."³⁷⁶ Shari'a limitations are added to secular constitutional limitations to restrict further the scope and extent of freedom of speech.³⁷⁷

No constitutional article deals with freedom of speech in particular. The Constitution addresses certain elements of freedom of speech in different articles. Article 24 states that:

Publications and the press are free to express matters,
except when they are detrimental to the foundations of

State" in John Esposito, ed., *Islam in Asia: Religion, Politics and Society* (New York: Oxford University Press, 1987) 32-40.

³⁷⁵ The Constitution stipulates that Shari'a principles should prevail over all constitutional provisions, including those related to human rights. See the Constitution, arts. 4 and 20. See also M. H. A. Reisman, "Some Reflections on Human Rights and Clerical Claims to Political Power" (1994) 19 *Yale J. Int'l L.* at 514; Abdol-Karim Lahidji, "Constitutionalism and Clerical Authority" in Said Amir Arjomand, ed., *Authority and Political Culture in Shi'ism* (Albany: State University of New York Press, 1988) 133-58; Amir Arjomand, "Constitutions and the Struggle for Political Rights" *supra* note 326 at 39-82; Houchang Chehabi, "Religion and Politics in Iran: How Theocratic is the Islamic Republic?" (1991) 120 *J. Am. Academy of Arts & Science* 69-91; Shaul Bakhash, *The Reign of the Ayatollahs: Iran and the Islamic Revolution* (New York: Basic Books, 1984) at 77-78; and Mayer, "Islamic Rights or Human Rights: An Iranian Dilemma" *supra* note 345 at 272-76.

³⁷⁶ *Islam and Human Rights, Tradition and Politics*, *supra* note 95 at 84.

³⁷⁷ Freedom of speech in international law is not considered an absolute right. It is subject to qualifications provided by law. Any limitation on freedom of speech is appropriate if its purpose outweighs that of freedom of speech. Needless to say, many regulating laws, such as traffic rules, have an impact on freedom of speech but are not aimed at freedom of speech. See *ibid.* at 75; Karpen, "Freedom of Expression As a Basic Right" *supra* note 11 at 399; and the UDHR, *supra* Chapter One note 20 art. 29 (2).

Islam or to public rights. The law will provide the details.³⁷⁸

This article will be discussed in the next chapter. Here, what is significant is to notice that the article does not provide any effective mechanism to safeguard freedom of speech -- or freedom of the press, for that matter. It is mainly concerned with the idea of how limitations should be placed on the press. Unlike international human rights law, Iran's legal system qualifies freedom of expression in a way that hinders the free exchange of information and ideas. Freedom of expression is then conditional on compliance with the official interpretation of Shari'a norms and public interest.³⁷⁹

Furthermore, article 9 states, in part, that "the political, cultural, economic, and military independence and the territorial integrity of Iran may not be infringed in any manner under the pretext of exercising freedoms."³⁸⁰ The general and vague criteria, if not clearly defined by law, may be applied by the authorities to restrict speech. These limits apply to freedom of thought as well. Although the Constitution prohibits the interrogation or prosecution of any person "simply for holding a certain belief,"³⁸¹ it has been widely ignored.³⁸²

³⁷⁸ The Constitution, *supra* Chapter Two note 270, art. 24.

³⁷⁹ *Guardians of Thought*, *supra* note 343 at 23; Schirazi, *The Constitution of Iran*, *supra* note 341 at 61-81 and 150-57; Savory, "Islam and Democracy: The Case of the Islamic Republic of Iran" *supra* note 128 at 831-37; Flanz, "A Comparative Analysis of the Constitution of the Islamic Republic of Iran" *supra* note 341; Abdol-Karim Lahidji, "Mavared-e Tanaqoz-e Qanun-e Asasi-ye Jomhuri-ye Eslami-ye Iran ba Elamiyeh-e Jahani-ye Hoquq-e Bashar" [The Cases of Contradiction of the Constitution of the Islamic Republic of Iran with the Universal Declaration of Human Rights] (1985) 5 Alefba 19-41.

³⁸⁰ The Constitution, art. 9.

³⁸¹ *Ibid.* art. 23.

³⁸² For examples in this respect, see *supra* notes 346-352; *Amnesty International Annual Report (1996-2001)*; *Human Rights Watch World Report, (1996-2001)*. Implying the existence of restrictions on freedom of thought, President Khatami once said that "inquisition into people's thought, restriction of

Based on a Qur'anic phrase,³⁸³ article 8 also imposes an affirmative and duty on every citizen and the government "to enjoin the good and forbid the evil."³⁸⁴ In practice, the vagueness of this article has been misused by pressure groups and vigilantes to attack individuals and political meetings, and to restrict the right to free expression under the pretext of forbidding the evil.³⁸⁵

With respect to the right to participate in the conduct of public life, article 26 of the Constitution stipulates that:

Parties, societies, political and professional associations, as well as Islamic or recognized religious minorities organizations are free [permitted], provided they do not violate principles of independence, freedom, and national unity or *Islamic principles* and the foundations of the Islamic Republic.³⁸⁶

Article 27 also states that:

Unarmed assemblies and marches are permitted, *provided that they are not detrimental to Islamic principles.*³⁸⁷

thought and failure to respect the very nature of thinking will cause backwardness." IRNA, Tehran, October 21, 1999.

³⁸³ See *supra* note 172.

³⁸⁴ The Constitution, art. 8.

³⁸⁵ *Human Rights Watch World Report*, (1998) at 329, (1997) at 283, and (1996) at 277; and Wright, "Dateline Tehran: A Revolution Implodes" *supra* note 345 at 171. According to international law, the people are sovereign, and can exercise their freedom of speech, as a defensive right against the government, to differentiate between good and evil, and true and false. It is not up to the government to decide what is valuable and what is worthless. It is also against the impartiality and neutrality of a democratic and pluralistic government toward the ideas and opinions of the people, especially in political matters. See Karpen, "Freedom of Expression As a Basic Right" *supra* note 11 at 396; and Schauer, *Free Speech: A Philosophical Enquiry*, *supra* note 5 at 39.

³⁸⁶ The Constitution, art. 26 [emphasis added].

³⁸⁷ *Ibid.* art. 27 [emphasis added].

By subjecting freedom of assembly and association to undefined Shari'a criteria, these articles limit the content and scope of this fundamental freedom. They could easily be invoked by the government to deny or restrict protection of freedom of assembly and associations.³⁸⁸ According to article 26, only "recognized" religious minorities enjoy the right to freedom of association within Shari'a limits. In addition, they are only permitted to form their own religious associations, and are denied participation in Muslims' political parties and associations.³⁸⁹ It should also be mentioned that, according to article 168,

The definition of a political crime, the manner in which the jury [for the trial of political crimes] will be selected, their qualifications and the limits of their authority shall be determined by law, *based upon Islamic principles*.³⁹⁰

In fact, Shari'a criteria are not only used to restrict the scope of rights guarantees and protections; they also are used, as Mayer notes, to determine " what constitutes a political crime, thereby placing religious restraints on political

³⁸⁸ *Islam and Human Rights, Tradition and Politics*, *supra* note 95 at 82-86; Mayer, "Universal Versus Islamic Human Rights" *supra* note 118 at 328-29; "Islamic Rights or Human Rights: An Iranian Dilemma" *supra* note 345 at 273; Schirazi, *The Constitution of Iran*, *supra* note 341 at 124-46; and Human Rights Watch, "As Fragile As a Crystal Glass: Press Freedom in Iran" October 1999, Sec. IV at 1-4.

³⁸⁹ In 1999, the Commission of Article 10 of the Law on the Activities of (Political) Parties (see *infra* note 392) asked the Executives of the Construction Party to add the word "Muslim" as another qualification for members of the party. In its statute, submitted to the Commission for ratification, the Party had stated that every Iranian who is committed to the constitution could become its member. The Party had to comply with the Commission's demand. See also *Islam and Human Rights, Tradition and Politics*, *supra* note 95 at 81-82.

³⁹⁰ The Constitution, art. 168 [emphasis added].

freedom.”³⁹¹ Political crimes are yet to be defined. In practice, however, many legitimate political activities are subject to trial and punishment. All these restrictions based on the criteria of a specific religion contradict international human rights standards, which are subject only to limitations “imposed in conformity with the law and which are necessary in democratic society in the interest of national security ... or the protection of the rights and freedoms of others.”³⁹²

In addition to the constitutional articles, we should also refer to the law on political parties and associations.³⁹³ The law repeats Shari’a qualifications, and adds more limitations to the restraints stipulated in the Constitution. It requires political parties and other organizations to obtain a permit from the Ministry of the Interior.³⁹⁴ It also foresees the formation of a commission in the ministry, composed of the representatives of three branches of the government, to issue the permit and to exercise supervision over the activities of approved groups and organizations.³⁹⁵ The commission can withdraw its permit and propose before the court the dissolution of any party whose activities the commission finds contrary to the law.³⁹⁶ The Constitution itself does not require parties to receive permission from the authorities. It seems that

³⁹¹ *Islam and Human Rights, Tradition and Politics*, *supra* note 95 at 82.

³⁹² The ICCPR, arts. 21 and 22. For different aspects of freedom of association in international law, see Sedler, “The Constitutional Protection of Freedom of Religion, Expression, and Association in Canada and the United States” *supra* note 4 at 612-13.

³⁹³ The Law on the Activities of Parties, Societies, Political and Corporate Organizations and Islamic or Recognized Religious Minorities Associations (1981), reprinted in the Official Newspaper of the Islamic Republic of Iran, No. 10676, October 22, 1981.

³⁹⁴ *Ibid.* art. 8

³⁹⁵ *Ibid.* art. 9 and 10.

³⁹⁶ *Ibid.* art. 15 and 17.

the Ministry should only issue license for newly founded parties, not grant permission to every organizations.³⁹⁷

The law also lists a series of offenses, which may provide justification for banning a party or requesting that it be dissolved.³⁹⁸ Some of these offenses, such as “the violation of Islamic principles” and “promotion of anti-Islamic propaganda and distribution of misleading books and other publications,”³⁹⁹ are broad, vague, and subject to different interpretations that may allow the government to charge opposition parties and individuals with criminal acts and to ban their activities.

Until the recent political openness, the law on political parties had totally been ignored. Despite the constitutional guarantee of free association, independent political parties were not tolerated even within the restrictive provisions of the law. In addition, government limitations on political speech and assemblies, combined with mob attacks on individuals and meetings, made it impossible for political activists to communicate with the public or to create new parties.⁴⁰⁰ Evidently, NGOs, which called for democratic freedoms and respect for human rights, were also denied legal

³⁹⁷ Some political parties that have been active for years even before the Revolution have been denied legal recognition. For example, the Freedom Movement of Iran, founded in 1961 by nationalist-religious figures like Mehdi Bazarghan, has repeatedly been denied permission. It is now considered an illegal party but tolerated by the authorities. Many of its members and other nationalist-religious activists close to this party were arrested in March and April 2001. The judiciary once again repeated that the Freedom Movement of Iran is an illegal group and that any activity under its banner would constitute a crime. IRNA, March 18 and 28, 2001.

³⁹⁸ The Law on the Activities of Parties, art. 16.

³⁹⁹ *Ibid.* arts. 16 (h) and 16 (i). Other examples are: “Any exchange of information with foreign government organizations and political parties, which harm the national unity and the country’s interest” and “exploiting the existing religious, racial, and cultural diversity in Iranian society in order to stir up or intensify conflict within the ranks of the nation”. *Ibid.* arts. 16(b) and 16 (g).

⁴⁰⁰ *Human Rights Watch World Report*, (1997) at 282.

recognition.⁴⁰¹ Some of them were forcibly dissolved.⁴⁰² In recent years, several political parties and associations have been formed by people mostly from inside the circle of leadership. Independent opposition parties are yet to be permitted.⁴⁰³

Let us turn to the restrictions on electoral process and mechanisms, which are used to prevent independent and opposition candidates from running for parliamentary or presidential elections. Article 99 of the Constitution provides for the Guardian Council⁴⁰⁴ to play a supervisory role in the elections.⁴⁰⁵ Although it is not clear what exactly the scope of supervision is, it seems that the Guardian Council overstepped its constitutional power, and, in 1991, interpreted the article in a way that enabled it to monitor all aspects of the election and to examine directly the suitability of candidates.⁴⁰⁶ This process is generally referred to as “approbatory supervision.”⁴⁰⁷ Since then, the Guardian Council, dominated by hardliners, has controlled access to the election process by assessing such characteristics as the “candidates’ practical adherence to Islam” and “belief and practical commitment to the principle of the

⁴⁰¹ Mayer, “Universal Versus Islamic Human Rights” *supra* note 118 at 368-70.

⁴⁰² The Association to Defend the Freedom and Sovereignty of the Iranian Nation (*supra* note 350) was dissolved in June 1991.

⁴⁰³ See *Human Rights Watch World Report, 1998-1999*; Schirazi, *The Constitution of Iran*, *supra* note 341 at 88. Also Farsoun & mashayekhi, *Iran: Political Culture in the Islamic Republic*, *supra* note 339.

⁴⁰⁴ See *supra* Chapter two text accompanying notes 295-297.

⁴⁰⁵ The Constitution, art. 99.

⁴⁰⁶ See *Human Rights Watch World Report, 1996-2000*; and Schirazi, *The Constitution of Iran*, *supra* note 341 at 88-9.

⁴⁰⁷ Prior to 1991, it used to be the task of the Ministry of the Interior to examine the requirements of the suitability of candidates who could appeal to the Guardian Council, in case they were rejected by the Ministry. In 1991 and out of fear of the imminent exclusion of the radicals, the 3rd Parliament passed a bill to restrict the supervisory activity of the Guardian Council. The Council vetoed the bill and put forward its own interpretation of the constitutional article in question. It resolved that supervision in the Constitution means “giving approval”. See Schirazi, *The Constitution of Iran*, *ibid.* at 89. The Fourth Parliament, dominated by the conservatives thanks to the “approbatory supervision” of the Council, then passed a resolution and legalized the “approbatory supervision.” It was also included in the new Election Code, passed in Fall 1999 by the Fifth Parliament. In a letter to the leader, the representatives of the Fifth

absolute guardianship of jurisprudent (*velayat-e Mutlaqeh-e faqih*).⁴⁰⁸ It has excluded hundreds of candidates from different elections in a summary and arbitrary manner, violating the internationally recognized right “to take part in the conduct of public affairs,” “to vote and to be elected,” and “[to] have access ... to public service”⁴⁰⁹ without any distinction or discrimination of any kind. Indeed, this process signifies that the idea of election in Iran’s constitutional system is not founded on a specific political philosophy. In fact, it is not well understood that election process is a relative concept, and that exercising the right to franchise does not always mean every eligible candidate will be elected.⁴¹⁰

In 1992, the Guardian Council banned some 1,110 of 3,150 candidates for the fourth parliamentary election, including 45 radical members of the Third Parliament.⁴¹¹ And again, in 1996, for the first round of the fifth parliamentary election, the Council disqualified 44% of 5,121 candidates who registered to run.⁴¹² It also vetoed 234 and approved only four candidates for the seventh presidential election in 1997.⁴¹³ The Council has never been obliged to give the candidates any reason for its decision. Its

Parliament stressed the principle of approbatory supervision, and praised it as a way to block different tendencies and preferences from entering the Parliament. See IRNA, Tehran, June 1, 1999.

⁴⁰⁸ The Election Code (1999). See also Schirazi, *The Constitution of Iran*, *supra* note 341 at 86-7; and *Human Rights Watch World Report*, (1997) at 282.

⁴⁰⁹ The ICCPR, art. 25.

⁴¹⁰ See generally Hosein Modarresi Tabataba’i, “Islamic Legislation and the Majority Opinion in Islamic Legislation” Summary of a paper presented at the John Olin Center for Inquiry into the Theory and Practice of Democracy, University of Chicago, May 9, 1985; and Reisman, “Some Reflections on Human Rights and Clerical Claims to Political Power” *supra* note 374 at 517.

⁴¹¹ *Human Rights Watch World Report* (1992); Schirazi, *The Constitution of Iran*, *supra* note 341 at 87-8; Farzin Sarabi, “The Post-Khomeini Era in Iran: The Election of the Fourth Islamic Majles [Parliament]” (1994) 48 *Middle East J.* 89-107.

⁴¹² *Human Rights Watch world report* (1996); Schirazi, *ibid.*; and Wright, “Dateline Tehran: A Revolution Implodes” *supra* note 345 at 170-71.

⁴¹³ See *Human rights Watch World Report*, (1998) at 329.

letters of rejection, if any, do not specify why they were barred.⁴¹⁴ Those rejected have no right to appeal. In practice, all the candidates from opposition parties and those who “represent a position contrary to that of conservatives and moderates”⁴¹⁵ have been deemed unsuitable, on the grounds that they are not committed sincerely to the principle of *velayat-e faqih*. And they are prevented from contesting the elections.

Under the pressure of public opinion and free press, the Guardian Council had to qualify most of the moderate and reformist candidates for the sixth parliamentary election in February 2000. The Council only managed to disqualify independent nationalist-religious candidates. Thus, the Sixth Parliament is now controlled by reformists allied to President Khatami.⁴¹⁶

Furthermore, based on approbatory supervision, the Guardian Council can also annul voting results in any riding and stop the process. In the 1996 election for the Fifth Parliament, it annulled the election results in some cities, and accused several candidates of using “anti-revolutionary slogans, making illusory promises, and vote buying” without substantiating its claims or identifying those candidates. In other cases, it provided no reason at all.⁴¹⁷ Seemingly, the Council was unhappy with the election

⁴¹⁴ The Council only declares the list of approved candidates. Those who do not make to the list are obviously prevented from running. It should be noted that, according to the recent decision made by the Expediency Council (see Chapter Two note 312), the Guardian Council was required to present valid reasons for its decisions to bar candidates to run for the sixth parliamentary election in February 2000. See Iran news, Tehran, November 14, 1999. However, the Council did not comply with the Expediency Council’s demand and provided no reason, let alone the valid one, for the disqualification of numerous candidates.

⁴¹⁵ Schirazi, *The Constitution of Iran*, *supra* note 341 at 88.

⁴¹⁶ See IRNA, February 2000.

⁴¹⁷ *Human Rights Watch World Report*, (1997) at 282.

results, not the process. In February 2000, the Council also annulled the voting results in several ridings where the reformist candidates had won.⁴¹⁸

The restraints on the right to take part in public life and the procedure of exclusion do not stop here, nor is it limited only to the Guardian Council. For instance, according to the law, the elected candidates still require a vote of accreditation from their colleagues in the plenary session of the new parliament, whereby opposition candidates are often subjected to “a thorough examination of their biography, political career, and ideological orientation to find grounds to justify denying them a vote of confidence.”⁴¹⁹ Above all, the parliament’s legislative power is substantially limited by the Guardian Council and other non-elected policy-making bodies,⁴²⁰ the discussion of which is beyond the scope of this thesis.

Clearly, arbitrary bans on candidates and political parties, and the lack of freedom of assembly and association for opposition candidates, vastly restrict the rights of citizens to participate in selecting their representatives.⁴²¹ Any respect for freedom of expression and the right to take part in the conduct of public affairs requires that arbitrary bans on candidates and other constraints on political life be lifted, and the approbatory supervision by the Guardian Council be ended.

⁴¹⁸ In some ridings, the Council annulled only certain ballot boxes. As a result, defeated hardline candidates were declared winners. See IRNA, March-April 2000.

⁴¹⁹ Schirazi, *The Constitution of Iran*, *supra* note 341 at 90.

⁴²⁰ Such as the Council of the Expediency of the Islamic System (see Chapter Two note 312) and the guardian Council (see Chapter Two note 296). See also Chapter Two note 285 and *supra* note 352. And Schirazi, *ibid.* at 91-98.

⁴²¹ See *Human Rights Watch World Report*, (1997) at 282.

C. Freedom of Religion in Iran's Constitutional and Legal System

The rights provisions of the Iranian constitution do not address the issue of religious freedom as understood in international law. The constitution recognizes the Shi'a school of Islam as the official religion of Iran,⁴²² accords other Islamic faiths⁴²³ and traditional religious minorities⁴²⁴ the right to perform their own religious rites and to apply their own religious laws in personal status. As discussed in Chapter Two, the rights of religious minorities are limited to Shari'a rules and what the official religion permits, which relegates them to second-class status in the legal system of the country.⁴²⁵ Other religious groups are not recognized and their members are treated according to the dictates of "Islamic justice and equity" and Shari'a laws in every public or private aspect of life.⁴²⁶

This thesis suggests that freedom of religion, as an absolute and unqualified fundamental right in international human rights law, is not guaranteed in Iran's legal system even for Muslims. According to international human rights documents, everyone has the right to freedom of religion, including "freedom to change his religion

⁴²² The Constitution, art. 12.

⁴²³ As mentioned, the adherents of other Islamic faiths, mostly Sunni schools of thought, are not considered religious minorities, and are accorded full respect. According to the Constitution, municipal laws in regions where they are in majority are also subject to their Shari'a. See the Constitution, art. 12.

⁴²⁴ The Constitution applies the principle of religious tolerance only to Zoroastrians, Jews, and Christians, which are the monotheistic religions of revelations. See the Constitution, art. 13. The Iranian representative to the U.N. Committee on Economic, Social, and Cultural Rights once stated that an essential aspect of Iran's cultural policies is to "purify the human environment to eliminate the causes of atheism." U.N. ESCOR Comm. On Economic, Social, and Cultural R., 8th Sess., 7th Mtg., item 13, UN Doc. E/C. 12/1993/SR. 7 (1993).

⁴²⁵ Reisman, "Some Reflections on Human Rights and Clerical Claims to Political Power" *supra* note 374 at 517.

or belief,” and to publicly “manifest his religion or belief in teaching, practice, worship, and observance.”⁴²⁷ Iran’s constitutional and legal system does not recognize a Muslim’s right to change his religion. Although the Constitution forbids interrogation or attacking people because of their beliefs,⁴²⁸ it is neither meant nor interpreted to guarantee freedom of religion, including freedom to change the religion.⁴²⁹ The Criminal Code specifies several offenses as examples of apostasy, and stresses that the related punishments should be applied.⁴³⁰ Although the law does not stipulate the *hudud* crime of *ridda*, Shari’a rules are binding even in the absence of corresponding provisions in the Criminal or Civil Codes.⁴³¹

At the UN-sponsored discussions on the 1981 Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief, the Iranian representative raised objections with respect to the freedom to change religion, and argued that Muslims were not allowed to convert from their religion and that they were to be killed if they did so.⁴³² In reaction to an article published in a newspaper in August 1999, Iran’s supreme leader said, “Anyone who questioned the Islamic rationale for the death penalty deserved to be executed.” He also added that “if anyone denies

⁴²⁶ The Constitution, art. 14.

⁴²⁷ The UDHR, *supra* Chapter One note 20 art. 18; and the ICCPR, *supra* Chapter One note 20 art. 18 (1).

⁴²⁸ The Constitution, art. 23.

⁴²⁹ See *Islam and Human Rights, Tradition and Politics*, *supra* note 95 at 177-78.

⁴³⁰ The 1996 Criminal Code. Also arts. 180 513.

⁴³¹ The Constitution, art. 167.

⁴³² Aldeeb Abu-Sahlieh, “Les droits de l’homme et l’Islam” at 637. Also Abdulaziz Sachedina, “Freedom of Conscience and Religion in the Qur’an” and John Kelsay, “Saudi Arabia, Pakistan, and the Universal Declaration of Human Rights” both in *Human Rights and the Conflict of Culture: Western and Islamic Perspectives on Religious Liberty*, *supra* note 294 at 35-37 and 53-90 respectively; Ann E. Mayer, “Law and Religion in the Muslim Middle East” (1987) 35 Am. J. Comp. L. 143-47; *Islam and Human Rights, Tradition and Politics*, *supra* note 95 at 164; Sami Aldeeb Abu-Sahlieh, “Liberté religieuse et apostasie dans l’Islam” (1986) 23 Praxis juridique et religion 53.

religious stipulations, such as Islamic *qysas*,⁴³³ this person is an apostate, and the punishment for such a person is clear.”⁴³⁴

The United Nations’ Commission on Human Rights as well as human rights NGOs, such as Amnesty International and Human Rights Watch, have reported the discrimination and limitations that religious minorities have to face. They have repeatedly condemned the restrictive and repressive policies of the government with respect to freedom of thought, conscience, and religion in Iran.⁴³⁵ The case of the disfavored Baha’is, who are deemed to be descendants of persons who converted from Islam and therefore subject to punishment for crime of apostasy, is well documented by international human rights bodies and others.⁴³⁶ In Iran, Baha’is are not recognized as either a religious minority or a minority.⁴³⁷ Baha’ism is officially considered a political movement. Its members are often prosecuted for political crimes and criminal acts --

⁴³³ See *supra* Chapter Two note 78.

⁴³⁴ Associated press, Dubai (UAE), September 1, 1999.

⁴³⁵ Each year, the Report of the Special Representative of the UN Commission on Human rights in Iran condemns Iran on the situation of human rights, including freedom of religion. See for example, E/CN. 4/1997/63 February 11, 1997; E/CN. 4/1987/20 January 28, 1987; E/CN. 4/1993/March 4, 1993. Also *Human Rights Watch World Report*, 1993-2001; and *Amnesty International Annual Report*, 1996-2001.

⁴³⁶ See the reports of the Special representative of the UN Commission on Human Rights in Iran, 1988-2000, *ibid.*; *Human Rights Watch World Report*, *ibid.* The UN General Assembly’s Social, Humanitarian, and Cultural Committee recently approved critical resolution on human rights violations in Iran, including “unabated pattern of persecution” against Baha’is. See ‘U. N. panel rebukes Iran on human rights’ Reuters, the United Nations, November 19, 1999. Also generally Roger Cooper, *The Baha’is of Iran, Report 51* (London: Minority Rights Group, 1982-1991); and Douglas Martin, “The Persecution of the Baha’is of Iran, 1844-1984” (1984) 12/13 Baha’i Studies.

⁴³⁷ See the statement by the government representative at the UN Committee on Economic, Social, and Cultural Rights, UN ESCOR Comm. on Economic, Social, Cultural Rights, 5th Sess., 43rd Mtg., item 17, UN Doc. E/C. 12/1990/SR 43 (1990). In another statement, Iran’s then Attorney General said: “Baha’is, as individuals, are free to perform their religious acts, but they are not allowed to invite others to Baha’ism, to teach, and to form assemblies.” E/CN. 4/1987/20, January 28, 1987 at 21.

e.g., spying for Israel. However, it has been reported that the persecution of Baha'is is religiously motivated, and that they are prosecuted for the crime of apostasy.⁴³⁸

The constitutional and legal system of Iran does not endorse an unrestricted right to freedom of religion, especially in the case of apostasy -- for which a limit on religious tolerance was drawn. All these, of course, contradict international human rights standards, which require complete official neutrality toward religion⁴³⁹ and prohibit the government from preferring one religion to another. Freedom of religion should apply to all individuals equally, and should include freedom to change religion as well.

At this point, it is worth referring to the widely reported Rushdie affair, which has affected Iran's international relations and foreign policy for the last decade. In brief, the publication of *The Satanic Verses*, in September 1988, by British-Muslim novelist Salman Rushdie -- where "irreverent references are made to the Prophet of Islam, his wives and leading companions" and "the associations and negative connotations are obvious"⁴⁴⁰ -- caused many violent protests and demonstrations in various parts of the Islamic world by Muslims who demanded the ban of the book and even called for the death of the author. These protests led to the issuance of Ayatollah Khomeini's *fatwa* in

⁴³⁸ Payman Akhavan, "Implications of Twelver Shi'ih Mihdism on Religious Tolerance: The Case of the Baha'i Minority in the Islamic Republic of Iran" in *Islamic Law Reform and Human Rights*, *supra* note 158 at 197-218; and *Islam and Human Rights, Tradition and Politics*, *supra* note 95 at 178-80.

⁴³⁹ Sedler, "The Constitutional Protection of Freedom of religion, Expression, and Association in Canada and the United States" *supra* note 4 at 583.

⁴⁴⁰ *Toward an Islamic reformation*, *supra* note 123 at 182. See also *The Satanic Versus*, at 101, 117, 363-64, 374, and 381-82; M. D. Fletcher, ed., *Reading Rushdie: Perspectives on the Fiction of Salman Rushdie* (Atlanta, GA: Rodopi, 1994); and Chantal Delourme, ed., *Salman Rushdie, dimensions littéraire et politique* (Lille: Université Charles-de-Gaulle-Lille III, 1995).

February 1989.⁴⁴¹ The *fatwa* describes the book as blasphemous and the author as apostate. It also contains a death sentence against Rushdie, and calls on Muslims to kill him and any person associated with the publication of his book.⁴⁴² Later, Ayatollah Khomeini did not accept Rushdie's regret for any affront and anguish his book may have caused Muslims, and emphasized that he should be killed even if he repented.⁴⁴³ A semi-governmental foundation offered a bounty to whoever carried out the death sentence.⁴⁴⁴

From what we discussed earlier in this chapter, it is clear that the *fatwa* was issued according to Shari'a rules and corresponded to Shari'a law of apostasy. Based on Shari'a teachings, any kind of blasphemous expression, in verbal or written form, by a Muslim leads to apostasy. Anyone who witnesses his insult could kill him on sight.⁴⁴⁵ Moreover, any Muslim jurist may issue a *fatwa* against an apostate. Contrary to what An-Na'im states, to issue a *fatwa* the jurist does not need to be "the undisputed ruler of

⁴⁴¹ *Toward an Islamic reformation, ibid.*; Lisa Appignanesi & Sara Maitland, eds., *The Rushdie File* (New York: Syracuse University Press, 1990); Ala'iddin Kharufah, *Hukm al-Islam fi Jara'im Salman Rushdie* [Shari'a on Rushdie's Crimes] (Jeddah, Saudi Arabia: Dar al-Isfahani lil Taba'ah, 1989); Akhtar, *Be Careful With Muhammad, The Salman Rushdie Affair*, supra note 262; Raf'at Sayyid Ahmed, *Ayat Shaytaniyyah: Naqd Kitab Salman Rushdie* [The Satanic Versus, Book Review] (Cairo: Dar al-Sharqiyyah, 1989); Kamali, *Freedom of Expression in Islam*, supra note 92 at 228-35; and Raphael Aubert, *L'affaire Rushdie: Islam, identité et monde moderne* (Paris: Fides, 1990).

⁴⁴² *Toward an Islamic reformation, ibid.*; Richard Webster, *A Brief History of Blasphemy; Liberalism, Censorship, and "The Satanic Versus"* (Southwold, UK: Orwell Press, 1990) at 19; *Islam and Human Rights, Tradition and Politics*, supra note 95 at 180; and Mayer, "Islamic Rights or Human Rights: An Iranian Dilemma" supra note 345 at 290-92. For the text of the *fatwa*, see *Guardians of Thought*, supra note 343 at 85-86; *The Rushdie File, ibid.* at 68; and The New York Times, February 15, 1989.

⁴⁴³ Kamali, *Freedom of Expression in Islam*, supra note 92 at 228-35. See also The New York Times, February 20, 1989.

⁴⁴⁴ *Guardians of Thought*, supra note 343 at 13; Mayer, "Islamic Rights or Human Rights: An Iranian Dilemma" supra note 345 at 291; and Aubert, *L'affaire Rushdie: Islam, identité et monde moderne*, supra note 440. Hardliners repeat Rushdie's death threat each year. IRNA, February 14, 2001.

⁴⁴⁵ al-Awa, *Punishment in Islamic Law*, supra note 207; Rahman, *The Punishment of Apostasy in Islam*, supra note 236; and Abd al-Halim, *Al-Ridda fi Daw' Maflum Jadid*, supra note 235.

an Islamic state (*dar al-Islam*).”⁴⁴⁶ Based on Shari’a, any of the *ulama* has the universal jurisdiction over Muslims anywhere in the world, and could issue a decree on any subject without any restriction.⁴⁴⁷ In addition, Shari’a does not require a trial for an apostate; nor does it accept the repentance and recantation of a Muslim-born apostate.⁴⁴⁸ In the Rushdie affair, even the Islamic Conference Organization labeled the book blasphemous and the author an apostate. It did not endorse the death sentence though.⁴⁴⁹

The *fatwa* clearly violates several international norms and standards. In fact, to judge in absentia and to condemn to death anyone without the benefit of a fair trial and without a chance of defense; and to call on Muslims to seek out and murder a citizen of another sovereign country (extra-territorial jurisdiction) -- and, by extension, anyone involved in his case -- contradict the fundamental principles of modern criminal justice.⁴⁵⁰ The latter principles are recognized even in the Constitution of the Islamic Republic.⁴⁵¹ The *fatwa* moreover infringes on freedom of religion and expression, as

⁴⁴⁶ *Toward an Islamic Reformation*, *supra* note 123 at 184.

⁴⁴⁷ Bahnasi, *Al-Jara'im fi al-Fiqh al-Islami*, *supra* note 180; Kharufah, *Hukm al-Islam fi Jara'im Salman Rushdie*, *supra* note 440; and Rahman, *The Punishment of Apostasy in Islam*, *supra* note 236.

⁴⁴⁸ See *supra* text accompanying notes 250-251.

⁴⁴⁹ Bielefeldt, “Muslim Voices in Human Rights Debate” *supra* note 128 at 612; *Islam and Human rights, Tradition and Politics*, *supra* note 95 at 181; “Universal Versus Islamic Human Rights” *supra* note 118 at 337; and “Islamic Rights or Human Rights: An Iranian Dilemma” *supra* note 345 at 291.

⁴⁵⁰ Paul Stenhouse, “Blasphemy/Freedom of Speech in Islamic Law” (1989) 22 *Australian Forensic Sciences* at 5; *Toward an Islamic Reformation*, *supra* note 123 at 183; “Islamic Rights or Human Rights: An Iranian Dilemma” *ibid.*; and Ramine Kamrane, *La fatwa contre Rushdie: une interprétation stratégique* (Paris: Éditions Kimé, 1997).

⁴⁵¹ The Constitution, arts. 35, 36, and 37.

defined in international human rights documents.⁴⁵² Since it contains a death threat against specific individuals, the *fatwa* itself cannot be considered a protected speech.⁴⁵³

The *fatwa* undermines the rule of law and helps establish a tradition of direct arbitrary and violent action. It highlights the contradictions and incompatibility between Shari'a rules and modern standards in international relations and human rights. It also illustrates the need for a comprehensive reform of Islamic law that protects freedom of expression and religion as established in international human rights law, and promotes religious tolerance and pluralism.⁴⁵⁴

Many international human rights organizations and NGOs -- i.e., the United Nations' Commission on Human Rights, the ICCPR Human Rights Committee, and Amnesty International -- have repeatedly condemned the *fatwa* in numerous resolutions and reports, expressing concern about Iran's support for the death threat against Salman Rushdie over the years.⁴⁵⁵

In response, the government of Iran at first sought to diminish the importance of the *fatwa* and, rather unsuccessfully, to reconcile it with international legal order on the grounds that the book insulted Muslims and Islamic beliefs. It then sought to distance itself from the *fatwa* and the call for Rushdie's death. In recent years, the government

⁴⁵² The ICCPR, arts. 18 and 19.

⁴⁵³ *Guardians of Thought*, *supra* note 343 at 85-86. See also the ICCPR, *ibid.* arts. 19 and 20.

⁴⁵⁴ al-Ashmawy, *L'islamisme contre l'Islam*, *supra* note 154; Subhi Mahmasani, "Adoption of Islamic Jurisprudence to Modern Social Needs" in John J. Donohue & John L. Esposito, eds., *Islam in Transition: Muslim Perspectives* (New York: Oxford University Press, 1982); Mohammad Talbi, "Religious Liberty: A Muslim Perspective" *supra* note 240; "Muslim Voices in the Human Rights Debate" *supra* note 128 at 609; and *Toward an Islamic Reformation*, *supra* note 123 at 184.

⁴⁵⁵ See the Reports by the Special Representative of the UN Commission on Human Rights in Iran (1993-1999). As example, see UN Doc. E/CN. 4/1993/L. 35, March 8, 1993 and Un Doc. E/CN. 4/1997/63, February 11, 1997; and *Human Rights Watch World Report*, 1993-1999.

has rightfully announced that it regards the *fatwa* as “an opinion of a religious jurisprudence expert,” and claims that it would not carry out the execution.⁴⁵⁶ It should also be pointed out that, contrary to Mayer’s argument,⁴⁵⁷ in contemporary Iran’s religious-political structure, it is possible to differentiate between a religious ruling and the responsibilities of the government and state policy. In fact, this refers to differences between *fatwa* and *hukm*, discussed in Chapter Two.⁴⁵⁸ Consequently, the government stated that it was incapable of reversing or rescinding the *fatwa*, but that it would not seek to carry it out either.⁴⁵⁹

From the international community’s point of view, the breakthrough came only in September 1998 when Iran’s Foreign Minister and his British counterpart met at the United Nations, and reached an agreement on the Rushdie affair. The Iranian minister publicly announced that his government committed itself to do nothing to carry out the death sentence, and distanced from the bounty.⁴⁶⁰ This has, indeed, been the position of the government for some years.⁴⁶¹

Finally, it should not go unmentioned that not all the international attention on the Rushdie affair was for the sake of human rights and the protection of freedom of

⁴⁵⁶ The statement by then the head of the Judiciary, Ayatollah Mohammad Yazdi. See *Guardians of Thought*, *supra* note 343 at 88. Of course, the announcement was the official position of the government and not that of all political factions involved in Iran’s politics.

⁴⁵⁷ “Islamic Rights or Human Rights: An Iranian Dilemma” *supra* note 345 at 290.

⁴⁵⁸ In brief, unlike *hukm*, *fatwa* is associated with the religious rank of a scholar, not his political authority. See *supra* Chapter Two text accompanying notes 56-59. Again, this explanation may not be shared by all religious and political figures in Iran, especially now that it seems politics overrides even religious matters.

⁴⁵⁹ The government’s position was also confirmed by Amnesty International. See Agence France Presse, London, June 16, 1999.

⁴⁶⁰ JTA, “Ignoring American Sanction; London to Forge Ties With Tehran” London, April 13, 1999; and BBC World: Middle East, February 14, 1999.

⁴⁶¹ IRNA, Tehran, February 14, 2000.

expression and religion of the author. Some who rushed to defend Rushdie “had ulterior motives, and acted out of spite for Islam and Muslims.”⁴⁶² International power politics was involved. Some Western governments politicized the case, and used it as a “bargaining chip”⁴⁶³ in their political and economic relations with Iran. Meanwhile, they ignored other cases of human rights abuses by friendly regimes and human rights violations in their own countries.⁴⁶⁴ As the Malaysian Chair of the UN Human Rights Commission said in March 1996, “If you want to abuse human rights make sure that you are the best of friends of the big powers that matter, then you can get away with it.”⁴⁶⁵ But this does not diminish the real hardship evidenced by the Rushdie *fatwa*.

⁴⁶² *Toward an Islamic reformation, supra* note 123 at 184.

⁴⁶³ *Guardians of Thought, supra* note 343 at 86-7. For more on this subject, see Human Rights Watch, *Threat Against Rushdie* (New York: American Association of Publishers and the Fund for Free Expression, 1992).

⁴⁶⁴ For example, in France, many Muslim girls, in recent years, were expelled from public schools when they insisted on wearing head scarves. The government of France failed to respect Islamic beliefs and values, and to protect their religious freedom and the right to dress in accordance with their conscience and their personal religious convictions. For more on this issue, see “Islamic rights or Human Rights: An Iranian Dilemma” *supra* note 345 at 287-88.

⁴⁶⁵ He also said, “The biggest obstacle to achieving understanding in the field of human rights is the political factor that is injected into discussions almost every time it arises at the international fora. We see double standards again and again.” Reuters, “UN Rights Chairman Slams Western Hypocrisy” March 15, 1996.

Chapter Four

Freedom of the Press in Shari'a and Iran's Constitutional and Legal System

Introduction: Press Freedom in International Human Rights Law

Freedom of the press is, sometimes, viewed as an extension or another aspect of the fundamental right to free speech recognized in free states.¹ However, international human rights law treats freedom of the press as distinct from freedom of speech and “something other than just a vehicle for self-expression.”² The Press is regarded as a social institution whose freedom and independence are vital to a free and democratic society.³ It is the main instrument of freedom in a representative government and an important ideal to political liberty as well. Jefferson is reported to have written that:

¹ Stephen Klaidman, “The Roles and Responsibilities of the American Press” in Philip S. Cook, ed., *Liberty of Expression* (Washington, D. C.: Wilson Center Press, 1990) at 92; George V. Ferguson, “Freedom of the Press” in G. Ferguson, *Press and Party in Canada: Issues of Freedom* (Toronto: Ryerson Press, 1955) at 1; Ronald Dworkin, “Is the Press Losing the First Amendment?” (1980) 27 *New York Rev. of Books* 49-57; Robert Ladenson, “Freedom of the Press: A Jurisprudential Inquiry” (1980) 6 *Social Theory & Practice* 163; and M. D. Lepofsky, “The Role of ‘the Press’ in Freedom of the Press” (1992) 3 *Media & Communication L. Rev.* 89.

² Klaidman, “The Roles and Responsibilities of the American Press” *ibid.*; L.-P. Gratton, “La Liberté de presse au Québec, une liberté américaine? Étude sur le droit à la vie privée et la liberté de presse” (1997) 57 *Revue du Barreau* 913; P. Trudel, “Liberté d’information et droit du public à l’information” in A. Prujiner & F. Sauvageau, eds. *Qu’est-ce que la liberté de presse?* (Montreal: Éditions du Boréal Express, 1986) 174. The study will refer to the articles of international instruments in the second section of this chapter.

³ C. K. N. Raja, *Freedom of Speech and Expression Under the Constitutions of India and the United States* (Dharwad, India: Karnatak University Press, 1979) at 104; C. Beckton, “Freedom of Expression in Canada- 13 Years of Charter Interpretation” in G.-A. Beaudoin & E. P. Mendes, eds. *Charte*

The basis of our government being the opinion of the people, the very first object should be to keep that right; and were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter.⁴

As another commentator once said, “A democracy may not function if people are not continuously supplied with accurate factual knowledge of the world they live in”⁵; nor is any other freedom secure.⁶ A democratic society therefore should uphold the right of every individual to publish and broadcast his ideas and thoughts without any prior restriction or control.⁷ Beckton states that freedom of expression and the press is considered the foundation of individual liberty in Western democratic theory, and has been characterized as “the matrix, the indispensable condition of nearly every other

cannadienne des droits et libertés, 3rd ed. (Montreal: Wilson & Lafleur, 1996) 69; Henri Brun & Pierre Brun, *Chartes des droits de la personne, législation, jurisprudence et doctrine*, 13th ed. (Montreal: Wilson & La fleur, 2000) at 135-141; N. Vallières, “L’impact des garanties inscrites dans les chartes des droits sur la concentration de la presse écrite” (1995) 55 *Revue du Barreau* 41.

⁴ Thomas Jefferson, Letter to Col. Edward Carrington, Jan. 16, 1787, in Klaidman, “The Roles and Responsibilities of the American Press” *supra* note 1 at 93.

⁵ Ralph Ingersoll, “A Free Press- for What?” in *Freedom of the press Today, A Clinical Examination by 28 Specialists*, assembled by Harold L. Ickes (New York: Vanguard Press, 1941) at 137.

⁶ The Commission on Freedom of the Press, *A Free and Responsible Press, A General Report on Mass Communication: Newspapers, Radio, Motion Pictures, Magazines, and Books* (Chicago, Illinois: University of Chicago Press, 1947) at 6.

⁷ James T. Schleifer, “Tocqueville As an Observer: Freedom of Expression and the American Experience” in Cook, *Liberty of Expression*, *supra* note 1 29-41; Franklyn S. Haiman, *Speech and Law in a Free Society* (Chicago: University of Chicago Press, 1981); and Robert A. Sedler, “The Constitutional Protection of Freedom of Religion, Expression, and Association in Canada and the United States: A Comparative Analysis” (1988) 20 *Case Western Reserve J. Int’l L.* 577.

form of freedom.”⁸ She also adds that without the freedom to exchange ideas, to seek access to information, and to criticize the policies of the governing body, an individual is incapable of participating in the operation of his state, and without individual participation a true democracy can neither exist nor flourish.⁹

The term “the press” has undergone a transformation in meaning. It was used to refer to any form of printing in the 17th and 18th centuries, as distinguished from oral speech, and included all the newspapers, books, and pamphlets.¹⁰ As to its contemporary usage, some may exclude most books and many magazines, and add radio and television, but not the theater or the cinema.¹¹ Others would include not only newspapers and periodicals, but also books, posters, handbills, pamphlets, tapes and videotapes, discs, etc.¹² This study holds that, as far as human rights law is concerned, the word “press” is not confined to newspapers and periodicals, but includes books, pamphlets, and any other sort of publication regarded as the means of communicating

⁸ C. Beckton, “Freedom of Expression in Canada- How Free?” in the Canadian Institute for the Administration of Justice, *The Canadian Charter of Rights and Freedoms: Initial Experiences, Emerging Issues, and Future Challenges* (1984), at 149.

⁹ *Ibid.* See Vallières, “L’impact des garanties inscrites dans les chartes des droits sur la concentration de la presse écrite” *supra* note 3 41; P. Trudel, “Liberté de presse ou procès public et équitable? À la recherche du fondement au droit d’accéder aux audiences et de diffuser des information judiciaires” (1989) 49 *Revue du Barreau* 251; Jerome Barron, “Access to the Press- A New First Amendment Right” (1967) 80 *Harvard L. Rev.* 1641; and Lee Bollinger, “Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media” (1976) 75 *Michigan L. Rev.* 1.

¹⁰ Frederick Schauer, *Free Speech: A Philosophical Enquiry* (Cambridge: Cambridge University Press, 1982) at 106. In English tradition, it was referred to as “qualified privilege” -- the right of people of a free nation to have published fair and true reports of judicial, legislative, or other public and official proceedings. Samuel Arthur Dawson, *Freedom of the Press, A Study of the Legal Doctrine of “Qualified privilege”* (Littleton, CO: Fred B. Rothman, 1982) at 14.

¹¹ Schauer, *Free Speech: A Philosophical Enquiry*, *ibid.* See Deborah Holms, *Governing the Press, Media Freedom in the United States and Great Britain* (London: Westview Press, 1986); and Jane L. Curry & Joan R. Dassin, *Press Control Around the World* (New York: Praeger, 1982).

¹² Ulrich Karpen, “Freedom of Expression As a Basic Right: A German View” (1989) 37 *Am. J. Com. L.* 395 at 400; and Leo Cross, “International Law Aspects of the Freedom of Information and the Right to Communicate” in Philip C. Horton, ed., *The Third World and Press Freedom* (New York: Praeger, 1978) 55.

news and opinions to the public.¹³ It also covers radio and television, which have given new dimension to the range of publication and are protected as media of expression.¹⁴ However, the theater, cinema, and other artistic expressions, such as visual, musical, or poetic, may fall within the coverage of the free speech principle.¹⁵ It is in this sense that the term “press” and the conception of freedom of the press are used in this study. Of course, since all independent press are banned in Iran, and numerous editors and journalists are imprisoned, this study will focus more on newspapers and periodicals.

Freedom of the press, the first and most indispensable of freedoms to Tocqueville,¹⁶ means the right to print, publish, and circulate or broadcast what one pleases, without prior permission or license, subject of course to the consequences of law.¹⁷ It also implies the right to receive and impart information through the media, and includes its inevitable associate freedom of circulation of published material without any interference from any public authority¹⁸; without circulation, the publication would be of little value. Moreover, freedom of the press has been interpreted to include the

¹³ William Ernest Hocking, *Freedom of the Press, A Framework of Principle; A Report from the Commission on Freedom of the Press* (New York: Da Capo Press, 1972) at 210.

¹⁴ In the United States, the Supreme Court held that the broadcasting is entitled to the protection of the First Amendment. See Raja, *Freedom of Speech and Expression*, *supra* note 3 at 116.

¹⁵ See *Free Speech: A philosophical Enquiry*, *supra* note 10 at 109-10. Also Gratton, “La liberté de presse au Québec, une liberté américaine?” *supra* note 2 913; and Lepofsky, “The Role of ‘the Press’ in Freedom of the Press” *supra* note 1 at 89.

¹⁶ In his *De la Démocratie en Amérique* (1835, 1840), Alexis de Tocqueville praises freedom of the press and the functions of the press in a democratic society. See Jean-Claude Lamberti, “Tocqueville and the Freedom of the Press” in Cook, *Liberty of Expression*, *supra* note 1 at 16-25.

¹⁷ Lamberti, *ibid.* at 19-20; Hocking, *Freedom of the Press, A Framework of Principle*, *supra* note 13; G. Poulin, “La liberté de presse et le droit à un procès équitable en vertu de la Charte canadienne des droits et libertés” (1996) 10 *Revue juridique de l’Université Laval* 163; and M.-A. Blanchard, “Les interdits de publication et la liberté de presse” in *Formation permanente du Barreau du Québec, Développements récents en droit criminel (1994)* (Cowansville, Que.: Édition Yvon Blais, 1995) 31.

¹⁸ In fact, this is the guarantee of the right to be wrong so far as opinions and beliefs and advocacy of those ideas are concerned. It is also for the protection of the minority against the majority. See Arthur Capper, “Licensed Freedom Is Not Freedom” in *Freedom of the Press Today*, *supra* note 5 at 66. Also

right to access to the media,¹⁹ and the right to access to the news and to acquire information relevant to public affairs and conduct of government. This, indeed, makes freedom of the press distinct from freedom of speech.²⁰ It also recognizes some degree of privilege for the press with regard to the right to access to government institutions and to attend criminal trials in order to communicate the information to the public. The right to refuse to disclose the names of their sources is also an essential aspect of this privilege, the absence of which would handicap news-gathering.²¹ This is why freedom of the press²² differs from other forms of communications, such as freedom of speech. It is not only a means of self-expression, but a disseminator of news and opinions, and could go far beyond the reach of voice to inform and mobilize the public.²³ It treats political subjects and present them to a mass audience which promotes “the wide spread public deliberation that is the ideal of a democratic society.”²⁴ Therefore, as Schauer states, freedom of the press, along with the theory of religious tolerance,²⁵ are

generally G. Rutherglen, “Theories of Free Speech” (1987) 7 Oxford J. Legal Studies 45; and Robert F. Ladenson, *A Philosophy of Free Expression* (Totawa, NJ: Powman & Littlefield, 1983).

¹⁹ The issue of the right to access to media will be discussed below. Although freedom of the press originally concerns individuals who have something to utter, the readers and hearers and the consumers of news and opinions are also equally concerned.

²⁰ Eric Barendt, *Freedom of Speech* (Oxford: Clarendon Press, 1987) at 72; Susan A. Wolfson, “Freedom of Information and the Right to Curiosity” and David Goldberg, “Freedom of Speech and Access to the Media” both in Gerry Maher, ed., *Freedom of Speech: Basis and Limits* (Stuttgart: Franz Steiner Verlag Wiesbaden GMBH, 1986) at 67-70 and 82-85 respectively.

²¹ Barendt, *ibid.* See also Haiman, *Speech and law in a Free Society*, *supra* note 7 at 10; Hocking, *Freedom of the Press, A Framework of Principle*, *supra* note 13 at 79-80; and N. Dufour, “La liberté de la presse et le droit des journalistes de ne pas témoigner en cour” (1993) 7 *Revue Juridique de l’Université Laval* 130.

²² As discussed in Milton’s *Areopagitica* and *The tracts of the Levellers*.

²³ *Freedom of the Press, A Framework of Principle*, *supra* note 13 at 209.

²⁴ Schauer, *Free Speech: A philosophical Enquiry*, *supra* note 10 at 107. See generally John Keane, *The Media and Democracy* (Cambridge, UK: Polity Press, 1991); Judith Lichtenberg, ed., *Democracy and Mass Media, A Collection of Essays* (New York: Cambridge University Press, 1990) ; and Haiman, *Speech and Law in a Free Society*, *supra* note 7.

²⁵ As exemplified in classical works, such as Locke’s *Letter Concerning Toleration*, Bayle’s *Treatise on Universal Toleration*, and Turgot’s *Memoire to the King on Toleration*.

“two distinct strands of thought” that are considered the roots of the modern conception of freedom of speech.²⁶

A free press is free from compulsion and free for expression of opinions to all who want to communicate to the public. It is now understood to be a civil institution with the great deal of instrumental and democratic value. It has a cultural and political function in a free and democratic society.²⁷ The primary purpose of the constitutional guarantee of a free press and its privileges, such as access to the courts and parliamentary debates, was to create a “watchdog” or a kind of “fourth estate” outside the government, as an additional check on authorities; to inform, but not influence,²⁸

²⁶ *Free Speech: A Philosophical Enquiry*, *supra* note 10 at 106. For example, in the United States, it was the press that started the struggle for freedom of speech. See Raja, *Freedom of Speech and Expression*, *supra* note 3 at 247.

²⁷ John C. Nerone, ed., *Last Rights, Revisiting Four Theories of the Press* (Chicago: University of Illinois Press, 1995) at 5. For the importance and role of the press in Western countries, see Holmes, *Governing the Press, Media Freedom in the United States and Great Britain*, *supra* note 11 at 10-15; Curry & Dassin, *Press Control Around the World*, *supra* note 11 at 3 and 62; International Center Against Censorship, *Press Law and Practice, A Comparative Study of Press Freedom in European and Other Democracies, An Article 19 Report* (London: Article 19, 1993) at 38, 57, 162, 192, and 217; Nicole Duplé, “La liberté de la presse et la charte Canadienne des droits et libertés” in *Qu'est-ce que la liberté de presse?*, *supra* note 2 at 117; Frede Castberg, *Freedom of Speech in the West* (Oslo: Oslo University Press, 1960) at 13; Lichtenberg, *Democracy and the Mass Media*, *supra* note 24; Lucasa Powe, Jr., *The Fourth Estate and the Constitution, Freedom of the Press in America* (Berkeley: University of California Press, 1991); Eliane Couprie & Henry Olsson, *Freedom of Communication Under the Law* (The European Institute for the Media, 1987); Nancy J. Woodhull & Robert W. Snyder, *Defining Moments in Journalism* (New Brunswick, NJ: Transaction Publishers, 1998); and Richard Barbrook, *Media Freedom, the Contradictions of Communications in the Age of Modernity* (London: Pluto Press, 1995). Internationally, see Cross, “International Law Aspects of the Freedom of Information and the Right to Communicate” *supra* note 12 at 55; and Pero Ivacic, “Toward a Freer and Multidimensional Flow of Information” in Horton, *The Third World and Press Freedom*, *supra* note 12 at 135. For overall guidelines for the mass media, see 1978 UNESCO “Declaration on Fundamental Principles Concerning the Contribution of the Mass Media to Strengthening Peace and International Understanding, to the Promotion of Human Rights, and to Countering Racism, Apartheid, and Incitement to War” reprinted in Kaarle Nordenstreng, *The Mass Media Declaration of UNESCO* (Norwood, NJ: Ablex, 1984) at 271-75.

²⁸ According to Tocqueville, the specific task of the press is to inform and to depict the social scene, not to influence opinions or to educate. See Lamberti, “Tocqueville and the Freedom of the Press” *supra* note 16 at 16. As will be indicated, the press, at least indirectly, does influence opinions. See generally Stephen Bindman, “The Role of the Media in the Protection of Vulnerable Complainants” in Yves-Marie Morissette, Wade MacLauchlan, & Monique Ouellette, eds., *Open Justice, La transparence dans le système judiciaire* (Montreal: Édition Thémis, 1994) 129.

the public, and to promote the interest of the citizenry in social and political realms, in an open democratic society.²⁹ Democracy cannot survive without the press, and, as Tocqueville believed, the causes of representative government and of press freedom are indissolubly linked.³⁰ He considered freedom of the press as the mean to defend individual rights, describing it as a “resistance liberty” or weapon of defense.³¹ Thus, the press enjoys the ability to bring peace, stability, and justice to the people. Due to various restrictions on the press, many of these fine debates on press freedom are not relevant in Iran’s constitutional system.

The press is connected to associations as well. It enables individuals to discover that they share common ideas and plans, bringing them together and carrying them along. As Tocqueville put it, “newspapers make associations, and associations make newspapers.”³² This clearly indicates that the press influences opinions and enjoys the power “to condition people’s beliefs, attitudes, values, and worldview,”³³ which raises the issue of the responsibility of the press to meet readers’ needs with regard to

²⁹ Haiman, *Speech and Law in a Free Society*, *supra* note 7 at 11; Judith Lichtenberg, “Foundations and Limits of Freedom of the Press” and Sanford J. Ungar “The Role of a Free Press in Strengthening Democracy” both in *Democracy and the Mass media*, *supra* note 24 at 105 and 368 respectively; A. Wayne MacKay, “Freedom of Expression: Is it All Just Talk?” (1989) 68 Can. Bar Rev. at 749 and 754-58.

³⁰ Cook, *Liberty of Expression*, *supra* note 1 at 3. See also Ungar, “The Role of the Press in Strengthening Democracy” *ibid.* at 368.

³¹ Lamberti, “Tocqueville and the Freedom of the Press” *supra* note 16 at 20. See Y. Pourbaix, “Le conflit entre la liberté de la presse et l’indépendance des juges” (1996) 3 *Revue d’études juridiques* 1; A. Wayne MacKay, “Freedom of Thought, Belief, Opinion and Expression Including Freedom of the Press and Other Media of Communications and Freedom of Peaceful Assembly: Whose Interest Are Protected?” in *Actes de la Conférence de l’Association du Barreau canadien, Vos clients et la Charte-Liberté et égalité* (Montreal: Éditions Yvon Blais, 1988) 131.

³² Alexis de Tocqueville, *Democracy, 1840* in Lamberti, *ibid.* at 18.

³³ Lichtenberg, *Democracy and Mass media*, *supra* note 24 at 8. See *Freedom of the Press Today*, *supra* note 5 at 47.

completeness, understandability, objectivity, and accuracy of the information it provides.³⁴ This issue will be elaborated as the discussion proceeds.

The special value of the press to society and its particular ability to alert the public may necessitate a high degree of protection for the press.³⁵ As Schauer states, “The nature of the material presented and the method of presentation may argue for particular protection, either broader in scope or of greater strength than that available under a general principle of freedom of speech.”³⁶ While most human rights guarantees and protections are concerned with the individuals’ rights and liberties, freedom of the press extends protection to an institution, which, according to Haiman, would not apply to individual citizens claiming protection under the principle of free speech.³⁷ Lichtenberg, too, believes that the press may be entitled to greater protection, “beyond those accorded speech in general.”³⁸ This idea is further reason to distinguish freedom of the press from more general freedom of speech.

The independent and distinct characteristic of freedom of the press has been emphasized in the theories of freedom of expression as well.³⁹ Some arguments for the

³⁴ Klaidman, “The Roles and Responsibilities of the American Press” *supra* note 1 at 98-103. Also generally *Free and Responsible Press*, *supra* note 6 at 69-79.

³⁵ Klaidman, *ibid.* at 92-93; Dworkin, “Is the Press Losing the First Amendment?” *supra* note 1 at 49; Ladenson, “Freedom of the Press: A Jurisprudential Inquiry” *supra* note 1 at 163; C. Hébert, “La vie privée a-t-elle une place face à la liberté de presse?” (1996) 10 *Revue Juridique de l’Université Laval* 162.

³⁶ Schauer, *Free Speech: A Philosophical Enquiry*, *supra* note 10 at 107. See Barendt, *Freedom of Speech*, *supra* note 20 at 67.

³⁷ Haiman, *Speech and Law in a Free Society*, *supra* note 7 at 11-2; C. Sauriol, “Liberté d’expression: grandeurs et misères” in *Formation permanente du Barreau du Québec, Développements récents en droit administratif et constitutionnel (1999)* (Cowansville, Que.: Éditions Yvon Blais, 1999) 171; P. Anisman & A. M. Linden, eds., *The Media, the Courts and the Charter* (Toronto: Carswell, 1986); and Beckton, “Freedom of Expression in Canada - 13 Years of Charter Interpretation” *supra* note 3 at 169.

³⁸ Lichtenberg, “Foundations and Limits of Freedom of the Press” *supra* note 29 at 105.

³⁹ The First Amendment treats freedom of the press as distinct from freedom of speech. See Klaidman, “The Role and Responsibility of the American Press” *supra* note 1 at 92. Also generally Thomas I.

free speech principle do not cover the press. For example, the arguments from self-fulfillment and personal development,⁴⁰ which focus on the interests of speaker, are, as Barendt states, irrelevant to the institutional press. Similarly, Mill's truth argument⁴¹ does not particularly apply to the function of the press.⁴² Other theories, however, address the issue and provide for the promotion and protection of freedom of the press from different perspectives -- individual or public interests, the interests of publishers or that of the consumers, political or intellectual values, or virtues like truth and tolerance.⁴³

Liberal theories⁴⁴ view freedom of the press more as an individual right which provides an opportunity for self-expression than an instrument for informing the public. This approach is more likely to consider freedom of the press as an extension of a fundamental right to the principle of free speech in order for people to "realize their

Emerson, *The System of Freedom of Expression* (New York: Random House, 1970); Peter Desbarats & Michèle Paré, *Liberté d'expression et nouvelles technologies* (Montreal: IQ, 1998); and Paul Chevigny, "Philosophy of Language and Free Expression" (1980) 55 *New York Univ. L. Rev.* 157.

⁴⁰ See Chapter Three, text accompanying note 46.

⁴¹ *Ibid.* text accompanying note 34-39.

⁴² Barendt, *Freedom of Speech*, *supra* note 20 at 68. The emphasis here is on the institutional freedom of the press and mass media in mass society. Of course, it does not necessarily mean that the press could not be used as mean to promote individual autonomy and self-expression and to achieve the truth.

⁴³ Lichtenberg, "Foundations and Limits of Freedom of the Press" *supra* note 29 at 106. For more on different views on the theory of freedom of the press, see classical works, such as Milton's *Areopagitica* (1644) for the theological approach; John Stuart Mill's *On Liberty* (1859) for the argument from truth; James Mill's *Liberty of the Press* (1811) and William Godwin's *Enquiry Concerning Political Justice* (1798) for the theory of utilitarianism; John Lock's *Epistola de Tolerantia ad Clarissimum Virum* (1689), John Asgill's *An Essay for the Press* (1712), and Thomas Paine's *Rights of Man* (1791-92) from individual rights perspective; Matthew Tindal's *Reasons Against Restricting the Press* (1704) for the natural rights theory; and Jeremy Bentham's *On the Liberty of the Press and Public Discussion* (1820-1) for the argument for good government through liberty of the press. See also Keane, *The Media and Democracy*, *supra* note 24 at 10-20; *Freedom of the Press, A Framework of principle*, *supra* note 13 at 3-12; Paul M. Dowling, *Polite Wisdom, Heathen Rhetoric in Milton's Areopagitica* (Lanham, Maryland: Rowman & Littlefield, 1995); and Leonard W. Levy, *Emergence of a Free Press* (New York: Oxford University Press, 1985).

⁴⁴ In this study, the term liberal theories covers the ideas of Libertarians as well as the teachings of liberalism. See Nerone, *Last Rights*, *supra* note 27 at 42.

human potential ... by expression of opinions and ideas”⁴⁵ and to attain the truth free from government control and influence.⁴⁶ In contrast, communitarians are more concerned with well-being of the society in general, and try to balance “the social worth of press freedom against competing social values, such as national security.”⁴⁷ They view freedom of the press as the means to exchange freely ideas and information and to check and influence public policy and the function of the government.⁴⁸

Political content of the press links the idea of freedom of the press to the argument from democracy as well. According to this argument, the press has a unique value, and plays an important role in a free and democratic system of government. It provides open criticism of authorities and policies, and retains “public control over officials.”⁴⁹ An institutional press with informative and critical function could perform as an additional check on the established power of government adhering to democratic principles.⁵⁰ The argument from democracy also suggests the need for special

⁴⁵ Klaidman, “The Roles and Responsibilities of the American Press” *supra* note 1 at 91-92.

⁴⁶ Freds Siebert, Theodore Peterson, & Wilbur Schramm, eds., *Four Theories of the Press, the Authoritarian, Libertarian, Social Responsibility, and Soviet Communist Concepts of What the Press Should Be and Do* (Urbana, Illinois: University of Illinois Press, 1956) at 3 and 39-62. Also generally David Kelley & Roger Donway, “Liberalism and Free Speech” in *Democracy and the Mass Media*, *supra* note 24 at 66. The theory of utilitarianism, too, views state control over the press as a license for despotism and contrary to principle of maximizing the happiness of the governed. *Ibid.* at 15. The issue of state censorship will be discussed below. See also H. Brun, “Libertés d’expression et de presse: droit à la dignité, l’honneur, la réputation et la vie privée” (1992) 23 *Revue générale de droit* 449; and A. Vincent, “La liberté d’expression et les limitations imposées par l’État” in *Formation permanente du Barreau du Québec, Développements récents en droit criminel (1994)* (Cowansville, Que.: Éditions Yvon Blais, 1995) 15.

⁴⁷ See “The Roles and Responsibilities of the American Press” *supra* note 1 at 92.

⁴⁸ *Ibid.* The theory of social responsibility also imposes obligation on the press to be socially responsible, and to make sure that all sides of any issue are fairly presented and that the public has enough information to decide on any subject. See generally *Four Theories of the Press*, *supra* note 46 at 5 and 73-77; Nerone, *Last Rights*, *supra* note 27 at 77-124; and Hoyt H. Purvis, *The Press: Free and Responsible?* (Austin: University of Texas Press, 1982).

⁴⁹ *Free Speech: A Philosophical Enquiry*, *supra* note 10 at 107.

⁵⁰ *Ibid.* See Lichtenberg, “Foundations and Limits of the Press” *supra* note 29 at 110; Ladenson, “Freedom of the Press: A Jurisprudential Inquiry” *supra* note 1 at 163; Don R. Pember, *Mass Media*

protection for the institutional press “in view of its particular responsibilities in keeping the public informed.”⁵¹ The right to access to public institutions and the right to investigate public affairs also distinguish freedom of the press from freedom of speech. These rights are “far removed from free speech and its immediate implications.”⁵²

Freedom of the press, nevertheless, is not an absolute value. Several limitations are imposed on freedom of the press even in a free and democratic society.⁵³ In fact, special protection for the press requires certain responsibilities as well. In society, moral imperatives collide, and, as Isaiah Berlin states, values can clash.⁵⁴ Therefore, freedom of the press, as an important social value, “must compete with other cardinal values, and consider the consequences of its actions.”⁵⁵

First, the responsibility of the press requires self-regulation and self-restraint in publishing or broadcasting any material that may affect, or cause harm to, individuals’

Law, 2nd ed. (Dubuque, Iowa: Wm. C. Brown, 1981); Also M. A. Drumbl, I. Lee, & M. Rafuse, “La liberté d’expression et la dignité de la personne devant la Cour suprême du Canada” (1994) 5 *Windsor Rev. Legal & Social Issues* 109.

⁵¹ Barendt, *Freedom of Speech*, *supra* note 20 at 68.

⁵² *Ibid.* at 69. See also C. Feasby, “*Libman v. Quebec* (A. G.) and the Administration of the Process of Democracy under the Charter: The Emerging Egalitarian Model” (1999) 44 *McGill L. J.* 5; J.-F. Gaudreault-DesBiens, *La liberté d’expression entre l’art et le droit* (Montreal: Liber/Les Presses de l’Université Laval, 1996); and C. Marcouiller, *La Charte canadienne de droits et libertés et le domaine constitutionnel de l’expression commerciale* (Ottawa: Bibliothèque nationale du Canada, 1995).

⁵³ Stephen Norris, “Being Free to Speak and Speaking Freely” in T. Honderich, ed., *Social Ends and Political Means* (London: Routledge & Kegan Paul, 1976) 13; L. C. Bollinger, *The Tolerant Society: Freedom of Speech and Extremist Speech in America* (New York: OUP, 1986); and Barendt, *Freedom of Speech*, *supra* note 20.

⁵⁴ Isaiah Berlin, Lecture on the occasion of his receiving Giovanni Agnelli International Prize on February 15, 1988, reprinted in *New York Review of Books*, March 17, 1988 at 15. See Klaidman, “The Roles and Responsibilities of the American Press” *supra* note 1 at 94.

⁵⁵ Klaidman, *ibid.* at 94-95. See D. Dyzenhaus, “Regulating Free Speech” (1991) 23 *Ottawa L. Rev.* 289; D. Buron, “Liberté d’expression et diffamation de collectivités: quand le droit à l’égalité s’exprime” (1988) *Cahiers de Droit* 491; Y. Denault, “La diffamation: même en politique, il y a des limites à la liberté d’expression” in *Formation permanente du Barreau du Québec, Développements récents en droit municipal (1999)* (Cowansville, Que.: Éditions Yvon Blais, 1999) 107; and Y. De Montigny, “Les rapports difficiles entre la liberté d’expression et ses limites raisonnables” (1991) 22 *Revue Générale de Droit* 129.

or groups' rights and liberties.⁵⁶ The press should consider the benefits and harms of specific pieces of information, and remember that freedom of the press includes freedom to refrain from expression as well. The press, as journalist Jean Lacouture believes, should define its responsibility with respect "to national or collective interest, public morale, the profession, the readers, and the journalists themselves."⁵⁷

Apart from self-discipline, the law should also require some limitations and regulations in different areas -- i.e., public order and national security, defamation, obscenity and pornography, sedition, incitement to an offense or discrimination, and contempt of court and of legislature -- to protect other individuals' rights as well as social values.⁵⁸ Limitations may also be imposed on the press with respect to the right to access to government institutions, especially courtrooms. Discretionary provisions may prevail over the concept of open court in order to protect certain rights -- those of witnesses, jurors, victims, and the accused as well as and the integrity of judicial system -- and to prohibit the publication of certain items.⁵⁹ Of course, these limitations and

⁵⁶ Karpen, "Freedom of Expression As a Basic Right" *supra* note 12 at 401-2; Holms, *Governing the Press*, *supra* note 11 at 6; Emerson, *The System of Freedom of Expression*, *supra* note 39 at 10; Castberg, *Freedom of Speech in the West*, *supra* note 27 at 429; M. Redish, "The Proper Role of the Prior Restraint Doctrine in First Amendment Theory" (1984) 70 *Virginia L. Rev.* 53; and V. Blasi, "Toward a Theory of Prior Restraint: The Central Linkage" (1981) 66 *Minn. L. Rev.* 11.

⁵⁷ Jean Lacouture, "The Responsibilities of a Journalist in a Democratic Regime" in Cook, *Liberty of Expression*, *supra* note 1 at 110-11.

⁵⁸ Archibald Cox, *Freedom of Expression* (Cambridge: Harvard University Press, 1981) at 62; Lichtenberg, "Foundations and Limits of Freedom of the Press" *supra* note 29 at 102-35; Irwin Cotler, "Hate Speech, Equality and Harm under the Charter: Towards a Jurisprudence of Human Dignity for a Free and Democratic Society" in Beaudoin & Mendes, *Charte canadienne des droits et libertés*, *supra* note 3 at 215; Duplé, "Les liberté d'opinion et d'expression: nature et limites" (1987) 21 *Revue Juridique Thémis* 541; and R. Vandycke, "La Charte constitutionnelle et les droits économiques, sociaux et culturels" (1989-90) *Annuaire canadien des droits de la personne* 167.

⁵⁹ MacKay, "Freedom of Expression: Is It All Just Talk?" *supra* note 29 at 753 and 758-63. For more on limitations and regulations on the press, see generally Stephen Holms, "Liberal Constraints on Private Power?: Reflections on the Origins and Rationale of Access Regulation"; Owen M. Fiss, "Why the State?"; Carl S. Stepp, "Access in a Post-Social Responsibility Age"; and Lee C. Bollinger, "The Rationale of Public Regulation of the Media" all in *Democracy and the Mass Media*, *supra* note 24 at 21,

restraints, as Beckton states, have to be examined with care.⁶⁰ Thomas Jefferson once said, “Our liberty depends on the freedom of the press, and that cannot be limited without being lost.”⁶¹ John Adams also wrote:

If there is ever to be an amelioration of the condition of mankind, philosophers, theologians, legislators, politicians, and moralists will find that the regulation of the press is the most difficult, dangerous, and important problem they have to resolve. Mankind cannot now be governed without it, nor at present with it.⁶²

The idea of reasonable limitations and proper regulations differs totally from the concept of censorship or prior restraints, under which all material should be submitted in advance to an official body to approve their publication.⁶³ In a censorship system, any publication, without securing previous permission, is an offense regardless of the content of that publication. Both Milton in his *Areopagitica* and Blackstone in his

136, 186, and 355 respectively. For offenses of the press, see James Mill’s *Liberty of the Press* (1825) (New York: Sentry Press, 1967).

⁶⁰ C. Beckton, “Freedom of the Press in Canada: Prior Restraints” in P. Anisman & A. Linden, eds., *The Media, the Courts, and the Charter* (1986) at 142; N. Duplé, “Les limites intrinsèques et les limitations étatiques de la liberté d’expression: l’interprétation téléologique et contextualisée” in G.-A. Beaudoin, ed., *La Charte: dix ans après* (Cowansville, Que.: Éditions Yvon Blais, 1992) 39; and C. Sauriol, *Les abus de la liberté d’expression: l’encadrement juridique du rôle du critique* (Cowansville, Que.: Éditions Yvon Blais, 1993).

⁶¹ Thomas Jefferson, 1786, in *Freedom of the Press Today*, *supra* note 5 at i.

⁶² John Adams to James Lloyd on February 11, 1815, in *A Free and Responsible Press*, *supra* note 6 at iii.

⁶³ Schauer, *Free Speech: A Philosophical Enquiry*, *supra* note 10 at 49. See P. H. Russell, “Judicial Free Speech: Justifiable Limits” (1996) 45 *Univ. New Brunswick L. J.* 155; Redish, “The Proper Role of the Prior Restraint Doctrine in First Amendment Theory” *supra* note 56 at 53; On reasonable limitations in the Canadian Charter, see A. Bigenwald, “L’évaluation des objectifs législatifs en vertu de l’article premier de la Charte canadienne des droits et libertés” (1994) 35 *Cahiers de Droit* 779; L. Huppé, “Quelques objectifs législatifs suffisamment importants aux fins de l’article 1 de la Charte” (1991) 51 *Revue du Barreau* 294; and De Montigny, “Les rapports difficiles entre la liberté d’expression et ses limites raisonnables” *supra* note ? 129.

Commentaires rejected the idea of prior restraints, as contrasted with subsequent punishments.⁶⁴ The concept of censorship contradicts freedom of expression and press freedom and should be avoided in a free and democratic society. Furthermore, the press should be free from the need to obtain permit to carry on its activities.

On the other hand, the rules for subsequent punishments, as Schauer notes, should be drawn narrowly and carefully.⁶⁵ For freedom of the press becomes meaningless if the law imposes heavy penalties or civil liabilities and the publisher is under threat of punishment for publication of any material.⁶⁶ In fact, improper punishment results in self-censorship and prevents publication. The practice of the press, in every country, reveals the type of political authority therein, for the press “publicizes the rules by which it plays.”⁶⁷ The system of censorship in authoritarian states and freedom of the press in democratic countries are two ends of the press freedom spectrum. In Iran, books are censored; newspapers and magazines need to obtain permit; publications are banned regularly; and many are denied the right to

⁶⁴ The ban from further distribution of certain publication or of its particular issue and judicial injunctions on the publication of specific matters -- i.e., pre-trial publishing of criminal cases or highly classified materials -- are mild form of prior restraints considered legal. See Schauer, *ibid.* at 148-52; and Kent Greenawalt, “Free Speech in the United States and Canada” (1992) 55 *L. & Contemporary Problems* at 10.

⁶⁵ Schauer, *ibid.* at 151-52; Wayne MacKay, “Judging and Equality: For Whom Does the Charter Toll?” in C. Boyle, W. MacKay, E. McBride, *et al.*, eds., *Charterwatch: Reflections on Equality* (Toronto: Carswell, 1986) at 62-87; and Vincent, “La liberté d’expression et les limitations imposées par l’État” *supra* note 46 at 15.

⁶⁶ Of course, if the offense is proven in a fair trial, the offender should bear the consequences of law. See generally T. Heinrichs, “Censorship As Free Speech! Free Expression Values and the Logic of Silencing in *R. v. keegstra*” (1998) 36 *Alberta L. Rev.* 835; Lepofsky, “The Role of ‘the Press’ in Freedom of the Press” *supra* note 1 at 89; E. Foster, “La Charte canadienne des droits et libertés: pour la protection des droits de la personne humaine ou instrument d’évolution de la société?” (1989) 30 *Cahiers de Droit* 237; W. Ian C. Binnie, “Publication Bans: An Examination of Some General Principles” in *Open Justice, La transparence dans le système judiciaire*, *supra* note 28 at 63.

⁶⁷ Holmes, *Governing the press*, *supra* note 11 at 1.

publish. The courts also impose heavy punishments on writers and journalists. Needless to say, the law does not recognize the right to access to information.

Finally, it should be said that press organizations are generally in the hands of large corporations and a powerful few, whose interests determines who and what get printed or aired and reach the public.⁶⁸ A single publisher owns several publications and titles, and puts interests and profits ahead of the services he renders to the audience.⁶⁹ The development of the press as mean of mass communication has significantly limited the people's right to access to media in order to represent different social and political viewpoints. The press is not neutral, and the public's right to know is limited by the boundaries of ownership of the powerful press.⁷⁰ In fact, the process of acquiring, disseminating, and using knowledge, as Thomas Gibbons observes, are "distorted by the media's influence and those who might control that influence."⁷¹

⁶⁸ *Four Theories of the Press*, *supra* note 46 at 4-5; Jeffrey B. Abramson, "Four Criticisms of Press Ethics" in *Democracy and the Mass Media*, *supra* note 24 at 239; and Paul Hoch, *The Newspaper Game, the Political Sociology of the Press, an Inquiry into Behind-the-Scenes Organizations, Financing, and Brainwashing Techniques of the News Media* (London: Calder & Boyars, 1974).

⁶⁹ Lichtenberg, "Foundations and Limits of Freedom of the Press" *supra* note 29 at 103; Lee Bollinger, "Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media" (1976) 75 *Michigan L. Rev.* 1; Hocking, *Freedom of the Press, A Framework of Principle*, *supra* note 13. In Canada, see André Tremblay, "La liberté d'expression au Canada: le cheminement vers le marché libre des idées" in Daniel Turp & G.-A. Beaudoin, eds., *Perspectives canadiennes et européennes des droits de la personne* (Cowansville, Que.: Éditions Yvon Blais, 1986) 281; Trudel, "Liberté de presse ou procès public et équitable?" *supra* note 9 at 251; Trudel, "Liberté d'information et droit du public à l'information" *supra* note 2 at 174; Vallières, "L'impact des garanties inscrites dans les chartes de droits sur la concentration de la presse écrite" *supra* note 3 at 141.

⁷⁰ MacKay, "Freedom of Expression: Is It All Just Talk?" *supra* note 29 at 764. Also Harry Glasbeek, "Comment: Entrenchment of Freedom of Speech for the Press -- Fettering of Freedom of Speech of the People" in *The Media, the Courts, and the Charter*, *supra* note 37 at 101; John Richard & Stuart M. Robertson, *The Charter and the Media* (Ottawa: Canadian Bar Foundation, 1985); Jerome A. Barron, *Freedom of the Press for Whom? The Right of Access to Mass media* (Indiana: Indiana University Press, 1973); and Ted Schwarz, *Free Speech and False Profits, Ethics in the Media* (Cleveland, Ohio: Pilgrim Press, 1996).

⁷¹ Thomas Gibbons, "Impartiality in the Media" and David Goldberg, "Freedom of Speech and Access to the Media" both in Maher, *Freedom of Speech: Basis and Limits*, *supra* note 20 at 72 and 82-85 respectively.

Therefore, speaking of freedom of the press is more likely “to advance the interests of the corporate elite than those of the average citizens.”⁷² If freedom of the press, as Schauer believes, protected the interests of the lone pamphleteer,⁷³ the press should be democratized and the plurality of newspapers restored.⁷⁴ The government could intervene and support certain publications, financially or otherwise, in order to prevent press monopolies and to balance the market power of those with mass publications.⁷⁵ Press monopoly may put freedom of the press at risk. The government’s help may also be required to protect specific cultural attributes⁷⁶ and to guarantee a chance to publish for a greater number of people with different opinions.

⁷² A. Addis & D. Fraser, “Chant Down Babylon: Libertarian Socialism and Free Speech” in MacKay, “Freedom of Expression: Is It All Just Talk?” *supra* note 29 at 720. See William L. Miller, ed., *Alternatives to Freedom: Arguments and Opinions* (New York: Longman, 1995).

⁷³ Schauer, *Free Speech: A Philosophical Enquiry*, *supra* note 10 at 106.

⁷⁴ Karpen, “Freedom of Expression As a Basic Right” *supra* note 12 at 401.

⁷⁵ *Ibid.*

⁷⁶ Such as “Canadian” newspapers in Canada.

I. Freedom of Publication in Shari'a

Freedom of the press, as a modern human rights concept, is unknown in Shari'a. The idea of free press and freedom of publication is not addressed in the works of the contemporary *ulama* either. However, Shari'a's general principles on human rights are applicable here. From the discussions of the previous chapters, one may conclude that Shari'a criteria conflict with international human rights standards on press freedom. The main characteristics of human rights in Shari'a -- i.e., God-given and duty-oriented nature of rights and freedoms, the obligation to speak the truth, and the principle of the commanding good and forbidding evil -- are also present and binding in discussion on press freedom.⁷⁷ Furthermore, Shari'a restrictions and limitations on freedom of expression and speech, freedom of religion, and the right to participate in public life, discussed in Chapter Three, determine the boundaries of press freedom in Shari'a.⁷⁸

The press is free as long as it operates within Shari'a limits.⁷⁹ Whereas freedom of speech is only an obligation to speak the truth,⁸⁰ freedom of the press would be an

⁷⁷ Mohammad Hashim Kamali, "Fundamental Rights of the Individual: An Analysis of *Haqq* (Right) in Islamic Law" (1993) 10 *Am. J. Islamic Social Sciences* 340-66; M. H. Kamali, *Freedom of Expression in Islam* (Kuala Lumpur: Berita, 1994) at 18-24; Abd al-Wafi, *Huquq al-Insan fi al-Islam* [Human Rights in Islam] (Cairo: Matba'ah al-Risalah, n.d.); A. Ahmed An-Na'im, "Human Rights in the Muslim World: Socio-Political Conditions and Scriptural Imperatives, A Preliminary Inquiry" (1990) 3 *Harvard H. R. J.* 22.

⁷⁸ Henry Siegman, "The State and the Individual in Sunni Islam" (1964) 54 *Muslim World* 23; Bassam Tibi, "Islamic Law/Shari'a, Human Rights, Universal Morality and International Relations" (1994) 16 *H. R. Quart.* at 290; Sami Awad Aldeeb Abu-Sahlieh, *Les Musulmans face aux droits de l'homme: religion, droit et politique, étude et document* (Bochum, Germany: D. Winkler, 1994); S. Hossein Nasr, "The Concept and Reality of Freedom in Islam and Islamic Civilization" in Alan S. Rosenbaum, ed., *The Philosophy of Human Rights; International Perspectives* (Westport, Connecticut: Greenwood Press, 1980) at 96.

⁷⁹ Abul Al'a Mawdudi, *Islamic Law and Constitution* (Lahore: Islamic Publications, 1979) at 355-67; Mohammad Selim al-Awa, *On the Political System of the Islamic State* (Indianapolis: American Trust,

obligation to print and broadcast the truth as Shari'a defines it. That is, the press should promote Shari'a teachings, and operate within the main objectives of the Islamic government.⁸¹ It should also educate people, and negate blasphemy and impiety.⁸²

Clearly, the function of the press, in this manner, does not correspond to the idea of freedom of the press as understood in international human rights law and in a free and democratic society. The democratic value and political function of the press -- i.e., an additional check on officials and government policies -- does not fit Shari'a model of the state where the caliph controls all branches of the power.⁸³ Therefore, the press may only disseminate the government news and develop the official plans all within the Islamic principles and Shari'a limits.

Shari'a confers the right to freedom of the press on the condition that it be used for propagation of virtue and truth, not for spreading evil and wickedness.⁸⁴ The right to enjoin the good and forbid evil is not only a right but also an obligation for every

1980) at 88; C. G. Weeramantry, *Islamic Jurisprudence: An International Perspective* (London: Macmillan, 1988) at 124; Abd al-Karim Zaydan, *Al-Fard wa al-Dawlah fi al-Shari'ah al-Islamiyyah* (Gary, Indiana: Al-Ittihad al-Alami li l'Munazzamat al-Tullabiyyah, 1970).

⁸⁰ The Qur'an asks people to speak plainly and not to distort the fact. Qur'an 4:135. See Jack Donnelly, *Universal Human Rights in Theory and practice* (London: Cornell University Press, 1989) at 51.

⁸¹ Mawdudi, *Islamic Law and Constitution*, *supra* note 79 at 153; Ahmed Jalal Hammad, *Hurriyyah al-Ra'y fi al-Maydan al-Siyasi* [Freedom of Opinion in Political Sphere] (Cairo: Dar al-Wafa lil Taba'ah wa al-Nashr, 1987); Muhammed Khidr Husayn, *Al-Hurriyyah fi al-Islam* [Freedom in Islam] (Cairo: Dar al-I'tisam, n.d.).

⁸² Taqi al-Din Ibn Taymiyyah, *Public Duties in Islam: The Institution of Hisbah*, trans. by Muhtar Holland (Licester, UK: Islamic Foundation, 1982); Kamali, *Freedom of Expression in Islam*, *supra* note 77 at 30-35 and 61-71; and Hussein Mehrpoor, *Didghah-ye Jadid dar Masa'el-e Huquqi* [New Ideas in Legal Issues] (Tehran: Ettela'at, 1995) at 140-41.

⁸³ Javid Iqbal, "The Concept of State in Islam" in Mumtaz Ahmad, ed., *State, Politics, and Islam* (Washington, D. C.: American Trust, 1986) 39; Hassan al-Turabi, "The Islamic State" in John Esposito, ed., *Voices of Resurgent Islam* (New York: Oxford University Press, 1983) 241; Anwar G. Chejne, *Succession to the Rule in Islam* (Lahore: Muhammad Ashraf, 1960); A. K. S. Lambton, *State and Government in Medieval Islam* (Oxford: Oxford University Press, 1981); and M. H. Kamali, "The Limits of Power in an Islamic State" 9(1989) 28 *Islamic Studies* 323-53.

Muslim individual and the government as well.⁸⁵ This, in fact, sets the authorities at liberty to censor any material of the press under the pretext of commanding good and forbidding evil; while, in a free and democratic society, it is not up to the government to decide what is proper and what is not. In addition, according to Shari'a, every individual is also entitled to intervene and forbid the publication of improper contents to the extent of his ability to do so without responsibility for any possible compensation.⁸⁶ This also contradicts the modern idea of freedom of the press and may only result in more self-censorship by the press.

Based on Shari'a rules, Muslims are not free to choose other religions or beliefs. Thus, the propagation and promotion of polytheism, blasphemy, and profane beliefs are forbidden in an Islamic society.⁸⁷ Moreover, one may not question or criticize the Islamic foundations and divine laws.⁸⁸ The publication of obscene and pornographic materials are also prohibited. Under Shari'a, the publication of *kutub dhalla*

⁸⁴ Abul Al'a Mawdudi, *Human Rights in Islam* (Leicester, UK: Islamic Foundations, 1986) at 28-29; and Majid Alikhan, "A Comparative Study of Universal Declaration of Human Rights and Declaration of Human Rights in Islam" (1991) 22 *Islam & Modern Age Quart.* at 186-87.

⁸⁵ Mohammad H. Kamali, "Freedom of Expression in Islam: An Analysis of *Fitnah*" (1993) 10 *Am. J. Islamic Social Sciences* at 196; A. Ahmed An-Na'im, *Toward an Islamic Reformation, Civil Liberties, Human Rights, and International Law* (Syracuse: Syracuse University Press, 1990) at 79-80; Abd al-Karim Zaydan, *Majmu'ah Buhuth Fiqhiyyah* [Discussion on the Shari'a] (Baghdad: Maktabah al-Quds, 1975) at 128; and Ibn Taymiyyah, *The Institution of Hisbah*, *supra* note 82. For more on this Qur'anic principle, see Chapter Three, text accompanying notes 172-179.

⁸⁶ "An Analysis of *Fitnah*" *ibid.*; Ibn Qayyim, *Al-Jawziyyah al-Turuq al-Hukmiyyah fi al-Siyasah al-Shariyyah* [Political System in Shari'a] ed. by Muhammad Jamil Ghazi (Cairo: al-Mu'assasah al-Arabiyyah lil Taba'ah wa al-Nashr, 1961) at 278; Kamali, *Freedom of Expression in Islam*, *supra* note 77 at 30-35; Mustafa al-Siba'i, *Ishtirakiyyah al-Islam* [Political System in the Islamic Society] 2nd ed. (Damascus: Dar al-Qawmiyyah lil Taba'ah wa al-Nashr, 1960) at 52; Hammad, *Hurriyyaht al-Ra'y*, *supra* note 81 at 221.

⁸⁷ Muhamed Selim al-Awa, *Punishment in Islamic Law* (Indianapolis: American Trust, 1982) at 43; al-Samara'i, *Ahkam al-Murtad*, at 43-46, 99, and 116; Salim al-Bahnasawi, *Al-Hukm wa Qadiyyah Takfir al-Muslim* [Attribution of Disbelief to a Muslim] 3rd ed. (Kuwait: Dart al-Buhuth al-Ilmiyyah, 1985) at 62; and Kamali, *Freedom of Expression in Islam*, *supra* note 77 at 206-28.

⁸⁸ See Rajab Muhammad Abd al-Halim, *Al-Riddah fi Daw' Mafhum Jadid* [New Concept of Apostasy] (Cairo: Dar al-Nahdah al-Arabiyyah, 1985); Khidr, *Al-Hurriyyah fi al-Islam*, *supra* note 81.

(misleading books) -- i.e., the printing and broadcasting of blasphemous or perverse beliefs and materials -- is prohibited.⁸⁹ According to several sayings and traditions in the *Sunna*, the transaction, trade, or keeping of whatever causes harm and corruption is not permitted.⁹⁰ This ruling includes *kutub dhalla* as well.⁹¹ Thus, the buying, selling, borrowing, keeping, reading, or teaching of misleading publications are prohibited.⁹² All these publications must then be destroyed.⁹³

Kamali places *kutub dhalla* under *fitna* categories⁹⁴ and, referring to a narration from Anas ibn Malik (Imam of Maliki school of Sunni Islam), states:

Literature dealing with vice and pornography, as well as books that distort the truth, advocate lies, and propagate pernicious views and doctrines may be destroyed, for “the harm that

⁸⁹ See generally S. A. Rahman, *The Punishment of Apostasy in Islam*, 2nd ed. (Lahore: Institute of Islamic Culture, 1978); Abd al-Hakim Hasan al-Ili, *Al-Hurriyyat al-Ammah* [Public Freedoms] (Cairo: Dar al-Fikr, 1983); and Abdulaziz Sachedina, “Freedom of Conscience and religion in the Qur’an” in David Little; John Kelsay; & A. Sachedina, eds., *Human Rights and the Conflict of Culture: Western and Islamic Perspectives on Religious Liberty* (Columbia: University of South Carolina Press, 1988) 53-90.

⁹⁰ For example, Imam Jafar al-Sadeq (a Shi’a Imam) is reported to have said: “The sale, trade, keeping, or teaching of whatever brings harm is forbidden.” Al-Hurr al-Ameli (d. 1684 AD), *Wasa’il al-Shi’a* [The Collection of Shi’a Traditions] vol. XII (Tehran: Maktaba Islamia, 1977-78) at 57.

⁹¹ Mohammad Hasan Najafi, *Javahir al-Kalam fi Sharh Shara’e al-Islam* [Shari’a Book] 7th ed., vol. XXII (Beirut: Dar al-Ihya al-Turath al-Arabi, n.d.) at 56.

⁹² Those who are capable of refuting harmful materials are excluded from this ruling. *Ibid.* See other Shari’a books, i.e., Mohaqiq al-Hilli (1182-1256 AD), *Shara’e al-Islam fi Masa’il al-Halal va al-Haram*; Shams al-Din Mohammad (1314-1366 AD), *Al-Lum’a al-Dameshqiya*; Allama al-Hilli (1227-1306 AD), *Tabsira al-Mota’alimin fi al-Ahkam al-Din*, all in *Silsila al-Yanabi al-Fiqhia*, Compiled by Ali Asghar Morvarid, vols. XIV and XXXV (Beirut: Muassisa Fiqh al-Shi’a, 1993).

⁹³ Najafi, *Javahir al-Kalam*, *supra* note 91 at 57.

⁹⁴ For more on the concept of *fitna*, see Chapter Three under “The Concept of *Fitna* and Its Significance on Freedom of Speech under Shari’a”. See also Kamali, *Freedom of Expression in Islam*, *supra* note 77 at 183-206; Kamali, “An Analysis of *Fitna*” *supra* note 85 at 178-98; Abd al-Qadir Awdah, *Al-Tashri al-Jina’i al-Islami Muqarinan bi al-Qanun al-Wad’i* [Islamic Criminal Law, A Comparative Study] vol. I (Beirut: Mu’assasat al-Risala, 1992) at 104-105; and al-Awa, *On the Political System of the Islamic State*, *supra* note 79.

emanates from these is greater than wine vessels or musical instruments. There is no liability for financial loss.”⁹⁵

Like the principle of commanding the good and forbidding evil, the concept of *kutub dhalla* negates the modern idea of freedom of publication and the press and results in self-censorship by the press themselves. It leaves the authorities free to decide on misleading books and materials and to repress independent publications and those critical of government policies. The concept of *kutub dhalla* is not well-defined, and its vague and obscure characteristics may lead to more restriction on press freedom.⁹⁶

⁹⁵ “An Analysis of *Fitna*” *ibid.* at 195-96. Also Ibn Qayyim al-Jawziyyah, *Ighathat al-Lahfan min Makayid al-Shaytan*, ed. by A. al-Baltaji, vol. II (Cairo: Dar al-Turath al-Arabi, 1983).

⁹⁶ In Islamic history, one may find numerous examples of the denial of the right to speak and to write. At the end of this section, it might be of interest to refer to the case of Hussain ibn Mansour al-Hallaj -- perhaps, one of the most tragic examples of the denial of freedom of conscience, thought, and religion as well as the denial of free speech and freedom to write. Hallaj was born in 858 AD in South-Western Iran and later professed Sufism, receiving his Sufi habit in Basra, Iraq. He tried to purify his own heart as prerequisite for the realization of any moral and spiritual vocation on behalf of his community, and developed his position on personal inspiration from God (*ilham*). As an Islamic mystic, he attracted a number of disciples, and preached his notion of “the disappearance of the self in God.” The beliefs and teachings of Hallaj were considered a divergence from the traditional Sufism maintained by the Baghdad School. Moreover, people looked at him for spiritual guidance, which gained him much notoriety, and placed him further in jeopardy as a threat to the established religious and political order. As his language continued to become more abstract and other Sufis attacked his ideas, he was accused of *zandaqa* (heresy) and preaching the overthrow of the Shari’a and the government. He was imprisoned for several years after a *fatwa* (religious decree) was issued against him. His last works were written during this period. Later, Hallaj was tried and condemned to death at the hands of jealous and manipulative government and religious officials. According to Massignon, he was executed, in 922 AD, cruelly and brutally after he was tortured ruthlessly. Most of his writings, including his poems, along with those of his followers, were burned after his death. However, in the minds of his followers, he stood as a witness for “the community unity, the unity of ritual, the unity of the sacred, and the Oneness of God.” See Herbert W. Mason, *Al-Hallaj* (Richmond, Surrey: Curzon Press, 1995); Louis Massignon, *La passion de Husayn Ibn Mansur Hallaj: martyr mystique de l’Islam*, nouvelle édition, vol. I (Paris: Gallimard, 1975), for its English version, see *The passion of al-Hallaj, Mystic and Martyr of Islam*, trans. by Herbert W. Mason, vol. I (Princeton, NJ: Princeton University Press, 1982). Also Ali Mir Fetrus, *Hallaj*, 11th ed. (France: Farhang, 1984). In 977 AD, when an Hallajian *warraq* (book publisher) died in Mecca, among the charges against him was that of possessing “forbidden texts.” Mir Fetrus, *ibid.* at 252.

II. Islamic Human Rights Declarations and Freedom of the Press

We have already argued that Islamic human rights declarations have followed the International Bill of Human Rights only in style and rhetoric, not in content and principles. They have employed modern language and terminology, but imposed Shari'a criteria and restrictions on basic and fundamental human rights and freedoms -- i.e., the rights of women and religious minorities, freedom of expression and speech, and the right to participate in public life.⁹⁷ The status of press freedom is not an exception in these declarations and, no doubt, contradicts international human rights principles and standards.

The 1990 Cairo Declaration does not provide for freedom of the press. One should refer to the general articles and those related to freedom of speech and opinion in this respect.⁹⁸ Providing a general Shari'a qualification, article 24 reads: "All the rights and freedoms stipulated in this Declaration are subject to the Islamic Shari'a."⁹⁹ Article 25 also states: "The Islamic Shari'a is the only source of reference for the explanation or clarification of any of the articles of this Declaration."¹⁰⁰ As already

⁹⁷ Ann Elizabeth Mayer, *Islam and Human Rights, Tradition and Politics* (Boulder, CO: Westview Press, 1991) at 86-91.

⁹⁸ Ann E. Mayer, "Universal Versus Islamic Human Rights: A Clash of Cultures or a Clash with a Construct?" (1994) 15 *Michigan J. Int'l L.* at 335. However, the Universal Declaration of Human Right clearly states that freedom of opinion and expression "includes freedom to ... seek, receive, and impart information and the ideas through any media and regardless of frontiers." The UDHR, *supra* Chapter One note 20, art. 19. The International Covenant on Civil and Political Rights also states that the right to freedom of expression "shall include freedom to seek, receive and impart information and ideas of all kind, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice." The ICCPR, *supra* Chapter One note 20, art. 19(2).

⁹⁹ The 1990 Cairo Declaration, *supra* Chapter Two note 182, art. 24.

¹⁰⁰ *Ibid.* art. 25.

argued, the vague and obscure Shari'a qualifications negate any rights guarantees as protected under international human rights documents.¹⁰¹

Article 22(a) of the Cairo Declaration guarantees the right to free expression as long as it would not contradict the principles of Shari'a.¹⁰² Moreover, article 22(b) provides the right to enjoin the good and forbid evil, according to Shari'a norms. And article 22(c) also prohibits any expression that "may violate sanctities and the dignity of the prophets, undermine moral and ethical values or disintegrate, corrupt, or harm society or weaken its faith."¹⁰³

These vague and value-laden terms and qualifications, as Mayer notes, provides "additional pretext for justifying sweeping censorship" based on Shari'a. They may be used for the curbing of speech and the press "in ways that would suit the political purposes of government, albeit using ostensibly religious criteria."¹⁰⁴ With no attempt at defining Shari'a limits in the Cairo Declaration, these articles could be invoked by the Islamic states only to justify censorship against the press, and to repress and punish the independent publications in Muslim countries.¹⁰⁵ Political rulers can easily censor any publication, arguing that its content corrupts Muslims or weakens their faith.

Therefore, one may conclude that the Cairo Declaration does not provide for freedom of the press; rather, it "believes that Islamic criteria could be used as a criterion

¹⁰¹ Ann E. Mayer, "Islamic Rights or Human Rights: An Iranian Dilemma" (1996) 29 *Iranian Studies*, at 277-78.

¹⁰² The 1990 Cairo Declaration, art. 22(a).

¹⁰³ *Ibid.* arts. 22(b) and 22(c).

¹⁰⁴ "Universal Versus Islamic Human Rights" *supra* note 98 at 335-36.

¹⁰⁵ *Ibid.* at 329 and 336.

for censoring publications.”¹⁰⁶ In practice, Islamic governments and fundamentalist pressure groups call on Shari’a qualifications to curb freedom of speech, and to censor the press and publications.¹⁰⁷ The 1992 Basic Law of Saudi Arabia¹⁰⁸ is a clear example of this kind. It provides no guarantee of press freedom, imposes Shari’a restrictions and limitations on the press, and demands the media, publications, and all means of expression to adhere to state regulations that provide broad and vague bases for censorship.¹⁰⁹

The 1981 Islamic Declaration does not provide for freedom of the press either. It guarantees only freedom of expression within the limits prescribed by Shari’a, and forbids the dissemination of “falsehood” or circulation of any report that “may outrage public decency, or to indulge in slander, innuendo or to cast defamatory aspersions on other persons.”¹¹⁰ Since there are no settled meanings for term such as falsehood and defamation in Shari’a, the scope of these restrictions, once again, is left vague and uncertain.¹¹¹ Article 12 also provides:

There shall be no bar on the dissemination of information provided it does not endanger the security of the society or the state and is confined within the limits imposed by Shari’a.¹¹²

¹⁰⁶ *Ibid.* at 336.

¹⁰⁷ See generally Human Rights Watch, *Guardians of Thought, Limits on Freedom of Expression in Iran* (New York: Middle East Watch, 1993); Karim Alrawi, “The Still Small Voice within Egypt” INDEX on Censorship, February 1992, at 25; and Ami Ayalon, *The Press in the Arab Middle East, a History* (New York: Oxford University Press, 1995).

¹⁰⁸ “Universal Versus Islamic Human rights” *supra* note 98 at 350-64. Also Human Rights Watch, *Empty Reforms, Saudi Arabia’s New Basic Law* (New York: Middle East Watch, 1992).

¹⁰⁹ 1992 Basic Law of Saudi Arabia, art. 39.

¹¹⁰ The 1981 Islamic Declaration, *supra* Chapter Two note 180, art. 12(a).

¹¹¹ Mayer, *Islam and Human Rights, Tradition and Politics*, *supra* note 97 at 173-74.

¹¹² The 1981 Islamic Declaration, art. 12(d).

The 1979 al-Azhar Draft provides only for “the natural basic rights of religious and intellectual beliefs” within the limits imposed by Shari’a, which does not even cover freedom of speech, not to mention freedom of the press.¹¹³

As Mayer states, the limitations on freedom of speech and the press “using the criteria of one religion are unacceptable under international human rights norms.”¹¹⁴ Islamic human rights declarations neither address nor provide for freedom of the press. They can only be employed by political rulers to hinder people’s right to free speech and to censor free press and publications.

¹¹³ The 1979 al-Azhar Draft, *supra* Chapter Two note 181, art. 29.

¹¹⁴ *Islam and Human Rights, Tradition and Politics*, *supra* note 97 at 173-74. Article 10(a) of the European Convention on Human Rights reads: “Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers...” reprinted in *Press Law and Practice*, *supra* note 27 at 297.

III. Freedom of the Press in Iran's Constitutional and Legal System

Introduction

During a few historical opportunities discussed in Chapter Three,¹¹⁵ the press was always the first institution to advocate the idea of constitutionalism, freedom, and democracy in Iran. In the absence of modern political parties, the press, in greater number and diversity, undertook the responsibility to inform, educate, and inspire people to build a free and democratic society. The press targeted despotic regimes, revealed their corrupt nature and wrong-doings, and strengthened people's resistance against political rules.¹¹⁶ Consequently, as soon as despotic governments gained control over the course of the events, the press were first to be closed down, and the publishers and editors to be imprisoned, tortured, and executed.¹¹⁷

The Constitutional Revolution (1906-1911) witnessed tensions and conflicts as human rights were accommodated within an Islamic framework.¹¹⁸ Despite the

¹¹⁵ See Chapter Three, introduction to Section III.

¹¹⁶ See generally John Foran, ed., *A Century of Revolution: Social Movements in Iran* (Minneapolis: University of Minnesota Press, 1994); Ervand Abrahamian, *Iran Between Two Revolutions* (Princeton: Princeton University Press, 1982); and Carl Boggs, *The Two Revolutions* (Boston: South End Press, 1984).

¹¹⁷ Nikki R. Keddie, *Iran: Religion and Society* (London: Frank Cass, 1980); Auetis Sultanzadeh, "Le mouvement révolutionnaire en Iran" in Cosroe Chaqueri, ed., *La social-démocratie en Iran* (Florence: Mazdak Press, 1979) 68-72; and Janet Afary, "Social Democracy and the Iranian Constitutional Revolution of 1906-1911" in Foran, *A Century of Revolution*, *supra* note 116 at 21-43.

¹¹⁸ Mayer, *Islam and Human Rights, Tradition and Politics*, *supra* note 97 at 78; Abdul-Hadi Hairi, *Shi'ism and Constitutionalism in Iran* (Leiden: E. J. Brill, 1977); Said Amir Arjomand, "The Ulama's Traditionalist Opposition to Parliamentarism, 1907-1909" (1981) 17 *Middle Eastern Studies* 174-90; Mangol Bayat, *Iran's First Revolution: Shi'ism and the Constitutional Revolution of 1905-1909* (New York: Oxford University Press, 1991); Venessa Martin, "Shaikh Fazlallah Nuri and the Iranian

opposition of the conservative *ulama* to the ideas of freedom and equality, the Constitution guaranteed freedom of expression and the press.¹¹⁹ Article 20 of the 1907 Supplementary to the Constitution provided:

All publications, except heretical books and matters harmful to the perspicuous religion [of Islam] are free, and are exempted from censorship. If, however, anything should be discovered in them contrary to the Press Law [passed in February 1908] the publisher or writer is liable to punishment according to that law.¹²⁰

The article placed Shari'a qualifications on freedom of the press. As noted, subjecting rights to Shari'a criteria is contrary to the very idea of fundamental rights and freedoms. However, considering the opposition of powerful conservative *ulama* to rights guarantees in the constitution, the mere guarantee of press freedom and the cancellation of censorship was a victory for the advocates of constitutionalism.¹²¹ Article 79 also required the presence of a jury in the press trials.¹²²

Revolution, 1905-1909" (1987) 23 *Middle Eastern Studies* 39-53; and Mansour Moaddel, "The Shi'i *Ulama* and the State in Iran" (1986) 15 *Theory & Society* 519-56.

¹¹⁹ See generally Venessa Martin, *Islam and Modernism: The Iranian Revolution of 1906* (London: I. B. Tauris, 1989); Janet Afary, *The Iranian Constitutional Revolution, 1906-1911: Grassroots Democracy, Social Democracy, and the Origins of Feminism* (New York: Columbia University Press, 1996) at 89-115.

¹²⁰ The 1907 Supplementary to the Constitution, art. 20.

¹²¹ The conservative *ulama* still found the article un-Islamic. Shaikh Fazl Allah Nuri continued to attack it as contrary to Islamic principles and values. See Hairi, *Shi'ism and Constitutionalism*, *supra* note 118; Bayat, *Shi'ism and the Constitutional Revolution*, *supra* note 118; Martin, "Shaikh Fazlallah Nuri and the Iranian Revolution" *supra* note 118 at 39-53; Michael M. Fischer, *Iran: From Religious Dispute to Revolution* (Cambridge: Harvard University Press, 1980); Abdul-Karim Lahidji, "Constitutionalism and Clerical Authority" in Said Amir Arjomand, ed., *Authority and Political Culture in Shi'ism* (Albany: State University of New York Press, 1988) 133-58.

¹²² The 1907 Supplementary to the Constitution, art. 79.

According to Afary, between 1905 and 1911, over two hundred periodicals began publication.¹²³ The influential and radical newspapers and weeklies -- i.e., *Habl al-Matin*, *Sur-e Israfil*, and *Musavat* -- challenged the political, economic, and cultural institutions of the country, and gained a reputation as advocates of civil rights and freedoms.¹²⁴ They also defied the hegemony of the clerical establishment, and dared to defend and practice freedom of expression.¹²⁵ Although the press tried to maintain their freedom at any cost, the return of despotic rule and oppression put an end to press freedom in the Constitutional Era. Most publications were then banned by the government, and the publishers and writers faced long prison terms and execution.¹²⁶ The same story repeated itself in the 1950-1953 Nationalization of Oil Industry movement¹²⁷ and the early years of the 1979 Islamic Revolution.¹²⁸

¹²³ Afary, *The Iranian Constitutional Revolution*, *supra* note 119 at 116-21.

¹²⁴ *Ibid.* Also Sorour Soroudi, "Sur-e Esrafil [Newspaper], 1907-1908: Social and Political Ideology" (1988) 24 *Middle Eastern Studies* 230-43; Mohamad Tavakoli-Taraghi, "Refashioning Iran: Language and Culture During the Constitutional Revolution" (1990) 23 *Iranian Studies* 77-101; and Juan R. I. Cole, "Iranian Millenarianism and Democratic Thought in the Nineteenth Century" (1992) 24 *Int'l J. Middle East Studies* 1-26.

¹²⁵ *The Iranian Constitutional Revolution*, *supra* note 119 at 140-41. Also generally Goël Kohan, *Tarikh-e Sansour dar Mat'bou'at-e Iran* [The History of Censorship in the Iranian Press] 2 vols. (Tehran: Aghah, 1984-5); Edward G. Browne, *The Press and Poetry of Modern Persia* (Cambridge: Cambridge University Press, 1914); and Theda Skocpol, "Rentier State and Shi'a Islam in the Iranian Revolution" (1982) 11 *Theory & Society* 265-304.

¹²⁶ Afary, *The Iranian Constitutional Revolution*, *ibid.* at 289-90; Hairi, *Shi'ism and Constitutionalism in Iran*, *supra* note 118.

¹²⁷ See Chapter Three, Introduction to Section III. Also generally Amin Banani, *The Modernization of Iran: 1921-1941* (Stanford: Stanford University Press, 1961); Sussan Siavashi, *Liberal Nationalism in Iran: The Failure of a Movement* (Boulder, CO: Westview Press, 1990); Sepehr Zabih, *The Mossadegh Era: Roots of the Iranian Revolution* (Chicago: Lake View Press, 1982); Homa Katouzian, *Mussadiq and the Struggle for Power in Iran* (London: I. B. Tauris, 1999); James A. Bill & Wm. Roger Louis, eds., *Musaddiq, Iranian Nationalism and Oil* (London: I. B. Tauris, 1988); Mostafa Elm, *Oil, Power, and Principles: Iran's Oil Nationalization and Its Aftermath* (Syracuse: Syracuse University Press, 1992).

¹²⁸ See Chapter Three, Introduction to Section III. Also Mayer, *Islam and Human Rights, Tradition and Politics*, *supra* note 97 at 78-79; Asghar Schirazi, *The Constitution of Iran, Politics and the State in the Islamic Republic*, trans. by John O'kane (London: I. B. Tauris, 1997) 135; Shaul Bakhash, *The Reign of the Ayatollahs, Iran and the Islamic Revolution* (New York: Basic Books, 1984); Donald Newton Wilber, *Iran, Past and Present: From Monarchy to Islamic Republic* (Princeton: Princeton University Press, 1981); Sepehr Zabih, *Iran's Revolutionary Upheaval: An Interpretive Essay* (San Francisco:

Apart from these historical opportunities, the history of the press in Iran is associated with the history of censorship.¹²⁹ The primary functions of the press were always ignored, and the press became the propaganda machinery of the political rulers. The severe application of censorship and the financial dependence on the government prevented the growth of an independent press in contemporary Iranian history. In the following sections, the study presents the problematic of the press in Iran, and examines the guarantees and protections the press enjoys in the constitutional and legal system of the country.

A. The Problematic of the Press in Today's Iran

Following the end of the war with Iraq in 1988 and the relative openings of the late 1980s and early 1990s, journalists took advantage of the relatively liberal stance of the moderate government of then-President Rafsanjani on social and cultural developments, and the number of publications rose to comparatively high levels.¹³⁰

Alchemy Books, 1979); Said Amir Arjomand, ed., *From Nationalism to Revolutionary Islam* (Albany: State University of New York Press, 1984); S. Amir Arjomand, *The Turban for the Crown: The Islamic Revolution in Iran* (New York: Oxford University Press, 1988); S. K. Fardoun & M. Mashayekhi, eds., *Iran: Political Culture in the Islamic Republic* (London: 1992); Said Amir Arjomand, "Constitutions and the Struggle for Political Rights: A Study in the Modernization of Political Traditions" (1992) 33 *Archives of European Sociology* 39-82.

¹²⁹ Kohan, *The History of Censorship in the Iranian Press*, *supra* note 125.

¹³⁰ Schirazi, *The Constitution of Iran*, *supra* note 128 at 137; Robin Wright, "Dateline Tehran: A Revolution Implodes" (1996) 103 *Foreign Policy* at 171; Human Rights Watch, *Guardians of Thought*, *supra* note 107 at 33; and Reporters Sans Frontières, *Report on Freedom of the Press Throughout the World (1993)* (Great Britain: Ashford Colour Press, 1993) at 150. Also Nouchine Yavari-d'Hellencourt, "La difficile réémergence d'une presse indépendance en Iran: *Kyan* [Magazine], une revue en quête de modernité islamique" (1995) 20 *Cahier d'Études sur la Méditerranée orientale et le Monde Turco-Iranien* 91-114.

With the great diversity in form and content displayed by the press, public discussion seemed more open and dynamic on a wide range of issues. However, The conservative hardliners accused the government of adopting a liberal attitude in the cultural sphere and forced the then-Minister of Culture and Islamic Guidance to resign from his post in 1992.¹³¹ They took over the ministry, gained the government's support, and led the so-called struggle against "Western cultural inroads".¹³²

Since then, constitutional guarantees on freedom of the press have been ignored or denied; basic legal safeguards have been absent; and fair trial procedures in prosecutions have been violated, including the introduction of new charges during the proceeding without new evidence, particularly in trials that have taken place before the Islamic Revolutionary Courts.¹³³ The laws requiring that press offenses be tried openly and in the presence of a jury were also widely ignored.¹³⁴ The government strictly defined the parameters of permissible dissent or criticism, and used severe mechanisms of control for tolerated discourse. Its pressure was also intensified with repressive conduct through subtle harassment.¹³⁵

In practice, the government stepped up attacks on the press. Editors and journalists who published critical commentary risked suspension and prosecution, and

¹³¹ The Minister was Mohammad Khatami, now the President of the Islamic Republic. See Reporters Sans Frontières, (1993) at 151-52; *Human Rights Watch World Report (1993)*; and *Amnesty International Annual Report (1993)*.

¹³² Since then, the term "Western cultural inroads" has been the pretext for suppression of the press, journalists, and intellectuals. Each year, the government allocates a special budget to certain institutions to carry on the struggle against cultural onslaught. See Azadeh Kian, "L'invasion culturelle occidentale: mythe ou réalité?" (1995) 20 *Cahier d'Études sur la Méditerranée orientale et le Monde Turco-Iranien* 73-90.

¹³³ See *supra* Chapter Three, note 348. Also *Human Rights Watch World Report*, (1995) at 273-74 and (1997) at 283.

¹³⁴ *Guardians of Thought*, *supra* note 107 at 12.

faced arbitrary arrests and imprisonment.¹³⁶ Many publishers and staff were charged with, and imprisoned and imprisoned for, writings allegedly offending Shari'a, or contrary to state policies. The denial of freedom of the press in Iran has been well documented.¹³⁷ Several publications were ordered to close down, and "others stopped publication after government subsidies for paper were revoked."¹³⁸ The Islamic Revolutionary Courts were behind most of the closure of publications.¹³⁹ The pressure against the press culminated in vigilante attacks on individuals or groups who dared to question the government. Thugs linked to certain political factions took the law into their own hands and harassed critics of all kind, ransacking newspaper offices, burning properties, and beating writers and journalists.¹⁴⁰ In the face of increasing hardships and repression, writers and press editors protested the growing restrictions and mob attacks,

¹³⁵ *Ibid.* at 33 and 125; Schrazi, *The Constitution of Iran*, *supra* note 128 at 135.

¹³⁶ *Human Rights Watch World Report*, (1997) at 282; and Wright, "Dateline Tehran: A Revolution Implodes" *supra* note 130 at 171.

¹³⁷ For example, Abbas Abdi, editor of daily Salam, Abbas Maroufi, editor of monthly Gardoun, Abolghasem Golbaf, publisher of monthly Gozaresh, were arrested, charged, or imprisoned. For more cases, see *Human Rights Watch World Report*, (1995) at 270 and (1997) at 282-83; Schirazi, *The Constitution of Iran*, *supra* note 128 at 137; Reporters Sans Frontières, (1993) at 150-52; and *Guardians of Thought*, *supra* note 107 at 46-54.

¹³⁸ Wright, "Dateline Tehran: A revolution Implodes" *supra* note 130 at 171. For the cases of closed publications, such as Havades, Takapu, Payam-e Daneshju, Rah-e Mojahed, Jahan-e Islam, and Tous, see *Human Rights Watch World Report*, (1995) at 270, (1996) at 276-77, and (1997) at 282; Schirazi, *ibid.* at 137-38; Reporters Sans Frontières, *ibid.*; and *Guardians of Thought*, *ibid.* at 40-6 and 111-13.

¹³⁹ Despite the announcement of the then-head of the Judiciary that "all press and political trials must be held in the presence of juries and attorneys" and otherwise, he added, "the verdicts will be nullified by the Supreme Court." Yet the prosecution of some press was subsequently initiated and/or tried by the Islamic Revolutionary Courts, where trials are routinely held behind closed doors, without the presence of a jury. The government invoked the jurisdiction of these courts in offenses, including those relating to journalists, writers, and intellectuals, who, in its opinion, endangered the interests of the Islamic Republic. The courts have been widely criticized for their disregard for due process and also harsh sentences. See *Iran Focus* (UK) vol. 5 no. 1, Jan.-Feb. 1992; *Iran: Press Freedom Under the "Moderates"* (London: Article 19, 1992) at 10; *Guardians of Thought*, *ibid.* at 24-5; *Human Rights Watch World Report*, (1996) at 277; and Reporters Sans Frontières, (1993) at 150.

¹⁴⁰ For example, in August 1995, the Morgh Amin Publishing House was firebombed in Tehran because it had published a book condemned by vigilantes as un-Islamic. The attack, praised by hardliners, sparked a controversy in the press. See *Human Rights Watch World Report*, (1996) at 277 and (1997) at 283.

and called on the government to deal legally with arbitrary clamp-downs on freedom of expression and the press. These efforts had no result.¹⁴¹ A high governmental official even said that the press does not understand its limits and acts “without wisdom and common sense.”¹⁴²

With the election of President Khatami in 1997, followed by a relative openness in the society, the movement for democracy, once again, was born in the press. As a result, the number of publications dramatically increased; and the new government promoted greater press freedom.¹⁴³ In the absence of independent political parties, many newspapers and magazines, with independent editorial positions, played an important role in political scene, and became forums for debate about different cultural, social, and political issues.¹⁴⁴ The press continued to raise public awareness “about alternative viewpoints and are the major mobilizing tool of reformists seeking greater respect for rights within the Islamic Republic.”¹⁴⁵

¹⁴¹ In October 1994, a group of 134 renowned writers and poets wrote an open letter to the government criticizing “anti-democratic practices,” such as restrictions on freedom of expression and harassment and persecution of writers, and asked for an end to censorship and hardships. Many of them received death threats, and some were arrested. See *Human Rights Watch World Report*, (1995) at 273-74; Wright, “Dateline Tehran: A Revolution Implodes” *supra* note 130 at 171. For other cases of protests, see *Human Rights Watch World Report*, (1996) at 276-77 and (1997) at 283. Saidei Sirjani, a prolific writer, was arrested for circulating open letters to the authorities, denouncing censorship on books and the lack of freedom in Iran. He died mysteriously in detention. See *Human Rights Watch World Report*, (1995) at 270 and (1996) at 276-77. Faraj Sarkouhi editor of monthly *Adineh*, was also held for months without contact with family members or his lawyers. He was then sentenced to a prison term for allegedly attempting to leave the country illegally. See *Human Rights Watch World Report*, (1998) at 330.

¹⁴² The statement by Mostafa Mirsalim, then-Minister of Culture and Islamic Guidance. See *Human Rights Watch World Report*, (1997) at 283.

¹⁴³ Human Rights Watch, “As Fragile as a Crystal Glass: Press Freedom in Iran” (New York: Middle East and North Africa Division, October 1999) Sec. III at 1.

¹⁴⁴ “As Fragile as a Crystal Glass” *ibid.*; *Human Rights Watch World Report*, (1998-2001); and *Amnesty International Annual Report*, (1998-2001). The history of the press in Iran is associated with advocacy of political freedoms and struggle against censorship.

¹⁴⁵ “As Fragile as a Crystal Glass” *ibid.*

However, the press has paid a high price for its freedom. The conservative hardliners who controlled the Parliament until May 2000 and held sway over the Judiciary and the police forces, resisted press freedom and fought back in any way they could. The pressure was manifested in laws passed by the legislature and intensified by the severe and harsh measures taken by the Judiciary. Since 1997, the pressure on the press has increased, and editors and journalists of the reformists publications continue to be subject to recurrent waves of repression.¹⁴⁶

In the past four years, many editors and writers have been detained by order of the Press Court,¹⁴⁷ and charged with different crimes and offenses.¹⁴⁸ They have been subject to interrogation and torture, and accused of “circulating harmful propaganda and causing confusion.”¹⁴⁹ The banning of newspapers and magazines critical of conservative institutions also continued, and many publications were forced to close down under official pressure.¹⁵⁰ Ignoring many legal provisions, the hardline judges of

¹⁴⁶ Hardliners warned the press not to criticize Islamic principles and the official policies of the state and threatened crack down on liberal publications. See Reuters, Tehran, Sept. 17, 1999. The Special Court for Clergy (see Chapter Three text accompanying note 355) also barred the press from citing Ayatollah Hossein-Ali Montazeri, one of the great *ulama* and a leading dissident, who has been under house arrest for years now. See Agence France Presse, “Court Bans Mention of Iranian Cleric” Tehran, March 4, 1999.

¹⁴⁷ These courts are special branches of judicial courts, which deal with press offenses. According to the Constitution, press offenses should be tried openly and in the presence of a jury.

¹⁴⁸ For example, Mohammad-Reza Zaeri, editor of monthly *Khaneh*, Mohammad Mahdavi, editor of *Gozaresh-e Rouz*, Heshmatollah Tabarzadi, editor of *Hoviat-e Khish*, and Jaleh Oskou’i, female editor of weekly *Panjshanbe-ha* were detained and charged with publishing lies and insults or distorting the truth. See “As Fragile as a Crystal Glass” *supra* note 143 Sec. III at 1-3; Tehran Times, “Managing Director, Editor-in-Chief Detained” June 19, 1999; BBC World News: Middle East, July 28, 1999, Agence France Presse, “Director of Weekly Arrested” June 16, 1999 and “Iran Jails Female Editor” Oct. 11, 1999.

¹⁴⁹ *Human Rights Watch World Report*, (1998) at 330-31.

¹⁵⁰ For example, the newspapers and magazines *Aftab Gardoun*, *Panjshanbeh-ha*, *Gozaresh-e Rouz*, *Zan*, *Khaneh*, *Jame’a*, *Neshat*, *Rah-e No*, *Tavana*, *Adineh*, were all closed down by the Press Court on charges of publishing lies and disrupting public order, publishing immoral and false materials, or articles against Islam and general interests. See “As fragile as a Crystal Glass” *supra* note 143 Sec. III at 2-4; Reuters, “Iran Closes Publisher Over ‘Blasphemous’ Book” Tehran, Oct. 15, 1999; Agence France Presse, “Liberal Magazine Banned in Iran” Tehran, Feb. 3, 1998; Iran daily, “Court Verdicts on Zan, Bavar

the Press Court played a great role in this respect.¹⁵¹ The judges even illegally dismissed several jurors who had protested their actions and absented themselves.¹⁵² The Islamic Revolutionary Courts¹⁵³ and the Special Court for Clergy¹⁵⁴ were also involved in curbing the press. The judiciary seems to believe that it is neither responsible for its actions nor accountable to the public.¹⁵⁵ In addition, the pressure of gangs of thugs continued to mount. They still attack publishing houses, ransack newspaper offices, and beat up journalists and writers.¹⁵⁶ So far, no action has been

Publications” Tehran, Dec. 15, 1998; IRNA, “License of Daily *Jame'a* Revoked” Tehran, June 10, 1998; Associated Press, “Iran Closes Two Liberal Newspapers” Tehran, Sept. 20, 1998. The publication of a satirical play, allegedly blasphemous, in *Moj*, an obscure student newsletter, also caused an uproar between reformist and conservative camps. The Press Court intervened, closed the publication, and sentenced its editor and writers to several years in prison. They were later pardoned. See Agence France Presse, “Iranian Students Stage Rival Demonstrations” Tehran, Nov. 9, 1999 and Reuters, Sept. 28, 1999.

¹⁵¹ Contrary to the law which states only managing directors of publications are accountable to the court, the Press Court has repeatedly summoned editors and writers, charged them with different crimes, and, at times, sentenced them to prison terms. The court also requires that accused persons post high bails in order to avoid detention. See “As fragile as a Crystal Glass” *ibid.* at 3-5; Iran News, “Court Summons *Zan* Caricaturist” Apr. 11, 1999 and Reuters, Tehran, Apr. 10, 1999.

¹⁵² See “As Fragile as a Crystal Glass” *ibid.* at 3; Tehran Times, “Ousted Members of Press Jury Lodge Complaint with Judicial Disciplinary” Apr. 28, 1999; and Reuters, “Iran Jury Holds Ground Against Hard-line Judge” Tehran, Nov. 7, 1999.

¹⁵³ For example, in the cases of dailies *Toos* and *Zan*, charges were brought against writers, editors, and publishers in the Islamic Revolutionary Courts. The Court closed down the newspapers and, in the case of *Toos*, detained its editors and writers, *incommunicado*, on charges of publishing articles against “security and general interests” and “enmity with God”. “As Fragile as a Crystal Glass” *ibid.* at 2-4; IRNA, “*Toos* Managers Arrested” Sept. 16, 1998; and Associated Press, Sept. 19, 1998.

¹⁵⁴ The Special Court tried and sentenced Mohsen Kadivar and Mohsen Saeidzadeh, in June 1998 and Feb. 1999, respectively, on charges arising from their journalistic writings about the Islamic Government and reform in family law and women’s rights accordingly. See “As Fragile as a Crystal Glass” *ibid.* at 4. The Court also ordered the closure of daily *Salam*, and convicted its cleric managing director on charges of misleading the public. The case of Abdullah Nouri, publisher of daily *Khordad*, was discussed in the last chapter. Nouri is now serving his five year prison term, and his newspaper is shut down.

¹⁵⁵ Mohammad Yazdi, former head of the Judiciary, once exploded in anger against the press, and said that it was none of the media’s business whom they sent to jail. “What is going on?” he asked. “We tell those people: What is going on? Why would we tell you what is going on? It does not concern you ... Do we have to tell you the reason for an arrest?” Iran Times, Jan. 9, 1998. On the idea’s of Yazdi, see also *supra* Chapter One note 144.

¹⁵⁶ For example, the militants ransacked the offices of independent Iran-e Farda magazine and attacked *Tous* editorial offices and beat up its editor, Mashallah Shamsolvaezin. “As Fragile as a Crystal Glass” *ibid.* at 1-2; *Human Rights Watch World Report*, (1998) at 330-31; and Associated Press, “Iran Militants Assault Journalists” Tehran, Aug. 1, 1998.

taken against the perpetrators. However, government of President Khatami usually condemns the attacks.¹⁵⁷

For a while, the control of the press through closure, prosecution, and intimidation failed to succeed. Following each closure, the reformists begin a new publication with the same editorial team and the same format and content. This angered hardliners.¹⁵⁸ The more the conflict over the press freedom continued to intensify and reformists seemed to win the battle, the more conservatives tended to resort to violence.¹⁵⁹

Shortly after the sixth parliamentary elections in February 2000, in which the reformists won big, the hardliners' pressure on the press reached its climax.¹⁶⁰ In April 2000, the Judiciary suspended nearly 20 pro-reform newspapers and magazines all at once. It has closed down a dozen more since then.¹⁶¹ These publications were all charged with printing materials against Islamic principles, spreading lies to distort public opinion, insulting religious sanctities, and undermining national security.¹⁶² The

¹⁵⁷ "As Fragile as a Crystal Glass" *ibid.* at 1; IRNA, "Islamic Guidance Minister Objects to Law Enforcement Interference" Apr. 15, 1998; and Salam Daily, "Press on Mayor's Case" Tehran, Apr. 19, 1998.

¹⁵⁸ Dailies Jame'a, Tous, Neshat, and Asr-e Azadeghan were all published by the same editorial staff each after that its forerunner was closed down by the officials. Although the conservatives objected, there was no law banning the publication of a new title by the same staff. See "As Fragile as a Crystal Glass" *ibid.*; and New York Times, "Iran Reformers Start Another Paper" Oct. 10, 1999.

¹⁵⁹ As mentioned in Chapter Three, rogue agents of the Intelligence Ministry were involved in the wave of murders and disappearances of known writers and intellectuals.

¹⁶⁰ The militants, seemingly linked to hardliners, assassinated Saeed Hajarian, a prominent reformist and the managing director of daily Sobh-e Emrooz, and threatened some others to death. See Reuters, Tehran, March 12, 2000.

¹⁶¹ Human Rights Watch World Report (2001); Reuters, "Iran Judiciary Bans 12 Reformist Publications" Tehran, April 24, 2000. Earlier, the supreme leader had said that reformist newspapers had been turned to "bases of enemy." His remarks were widely seen as signaling a campaign against press freedom. *Ibid.*

¹⁶² Among those closed were the mass-circulation Fath, Asr-e Azadeghan, Mosharekat, Sobh-e Emrooz, Bayan, and Bahar. See IRNA, Tehran, April 27, June 25, August 30, 2000; Associated Press, April 24, 2000; and Reuters, Aug. 8, 2000. More newspapers and magazines were closed in March 2001.

Judiciary also jailed many prominent editors and journalists and sentenced them to lengthy prison terms.¹⁶³ The hardliners also forced Ataollah Mohajerani, the reformist Minister of Culture, to resign.¹⁶⁴ Needless to say, pressure groups continue to attack publications regularly.¹⁶⁵ Political parties and several international organizations expressed concern about the situation and condemned months of successive newspaper closure and the jailing of journalists.¹⁶⁶

At present, there is no independent newspaper or magazine. Most reformist publications are also closed. Internet and foreign media have become the main sources of news and information. Basic legal safeguards for freedom of the press are lacking. The press remains vulnerable and hostage to pressures and arbitrary closures and journalists to persecution. Hardline conservatives are determined to derail reform movement.

¹⁶³ Like Akbar Ganji, Mashallah Shamsolvaezin, Emadoddin Baqi, Latif Safari, Ibrahim Nabavi, Masoud Behnoud, Ahmad Zeidabady, and Masoud Behnoud. See IRNA, Oct. 22, 28, and 29, 2000, and Jan. 11, and Feb. 28, 2001; Reuters, Tehran, April 23, 2000; Agence France Presse, Jan. 11, 2001. All these journalists had only expressed their views on social and political issues. Akbar Ganji (see Chapter Three note 372), a best-selling author, had exposed a network of state-sponsored death squads that were responsible for killing writers and intellectuals.

¹⁶⁴ Despite the fact that both the President and the Parliament backed his policy of promoting press freedom. The President gave in to mounting pressure from the Leader, who had several times condemned the policies of the Ministry. See Reuters, "Iran's Cultural Architect Steps Down" Tehran, Dec. 14, 2000.

¹⁶⁵ In September 2000, they raided a bookstore in the city of Isfahan and confiscated some 700 books, magazines, and compact disks, which they believed were anti-Islamic. Tehran Times, Sept. 20, 2000. In January 2001, vigilantes raided several cinemas in protest at what they considered "obscene scenes" shown in a film they were screening. In a film, women play instruments in a music group which, according to the Shari'a, is not allowed in front of a non-female audience. Entekhab Daily, Tehran, Jan. 2, 2001; and DPA, Tehran, Jan. 3, 2001.

¹⁶⁶ The United Nations' General Assembly expressed concern about "the deterioration of the situation with regard to freedom of opinion and expression, in particular at restrictions on the freedom of the press." Reuters, The United Nations, Dec. 4, 2000. The International Press Institute (IPI) and the Committee to Protect Journalists (CPJ) also condemned clamp-down. See Agence France Presse, Vienna, Aug. 7, 2000; and CPJ Newsletter, New York, Aug. 8, 2000. See also *Human Rights Watch World Report (2001)*. In January 2001, in a letter to the Leader, a leading reformist student group blamed him for newspaper closing and critics being arrested. "The press is symbol of freedom of expression, and it is being closed under direct orders from you." The letter reads. Associated Press, Tehran, Jan. 17, 2001. In

B. Press Freedom in the Constitution

Due to the lack of customary law and legal precedents and jurisprudence set by independent judiciary in Iran,¹⁶⁷ one could refer only to the Constitution in order to comprehend the principles, scope, and extent of press freedom in constitutional and legal system of the country.

The constitutional provisions governing public discourse and rights guarantees do not provide an effective protection for freedom of the press. These provisions consist of a framework of international human rights documents and Shari'a content and principles.¹⁶⁸ Freedom of the press is not adequately protected, and constitutional guarantees are subject to Shari'a limitation and conditional on compliance with Shari'a standards.¹⁶⁹ The constitutional provisions to which Shari'a qualifications are added may be used by the government as the basis for limiting or denying human rights and freedoms that individuals could claim under international human rights norms and

February 2001, Reporters Sans Frontières stated that Iran is now the country with the most journalists in prison in the world. RSF, press release, Feb. 14, 2001.

¹⁶⁷ The lack of legal precedents and jurisprudence is a more general problem of interpretation in the Iranian legal system. There is only the Shari'a. It is the main source of law, jurisprudence, and interpretation.

¹⁶⁸ Mayer, "Islamic Rights or Human Rights: An Iranian Dilemma" *supra* note 101 at 269 and 372.

¹⁶⁹ *Guardians of Thought*, *supra* note 107 at 23; Schirazi, *The Constitution of Iran*, *supra* note 128; Said Amir Arjomand, "Qavanin-e Asasi-e Iran dar Chaharchub-e Tarikhi va Tatbiqi" [Iran's Constitutions in a Historical and Comparative Framework] (1993) 16 *Negah-e No* 6-19; Roger M. Savory, "Islam and Democracy: The Case of the Islamic Republic of Iran" in C. E. Bosworth, Charles Issawi, R. Savory, *et al.*, eds., *The Islamic World from Classical to Modern Times, Essays in Honor of Bernard Lewis* (Princeton: Darwin Press, 1989) at 831-37. See also Shahrough Akhavi, "Iran: Implementation of an Islamic State" in John Esposito, ed., *Islam in Asia: Religion, Politics and Society* (New York: Oxford University Press, 1987) 32-40.

value,¹⁷⁰ especially when traditional interpretations of Shari'a are hard to reconcile with modern human rights standards -- i.e., the equality of men and women and the ban on discrimination based on religion. Meanwhile, Iran has subscribed to the Universal Declaration of Human Rights and has ratified the International Covenant on Civil and Political Rights. It continues to adhere to the modern system of international law and is consequently bound by international norms guaranteeing the basic and fundamental human rights and freedoms.¹⁷¹

Article 24 of the Constitution is the only constitutional provision on press freedom.¹⁷² This article constitutes the principle of press freedom. The last phrase of the article also means that the law should elaborate only the exceptions with regard to Islam and public rights, not the scope and extent of the principle of press freedom itself. However, it is interpreted that Shari'a defines the concept and scope of press freedom.¹⁷³ Considering the fact that Shari'a qualifications are subject to differing interpretations, the article leaves the authorities to restrict the press at will. Acknowledging the principle of press freedom but imposing undefined Shari'a standards makes constitutional guarantees meaningless.¹⁷⁴

¹⁷⁰ For example, see the UDHR, *supra* Chapter One note 20, art. 19; and the ICCPR, *supra* Chapter One note 20, art. 19. Also Mayer, *Islam and Human Rights, Tradition and Politics*, *supra* note 97 at 82; M. H. A. Reisman, "Some Reflections on Human Rights and Clerical Claim to Political Power" (1994) 19 *Yale J. Int'l L.* at 514; Lahidji, "Constitutionalism and Clerical Authority" *supra* note 121 at 133-58; Amir Arjomand, "Constitutions and the Struggle for Political Rights" *supra* note 128 at 39-82; and Bakhsh, *The Reign of the Ayatollahs*, *supra* note 128 at 77-78.

¹⁷¹ For more on this, see Chapter Two, text accompanying note 320.

¹⁷² Article 24 states: "Publications and the press are free to express matters, except those that are detrimental to the foundations of Islam, or to the public rights. The law will provide the details."

¹⁷³ The articles of the Press law which adds more exceptions to press freedom will be discussed below.

¹⁷⁴ See "Islamic Rights or Human Rights: An Iranian Dilemma" *supra* note 101 at 269 and 273.

Therefore, article 24 does not seem to have a positive approach towards freedom of the press; nor does it provide an adequate basis for protecting press freedom. Unlike the 1907 Supplementary to the Constitution, article 24 does not even prohibit censorship.¹⁷⁵ It is crippled by vague and unclear exceptions, and does not cover all the press activities concerned.¹⁷⁶

Freedom of the press is further undermined by an affirmative duty to promote the good and to prohibit evil, as construed by Shari'a.¹⁷⁷ Therefore, censorship in Iran is both "proscriptive and prescriptive."¹⁷⁸ In other words, legal provisions set the limits of discourse and dictate its content as well. The press are then required to observe Shari'a limitations and write in a manner that "conforms to the prevailing value system."¹⁷⁹ All this indicates that the authoritarian theory of the press is applied in the Iran's constitutional system, where the press are subject to definite control by the state and may discuss matters only within the limits determined by the government. In Iran, even state-set restraints are not clearly defined.

The Constitution sets special conditions for the trial of press offenses. Article 168 states:

¹⁷⁵ The 1907 Supplementary to the Constitution, art. 20.

¹⁷⁶ *Guardians of Thought*, *supra* note 107 at 11.

¹⁷⁷ The Constitution, *supra* Chapter Two note 270, art. 8. See *Human Rights Watch World Report*, (1998) at 329, (1997) at 283, and (1996) at 277; Wright, "Dateline Tehran: A Revolution Implodes" *supra* note 130 at 171; Schirazi, *The Constitution of Iran*, *supra* note 128 at 61-81 and 150-57; Savory, "Islam and Democracy: The Case of the Islamic Republic of Iran" *supra* note 169 at 831-37; Abdol-Karim Lahidji, "Mavared-e Tanaqoz-e Qanun-e Asasi-ye Jomhuri-ye Eslami-ye Iran ba Elamiyeh-e Jahani-e Hoquq-e Bashar" [The Cases of Contradiction of the Constitution of the Islamic Republic of Iran with the Universal declaration of Human Rights] (1985) 5 Alefba 19-41.

¹⁷⁸ *Guardians of Thought*, *supra* note 107 at 11.

¹⁷⁹ *Ibid.*

Political and press offenses will be tried openly and in the presence of a jury in judicial courts. The manner in which the jury will be selected, their qualifications, and the limits of their authority as well as the definition of political crimes shall be determined by law *in accordance with Islamic principles*.¹⁸⁰

This provision provides constitutional guarantee for press freedom and protects journalists against arbitrary trials held behind closed doors. It is, however, restricted by Shari'a criteria, leaving the legal protection undefined, especially when one notes that the concept of jury is unknown in Shari'a and that the question of the presence of jury in court is not addressed in Shari'a at all.¹⁸¹ In practice, many press offenses are dealt with in the Islamic Revolutionary Courts -- where jury is mostly absent -- or in the Special Court for Clergy, which is independent of the Judiciary and operates under the supervision of the leader.

It should also be pointed out that the Constitution places the mass media (radio and television) under the direct supervision of the leader. Article 175 reads:

In the Radio and Television of the Islamic Republic of Iran, freedom of expression and ideas should be guaranteed *in accordance with Islamic principles* and the interests of the country. The appointment and dismissal of the head of the Radio and Television of the Islamic republic of Iran rests with the leader. A council consisting of two representatives each of the president, the head of the Judiciary, and the Islamic

¹⁸⁰ The Constitution, art. 168 [emphasis added].

¹⁸¹ In Islamic tradition, it is suggested that a group of the *ulama* be present before the judge in order for the judge to seek their council if necessary and avoid mistakes. Useful though this idea may be, it is totally different from the modern concept of jury and its role and function in trials. The consultation of the *ulama* has no binding effect on the judge. He may proceed and execute his own decision. See also Mayer, *Islam and Human Rights, Tradition and Politics*, *supra* note 97 at 82.

Consultative Assembly [the Parliament] shall supervise the functioning of this organization.¹⁸²

Moreover, article 44 places radio and television, along with all large-scale and major industries, within the state sector, which will be publicly owned and administered by the state.¹⁸³ The preamble of the Constitution also requires that the mass media “must strictly refrain from diffusion and propagation of destructive and anti-Islamic practices.”¹⁸⁴ With regard to the role and importance of radio and television, especially in Iran, where the rate of illiteracy is still high, it is contradictory to international human rights standards that the law does not allow individuals to establish non-governmental radio and television stations at national or local levels.¹⁸⁵ In practice, only the voice of officials finds a place in the state-owned radio and television network, and the news and reports with respect to public discourse and events are mostly censored.¹⁸⁶

¹⁸² The Constitution, art. 175 [emphasis added].

¹⁸³ *Ibid.* art. 44. It might be argued that article 44 refers only to the state-owned radio and television organization supervised by the government and does not prohibit private ownership of radio and television stations. See Reza Eslami Somea & Ali Ghanbarpour, “Public Participation in the Establishment of non-Governmental Radio and Television Stations” Tehran, *Asr-e Azadeghan Newspaper*, March 26, 2000, at 5. The official interpretation of the article, however, prohibits public participation in this respect.

¹⁸⁴ The Constitution, the Preamble.

¹⁸⁵ In the view of this study, license to set up a radio or television station should be granted by an independent commission.

¹⁸⁶ The mass appeal of the programs of state-owned radio and television is limited by their lack of diversity and largely political and religious content. Although the use of satellites is prohibited, satellite dishes and foreign radio broadcasts are widely used. See *Guardians of Thought*, *supra* note 107 at 66-67.

C. The Press Law

The 1979 Press Act, passed by the Revolutionary Council,¹⁸⁷ required that all the existing publications obtain a permit from the government.¹⁸⁸ As a result of the denial of permit, many publications closed, and, within two-three years, the opposition press ceased to exist.¹⁸⁹ The governmental control over the press was intensified with the passage of a more comprehensive law, approved by the Parliament in 1986 -- setting out operating guidelines for newspapers and magazines.

Like the Constitution itself, the 1986 Press Law contained ambiguities and broadly-worded language and provided no clear measures for freedom of the press.¹⁹⁰ The limits were defined in complex and arbitrary ways, and restrictions were considered appropriate when the material “is detrimental to the foundations of Islam” without providing clear definition of those foundations in question.¹⁹¹ The law added further exceptions, and there was uncertainty as to the governing norms, press offenses, and punishments.¹⁹² The law provided judicial as well as administrative closure of the press and allowed courts other than press court to intervene in certain cases.¹⁹³

¹⁸⁷ The Revolutionary Council performed legislative functions prior to the convening of the Parliament in 1980.

¹⁸⁸ The 1979 Press Act, arts. 2-7.

¹⁸⁹ See *Guardians of Thought*, *supra* note 107 at 33-34.

¹⁹⁰ The 1986 Press Law, arts. 2 and 3.

¹⁹¹ *Ibid.* art. 6.1

¹⁹² *Ibid.* arts. 6 and 23-33.

¹⁹³ *Ibid.* arts. 27-29.

In the Spring 2000, the outgoing hardline-dominated Fifth Parliament amended the 1986 Press Law, adopting harsh new measures against the press.¹⁹⁴ The 2000 Press Law provides “greater control over the activities of journalists”¹⁹⁵ and restricts further press freedom in Iran. The new amendments, among others, provide the governmental body with powers to order the closure of a publication without prior court approval; empower the judge to overrule jury decisions in certain cases; legalize the involvement of the Islamic Revolutionary Courts and the Special Court for Clergy in press trials; and hold journalists and writers accountable for their articles and press activities.

The reformist Sixth Parliament attempted to revise the 2000 Press Law, but was barred by the Supreme Leader to discuss the motion. In a letter to the Parliament, he wrote that “the bill is not legitimate and not in interest of the system and the revolution.”¹⁹⁶ Since then, the Guardian Council¹⁹⁷ has rejected even the Parliament’s interpretation of the press law, as contrary to Shari’a.¹⁹⁸ The following is a brief review of the 2000 Press Law.

The Press Law applies only to publications that appear regularly with sequenced numbers.¹⁹⁹ It expands on the constitutional duty to “enjoin the good and forbid evil,”

¹⁹⁴ Agence France Presse, “Conservatives Step Up Pressure on Reformists in Iran” Tehran, April 18, 2000.

¹⁹⁵ Human Rights Watch, “As Fragile As Crystal Glass” *supra* note 143 Sec. I at 2.

¹⁹⁶ He also wrote: “If the enemies of Islam and the Revolution infiltrate the press, this will be a big danger to national security and the people’s religious beliefs. ... The current law [the 2000 Press law] has somewhat been able to prevent such a disaster.” IRNA, Aug. 6, 2000; and Guardian, “Iran’s Leader Stamps on Freedom” Tehran, Aug. 7, 2000.

¹⁹⁷ See Chapter Two, text accompanying notes 295-297.

¹⁹⁸ The Council stated: “Considering the Supreme Leader’s order concerning the press law, the parliamentary approval was considered contrary to the Shari’a.” Associated Press, “Iran Body Dismissed Newspaper Bill” Tehran, Nov. 2, 2000.

¹⁹⁹ The 2000 Press Law, art. 1. The process of censorship and content control of books and films will be mentioned as the discussion proceeds.

and places an affirmative duty on the press to promote public good and educate and propagate Islamic culture and particular values and ideologies,²⁰⁰ subject to different interpretations and arbitrary applications. Furthermore, the Press Law sets vaguely-defined restrictions on the press, and forbids the newspapers and magazines from publishing certain materials.²⁰¹ The law gives little meaningful guidance to the press on these prohibitions, which may be easily manipulated, providing the authorities “with ample opportunity to censor, restrict, and find offenses.”²⁰²

The Press Law also adds more exceptions to those mentioned in the Constitution. Article 24 of the Constitution provides for the freedom of the press except when the material in question is detrimental to Islamic principles or to public rights. The Press Law, however, not only adds Shari’a laws to those exceptions but also regulates the principle of press freedom itself. The Law forbids the press from engaging in many cultural and social issues allegedly “harmful to Islam”.²⁰³ This, indeed, violates the constitutional provision and undermines further the protection of press freedom.

²⁰⁰ Contemplating a specific role and content for the press, article 2 stipulates that the press has a mission

- a. to enlighten public opinion and raise the level of people’s knowledge and awareness ...
- b. to promote and advance the goals set forth in the Constitution ...
- c. to struggle against false and divisive social boundaries and to avoid setting different strata in society against one another by classifying them on the base of race, language, and custom;
- d. to fight against the manifestations of colonial culture (e.g. prodigality, waste, vanity, ...)
- e. ...

²⁰¹ Article 6 prohibits publishing of materials that contradict “Islamic foundations,” violate “the principles of the Islamic republic,” spread “prostitution” or “wastefulness,” propagate “excessive consumption,” create “division among different social groups and classes,” or threaten “security, integrity, and interests of the state.” Article 6.10 bans images of women in publications if they do not conform to a strict dress code. It also bans any discussion on the protection of women’s rights that contradicts Shari’a rules. Article 6.12 bans the publication of articles critical of the Constitution.

²⁰² “As Fragile as a Crystal Glass” *supra* note 143 Sec. IV at 1.

²⁰³ The 2000 Press Law, art. 6.

The Press Law forbids all censorship and government control of the press. It states:

No official or unofficial authority has the right to exert pressure on the press for the publication of any material or article, or attempt to censor or control the press.²⁰⁴

The terms of this article have not always been honored, and the article itself may contradict all the restrictions noted above.²⁰⁵ Moreover, the law prescribes heavy punishments for contents deemed inappropriate. This may cause journalists to be far more cautious. Although subsequent restrictions are recognized under international law,²⁰⁶ the possibility of heavy punishment would certainly lead to self-censorship. Other mechanisms -- i.e., the government failure to renew permits and deprivation of government-subsidized papers -- also serve as effective means of control and pervasive censorship.

The Press Law also prohibits printing or publication without an official permit²⁰⁷ and requires that all newspapers and magazines obtain permit from the government before commencing publication.²⁰⁸ This seems contradictory to the principle of press freedom provided in the constitution. The law restricts the eligibility to start a publication and limits the right to publish to those who exhibit what is

²⁰⁴ *Ibid.* art. 4.

²⁰⁵ *Guardians of Thought*, *supra* note 107 at 25.

²⁰⁶ See Schauer, *Free Speech: A philosophical Enquiry*, *supra* note 10 at 151-52.

²⁰⁷ The 2000 Press Law, art. 7(a).

²⁰⁸ *Ibid.* art. 8.

considered “moral fitness,”²⁰⁹ subject to abuse and manipulation. The eligibility of all applicants must be approved by the Intelligence Ministry, Justice Department, and the police.²¹⁰

The press matters are monitored by the Supervisory Press Board in the Ministry of Culture and Islamic Guidance.²¹¹ The Board issues permits for publication, looks into allegations of press offenses, and submits a statement to the Press Court requesting prosecution if legal action is deemed necessary.²¹² The Board may reject any publication request on the grounds that application does not fit the qualifications required by the law.²¹³ In numerous cases, the Board is empowered to close publications by administrative order.²¹⁴ The power and jurisdiction of the Supervisory Press Board, dominated by government representatives, are not clearly defined in the law. Its power to close publications contravenes constitutional provisions -- e.g., article 168, which requires that the press offenses be dealt with openly and in court.

The Press Law requires that press offenses be prosecuted in the court and before a jury.²¹⁵ A council composed of a representative from the Ministry of Culture, head of

²⁰⁹ *Ibid.* art. 9(4). Article 9.a(6) requires applicants be committed to the Constitution. Articles 9.b(5) and 9.b(8) also forbade opponents of the Islamic Republic to be employed in industry or to have any kind of press activity.

²¹⁰ *Ibid.* art. 9.b(6). In December 2000, Justice Department declared many reformists, including government officials and several parliament deputies, incompetent and ineligible to start publication. *Hamshahri Newspaper*, Tehran, Dec. 6, 2000.

²¹¹ The Board consists of a Supreme Court judge, the Minister of Culture or his representative, a member of the Parliament, a university professor assigned by the Minister of Higher Education, a managing director of a publication elected by the press, a professor from religious seminaries, and a member of Cultural Revolution Supreme Council. *Ibid.* art. 10.

²¹² *Ibid.* arts. 11 and 12.

²¹³ *Ibid.* art. 13.

²¹⁴ Publication of materials contrary to Islamic foundations and the Shari'a, insulting the Leader or the “recognized sources of emulation” (the great *ulama*), and repeatedly insulting public morals are a few instances in this respect. *Ibid.* arts. 27 and 28.

²¹⁵ *Ibid.* art. 34.

the courts of justice, head of Islamic Propagation Organization, Friday prayer leader, and the head of city council in each locality where the court is convened selects the press jury from a variety of social groups for two years.²¹⁶ After hearing a case, the jury decides on the guilt or innocence of the defendant and, if recommending a conviction, on whether the criminal deserves a reduced sentence.²¹⁷ The process of jury composition is initiated by the government, and jury members are selected by the officials. This undermines the role of jury as a safeguard for freedom of the press and questions the impartiality of jurors.

The power and role of the jury is not clearly stated in the law. For instance, if the jury finds the defendant guilty, the court may choose not to follow the jury decision and acquit him.²¹⁸ The presence of jury is not required in appeal hearings.²¹⁹ In certain cases,²²⁰ the law allows the involvement of the Islamic Revolutionary Courts and the Special Court for Clergy in press trials.²²¹ The jury in these courts is either absent or is selected by the court.²²² Both these courts disregard international standards of due process and offer few safeguards to defendants.²²³

²¹⁶ *Ibid.* art. 36. In practice, such juries are mostly made up of a mixture of hardline clerics, government officials, and editors of government-controlled publications. See “As Fragile As a Crystal Glass” *supra* note 143 Sec. IV at 2.

²¹⁷ The 2000 Press Law, art. 43.

²¹⁸ *Ibid.* art. 43(2).

²¹⁹ *Ibid.* art. 43(3).

²²⁰ Such as insulting Islam or the publication of materials contrary to national security. *Ibid.* arts. 24-26 and 29.

²²¹ *Ibid.* art. 34. The trials are usually held behind the closed doors.

²²² The jurors in the Special Court for Clergy are all clerics.

²²³ Human Rights Watch, “As Fragile As a Crystal Glass” *supra* note 143.

Regarding punishments, any violation of the law may lead to suspension or closure of publication and the prosecution and imprisonment of those responsible.²²⁴ In many cases, the Press Law empowers the Press Court to order closure of publications²²⁵ and imposes criminal penalties on editors and writers for press offenses.²²⁶ Contrary to international standards according to which only managing directors are responsible for all the materials published, the Press Law also holds editors and writers equally accountable.²²⁷ In addition, the type and scope of punishment in several cases is not defined; it is left to the judge's discretion to impose a *tazir*²²⁸ punishment on individuals.²²⁹ The law even stipulates that insulting Islam and its sanctities in the press could lead to the crime of apostasy -- punishable by death.²³⁰

Books and films are regulated separately and governed by regulations issued by the government. Unlike the press, the contents of books and films must be verified, in advance, by a censorship office. Authors and film producers need to secure permission to publish or produce their work. According to the vaguely-worded requirements of the Regulations on Book Publication,²³¹ books must serve particular objectives and promote certain principles and values.²³² The regulations also indicate materials harmful to the principles of Islam and public rights, and prohibit the publication of

²²⁴ *Guardians of Thought*, *supra* note 107 at 34.

²²⁵ The 2000 Press Law, arts. 23(3), 27, 28, and 31.

²²⁶ *Ibid.* art. 9.b(7) and 24-27.

²²⁷ *Ibid.*

²²⁸ See Chapter Two text accompanying notes 63-64.

²²⁹ The 2000 Press Law, arts. 24-29 and 31-33.

²³⁰ *Ibid.* art. 26.

²³¹ The Cultural Revolution Supreme Council approved the Regulations on Book Publication in May 1988, and the Ministry of Culture issued related directives.

²³² Books are required to encourage, among others, "reasonable and knowledgeable defense of political, economic, and cultural independence," "guarding the positive outcome of the Islamic Revolution," and

certain materials.²³³ In addition, the regulations require the Ministry of Culture and Islamic Guidance to set up a commission to oversee the publication of books and their compliance with article 24 of the Constitution.²³⁴ The commission supervises the censorship process for publication of books and other printed matters and issues approval permits at two stages of the publication process before a book's final release.²³⁵ The process must be repeated with every renewed edition of print run of the book.

The regulations governing film production,²³⁶ too, outline the objectives, forbidden topics, and the role of the councils to oversee the censorship process of film production.²³⁷ Four councils within the Ministry of Culture and Islamic Guidance are involved in separate stages of supervision, production, and censorship of films.²³⁸ It may take years to obtain a permit from the councils. Films shown abroad also need a

"confronting foreign cultural and political inroads." The Regulation on Book Publication, *ibid.* art. 3.a(5).

²³³ It forbids the publication of materials that would "profane and deny the meaning of religion," "propagate the objectives of destructive and unlawful groups and strayed sects," "defend monarchic and dictatorial regimes," and "insult or weaken national pride and patriotism and create loss of self-confidence before the culture, civilization, and imperialistic regimes of the West or the East." *Ibid.* art. 3.b.

²³⁴ *Ibid.* art. 4.

²³⁵ If the Commission disapproves of portions of the book, it will notify the publisher or the author with verbal instructions to make necessary changes and resubmit the book for consideration. This, of course, will result in significant additional costs. A ban on a book will lead to irrecoverable loss. See *Guardians of Thought*, *supra* note 107 at 73.

²³⁶ The Regulations on Film Production were approved by the Cabinet and issued by the Ministry of Culture in August 1989.

²³⁷ *Ibid.* Also the Regulations on the Issuance of Permit for Film Screening, 1983, revised in August 1985; and the Regulation on Policies and Methods of Film Production, Distribution, and Screening, 1993. See *Guardians of Thought*, *supra* note 107 at 30-32.

²³⁸ One to review a summary of the screenplay, one to review the full screenplay, one to review the completed film and issue or withhold a release permit, and the forth to review films denied release permit. See the 1985 Regulations, *ibid.*; the 1989 Regulations on Film Production; and the 1993 Regulations, *ibid.* Also *Guardians of Thought*, *ibid.* at 29-30.

special permit from the Ministry.²³⁹ Since the 1997 presidential election, the government has, in practice, loosened the process of censorship and control of book publication and film production.

²³⁹ The 1985 Regulations, *ibid.* art. 5. *Guardians of Thought, ibid.* at 94.

Conclusion

In the view of this thesis, the modern concept of human rights is the legal and political standard that represents the entitlement of all human beings. It pertains to individuals simply because they are human beings, irrespective of their religion, gender, or any other social or cultural characteristics. Rooted in human nature and human dignity, human rights and freedoms are universal, inalienable, interdependent, and indivisible.

Basic human rights and standards of conduct are articulated in numerous international documents, such as the International Bill of Human Rights. The modern idea of human rights is a relatively new challenge facing non-Western cultures. This thesis attempted to assess the challenge of human rights in Shari'a, examining its principles, characteristics, and standards, especially with respect to the principle of the equality of all citizens before the law. It also analyzed the notions of freedom and freedom of expression under Shari'a. We conclude that, judged according to international standards, Shari'a rights are not human rights per se. They are based on complex and vague traditions, subject to different and often conflicting interpretations.

Individualism, liberty, and equality are not established notions of Shari'a. The concepts of the human being as individual and of human rights as entitlements are not recognized in Shari'a. Rights are the privilege of God and constitute duties and obligations. They are subject to Shari'a qualifications, and are limited based on gender

and faith. Moreover, the conception of democracy is unknown in the Shari'a model of the state, and the right to equal participation of citizens in public life is not protected. The freedom of expression and freedom of thought, conscience, and religion are not guaranteed. In sum, Shari'a lacks the modern notion of human rights, and its principles and criteria contradict, and are hard to reconcile with, international human rights norms and standards.

We have argued that the application of Shari'a -- criminal law in particular -- is problematic, and would result in difficulties and hardships in Muslim countries. The law of apostasy runs contrary to the principles of pluralism and toleration. Discrimination against women however is considered lawful. Shari'a laws are invoked by undemocratic and repressive Islamic states to further limit human rights and suppress political opposition, using Islam as a pretext for denying rights.

Muslim reformists have been preoccupied with the incompatibility of Shari'a and modern human rights law. They have attempted to provide interpretations of Shari'a sources that conform to the modern notion of human rights and freedoms. However, Islamic reform ideas have not been translated into legal terms and provisions. Of course, in response to world support for the protection of human rights standards, as well as international pressure on Islamic states, following reports on their human rights record, many Muslim countries have accommodated some legal reform in family law or have stopped enforcing Shari'a criminal law altogether.

However, we argued that traditional mechanisms of reform within the framework of Shari'a are not adequate for achieving the necessary degree of reform.

We suggested that such reform in human rights law could only be achieved through broader religious and cultural initiatives based on a cross-cultural dialogue which addresses Shari'a deficiencies in public law and provides a new interpretation compatible with modern human rights law. We also argued that the efficiency of pragmatic solutions and changes in legal practice remains limited. These adjustments neither address the fundamental problems nor provide a structural solution for serious legal reforms. The study submits that essential reform cannot be achieved within a Shari'a context, which cannot but contradict universal human rights norms.

From a different perspective, this thesis also located the objective foundations of human rights in reason and human dignity. Therefore, the issue of human rights, like that of justice and democracy, is extra-religious in nature, comprising those basic values that deal with all human beings equally. In our view, human rights cannot be determined by religious criteria and qualifications alone. Human rights are derived from, and are directly attributed to, the fundamental characteristics of the human personality.

Any legal system, including Shari'a, should accept the reality of the modern concept of the nation state in international law and accommodate the recognition of cultural diversity and the equality of all citizens before the law. Muslim countries should promote the idea of a free and democratic society and guarantee their citizenry rights as individuals. Islamic human rights declarations should recognize fundamental universal human rights and provide adequate protections for civil and political rights

and liberties, without subjecting those rights to Shari'a qualifications and criteria. This would certainly improve the human rights situation in Muslim countries.

In Iran, traditional religious norms still govern the discourse on social and political matters. Since the Constitutional Revolution (1906-1911) Western elements have been incorporated into the national culture, but the traditional character of society has remained mostly intact. Iranian society has experienced some degree of modernization, but transition from tradition to modernity has been neither rationalized nor realized. Under despotic regimes, people always distanced themselves from governments, and the culture of dialogue and intellectual debates on social issues rarely blossomed. Social institutions and civil society have not yet been established; the conceptions of individual, individual rights, and citizenry are not fully recognized; and the ideas of constitutionalism, democracy, and political liberties are relatively unknown.

The traditional features of Iranian society are reflected in the country's constitutional and legal system as well. The supremacy of Shari'a over all types of law is the main characteristic of the constitution. Our study concludes that Iran's legal system does not recognize the modern conception of human rights and freedoms. Legal provisions do not institute adequate legal and administrative guarantees and safeguards. They are more rhetoric than substance. Human rights are qualified on the basis of gender and faith, and the freedom of expression and freedom of religion are restricted. Constitutionally, the study argued that the theocratic nature of the government in Iran -- based on the concept of the absolute guardianship of the jurisprudent -- contradicts the

principle of the separation of powers and democratic values in the conduct of public affairs. Political freedoms are non-existent, and freedom of the press is not guaranteed.

The thesis submits that the problem of human rights in Iran's system originates from its theological approach to the question of rights and is rooted in traditional religious beliefs and practices. As long as Shari'a is regarded as the theoretical structure and source of rights, a legal reform that conforms to international human rights norms and standards is not feasible. A substantial reform is needed. The establishment and institutionalization of a civil society should be founded by free will of the people based on democratic values, pluralism and guarantee of citizens' rights. The Constitution of the Islamic Republic should recognize human rights as individual entitlements applicable to all, without discrimination against women and religious minorities. Constitutional articles -- i.e., articles 12-14, 19, and 20 -- should be amended to allow for protection of the principle of equality of all citizens.

Moreover, the study recommends that articles 24, 26, and 27 of the Constitution be amended in order to guarantee freedom of expression -- including freedom of speech and freedom of the press -- and freedom of association without being subjected to the vague and undefined qualifications of Shari'a. The political system of the country should be democratized, accommodating the right to participate in public life for all citizens -- without the approbatory supervision of the Guardian Council (article 99 of the Constitution). The independence of the judiciary and judicial protections should also be guaranteed. The judiciary should end arbitrary detentions and summary trials of

political activists, writers, and journalists. It should confront and prosecute vigilantes who attack individuals, political meeting and rallies, and destroy property.

The thesis also suggests that article 23 of the Constitution be amended to protect freedom of thought, conscience, and religion, including freedom to change religion. Freedom of religion is an unqualified and distinctive right of universal application. People should be free from social or legal coercion to exercise their religious liberty and to follow the religion of their choice. Iran's Criminal Code should abolish the law of apostasy as well as cruel, inhuman and degrading punishments.

Finally, this study proposes that the Press Law be revised and amended. The restrictions on press freedom must be removed and freedom of the press guaranteed and protected consistent with international human rights instruments and in accordance with the norms and standards set out in the International Bill of Human Rights, to which Iran is a party. The Press Law must cease all punitive measures against the press and journalists arising from their criticism or deviation from government policy, and protect an appeal to an independent tribunal. A fair and public hearing should be held in presence of a jury -- composed of representatives from different walks of life, not the government -- before an impartial and competent judicial body. The involvement of the Islamic Revolutionary Courts and the Special Court for Clergy in press offenses should be prohibited. The Press Law should eliminate the issuance of permits for the press by the government so that restriction requirements for publications do not infringe on freedom of the press. The law should abolish the censorship process for the publication of books and film production. The Constitution should also be amended to prohibit the

state monopoly over mass media (article 175), and to allow independent radio and television stations.

The recent reform movement in Iran should experience a transition in the form of discourse. The idea of reform should arise out of contemporary realities, not be compelled to conform strictly with cultural and religious traditions. A civil society and a democratic government cannot be realized unless the reform movement theorizes modernism and the conceptions of pluralism, democracy, and individual rights. This process requires a cultural dialogue and an intellectual debate on social and political issues among both reformists and the public at large. The ability of Iranian society to acknowledge the modern notion of human rights and to appreciate the application of these rights would certainly guarantee the development of the reform movement toward a true civil society, where rights are recognized and freedoms protected.

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Glossary¹

Abd: Slave, as opposed to *hurr*.

Adl: Justice.

Ahkam al-khamsa: Five rulings of Shari'a, namely, *wajib*, *haram*, *mandub*, *makruh*, and *mubah*.

Ahkam: Pl. of *hukm*; rules; regulations; principles.

Ahl al-kitab: The people of the book; those who believe in one of the divine religious scriptures recognized in Islam.

Allah: God the Creator.

Aman: The contract of unbelievers with the Muslim state in order to stay in Islamic territories.

Amr bi al-ma'ruf wa nahy an al-munkir: The Qur'anic principle of commanding the good and prohibiting the evil.

Aql: Reason; wisdom.

Batil: Falsehood.

Bay'at: Oath of allegiance to the Islamic ruler.

Bid'a: Illicit innovation, as opposed to valid precedent.

Bughat: Armed political dissidents.

Dar al-harb: Land of war; territories at war with Islamic state.

Dar al-Islam: Muslim-governed territories, as opposed to *dar al-kufr*.

Dar al-Kufr: Non-Muslim territories, as opposed to *dar al-Islam*.

¹ For more on Islamic technical terms, see Mohammed Arkoun, *Rethinking Islam; Common Questions, Uncommon Answers*, trans. & ed. by Robert D. Lee (Boulder, CO: Westview Press, 1994) at 131-34; M. Cherif Bassiouni, ed., *The Islamic Criminal Justice System* (New York: Oceana, 1982) at 251-52; Mohammed Hashim Kamali, *Freedom of Expression in Islam* (Kuala Lumpur: Breta, 1994) at 291-94; Joseph Schacht, *An Introduction to Islamic Law* (Oxford: Clarendon, 1964).

Dharura: Necessity.

Dhimma: The contract of a recognized religious minority with Muslim authority.

Dhimmis: Recognized religious minorities (usually Christians and Jews).

Diyya: Monetary compensation for non-*qisas* crimes; compensation paid to surviving blood relatives of a victim.

Fahisha: Abomination; obscene act.

Fard ayni: Personal obligation, as opposed to *fard kafa'i*.

Fard kafa'i: Collective obligation of the community as a whole, as opposed to *fard ayni*.

Fasad al-qasd: Ill-intent.

Fatwa: Religious decree given by a jurist.

Fiqh: Islamic jurisprudence; refers to the opinions and commentaries of *ulama* and religious scholars; the specific and personal opinions of Muslim jurists.

Fisq al-amal: Sinful deeds.

Fitna: Upheaval; waging of war; temptation; sedition.

Fitnat al-shahwat: Verbal and behavioral passion or impulses.

Fitnat al-shubahat: Seditious speech

Foqaha: Pl. of *faqih*; Muslim jurists.

Hadd: Pl. *hudud*; lawful punishment; limit; definition.

Hadith: Sayings and teachings of the Prophet. In Shi'ite tradition, also sayings of imams.

Hanafi, Hanbali, Maliki, and Shafi'i: The four Sunni schools of jurisprudence.

Haqq al-Allah: The right or claim of God.

Haqq al-nas: The right or claim of the individual.

Haqq: Right. *Haqq* has no comprehensive meaning in Shari'a, and is accorded different legal, moral, and religious meanings.

Haram: Forbidden.

Hawa: Passion.

Hijab: The veil. The principle of *hijab* requires women to cover their bodies and hair except face and hands.

Hisbah: The principle of commanding good and forbidding evil in public life.

Hudud: Pl. of *hadd*; the major punishments; offenses for which prescribed punishments are strictly applied without allowing discretion to either official or private body or person.

Hukm: Ruling; injunction.

Huquq: Pl. of *haqq*.

Hurr: Free man, as opposed to *abd*.

Hurriyya: Freedom.

Hurriyyat al-mu'aradah: Freedom to criticize.

Hurriyyat al-ra'y: Freedom of opinion; freedom of speech.

Ibaha: Permissibility.

Ijma: Consensus among Muslim jurists.

Ijtihad: Independent legal reasoning leading to new judgment; endeavor of an Islamic scholar to find solutions for today's problems by studying the original sources and considering the basic principles.

Ikhtiyar: Free will.

Ilham: Personal inspiration from God.

Imam: Leading authority of a school of jurisprudence. In Shi'ite tradition, Ali (the fourth caliph) and his descendants; leader of the Islamic nation.

Imamat: The leadership of infallible imams.

Irtidad: Apostasy.

Istihsan: Legal or social preference.

Ithna Ashari: A Shi'ite school of thought believing in the twelve imams; faith of the majority of Iranians; officially recognized faith in the Constitution of the Islamic Republic of Iran.

Jabr: Determinism.

Jahiliyya: Pre-Islamic time or traditions.

Jihad: Armed struggle for a holy cause; in moral sense, struggling against evil or striving for excellence.

Jiz'ya: A special poll tax on *dhimmis*.

Kalâm: Islamic theology.

Khalifa: Caliph, leader of the Islamic world.

Khalwa: Gazing or intimate proximity between members of the opposite sexes; the presence alone with strangers of opposite sex; illicit privacy.

Khilafa: Caliphate; the classical Islamic theory of political legitimacy and authority.

Kufr: Blasphemy; disbelief; denying of Islam by one's words or conduct.

Kutub dhalla: Misleading books.

Ma'ruf: Good; the approved custom of Muslim society.

Ma'siya: Sin.

Makruh: Reprehensible; blameworthy yet legally not punishable.

Mandub: Recommended; praiseworthy.

Maslaha: Public good, benefit, or interest.

Mazhab: Islamic school of thought.

Mubah: Permissible.

Muharibah: Armed or highway robbery; resorting to arms in order to frighten people.

Muharibun: Apolitical rebels.

Munkar: Evil; disapproved and contrary to the established values of Shari'a.

Murtad al-fitri: An apostate who was born Muslim, as opposed to *murtad al-milli*.

Murtad al-milli: An apostate who was not born Muslim but who converted to Islam and then leaves it.

Murtadd: Apostate; a person who has renounced Islam.

Nasiha: Sincere advice.

Naskh: Abrogation or repeal.

Nijasa: Filthy; unclean.

Qadhf: False accusation of fornication; carries a *hadd* punishment of eighty lashes of the whip.

Qawama: Guardianship of the men over the women.

Qiyas: Analogical reasoning, traditionally used in Sunni jurisprudence, which extends a given ruling to a new case.

Qur'an: The holy book of Muslims.

Qysas: Retaliatory punishment for certain crimes against the person -- i.e., homicide, bodily harms and injuries.

Ra'y: Personal opinion.

Ra'y al-batil: Void opinion.

Ra'y al-madhmum: Blameworthy or objectionable opinion.

Ra'y al-sahih: Praiseworthy opinion.

Ridda: Apostasy.

Shari'a: A unified body of traditional formulation of Islamic law.

Shi'ite: Minority followed Ali (the fourth caliph) and his descendants as the only rightful imams.

Shura: The act of consultation of the Islamic ruler with senior members of Muslim society on public affairs.

Sunna: Traditions, teachings, and exemplary conduct of the Prophet Mohammed. In Shi'ite tradition, *Sunna* is expanded to the words and actions of Ali (the fourth caliph) and his descendants.

Sunni: The majority of Muslims who follow the *sunna* of the Prophet. Shi'ites add to the sunna of the Prophet that of the imams.

Ta'zir: Punishment for crimes which are neither *hudud* nor *qysas*; encompasses all offenses for which no defined punishments are prescribed in the Shari'a. It is left to the judge (state) to decide on the severity and form of punishment.

Taklif: Duty and obligation.

Taqlid: The imitation and following of the jurists of a school of Islamic jurisprudence.

Ulama: Pl. of *a'lim*; Muslim jurists.

Umma: Islamic nation; the community of Muslims.

Urf: Customary law or practice.

Vilaya: Guardianship.

Vilayat-i faqih: Guardianship of the jurisprudent.

Vilayat-i motlaqeh-e faqif: Absolute guardianship of the jurisprudent.

Wajib: Obligatory.

Zandaqa: Heresy.

Appendix

I. Selected Articles from the Constitution of Iran

II. The 1990 Cairo Declaration on Human Rights in Islam

III. The 1981 Universal Islamic Declaration of Human Rights

I. Selected Articles from the Constitution of the Islamic Republic of Iran (ratified in 1979 and amended in 1989)

Article 4

All civil, penal, financial, economic, administrative, cultural, military, political laws and regulations, as well as any other laws or regulations, should be based on Islamic criteria. This article will, absolutely and generally, prevail over all of the articles of the Constitution, and other laws and regulations as well. Any judgment in regard to this will be made by the jurist members of the Guardian Council.

Article 5

During the Occultation of the *Wali-e Asr* [the Twelfth Imam], the *vilayat* [guardianship] and leadership of the *umma* [nation] in the Islamic Republic of Iran devolve upon the just and pious *faqih* [Muslim jurist] who is fully aware of the circumstances of his age, courageous, resourceful, and possessed of administrative ability, in accordance with Article 107.

Article 8

In the Islamic Republic of Iran, *amr bi al-ma'ruf wa nahy an al-munkir* [commanding the good and prohibiting the evil] is a universal and reciprocal duty that must be fulfilled by the people with respect to one another, by the government with respect to the people, and by the people with respect to the government. [This

is in accordance with the Qur'anic verse (9:71)]: “The believers, men and women, are guardians of one another; they enjoin the good and forbid the evil.”

Article 12

The official religion of Iran is Islam and the Twelver Ja'fari [Ithna Ashari school of Shi'ite], and this principle will remain eternally immutable. Other Islamic schools, including the Hanafi, Shafi'i, Maliki, Hanbali, and Zaidi, are to be accorded full respect, and their followers are free to act in accordance with their own jurisprudence in performing their religious rites. These schools enjoy official status in matters pertaining to religious education, affairs of personal status (marriage, divorce, inheritance, and wills) and related litigation in courts of law. ...

Article 13

The Iranian Zoroastrians, Jews, and Christians are the only recognized religious minorities. They are free, within the limits of the law, to perform their religious rites, and may exercise their religious regulations in personal status.

Article 14

In accordance with the Qur'anic verse ... [60:8], the government of the Islamic Republic of Iran and Muslims shall treat non-Muslims according to virtue and public morals and Islamic justice, and to honor their civil rights. This principle will

be applied only to those who do not become involved in conspiracies and activities which are against Islam and Islamic Republic of Iran.

Article 19

The people of Iran, regardless of their ethnic or tribal origins, shall enjoy equal rights; color, race, language and the like shall not bestow any privilege.

Article 20

All citizens of the country, whether men or women, are equally protected by the law, and they enjoy human, political, economic, and social and cultural rights according to Islamic standards.

Article 24

Publications and the press are free to express matters, except when they are detrimental to the foundations of Islam or to public rights. The law will provide the details.

Article 26

Parties, societies, political and professional associations, as well as Islamic or recognized religious minorities organizations are free [permitted], provided they do not violate principles of independence, freedom, and national unity or Islamic principles and the foundations of the Islamic Republic.

Article 27

Unarmed assemblies and marches are permitted, provided that they are not detrimental to Islamic principles.

Article 168

Political and press offenses will be tried openly and in the presence of a jury in judicial courts. The manner in which the jury will be selected, their qualifications, and the limits of their authority as well as the definition of political crimes shall be determined by law in accordance with Islamic principles.

Article 175

In the Radio and Television of the Islamic Republic of Iran, freedom of expression and ideas should be guaranteed in accordance with Islamic principles and the interests of the country. The appointment and dismissal of the head of the Radio and Television of the Islamic Republic of Iran rests with the leader. A council consisting of two representatives each of the president, the head of the Judiciary, and the Islamic Consultative Assembly [the Parliament] shall supervise the functioning of this organization.

II. The 1990 Cairo Declaration on Human Rights in Islam

ANNEX TO
RES. NO.49/19-P

THE CAIRO DECLARATION **ON** **HUMAN RIGHTS IN ISLAM**

The Member States of the Organization of the Islamic Conference,

Reaffirming the civilizing and historical role of the Islamic Ummah which God made the best nation that has given mankind a universal and well-balanced civilization in which harmony is established between this life and the hereafter and knowledge is combined with faith; and the role that this Ummah should play to guide a humanity confused by competing trends and ideologies and to provide solutions to the chronic problems of this materialistic civilization.

Wishing to contribute to the efforts of mankind to assert human rights, to protect man from exploitation and persecution, and to affirm his freedom and right to a dignified life in accordance with the Islamic Shari'ah

Convinced that mankind which has reached an advanced stage in materialistic science is still, and shall remain, in dire need of faith to support its civilization and of a self-motivating force to guard its rights;

Believing that fundamental rights and universal freedoms in Islam are an integral part of the Islamic religion and that no one as a matter of principle has the right to suspend them in whole or in part or violate or ignore them in as much as they are binding divine commandments, which are contained in the Revealed Books of God and were sent through the last of His Prophets to complete the preceding divine messages thereby making their observance an act of worship and their neglect or violation an abominable sin, and accordingly every person is individually responsible - and the Ummah collectively responsible - for their safeguard.

Proceeding from the above-mentioned principles,
Declare the following:

ARTICLE I:

(a) All human beings form one family whose members are united by submission to God and descent from Adam. All

men are equal in terms of basic human dignity and basic obligations and responsibilities, without any discrimination on the grounds of race, colour, language, sex, religious belief, political affiliation, social status or other considerations. True faith is the guarantee for enhancing such dignity along the path to human perfection.

(b) All human beings are God's subjects, and the most loved by Him are those who are most useful to the rest of His subjects, and no one has superiority over another except on the basis of piety and good deeds.

ARTICLE 2:

(a) Life is a God-given gift and the right to life is guaranteed to every human being. It is the duty of individuals, societies and states to protect this right from any violation, and it is prohibited to take away life except for a Shari'ah prescribed reason.

(b) It is forbidden to resort to such means as may result in the genocidal annihilation of mankind.

(c) The preservation of human life throughout the term of time willed by God is a duty prescribed by Shari'ah

(d) Safety from bodily harm is a guaranteed right. It is the duty of the state to safeguard it, and it is prohibited to breach it without a Sharia-prescribed reason.

ARTICLE 3:

(a) In the event of the use of force and in case of armed conflict, it is not permissible to kill non-belligerents such as old man, women and children. The wounded and the sick shall have the right to medical treatment; and prisoners of war shall have the right to be fed, sheltered, and clothed. It is prohibited to mutilate dead bodies. It is a duty to exchange prisoners of war and to arrange visits or reunions of the families separated by the circumstances of war.

(b) It is prohibited to fell trees, to damage crops or livestock, and to destroy the enemy's civilian buildings and installations by shelling, blasting or any other means.

ARTICLE 4:

Every human being is entitled to inviolability and the protection of his good name and honour during his life and after his death. The state and society shall protect his remains and burial place.

ARTICLE 5:

(a) The family is the foundation of society, and marriage is the basis of its formation. Men and women have the right to marriage, and no restrictions stemming from race, colour or nationality shall prevent them from enjoying this right.

(b) Society and the State shall remove all obstacles to marriage and shall facilitate marital procedure. They shall ensure family protection and welfare.

ARTICLE 6:

(a) Woman is equal to man in human dignity, and has rights to enjoy as well as duties to perform; she has her own civil entity and financial independence, and the right to retain her name and lineage.

(b) The husband is responsible for the support and welfare of the family.

ARTICLE 7:

(a) As of the moment of birth, every child has rights due from the parents, society and the state to be accorded proper nursing, education and material, hygienic and moral care. Both the fetus and the mother must be protected and accorded special care.

(b) Parents and those in such like capacity have the right to choose the type of education they desire for their children, provided they take into consideration the interest and future of the children in accordance with ethical values and the principles of the Shari'ah

(c) Both parents are entitled to certain rights from their children, and relatives are entitled to rights from

their kin, in accordance with the tenets of the Shari'ah.

ARTICLE 8:

Every human being has the right to enjoy his legal capacity in terms of both obligation and commitment, should this capacity be lost or impaired, he shall be represented by his guardian.

ARTICLE 9:

(a) The question for knowledge is an obligation and the provision of education is a duty for society and the State. The State shall ensure the availability of ways and means to acquire education and shall guarantee educational diversity in the interest of society so as to enable man to be acquainted with the religion of Islam and the facts of the Universe for the benefit of mankind.

(b) Every human being has the right to receive both religious and worldly education from the various institutions of, education and guidance, including the family, the school, the university, the media, etc., and in such an integrated and balanced manner as to develop his personality, strengthen his faith in God and promote his respect for and defence of both rights and obligations.

ARTICLE 10:

Islam is the religion of unspoiled nature. It is prohibited to exercise any form of compulsion on man or to exploit his poverty or ignorance in order to convert him to another religion or to atheism.

ARTICLE 11:

(a) Human beings are born free, and no one has the right to enslave, humiliate, oppress or exploit them, and there can be no subjugation but to God the Most-High.

(b) Colonialism of all types being one of the most evil forms of enslavement is totally prohibited. Peoples suffering from colonialism have the full right to freedom and self-determination. It is the duty of all States and peoples to support the struggle of colonized peoples for

the liquidation of all forms of colonialism and occupation, and all States and peoples have the right to preserve their independent identity and exercise control over their wealth and natural resources.

ARTICLE 12:

Every man shall have the right, within the framework of Shari'ah, to free movement and to select his place of residence whether inside or outside his country and if persecuted, is entitled to seek asylum in another country. The country of refuge shall ensure his protection until he reaches safety, unless asylum is motivated by an act which Shari'ah regards as a crime.

ARTICLE 13:

Work is a right guaranteed by the State and Society for each person able to work. Everyone shall be free to choose the work that suits him best and which serves his interests and those of society. The employee shall have the right to safety and security as well as to all other social guarantees. He may neither be assigned work beyond his capacity nor be subjected to compulsion or exploited or harmed in any way. He shall be entitled - without any discrimination between males and females - to fair wages for his work without delay, as well as to the holidays, allowances and promotions which he deserves. For his part, he shall be required to be dedicated and meticulous in his work. Should workers and employers disagree on any matter, the State shall intervene to settle the dispute and have the grievances redressed, the rights confirmed and justice enforced without bias.

ARTICLE 14:

Everyone shall have the right to legitimate gains without monopolization, deceit or harm to oneself or to others. Usury (riba) is absolutely prohibited.

ARTICLE 15

(a) Everyone shall have the right to own property acquired in a legitimate way, and shall be entitled to the rights of ownership, without prejudice to oneself, others or to society in general. Expropriation is not permissible except for the requirements of public interest and upon payment of immediate and fair compensation.

(b) Confiscation and seizure of property is prohibited except for a necessity dictated by law.

ARTICLE 16:

Everyone shall have the right to enjoy the fruits of his scientific, literary, artistic or technical production and the right to protect the moral and material interests stemming therefrom, provided that such production is not contrary to the principles of Shari'ah.

ARTICLE 17:

(a) Everyone shall have the right to live in a clean environment, away from vice and moral corruption, an environment that would foster his self-development and it is incumbent upon the State and society in general to afford that right.

(b) Everyone shall have the right to medical and social care, and to all public amenities provided by society and the State within the limits of their available resources.

(c) The State shall ensure the right of the individual to a decent living which will enable him to meet all his requirements and those of his dependents, including food, clothing, housing, education, medical care and all other basic needs.

ARTICLE 18:

(a) Everyone shall have the right to live in security for himself, his religion, his dependents, his honour and his property.

(b) Everyone shall have the right to privacy in the conduct of his private affairs, in his home, among his family, with regard to his property and his relationships. It is not permitted to spy on him, to place him under surveillance or to besmirch his good name. The State shall protect him from arbitrary interference.

(c) A private residence is inviolable in all cases. It will not be entered without permission from its inhabitants or in any unlawful manner, nor shall it be demolished or confiscated and its dwellers evicted.

ARTICLE 19:

(a) All individuals are equal before the law, without distinction between the ruler and the ruled.

(b) The right to resort to justice is guaranteed to everyone.

(c) Liability is in essence personal.

(d) There shall be no crime or punishment except as provided for in the Shari'ah

(e) A defendant is innocent until his guilt is proven in a fair trial in which he shall be given all the guarantees of defence.

ARTICLE 20:

It is not permitted without legitimate reason to arrest an individual, or restrict his freedom, to exile or to punish him. It is not permitted to subject him to physical or psychological torture or to any form of humiliation, cruelty or indignity. Nor is it permitted to subject an individual to medical or scientific experimentation without his consent or at the risk of his health or of his life. Nor is it permitted to promulgate emergency laws that would provide executive authority for such actions.

ARTICLE 21:

Taking hostages under any form or for any purpose is expressly forbidden.

ARTICLE 22:

(a) 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.

(b) Everyone shall have the right to advocate what is right, and propagate what is good, and warn against what is wrong and evil according to the norms of Islamic Shari'ah

(c) 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, undermine moral and ethical values or disintegrate, corrupt or harm society or weaken its faith.

(d) It is not permitted to arouse nationalistic or doctrinal hatred or to do anything that may be an incitement to any form or racial discrimination.

ARTICLE 23:

(a) Authority is a trust; and abuse or malicious exploitation thereof is absolutely prohibited, so that fundamental human rights may be guaranteed.

(b) 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.

ARTICLE 24:

All the rights and freedoms stipulated in this Declaration are subject to the Islamic Shari'ah.

ARTICLE 25:

The Islamic Shari'ah is the only source of reference for the explanation or clarification of any of the articles of this Declaration.

Cairo, 14 Muharram 1411H
5 August 1990

III. The 1981 Universal Islamic Declaration of Human Rights

UNIVERSAL ISLAMIC DECLARATION OF HUMAN RIGHTS

ISLAMIC COUNCIL

19 September 1981

PREAMBLE

Whereas the age-old human aspiration for a just world order wherein people could live, develop and prosper in an environment free from fear, oppression, exploitation and deprivation, remains largely unfulfilled;

Whereas the Divine Mercy unto mankind reflected in its having been endowed with super-abundant economic sustenance is being wasted, or unfairly or unjustly withheld from the inhabitants of the earth;

Whereas Allah has given mankind through His revelations in the Holy Qur'an and the *Sunnah* of His Blessed Prophet Mohammad an abiding legal and moral framework within which to establish and regulate human institutions and relationships;

Whereas the human rights decreed by the Divine Law aim at conferring dignity and honour on mankind and are designed to eliminate oppression and injustice;

Whereas by virtue of their Divine source and sanction these rights can neither be curtailed, abrogated nor disregarded by authorities, assemblies or other institutions, nor can they be surrendered or alienated;

Therefore we, as Muslims, who believe

- (a) in God, the Beneficent and Merciful, the Creator, the Sustainer, the Sovereign, the sole Guide of mankind and the Source of all Law;
- (b) in the Vicegerency (*Khilafah*) of man who has been created to fulfil the Will of God on earth;
- (c) in the wisdom of Divine guidance brought by the Prophets, whose mission found its culmination in the final Divine message that was conveyed by the Prophet Muhammad (Peace be upon him) to all mankind;
- (d) that rationality by itself without the light of revelation from God can neither be a sure guide in the affairs of mankind nor provide spiritual nourishment to the human soul, and, knowing that the teachings of Islam represent the quintessence of Divine guidance in its final and perfect form, feel duty-bound

- to remind man of the high status and dignity bestowed on him by God;
- (e) in inviting all mankind to the message of Islam;
 - (f) that by the terms of our primeval covenant with God, our duties and obligations have priority over our rights, and that each one of us is under a bounden duty to spread the teachings of Islam by word, deed, and indeed in all gentle ways, and to make them effective not only in our individual lives but also in the society around us;
 - (g) in our obligation to establish an Islamic order;
 - (i) wherein all human beings shall be equal and none shall enjoy a privilege or suffer a disadvantage or discrimination by reason of race, colour, sex, origin or language;
 - (ii) wherein all human beings are born free;
 - (iii) wherein slavery and forced labour are abhorred;
 - (iv) wherein conditions shall be established such that the institution of family shall be preserved, protected and honoured as the basis of all social life;
 - (v) wherein the rulers and the ruled alike are subject to, and equal before, the Law;
 - (vi) wherein obedience shall be rendered only to those commands that are in consonance with the Law;
 - (vii) wherein all worldly power shall be considered as a sacred trust, to be exercised within the limits prescribed by the Law and in a manner approved by it, and with due regard for the priorities fixed by it;
 - (viii) wherein all economic resources shall be treated as Divine blessings bestowed upon mankind, to be enjoyed by all in accordance with the rules and the values set out in the Qur'an and the *Sunnah*;
 - (ix) wherein all public affairs shall be determined and conducted, and the authority to administer them shall be exercised after mutual consultation (*Shura*) between the believers qualified to contribute to a decision which would accord well with the Law and the public good;
 - (x) wherein everyone shall undertake obligations proportionate to his capacity and shall be held responsible pro rata for his deeds;
 - (xi) wherein everyone shall, in case of an infringement of his rights, be assured of appropriate remedial measures in accordance with the Law;
 - (xii) wherein no one shall be deprived of the rights assured to him by the Law except by its authority and to the extent permitted by it;
 - (xiii) wherein every individual shall have the right to bring legal action against anyone who commits a crime against society as a whole or against any of its members;

- (xiv) wherein every effort shall be made to
 - (a) secure into mankind deliverance from every type of exploitation, injustice and oppression,
 - (b) ensure to everyone security, dignity and liberty in terms set out and by methods approved and within the limits set by the Law;

Do hereby, as servants of Allah and as members of the Universal Brotherhood of Islam, at the beginning of the Fifteenth Century of the Islamic Era, affirm our commitment to uphold the following inviolable and inalienable human rights that we consider are enjoined by Islam.

I. Right to Life

- (a) Human life is sacred and inviolable and every effort shall be made to protect it. In particular no one shall be exposed to injury or death, except under the authority of the Law.
- (b) Just as in life, so also after death, the sanctity of a person's body shall be inviolable. It is the obligation of believers to see that a deceased person's body is handled with due solemnity.

II. Right to Freedom

- (a) Man is born free. No inroads shall be made on his right to liberty except under the authority and in due process of the Law.
- (b) Every individual and every people has the inalienable right to freedom in all its forms—physical, cultural, economic and political—and shall be entitled to struggle by all available means against any infringement or abrogation of this right; and every oppressed individual or people has a legitimate claim to the support of other individuals and/or peoples in such a struggle.

III. Right to Equality and Prohibition Against Impermissible Discrimination

- (a) All persons are equal before the Law and are entitled to equal opportunities and protection of the Law.
- (b) All persons shall be entitled to equal wage for equal work.
- (c) No person shall be denied the opportunity to work or be discriminated against in any manner or exposed to greater physical risk by reason of religious belief, colour, race, origin, sex or language.

IV. Right to Justice

- (a) Every person has the right to be treated in accordance with the Law, and only in accordance with the Law.

- (b) Every person has not only the right but also the obligation to protest against injustice; to recourse to remedies provided by the Law in respect of any unwarranted personal injury or loss; to self-defence against any charges that are preferred against him and to obtain fair adjudication before an independent judicial tribunal in any dispute with public authorities or any other person.
- (c) It is the right and duty of every person to defend the rights of any other person and the community in general (*Hisbah*).
- (d) No person shall be discriminated against while seeking to defend private and public rights.
- (e) It is the right and duty of every Muslim to refuse to obey any command which is contrary to the Law, no matter by whom it may be issued.

V. Right to Fair Trial

- (a) No person shall be adjudged guilty of an offence and made liable to punishment except after proof of his guilt before an independent judicial tribunal.
- (b) No person shall be adjudged guilty except after a fair trial and after reasonable opportunity for defence has been provided to him.
- (c) Punishment shall be awarded in accordance with the Law, in proportion to the seriousness of the offence and with due consideration of the circumstances under which it was committed.
- (d) No act shall be considered a crime unless it is stipulated as such in the clear wording of the Law.
- (e) Every individual is responsible for his actions. Responsibility for a crime cannot be vicariously extended to other members of his family or group, who are not otherwise directly or indirectly involved in the commission of the crime in question.

VI. Right to Protection Against Abuse of Power

Every person has the right to protection against harassment by official agencies. He is not liable to account for himself except for making a defence to the charges made against him or where he is found in a situation wherein a question regarding suspicion of his involvement in a crime could be *reasonably* raised.

1 II. Right to Protection Against Torture

No person shall be subject to torture in mind or body, or degraded, or threatened with injury either to himself or to anyone related to or held dear by him, or forcibly made to confess to the commission of a crime, or forced to consent to an act which is injurious to his interests.

VIII. Right to Protection of Honour and Reputation

Every person has the right to protect his honour and reputation against calumnies, groundless charges or deliberate attempts at defamation and blackmail.

IX. Right to Asylum

- (a) Every persecuted or oppressed person has the right to seek refuge and asylum. This right is guaranteed to every human being irrespective of race, religion, colour and sex.
- (b) *Al Masjid Al Haram* (the sacred house of Allah) in Mecca is a sanctuary for all Muslims.

X. Rights of Minorities

- (a) The Qur'anic principle 'There is no compulsion in religion' shall govern the religious rights of non-Muslim minorities.
- (b) In a Muslim country, religious minorities shall have the choice to be governed in respect of their civil and personal matters by Islamic Law or by their own laws.

XI. Right and Obligation to Participate in the Conduct and Management of Public Affairs

- (a) Subject to the Law, every individual in the community (*Ummah*) is entitled to assume public office.
- (b) Process of free consultation (*Shura*) is the basis of the administrative relationship between the government and the people. People also have the right to choose and remove their rulers in accordance with this principle.

XII. Right to Freedom of Belief, Thought and Speech

- (a) Every person has the right to express his thoughts and beliefs so long as he remains within the limits prescribed by the Law. No one, however, is entitled to disseminate falsehood or to circulate reports which may outrage public decency, or to indulge in slander, innuendo or to cast defamatory aspersions on other persons.
- (b) Pursuit of knowledge and search after truth is not only a right but a duty of every Muslim.
- (c) It is the right and duty of every Muslim to protest and strive (within the limits set out by the Law) against oppression even if it involves challenging the highest authority in the State.
- (d) There shall be no bar on the dissemination of information provided it does not endanger the security of the society or the State and is confined within the limits imposed by the Law.
- (e) No one shall hold in contempt or ridicule the religious beliefs of others or incite public hostility against them; respect for the religious feelings of others is obligatory on all Muslims.

XIII. Right to Freedom of Religion

Every person has the right to freedom of conscience and worship in accordance with his religious beliefs.

XIV. Right to Free Association

- (a) Every person is entitled to participate individually and collectively in the religious, social, cultural and political life of his community and to establish institutions and agencies meant to enjoin what is right (*ma'roof*) and to prevent what is wrong (*munkar*).
- (b) Every person is entitled to strive for the establishment of institutions whereunder an enjoyment of these rights would be made possible. Collectively, the community is obliged to establish conditions so as to allow its members full development of their personalities.

XV. The Economic Order and the Rights Evolving Therefrom

- (a) In their economic pursuits, all persons are entitled to the full benefits of nature and all its resources. These are blessings bestowed by God for the benefit of mankind as a whole.
- (b) All human beings are entitled to earn their living according to the Law.
- (c) Every person is entitled to own property individually or in association with others. State ownership of certain economic resources in the public interest is legitimate.
- (d) The poor have the right to a prescribed share in the wealth of the rich, as fixed by *Zakah*, levied and collected in accordance with the Law.
- (e) All means of production shall be utilised in the interest of the community (*Ummah*) as a whole, and may not be neglected or misused.
- (f) In order to promote the development of a balanced economy and to protect society from exploitation, Islamic Law forbids monopolies, unreasonable restrictive trade practices, usury, the use of coercion in the making of contracts and the publication of misleading advertisements.
- (g) All economic activities are permitted provided they are not detrimental to the interests of the community (*Ummah*) and do not violate Islamic laws and values.

XVI. Right to Protection of Property

No property may be expropriated except in the public interest and on payment of fair and adequate compensation.

XVII. Status and Dignity of Workers

Islam honours work and the worker and enjoins Muslims not only

to treat the worker justly but also generously. He is not only to be paid his earned wages promptly, but is also entitled to adequate rest and leisure.

XVIII. Right to Social Security

Every person has the right to food, shelter, clothing, education and medical care consistent with the resources of the community. This obligation of the community extends in particular to all individuals who cannot take care of themselves owing to some temporary or permanent disability.

XIX. Right to Found a Family and Related Matters

- (a) Every person is entitled to marry, to found a family and to bring up children in conformity with his religion, tradition and culture. Every spouse is entitled to such rights and privileges and carries such obligations as are stipulated by the Law.
- (b) Each of the partners in a marriage is entitled to respect and consideration from the other.
- (c) Every husband is obliged to maintain his wife and children according to his means.
- (d) Every child has the right to be maintained and properly brought up by its parents, it being forbidden that children are made to work at an early age or that any burden is put on them which would arrest or harm their natural development.
- (e) If parents are for some reason unable to discharge their obligations towards a child, it becomes the responsibility of the community to fulfil these obligations at public expense.
- (f) Every person is entitled to material support, as well as care and protection, from his family during his childhood, old age or incapacity. Parents are entitled to material support as well as care and protection from their children.
- (g) Motherhood is entitled to special respect, care and assistance on the part of the family and the public organs of the community (*Ummah*).
- (h) Within the family, men and women are to share in their obligations and responsibilities according to their sex, their natural endowments, talents and inclinations, bearing in mind their common responsibilities toward their progeny and their relatives.
- (i) No person may be married against his or her will, or lose or suffer diminution of legal personality on account of marriage.

XX. Rights of Married Women

Every married woman is entitled to:

- (a) live in the house in which her husband lives;

- (b) receive the means necessary for maintaining a standard of living which is not inferior to that of her spouse, and, in the event of divorce, receive during the statutory period of waiting (*Iddah*) means of maintenance commensurate with her husband's resources, for herself as well as for the children she nurses or keeps, irrespective of her own financial status, earnings, or property that she may hold in her own right;
- (c) seek and obtain dissolution of marriage (*Khul'a*) in accordance with the terms of the Law. This right is in addition to her right to seek divorce through the courts;
- (d) inherit from her husband, her parents, her children and other relatives according to the Law;
- (e) strict confidentiality from her spouse, or ex-spouse if divorced, with regard to any information that he may have obtained about her, the disclosure of which could prove detrimental to her interests. A similar responsibility rests upon her in respect of her spouse or ex-spouse.

XXI. Right to Education

- (a) Every person is entitled to receive education in accordance with his natural capabilities.
- (b) Every person is entitled to a free choice of profession and career and to the opportunity for the full development of his natural endowments.

XXII. Right of Privacy

Every person is entitled to the protection of his privacy.

XXIII. Right to Freedom of Movement and Residence

- (a) In view of the fact that the World of Islam is veritably *Ummah Islamia*, every Muslim shall have the right to move freely in and out of any Muslim country.
- (b) No one shall be forced to leave the country of his residence, or be arbitrarily deported therefrom, without recourse to due process of law.

Explanatory Notes

1. In the above formulation of Human Rights, unless the context provides otherwise:

- (a) the term 'person' refers to both the male and female sexes.
- (b) the term 'Law' denotes the *Shari'ah*, i.e. the totality of ordinances derived from the Qur'an and the *Sunnah* and any other laws that are deduced from these two sources by methods considered valid in Islamic jurisprudence.

2. Each one of the Human Rights enunciated in this Declaration carries a corresponding duty.

3. In the exercise and enjoyment of the rights referred to above, every person shall be subject only to such limitations as are enjoined by the Law for the purpose of securing the due recognition of, and respect for, the rights and the freedom of others and of meeting the just requirements of morality, public order and the general welfare of the Community (*Ummah*).

4. The Arabic text of this Declaration is the original.