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# RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE

Religious Perspectives

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MARTINUS NIJHOFF PUBLISHERS

THE HAGUE / BOSTON / LONDON

A C.I.P. Catalogue record for this book is available from the Library of Congress.

EMORY UNIVERSITY

AUG 28 1996

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ISBN 90-411-0176-4 (Vol. 1)  
ISBN 90-411-0177-2 (Vol. 2)  
ISBN 90-411-0178-0 (Set of 2 volumes)

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Published by Kluwer Law International,  
P.O. Box 85889, 2508 CN The Hague, The Netherlands.

Sold and distributed in the U.S.A. and Canada  
by Kluwer Law International,  
675 Massachusetts Avenue, Cambridge, MA 02139, U.S.A.

In all other countries, sold and distributed  
by Kluwer Law International,  
P.O. Box 85889, 2508 CN The Hague, The Netherlands.

cover photograph: Corky Gallo, *Emory University*  
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Printed in the Netherlands





# Islamic Foundations of Religious Human Rights

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Following an introduction of the terms of reference and thesis of this chapter on the Islamic foundations of religious human rights, my discussion will fall into three parts. First, I will offer an outline of the origins, nature, and development of Islamic law and theology, and their modern influence. The second section will focus on the nature and circumstances of discourse about rights and responsibilities in the Islamic world today. In that light, I will suggest in the third section a theory of Islamic foundations of religious human rights, as can be perceived in the modern context.

## Introduction: The Imperative of Resolving a Paradox

Within the framework of this book as a whole, this chapter is supposed to discuss Islamic legal and theological foundations of religious human rights and responsibilities, and the influence of an Islamic discourse about rights in more recent Islamic legal life. As a matter of terminology, however, no distinction was made in the work of early Islamic scholars, or in the minds of their followers, between law and theology. Subject-matters ranging from legal, in the modern sense of the term, to that pertaining to belief and doctrine, ethics and morality, religious ritual practices, style of dress, hygiene, courtesy, and good manners, were all seen as falling within the domain of *Shari'a*, the divinely ordained way of life.<sup>2</sup> Accordingly, I will use the term *Shari'a* in the following discussion.

<sup>1</sup> I prepared the first draft of this chapter while a guest researcher at the Norwegian Institute of Human Rights. I also wish to acknowledge thankfully the instructive continuing discussions with Tore Lindholm, Senior Researcher at the Institute, over some of the issues discussed in this chapter.

<sup>2</sup> For analysis of the development of the concept of *Shari'a* see Fazlur Rahman, *Islam* (Chicago, 1979), 101-109.



The phrase "religious human rights," as used in this chapter, refers to those rights which pertain to freedom of belief and conscience, including religious dissent, conformity or lack thereof, and tolerance, as *human rights*.<sup>3</sup> That is to say, I am concerned with religious rights as conceived, articulated, and applied within a "human rights" paradigm, rather than within a particular religious or other frame of reference or legal system. The conception and implementation of religious rights as human rights is both necessary and paradoxical in that the two can neither be easily joined nor separated.<sup>4</sup>

The connection is difficult to make, on the one hand, because of the inherent tension between the underlying premise of universality of human rights and the specificity of religious foundations for those rights.<sup>5</sup> Since the universality of human rights means the validity and application of these rights to all human beings throughout the world, they must apply regardless of whether or not they are perceived to be founded in the religious beliefs of a given community. Universality of human rights is particularly challenged by religious activists, such as Islamist groups in several Islamic countries today, who claim that their religious belief requires the establishment of a "theocratic" state to enforce their vision of the sacred law. Yet, it is imperative to maintain the universality of human rights against such claims precisely because of the exclusive and abusive nature of a theocratic state, against believers and non-believers alike.

On the other hand, it is difficult to separate religion and human rights, because they both not only operate on the same moral plane of justification, but also overlap and interact in content. Both normative systems are premised on the same moral precepts of human relations,

<sup>3</sup> Human rights are those claims to which every human being is entitled by virtue of his or her humanity, without distinction as to race, color, sex, religion, language, or national origin. The current formulation of these rights is to be found in the 1948 Universal Declaration of Human Rights and subsequent international instruments, but I do not take these sources to be either definitive or exhaustive. New formulations can and should emerge, and old ones should remain open to revision, elaboration, and reformulation.

<sup>4</sup> On various aspects of this necessary but problematic relationship see generally Abdullahi Ahmed An-Na'im, et al., eds., *Human Rights and Religious Values: An Uneasy Relationship?* (Grand Rapids, MI, 1995); Leonard Swidler, ed., *Religious Liberty and Human Rights in Nations and Religions* (Philadelphia, 1986). For a discussion of some of the issues in relation to the subject-matter of this book, see, generally, Daniel G. Ashburn, ed., *The State of Religious Human Rights in the World: Preliminary Consultation, Preliminary Documents of Religious Human Rights Project 2* (1993).

<sup>5</sup> The basis of universality of human rights and practical criterion for their identification is in the Golden Rule or the principle of reciprocity, that is, these are rights which I claim for myself as a human being, not by virtue of any legal or other status and must therefore concede to others by the same token because that is the basis of my claim. See Abdullahi Ahmed An-Na'im, *Toward an Islamic Reformation: Civil Liberties, Human Rights and International Law* (Syracuse, 1990), 162-63.



and while believers are moved to uphold human rights norms out of religious conviction, the protection of the right to hold and act on those convictions is integral to the fundamental concept of human rights. Since believers will always make the connection, whether positively or negatively, it is better for human rights advocates to acknowledge and respond to it rather than pretend that it does not exist.

Failure to resolve the apparent paradox between religion and human rights, I maintain, is detrimental from both perspectives. Unless common ground can be found whereby people would uphold human rights as a matter of, or at least without violation to, their religious conviction, they would be expected to make a choice between the two "creeds."<sup>6</sup> In that case, I argue, the cost to the community or person making such a choice is not only in the loss of some or all of the benefits of the abandoned creed, but also in relation to the value of the adopted or preferred one. If a community opts for upholding what it believes to be the precepts of its religion over a commitment to human rights norms, then the community and its members will lose from a religious as well as a human rights point of view. Opting for human rights over religious precepts, on the other hand, would entail loss from a human rights as well as a religious perspective.

Loss of the benefits of the abandoned creed may be obvious, but how does a choice between the two creeds diminish the value of the adopted one as well? In my view, a commitment to human rights enhances the quality of religious belief and the relevance and utility of its precepts to the lives of its adherents. By its very nature, and in order to influence effectively the moral convictions and daily behavior of those who subscribe to it, religious belief must be voluntarily adopted and maintained. Coerced belief is a contradiction in terms, and can only breed hypocrisy, social corruption, and political oppression.

Moreover, as can be seen from the history of every major religion, internal disagreement is essential for the rejuvenation of belief and rectification of practice among its adherents. The survival and renewal of every major religion was ensured by the convictions and insights of its dissidents as much as by the conformity of its orthodoxy. In the Islamic context, for example, every form of Sunni, Sufi (mythic), or Shi'a belief held by its adherents today as "orthodox" was, at some point in history, a dissident view which survived against the opposition of the "orthodoxy" of that time. By protecting the right to dissent within a religious community, human rights norms and mechanisms safeguard the prospects of

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<sup>6</sup> Taken as a set of fundamental beliefs or principles, human rights can certainly be described as a creed. But I use the term here for a short-hand reference, without necessarily implying or rejecting the validity of its application to human rights.



spiritual growth of any religion and the practical utility of its precepts to the lives of its adherents.

Yet, as can also equally be seen from the history of every major religion, dissident religious views were always persecuted and repressed in the name of protecting the integrity of the faith, the community, and/or the moral well-being of others. While such concerns should be taken seriously because of their legitimate importance to believers, they should never be allowed to contradict or undermine the facts of religious and political plurality, or diminish the commitment of the community to recognize and respect them in the shared public domain. The present reality and future prospects of religious and political plurality must be fully acknowledged and catered for as integral to, and essential for the legitimacy and integrity of, the faith and/or the community.<sup>7</sup> Otherwise, claims of acting in the interest of protecting the integrity of the faith and community will be nothing more than a pretext for political and religious domination by certain elites or groups of believers.

From a human rights perspective, while a religious motivation to uphold human rights enhances the prospects of voluntary compliance and the emergence of the political will to enforce them, resistance to these rights from a religious point of view is extremely difficult to overcome. Muslim believers, for example, "cannot conceive of nor accept a system of rights which excludes religion. Religion for them suffuses every facet of life and no system of rights that ignores this fundamental axiom is worthy of adoption and enforcement."<sup>8</sup> Religious experience is therefore not only an indispensable resource for enlisting the support for human rights among believers, especially in forging the rational linkage of rights to responsibilities as people experience them in their everyday life,<sup>9</sup> but also a rich and valuable source of the content of those rights. Moreover, as noted earlier, these connections are being made by believers and must be acknowledged and responded to as such.

Thus, despite their difficult and paradoxical relationship, religion and human rights must not only be reconciled, but indeed support each other. This can and should be achieved, I believe, through efforts on both sides of the issue. Secular human rights advocates, on the one hand, must transcend an attitude of indifferent tolerance of religion to a moral recognition of religious faith and serious engagement of religious perspectives.

<sup>7</sup> The fundamental fact and legitimacy of necessary and permanent plurality is emphasized by the Qur'an itself, in verse 13 of chapter 49 which I would translate as follows: "We [God] have made you [all human beings] into peoples and tribes so that you may get to know each other and cooperate. Those who are most honored by God are the pious and righteous ones."

<sup>8</sup> John Witte, Jr., "Introduction" herein.

<sup>9</sup> Ibid.



Those who take religion seriously, on the other hand, must see human rights as integral to their belief or concern, rather than as a purely secular system to be accommodated. I see this chapter, and the book as a whole, as an effort to find such a common ground for mutual support.

In seeking to explore the prospects and problems of finding Islamic foundations for human rights, this chapter does not claim to offer a comprehensive discussion of the issues in relation to every aspect of Islamic history or all parts of the Islamic world. It is simply not possible to capture the full richness and complexity of many centuries of the history of major and highly diverse parts of the world in a single work. Instead, my purpose here is to distill the most pertinent features of that history, and to draw on some of the experiences of Islamic communities, in order to develop a coherent theory of Islamic foundations of religious human rights.

—As elaborated later, this theory is premised on two main principles. First, with respect to "internal" freedom of belief and dissent among Muslims, since identity and its normative system can only be meaningful and useful in historical context, Islamic identity and Shari'a must remain open to renegotiation and reconstruction by each community in its own particular circumstances. Given the fact that human agency is unavoidable in the interpretation and implementation of religious texts, every formulation of Islamic identity and articulation of Shari'a is necessarily a product of human reason and action. As such, no formulation or articulation should be allowed to monopolize religious authenticity and authority to the exclusion of others. Alternative formulations and articulations should be allowed to compete for acceptance by the community as the practical arbiter of Islamic authenticity. Freedom of belief and dissent must therefore be safeguarded among those who identify as Muslims in order to ensure the vitality and integrity of this process of renegotiation and reconstruction of religious identity and law.

Second, with respect to religious human rights of non-Muslims, modern circumstances of permanent religious and other pluralities of national and international political communities require equal respect for the religious human rights of all members of the community as the basis of the demand of Muslims themselves to those rights. Moreover, the recognition of the fact of plurality and its consequences is not only supported by scriptural Islamic sources, as noted earlier, but also sanctioned by the historical experience of Islamic communities.

### Shari'a, Past and Present

I would not restrict a discussion of Islamic foundations of religious human rights to the basis of those rights, or lack thereof, under Shari'a. Other aspects of Islamic consciousness, such as perceptions and experiences of piety and spirituality, as well as socio-economic and political factors, are always integral to an understanding of Muslim beliefs and behavior. Indeed, I maintain that the origins, nature, and context of the development of Shari'a was itself conditioned by the historical context of early Islamic societies of the Middle East.<sup>10</sup> In due course, local context also strongly influenced the adoption and adaptation of Shari'a in other parts of the Islamic world.

By the same token, historical contexts are affecting, and will continue to affect, the understanding and implementation of Shari'a as part of the foundations of religious human rights in Islamic societies. Local context and socio-economic and political factors influenced the displacement of Shari'a during the colonial and early independence era in most Islamic countries, as well as its recent resurgence as a framework of discourse about rights and human rights.

In this light, I will now offer a brief outline of the origins, nature and development of Shari'a as a theoretical model for an Islamic way of life. Although this ideal model was rarely fully implemented in the actual lives of Islamic communities and individuals, it remains a powerful symbol and source of motivation and framework for action to the present day. This section will therefore conclude with an evaluation and discussion of the role of Shari'a in modern Islamic discourse about rights and responsibilities.

The primary sources of the conceptual frame of reference and detailed content of Shari'a are the Qur'an and Sunna of the Prophet Muhammad.<sup>11</sup> Traditions of the earliest generations of Muslims were also

<sup>10</sup> An-Na'im, *Toward an Islamic Reformation*, 52-62.

<sup>11</sup> The Qur'an is the written text of what Muslims believe to be the final and conclusive record of divine revelation. The Qur'an was delivered by the Prophet and memorized by the first generation of Muslims until it was collected in a written text about two decades after the Prophet's death. Except for minor differences in the style of recitation, that text of the Qur'an, known as *Al-Mushaf Al-Uthmani*, is acknowledged by all Sunni Muslims as the only valid text of the Qur'an. The version of the text of the Qur'an accepted by Shi'a Muslims is slightly different, but not in ways which are significant for purposes of this chapter. See generally John Burton, *The Collection of the Qur'an* (Cambridge 1977).

Sunna of the Prophet were oral traditions of his verbal utterances and living example which were collected in written compilations for the first time during the second and third centuries of Islam, eighth and ninth centuries, A.D. The authenticity and relative authority of some texts of Sunna continue to create controversy among Sunni as well as Shi'a Muslims to the present day. On the concept and process of collection of Sunna and sources of contro-



taken as authoritative sources of Islamic guidance in popular practice. Throughout the first century of Islam, Islamic communities and individuals referred to these sources for guidance in their daily lives, in light of their own recollections of the living example of earlier generations and understanding of the message of Islam. The process of consulting scholars who were believed to be knowledgeable of the text and interpretation of the Qur'an and Sunna, and of the history and relevance of the traditions of early Islamic communities, gradually evolved into a practice of following a set of general principles and specific rulings attributed to a particular master or teacher and his leading disciples.

By the end of the second century of Islam, and beginning of the third (eighth and ninth centuries A.D.), the practice of adherence to a preferred scholar developed into a systematic and consistent following of what came to be known as his school of jurisprude, *madhhab*. For the next millennium, and largely to the present day, the development of Shari'a has been structured and governed by the methodology, principles, and rules set by the founding teachers, their immediate disciples, and subsequent scholars of the major surviving schools of Islamic jurisprudence, *madhahib al-fiqh al-Islami*.<sup>12</sup> Much of the legal and theological life of Islamic communities occurred within the framework of the school prevailing in a given community, often within a sub-division or line of thinking and authority.<sup>13</sup> However, the extinction of some schools, and shifts of territorial influence among the surviving schools, testifies to a dynamic of discourse and choice by Islamic communities according to the sense of each community of which school (or sub-school) is more responsive to its needs and interests at a given time.

Several features of the formative stage of Shari'a, in contrast to subsequent developments and more recent trends, should be noted here. First, the founding scholars were engaged in a process of derivation of general principles and specific rules for the guidance of their communities, responding to queries and requests or elaborating on hypothetical questions to clarify theoretical and methodological principles as they

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versy, see, Rahman, *Islam*, chap. 3 and Ahmad Hasan, *Early Development of Islamic Jurisprudence* (Islamabad, 1970), chap. 5.

<sup>12</sup> Rahman, *Islam*, 81-83.

<sup>13</sup> Thus, each of the surviving four Sunni schools (Maliki, Hanafi, Shafi'i and Hanbali—named after their founding scholars of the eighth and ninth centuries), tends to have a certain territorial sphere of influence within the Islamic world. Whereas the Maliki school, for example, is now generally more prevalent in North and West Africa, the Hanbali school is followed in Saudi Arabia, at least as the "official" doctrine of the Kingdom. But in the Saudi Arabian case, it is the Wahabi interpretation of the Hanbali school which prevails, rather than that of the other scholars of the school as a whole. Shi'i schools also have a similar territorial spread, the Ja'fari school in Iran, Zaiydi in southern Arabia, the Isma'ili among the Shi'a of the Indian sub-continent, and so forth.



deemed necessary and useful for the community. Thus, the founding scholars and their immediate disciples were not, and did not see or present themselves as, establishing separate or distinctive, let alone immutable, schools of thought. Yet, one school or another came to be rigidly followed as the only valid articulation of Shari'a. A more integrated approach appears to be emerging today as a result of the intellectual and political context of the modern Islamic movement, but automatic observance of the accepted school or scholar(s) continues to be the norm.

Second, the elaboration of Shari'a by the founding scholars through the interpretation of Qur'an and Sunna, in light of the living traditions of the early Islamic communities, was initially a spontaneous and unstructured process. To early Muslims, all divine guidance was contained in the Qur'an and Sunna, which were rendered in their own Arabic language and exemplified in the then oral history of their recent forefathers. Rigorous methodology for the derivation of Shari'a principles and rules evolved gradually in response to certain developments.<sup>14</sup> The evolution of rigorous and systematic methodology was also probably prompted by the growing maturity and complexity of Shari'a itself.

In response to these and other factors, scholars began to develop technical rules and criteria for the interpretation of the Qur'an, the authentication and recording of Sunna and its reconciliation with the Qur'an, the relevance and use of early traditions of Islamic communities in relation to the Qur'an and Sunna, and so forth. This occurred within each of the schools, but *al-Safi'i* is generally credited with the most systematic and influential methodological development of what came to be known as *ilm usul al-fiqh al-Islami*, the science of the foundations of Islamic jurisprudence.<sup>15</sup> But, over time, that legitimate and necessary

<sup>14</sup> With the spread of Islam east into Persia and India, and west through North Africa to Spain, the many diverse peoples who embraced the faith or came under the domain of its political power, did not know the Arabic language or the history of early Islamic communities. Moreover, those peoples had their own pre-Islamic cultures, some had ancient and highly developed civilizations, including their distinctive legal and theological systems, and social, political, and economic institutions. The interaction and cross-fertilization of Islamic principles and rules with pre-Islamic norms and institutions of the then newly Islamized communities was expected, as indeed had already happened in Arabia and the Middle East, but that had to be in accordance with Islamic criteria as developed by the early more authoritative scholars and model communities.

<sup>15</sup> On the formative stages of Islamic jurisprudence and methodological developments, see Joseph Schacht, *An Introduction to Islamic Law* (Oxford, 1964), 45-48, 58ff.; Majid Khadduri, trans., *Islamic Jurisprudence, Shafi'i's Risala* (Baltimore, 1961), 40-84; Hasan, *Early Development of Islamic Jurisprudence*, chap. 8; Noel Coulson, *A History of Islamic Law* (Edinburgh, 1964), chap. 4; George Makdisi, "The Juridical Theology of Shafi'i: Origins and Significance of Usul Al-Fiqh," *Studia Islamica* 59 (1984): 5-47.

methodological regulation became too inhibiting for, indeed detrimental to, the further development of Shari'a, especially in the modern era.<sup>16</sup>

This is particularly true and clear, in my view, in relation to the nature and role of *ijtihad*, literally self-exertion or effort, but referring in this sense to the exercise of deliberate juridical reasoning to derive principles and rules of Shari'a. Although technically understood by Islamic jurists as applying only to matters on which there is no clear and categorical text in the Qur'an and Sunna, *ijtihad* was clearly applied to those fundamental texts themselves. Community leaders and scholars were always exercising *ijtihad* in relation to the Qur'an and Sunna because they had to rely on their own judgment in deciding which provisions of the Qur'an and Sunna applied to a given situation or question, and in interpreting and applying the text(s) they deemed relevant. With the development of *usul al-fiqh*, however, *ijtihad* was regulated and restricted to the point of extinction, and remains extremely problematic to the present day.<sup>17</sup> But since *ijtihad* was defined and regulated through human reason in the past, rather than being the direct product of divine revelation as such, it can be re-defined and re-regulated through human reason today and in the future.

A third significant feature to note about the formative stages of Shari'a is that while the scholars were elaborating and perfecting an ideal and comprehensive normative system, the affairs of the state were conducted more in accordance with pragmatic political expediency than with the dictates of that system. For much of Islamic history since the Amawiy dynasty (661-750 A.D.), there existed "an uneasy truce between *ulama* [scholars of Shari'a] . . . and the political authorities.... As long as the sacred law [Shari'a] received formal recognition as a religious ideal, it did not insist on being fully applied in practice."<sup>18</sup> But the dichotomy between theory and practice should neither be exaggerated nor simplified in terms of secular and religious characterizations—an important point to note in relation to current Islamic discourse as indicated later.

For one thing, this dichotomy varied from time to time and from one field of Shari'a to another in ways that maintained the credibility of the appearance of allegiance to the ideal model from both the scholarly and political points of view. Second, the "light and distant" nature of government and administration in the imperial states of the past, coupled with the diffusion of Shari'a in inaccessible treatises and commentaries,

<sup>16</sup> An-Na'im, *Toward an Islamic Reformation*, chap. 3.

<sup>17</sup> Coulson, *A History of Islamic Law*, 80-81; Schacht, *An Introduction to Islamic Law*, 69ff.; An-Na'im, *Toward an Islamic Reformation*, 27-29. Cf. Wael B. Hallaq, "Was the Gate of Ijtihad Closed?" *International Journal of Middle Eastern Studies* 16 (1984): 3.

<sup>18</sup> Joseph Schacht, *The Origins of Muhammadan Jurisprudence* (Oxford, 1959), 84.



were not conducive to rigorous systematic implementation. Communities were left to conduct their daily affairs in accordance with their own local customary or traditional practices that included Shari'a norms, but not in a coherent and formal sense of codes of law in the modern sense of the term.

More significantly from the point of view of current debates about human rights in the Islamic world, the ideal of Shari'a has remained very much alive in the hearts and minds of Muslims, even when they lived under colonial administrations which sought to displace Shari'a by modern notions of law and government in formal and systematic ways.<sup>19</sup> As explained by Anderson:

To a Muslim, it has always been a far more heinous sin to deny or question the divine revelation than to fail to obey it. So it seemed preferable to continue to pay lip-service to an inviolable Shari'a, as the only law of fundamental authority, and to excuse departure from much of it in practice by appealing to the doctrine of necessity (*darura*), rather than to make any attempt to adapt law to the circumstances and needs of contemporary life.<sup>20</sup>

But this traditional attitude is presently being challenged by Islamic activists who are saying that Muslims are now free to implement the totality of Shari'a after several decades of political independence as nation-states. It is far from clear, and extremely doubtful to my mind, whether the modern Islamists' project will lead to the implementation of Shari'a as articulated by the founding scholars and known to Islamic communities through the ages. In addition to the incompatibility of fundamental aspects of Shari'a with the modern circumstances of living in pluralistic nation-states in a globalized and interdependent world,<sup>21</sup> the very effort of codification and enforcement by centralized coercive authority contradicts the nature of Shari'a and the mainstream of Islamic history. Nevertheless, I would insist that the Islamists' project must be taken very seriously because of its drastic consequences to human rights, and religious human rights in particular.

<sup>19</sup> On the process of displacement of Shari'a by Western laws during the colonial period, see Herbert Liebesny, *The Law of the Near and Middle East* (Albany, 1975), 56; James Norman D. Anderson, *Law Reform in the Muslim World* (London, 1970), 1-2, 33.

<sup>20</sup> Anderson, *Law Reform in the Muslim World*, 36.

<sup>21</sup> For a critique of the theoretical model of a Shari'a state in the modern context, see, generally, An-Na'im, *Toward an Islamic Reformation*, chaps. 4-7.



### Nature and Circumstances of The Present Discourse

It is difficult to generalize about the modern discourse of rights and responsibilities in all Islamic countries. Even in relation to certain regions or countries, one can identify several stages and forms of discourse. Generally speaking, however, this discourse tends to fall within two main stages, at least in relation to the countries of the Middle East and North Africa. During the struggle for independence, and immediately after it was achieved, the debate was focused upon nationalist projects whether liberal (such as that of Bourghiba in Tunisia), Arab/socialist (such as that of Nasir in Egypt), or socialist (such as that of the FLN in Algeria). Those projects were explicitly or implicitly secular in orientation with little reference, if any, to the role of Shari'a or an "Islamic ideology." However, upon the failure of the proponents of those projects to deliver the promised benefits, a variety of Islamist groups appear to have succeeded in seizing the initiative and re-defining the terms of discourse. I will focus on this second stage because of its significance to the subject of this chapter, without claiming that the "Islamization" of discourse is either total or irreversible throughout the Islamic world, or parts thereof.

In my view, discourse between Islamists and their opponents,<sup>22</sup> especially in the Middle East and North Africa, is complicated by contextual and operational factors and characterized by conceptual confusion. The reasons for this include the political and historical conditions under which discourse is taking place, the orientation and power relations of the participants as well as the subject-matter and terms of reference of the discourse itself. What is of particular concern for the subject of this chapter, however, is the conceptual confusion of this discourse.

On the Islamist side, the present discourse is apparently "modern" in its form and techniques, using to great effect sophisticated methods of organization, mass media and communications technology. These modern forms and techniques are being deployed in pursuit of the declared objective of recapturing and resurrecting an idealized vision of a past "Golden Age" of a powerful civilization. But that objective is usually presented as an ideological slogan, without a clear statement of how a

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<sup>22</sup> These two groups are certainly too diverse to be subsumed under single terms, even within the same country at a given time. While noting the variety of discourses and diversity of participants and contexts, the following analysis will focus on discourse about the role of Islam as political ideology and the definitive framework of constitutional and legal systems. In this light, I will use the term Islamists to refer to those who present themselves as such, and deliberately employ Islamic concepts and terminology in their discourse. Since those who do not present themselves as Islamists and do not use Islamic concepts and terminology as a matter of preference are united in their opposition to the Islamists, I will refer to them as such.

Shari'a model might be reconciled with the realities of a modern multi-religious nation-state or of international relations.

Despite these obvious problems with the Islamists' side of the discourse, their opponents appear to be in disarray and generally on the defensive. Possible reasons for this include such political factors as being associated in the public eye with the previous discredited nationalist, post-independence project, both liberal and socialist. Leftist Muslims appear to be demoralized and suffering a loss of ideological inspiration, especially after the collapse of the Soviet bloc and the general retreat of socialism in Europe. Liberal Muslims seem to suffer from perceptions of American patronage, which is seen as a liability in itself, in addition to its negative association with perceptions of total American bias in favor of Israel in the Arab-Israeli conflict.

The discourse is also distorted by prevailing conditions of political oppression in many countries of the region, which in turn inhibit communication and public debate, especially with respect to any subject-matter deemed by security forces to be "sensitive" or controversial. Denied access to the mostly state-owned media, the Islamists seek political support for their cause by preaching at mosques and other "religious" locations and occasions, as well as using their own media (tapes and publications). Islamists are also very effective in generating support through the provision of social and health services to the target communities. Their opponents lack the organization and orientation to use these means, but may have better access to newspapers, as and when permitted by the government, which are not read by the illiterate majority of the population. Thus, the two sides rarely interact directly between themselves, or with each other's constituencies among the public at large.

*Polarization*  
A sense of mutual hostility and suspicion is intensified, it seems, by a lack of conceptual common ground: while Islamists speak of Shari'a and the revival of the glorious Islamic tradition, the frame of reference of their opponents is modern notions of constitutionalism, democracy, and human rights. Consequently, there is not only growing polarization and mis-communication between the two sides, and between each of them and the public constituency of the other, but their respective positions are also likely to be seen as contradictory or irreconcilable. The Islamic public at large is therefore presented with a stark choice: either Islam and Shari'a or democracy and human rights, without discussion or explanation of why there must be a choice, and why in these terms in particular.

Moreover, perceptions of a wider context of a historical confrontation with the West seem to reinforce this stark choice. Islamists tend to point to Western support for democracy and human rights as a ploy of exploitation and domination. Liberal Muslims, on the other hand, are discour-



aged by Western double-standards, as reflected, for example, in its domineering behavior in the Gulf War of 1991 in contrast to its failure to act in Bosnia.

The most significant consequence of this wider context for our purposes here is that issues of identity and authenticity are seen as of paramount importance in a fundamental geo-political confrontation. Thus, the Islamists' discourse often seems to be more about the *right* to define the identity of the community, and the duty to protect it against hostile non-Muslims aliens and, perhaps more importantly, against subversion by corrupt Westernized elites or heretics and renegade Muslims, than about the actual meaning of that identity and its relevance in the modern national and international context. Having succeeded in emphasizing the "Islamic" dimension of that identity over all other ethnic, cultural, economic, and political elements, the Islamists now claim a monopoly over Islamic authenticity and authority to define and defend the identity of the community in those terms.

In their present defensive mode, on the other hand, opponents of the Islamists appear to be more concerned with defending themselves against charges of treason and subversion than with contesting the Islamists' right to define and defend the identity of the community in question. The very act of contesting the Islamists' definition of the identity of the community and monopoly of Islamic authenticity is seen as confirmation of the charge, rather than an attempt to incorporate other elements which may have been integral to that identity, or to oppose its political manipulation. In this way, the boundaries become more important than the content, and those threatened with exclusion become more concerned with asserting their conformity with the criteria of inclusion than with contesting those criteria and the way they are applied.

This confrontational and unproductive state of discourse, I suggest, is compounded further by two conceptual confusions, one over the relationship between religion and the state in the Islamic context, and the other pertaining to the relationship between rights and responsibilities in connection with conceptions of the individual and the community. The first is more explicit and visible; the second is more implicit in the first and less appreciated as a separate issue.

It is not possible to trace here the precise sources and chronology of the confusion about the relationship between religion and the state. It is clear, I would suggest, that this confusion evolved through a dialectical process since the middle of the last century when Muslim reformers began debating whether it is desirable to separate religion and state, or Islam and politics, in order to achieve rapid modernization. While the advocates of separation, which came to be known as secularism (*al-*



*ilmaniya*) cited lessons from European history and quoted Western political theory in support of their position, its opponents claimed that Islam allowed no distinction between religion and state.

The coercive and intrusive manner in which secularization was imposed by authoritarian regimes in Turkey and Iran after the end of the First World War, and attempts to do so in other parts of the Islamic World after the Second World War, aggravated the confusion and intensified the controversy over the issue. At present, Islamists present secularism as an anti-religious concept designed to alienate Muslims from their religion and thereby secure and perpetuate their domination and exploitation by the West. Those who advocate separation of Islam and politics, they allege, are anti-Islamic subversive agents of alien cultures serving the interests of foreign powers. In this way, the Islamists seek to discredit their opponents while installing themselves as the acknowledged guardians of Islamic identity and authenticity.

Liberal and socialist Muslims, on the other hand, have traditionally failed to take an Islamic discourse seriously or to educate themselves in its concepts and techniques. Whether this was due to a belief that it was unnecessary to engage in such discourse, or because of a fear that to do so would mean conceding the legitimacy and authority of the Islamists' frame of reference, the fact of the matter is that an Islamic discourse has become, or is becoming, unavoidable in many Islamic countries. It is therefore important to clarify the relationship between religion and the state from an Islamic point of view.

The other serious conceptual confusion pertains to the relationship between rights and responsibilities in connection to conceptions of the individual and community. Following their premise of seeking modernization through the application of European models and political theory, Muslim reformers emphasized earlier in the twentieth century the need to protect individual liberties against encroachment by the state and community at large. To counter that claim, Islamists now tend to emphasize the interests of the community over the rights of the individual.

This confusion is closely related to issues of identity as well as the relationship between religion and politics with direct consequences to freedom of belief. According to the Islamists, since Islam is the sole foundation of the identity of the community, the state must "regulate" freedom of belief as the essential criterion of membership in the community. By disputing this in favor of protecting individual freedom of belief, they charge, their secular (read anti-Islamic) opponents are weakening the Islamic identity of the community and undermining the Islamic nature of the state.

In this way, confrontational discourse faces modern Islamic communities with a compounded stark choice between "secular" individualism and "Islamic" communitarianism. As I will argue in the next section, the sharp dichotomy implicit in this choice is neither necessary from an Islamic religious point of view, nor realistic or useful to make in practice.

### Foundations of Religious Human Rights

In light of the previous discussion, it is clear that freedom of belief ought to be supported from an *Islamic religious* point of view, because it is essential for the authenticity of religious belief and experience as such and for the vitality and relevance of an Islamic normative system to the lives of Muslims today. An equally valid and fundamental reason for such support is that freedom of belief is essential for the peace and stability of necessarily and permanently pluralistic national and international political communities.

The task set for this chapter is to examine both the positive and negative aspects of an Islamic frame of reference for religious rights *as human rights*. This should be done, first, with a view to evaluating the existence or absence, adequacy or inadequacy, of Islamic foundations for these rights. The second purpose of such an evaluation, I believe, is to seek ways of developing Islamic foundations for freedom of belief, to the extent they are absent, and of promoting them to greater adequacy and stronger influence on Islamic law and behavior.

There is an obvious "advocacy" element in my perception of the second purpose of this task (also implicit throughout my analysis) in that I am not concerned with an "objective" or "impartial" evaluation of the situation, but rather with changing or supporting it in favor of better protection of human rights, including religious human rights. From my perspective as a Muslim who not only takes both Islam and human rights seriously, but also believe them to be mutually supportive normative systems, that is the point of the whole exercise.

The background, context, and some of the premises of my approach to this task have already been explained in the preceding sections. This final section offers a two-fold discussion. First, I shall briefly review the status of religious rights under Shari'a as commonly conceived in Islamic discourse today and assess that conception from a human rights point of view. Second, I will elaborate on a theory of stronger Islamic foundations for religious human rights with a view to promoting and enhancing the protection of these rights in Islamic countries today.



On the first count, the Shari'a scheme of religious rights provides that a person is essentially "free" to adopt or reject Islam, but certain consequences will follow from his/her choice:<sup>23</sup>

(1) If a person chooses to become a Muslim, or is born and raised as a Muslim, then he or she will have full rights of citizenship in an Islamic state, subject to limitations against the rights of women as conceived in modern constitutional and human rights law. However, once a Muslim or officially classified as such, a person will be subject to the death penalty if he or she becomes an apostate, that is, one who persists in repudiating his or her faith in Islam. An apostate is also subjected to forfeiture of property, nullification of marriage, and other legal consequences.

(2) If a person chooses to be or remain a Christian, Jew, or believer in another scriptural religion, as defined by Shari'a—one of *ahl al-kitab*, the People of the Book or believers in divine scripture who are called *dhimmis*—he or she will suffer certain limitations of rights as a subject of an Islamic state. There are differences as to the scope and extent of these limitations among various schools of thought and individual scholars of Shari'a, and the practice has also varied over time. The essential point is that *dhimmis* are not supposed to enjoy complete legal equality with Muslims.

(3) If a person is neither a Muslim nor one of *ahl al-kitab*, as defined by Shari'a, then that person is deemed to be an unbeliever (*khafir* or *mushrik*). An unbeliever is not permitted to reside permanently, or even temporarily according to stricter interpretations, in peace as a free person within the territory of an Islamic state except under special permission for safe conduct (*aman*). In theory, unbelievers should be offered the choice of adopting Islam, and if they reject it they may either be killed in battle, enslaved, or ransomed if captured.

Compared to the legal and theological systems of other "state religions" of the past, it is clear that the Shari'a scheme of religious rights was superior from a modern perspective of freedom of belief. Moreover, except for minor exceptions or relatively brief periods, such as the early Fatimi dynasty in Egypt in the tenth century A.D., past and present Islamic states have generally tended to adopt the least restrictive interpretation of these principles, or to disregard them in favor of relatively greater freedom of belief.

But when judged by modern standards of human rights, the Shari'a scheme is objectionable not only because of its limitations on freedom of belief for Muslim and non-Muslims alike, but also in view of its very con-

<sup>23</sup> For elaboration and documentation of the Shari'a scheme, see An-Na'im, *Toward an Islamic Reformation*; id., "Religious Minorities under Islamic Law and the Limits of Cultural Relativism," *Human Rights Quarterly* 9(1) (1987): 1-18.

ception of civil and political rights on the basis of a religious classification of people. To illustrate briefly the first point, the capital crime of apostasy not only violates the right of a Muslim to adopt another faith or belief, but can and has been used to punish Muslims who express unorthodox views which are deemed to be a repudiation of belief in Islam.<sup>24</sup> While limitations on the rights of non-Muslim believers clearly constitute serious discrimination on grounds of religion, the possibility of death or enslavement for an unbeliever is a total nullification of any notion of human rights in principle and content.

Moreover, the very notion of basing civil and political rights on a religious classification is inherently inconsistent with the premise of the universality of human rights, however "insignificant" the legal consequences of that universality may appear to be. I would therefore conclude that although there are foundations for some religious rights in Shari'a and in the practice of Islamic states past and present, that level of protection of freedom of belief does not offer a sufficient foundation for religious *human* rights.

Nevertheless, I suggest that it is possible to construct a coherent and conceptually valid theory of Islamic foundations of religious human rights based on the following elements. First, since Shari'a is a historically-conditioned *human* interpretation of the fundamental sources of Islam, alternative modern interpretations are possible. Second, a reconstruction of Shari'a in support of Islamic foundations for religious human rights is imperative in view of the need for contesting and renegotiating Islamic identity and its normative system in the present circumstances of plurality of national and international political communities. Third, such a theory will be fully Islamic, because it would be based on the text of the Qur'an as interpreted and accepted by Muslims in the present context, instead of applying Shari'a principles which were the product of interpretation by earlier Muslims in their own historical context. To clarify further these elements, it is necessary to outline the hermeneutical premise of this theory.

Hermeneutics may be defined as the art or science of interpretation, especially of scriptural texts. In view of the inevitability of using human reason and action in understanding and implementing any text, as noted earlier, a hermeneutical process is necessary for understanding the purpose and normative content of a text like the Qur'an or Bible.<sup>25</sup>

<sup>24</sup> For a recent example of this, see Abdullahi Ahmed An-Na'im, "The Islamic Law of Apostasy and its Modern Applicability: A Case from the Sudan," *Religion* 16 (1986): 197-223.

<sup>25</sup> For an elaboration on this point and the following remarks see Abdullahi An-Na'im, "Toward an Islamic Hermeneutics for Human Rights," in An-Na'im, et al., eds., *Human Rights and Religious Values: An Uneasy Relationship?*, 229-42.



Each religion, or specific tradition within a religion, is supposed to have its own distinctive set of interpretative techniques and their underlying assumptions which are accepted as valid or authoritative by the adherents of the religion or tradition in question. In reality, however, there will be more than one competing hermeneutical framework, each of which is open to mutual challenge and reformulation among co-believers. Thus, for example, the diversity of Sunni, Shi'a, and Sufi Muslim schools of thought signify differences in the hermeneutical framework, not only among Muslims in general but also among those who belong to each of the Islamic traditions.

Although the proponents of one Islamic interpretative framework would normally tend to characterize those of others as invalid or illegitimate, even un-Islamic, the only reasonable and practical way to settle such differences is for each side to present its case to the relevant community of believers as the ultimate arbiter and mediator between competing frameworks. This would usually happen in the process of seeking the support and allegiance of the community, and the issue would be settled over time through the community's adoption or rejection of one point of view or another. But how does a particular type of Islamic interpretative framework emerge and prevail over others at a certain time?

The emergence of a new interpretative framework, I suggest, is normally a function of individual and collective orientation, that is to say, the conditioning of the existential or material circumstances of the person and the community in relation to the text. A Muslim, for example, would understand the text of the Qur'an, and derive its normative implications, in terms of his or her knowledge and experience of the world, including perceptions of self-interest in political, economic, and social context, and of the realities of inter-communal and/or international relations. A similar process, I maintain, operates at the communal level in that the prevalence or demise of an interpretative framework is normally a function of the collective orientation of the community as defined above, that is to say, the conditioning of the existential or material circumstances of the community at a given time.

This does not mean that the process is either completely deterministic in that interpretations are automatically determined by settled and immutable orientations, or wholly relativistic in opening religious texts to all and every type of interpretation. The process is not deterministic because individual and collective orientations are sometimes influenced by visions of change and transformation beyond the immediate conditioning of circumstances as perceived by the general population. Otherwise, there would be no opportunity for the emergence of radical ideas and social movements capable of transcending the conditioning of individual

and communal circumstances, and indeed eventually transforming those circumstances themselves. Individuals and communities do exercise a choice in articulating, adopting, or rejecting one interpretative framework or another.

The process is not arbitrary and relativistic because the validity of a proposed interpretation is judged by a living community through serious discussion and deliberation. The proponents of each interpretation will, of course, seek to win the support of the community through the use of what they claim are Islamic concepts and arguments, but it is the community which will ultimately make that determination. In practice, the community may follow the advice of its political or opinion leaders, and those whose proposals were thereby rejected should accept that decision until they can either win those leaders over or persuade the community not to follow their advice. The alternative is to seek to impose their interpretation on the community which will only be counter-productive in the end.

In the process of emergence and adoption or rejection of interpretative frameworks there is the factor of "historical contingency," which refers to the notion that an idea will not emerge or prevail prematurely. But since historical contingency can only be judged in retrospect, who is to predict whether or not an idea is in fact premature and how can that be done with certainty? The emergence of an idea and the ability of its proponents to propagate it are indications of the ripening of historical contingency, but only time will tell whether or not the circumstances of the period were conducive to the conditioning and/or individual and collective choice that would allow it to prevail. In fact, as illustrated by the history of major religions, including Islam, social and political resistance are to be expected, and should not be taken as conclusive evidence of the final rejection of an idea, however radical or innovative it may appear to be.

To illustrate briefly the application of this analysis to the subject of Islamic foundations of religious human rights, I would cite verse 137 of chapter 4, which can be translated as follows:

Those who believed, then disbelieved, believed again and disbelieve once more, and become even more disbelieving, God shall not forgive them or guide them on the right path.

Although the majority of early Islamic scholars interpreted this verse as consistent with the imposition of the death penalty for apostasy,<sup>26</sup> I would see it as conclusively excluding any possibility of punishment for

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<sup>26</sup> See, e.g., *Tafsir al-Tabari*, 9:314-18 (*Dar al-Ma'arif bi-Masr*, not dated).



disbelief in this life, since there is no mention of such punishment in this verse or anywhere else in the Qur'an. The difference between my understanding of this verse and that of early scholars, which is still advocated by some Islamists today, reflects divergence in interpretative frameworks, but neither is more or less Islamic because of that reason alone. Disagreement between these frameworks and their normative implications should be settled by the community of Muslims at large in light of the Islamic argumentation presented on behalf of each position.

The example of apostasy is particularly appropriate for the purposes of my analysis, because it also involves the conceptual confusions mentioned earlier, namely, the question of the relationship between Islam and the state and that between rights and responsibilities. In the absence of Qur'anic authority, as noted earlier, the punishment of apostasy under Shari'a is based on reports of Sunna. But the support of Sunna for this punishment is valid only on the assumption of a certain type of unity of Islam and the state and a particular view of rights and responsibilities that conditions the former on performance of the latter. Sunna can be understood to support imposing the death penalty for apostasy only if disbelief is equated with high treason on the assumption that citizenship is based on belief in Islam. That assumption, in turn, is valid only under a view of entitlement to the rights of citizenship on the condition of satisfactory performance of the responsibilities of belief as a pre-requisite of membership of the community whose members enjoy those rights.<sup>27</sup> Moreover, this reasoning is premised on a conception of freedom of belief as a conditional right of citizens and not as a human right to which all human beings are entitled.

While this reasoning and its underlying premise were valid, in my view, in the historical context of the formative stages of Shari'a, they are no longer valid today. The individual and collective orientations of Muslims today, I believe, are probably different from those of earlier generations because of the radical transformation of existential and material circumstances of today compared to those of the past. In contrast to the localized traditional existence of past Islamic societies, Muslims today live in multi-religious nation-states which are fully incorporated into a globalized world of political, economic, and security interdependence, and constantly experiencing the effects of mutual social/cultural influence with non-Islamic societies. While some individual Muslims may still choose to advocate traditional notions of community and conditionality of rights, the reality of the pluralistic national and international political communities of today support entitlement to freedom of belief as a hu-

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<sup>27</sup> See An-Na'im, *Toward an Islamic Reformation*, 86-87.

man right rather than a conditional right of membership of a religious community.

In support of the view that freedom of belief is a human right to which all human beings are entitled by virtue of their humanity, rather than a right conditioned upon the performance of certain responsibilities of membership in a community, I would note that the right is needed and useful only in the former rather than the latter sense. If the benefits of freedom of belief is available only to believers who are accepted as such, what is the rationale for having a right to freedom of belief at all? The right to freedom of belief is needed, and can be claimed, only by non-believers and believers who are not accepted as such by the community in question. I would also recall here the argument made earlier about the importance of freedom of belief, including the right of dissent, for the vitality and relevance of the religion itself and its normative system.

Finally, I wish to add the following suggested clarification of the above-mentioned conceptual confusion of the relationship between religion and the state and that of the individual and community in the Islamic context. In my view, notions of complete unity of religion and state, on the one hand, and their strict separation in a community of believers, on the other, are both conceptual fallacies which also lacks support in Islamic history, including the articulation and implementation of Shari'a itself.

The organic relationship between religion and *politics* is too obvious to deny, and is not problematic except when it results in restrictions on the legal and human rights of citizens on the ground of their faith or belief. Even with regard to the state, religion can legitimately play a ceremonial or symbolic role in public life. What is objectionable is for religious beliefs to be constituted as the basis of political authority and legal system of a nation-state in ways which, for example, condition or base legal and human rights on faith or belief or gender. To do so would immediately repudiate the survival of the political community as well as undermine the integrity and authenticity of religious belief and practice.

It is important to inject this clarification in current discourse about rights and human rights in Islamic countries today, because, as indicated earlier, the protagonists tend to misconceive the issues and unduly restrict the options open to Islamic societies. Instead of facing Islamic societies with a false stark choice between total unity or complete separation of Islam and politics/state, participants in the discourse should seek to clarify and articulate a formulation of the relationship in ways which satisfies an Islamic sense of identity and self-determination without violating internationally-recognized human rights norms.



It is also important to emphasize that secularism, as practiced in many parts of the world (and not only the West), is not anti-religion. On the contrary, secularism was conceived and applied in parts of Western Europe and the United States in order to protect freedom of belief and promote religious piety.<sup>28</sup> Moreover, there is nothing in the concept and practice of secularism to justify associating it as such with the exploitation and domination of others. Western powers did not colonize, and now seek to dominate, Islamic countries *because* the former were/are secular, or *through* secularizing the latter countries. Nevertheless, the existence of these misconceptions must be acknowledged and addressed by those who are concerned that the relationship between Islam and politics or the state is not only compatible but also fully supportive of universal human rights, including religious human rights.

### Conclusion: Realities and Prospects

Islamic Shari'a and history present a mixed picture regarding foundations of religious human rights, whereby the theory of the freedom of belief was comparatively superior to those of other state-religions in the past and the practice was generally better than the theory, but both are no longer acceptable from a modern human rights point of view. Strong Islamic foundations for religious human rights are conceptually possible, but their practical prospects depend on the outcome of the current discourse in Islamic countries.

Although I strongly believe in the Islamic validity of the theory presented in this chapter, I would neither suggest that it is the only possible Islamic foundation of religious human rights nor claim that it is necessarily widely accepted as such in practice. In my view, the more Islamic foundations for religious human rights one can find, the better, for these multiple foundations will support and reinforce each other in promoting these rights as universal human rights. My theory may not be consciously accepted as such, but all its factual elements and essential logical premises are familiar to educated Muslims and scholars of Islam.

By addressing it to Muslims, I hope that my theory will contribute to promoting an Islamic commitment to religious human rights, and thereby influence current and future practice in favor of greater respect and protection of these rights in Islamic countries today. A better understanding by non-Muslims of the prospects and problems of Islamic foun-

<sup>28</sup> For a concise clarification prompted by the needs of an Islamic discourse without being part of it see, Helge Hoibraaten, "Secular Society: An Attempt at Initiation," in Tore Lindholm and Kari Vogt, eds., *Islamic Law Reform and Human Rights: Challenges and Rejoinders* (Oslo, 1993), 231-57.

dations for religious human rights, together with efforts from other religious perspectives contained in this book and its sequel, should also contribute to enabling believers and non-believers alike to collaborate in a global project to protect and promote universal religious human rights.<sup>29</sup>

## Rights of Women Within Islamic Communities

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Before I address the issue of the human rights of women within Islamic communities, I consider it necessary to reflect on two areas of concern which have—in my judgement—a critical bearing on the human rights debates in the present-day Muslim world. The first area of concern relates to some widely-held assumptions regarding human rights and to the secular nature of the human rights discourse which has developed within the framework of the United Nations. The second area of concern relates to the perception of Islam and Muslims, in and by the West, and the image of Muslim women which has become prevalent in Western societies.

### Some Assumptions About "Human Rights"

In the contemporary world, the term "human rights" has become a fad, and it is often used rather glibly. Underlying this usage is the assumption that everyone knows what "human rights" are and from whence they came. Another widespread assumption is that human beings do, in fact, possess "human rights." If the latter assumption were valid, that is, if "human rights" were a universal human possession, there would not be significant numbers of persons in virtually every society in

<sup>29</sup> I see this process as integral to the project of promoting universal cross-cultural legitimacy of human rights. See, generally, Abdullahi A. An-Na'im and Francis M. Deng, eds., *Human Rights in Africa: Cross-Cultural Perspectives* (Washington, 1990); Abdullahi A. An-Na'im, ed., *Human Rights in Cross-Cultural Perspectives* (Philadelphia, 1992).

This argument leads, however, to the question: if "human rights" exist though they are not being exercised by all or most human beings (many of whom would be astonished to know that they had any such "rights"), then in what sense do these "human rights" exist? It is an historical fact