

Winter 1992

Civil Rights in the Islamic Constitutional Tradition: Shared Ideals and Divergent Regimes, 25 J. Marshall L. Rev. 267 (1992)

Abdullahi Ahmed An-Na' Im

Follow this and additional works at: <https://repository.law.uic.edu/lawreview>



Part of the [Civil Rights and Discrimination Commons](#), [Comparative and Foreign Law Commons](#), [Human Rights Law Commons](#), [International Law Commons](#), [Law and Gender Commons](#), [Law and Race Commons](#), [Legal History Commons](#), and the [Religion Law Commons](#)

Recommended Citation

Abdullahi Ahmed An-Na'Im, Civil Rights in the Islamic Constitutional Tradition: Shared Ideals and Divergent Regimes, 25 J. Marshall L. Rev. 267 (1992)

<https://repository.law.uic.edu/lawreview/vol25/iss2/4>

This Symposium is brought to you for free and open access by UIC Law Open Access Repository. It has been accepted for inclusion in UIC Law Review by an authorized administrator of UIC Law Open Access Repository. For more information, please contact repository@jmls.edu.

CIVIL RIGHTS IN THE ISLAMIC CONSTITUTIONAL TRADITION: SHARED IDEALS AND DIVERGENT REGIMES

ABDULLAHI AHMED AN-NA'IM*

INTRODUCTION

The basic premise of this paper is that, broadly speaking, human societies are entitled, and do in fact seek, to follow their own paths to self-determination in accordance with their world-views and visions of the public good.¹ Given the commonalities of human nature and environment,² paths to self-determination tend to intersect and overlap. This presents possibilities of both confrontation and cooperation among human societies. Without overlooking the fact that destructive confrontation continues to endanger human life and dignity, nor minimizing the role of international power relations in this regard, I believe that cooperation between societies on the basis of mutual respect and understanding is possible, indeed imperative.

In this light, and in accordance with the theme of this symposium (a decent respect for the opinion of humankind), I propose to contribute to the discourse of mutual respect and understanding by presenting an internal critique of civil rights in the Islamic constitu-

* LL.B., University of Khartoum, the Sudan, 1970; LL.B., University of Cambridge, England, 1973; Diploma (MA) in Criminology, University of Cambridge, England, 1973; Ph.D. in Law, University of Edinburgh, Scotland, 1976. Formerly: Associate Professor of Law, University of Khartoum, the Sudan; Visiting Professor of Law, UCLA, 1985-87; Ariel F. Sallows Professor of Human Rights, College of Law, University of Saskatchewan, Canada, 1988-91. Presently: Olof Palme Visting Professor, 1991-92, Faculty of Law, Uppsala University, Sweden.

I am grateful to Tore Lindholm for his helpful comments and suggestions on an earlier draft of this paper.

1. The notion of societies as actors on a collective will can be problematic because it is often abused by despotic leaders who appropriate to themselves the exclusive right to speak and act for a given society as an organic whole. While being sensitive to this danger, I find it useful to speak of society in this figurative sense without losing sight of issues of internal power relations and political struggle over whose version of the society's world view prevails, or who determines what is in the public good. Although this is not the subject of the paper as such, these issues will be taken into account in the course of my discussion.

2. See generally CULTURE AND HUMAN NATURE: THEORETICAL PAPERS OF MELFORD E. SPIRO ch. 1 (B. Kilborne and L. Langness eds., 1987).

tional tradition in the modern context. I must emphasize from the outset that I am doing this out of the conviction that Muslim peoples have the right to conduct their constitutional and legal affairs in conformity with the principles of Islam. This right, however, is subject to the obligation of respecting the legitimate rights of all individuals and groups within Islamic countries. It is my task as a Muslim to seek ways of fulfilling this obligation from an Islamic point of view. The following internal critique is therefore intended to affirm, legitimate and effectuate the right of Muslims to self-determination in terms of an Islamic identity, including the application of Islamic law, and not to repudiate that right.

For the purposes of this paper, I define civil rights as the rights of the individual against the state and society at large, commonly referred to in human rights discourse as civil and political rights. These include rights of political participation, equality before the law, and freedom from discrimination on grounds such as race, religion or gender. I realize that this working definition may be too narrow or problematic in some contexts, but take it to be sufficient for the purposes of this paper, as determined by the framework of the symposium.³

In Western constitutional discourse, the terms "civil rights" and "civil liberties" are often used interchangeably, but "when they are differentiated the latter generally denotes the rights of *individuals*, while the former refers to the constitutional and legal status and treatment of *minority groups* that are marked off from the majority by race, religion, or national origin."⁴ I do not wish to make this distinction here because it is not helpful for my analysis. As shown in section III below, women and non-Muslims are denied some civil liberties under historical formulations of Shari'a *because* of gender and religion.⁵ Until these aspects of Shari'a are removed through Islamic reform as suggested below, it is misleading to maintain a distinction between civil rights and liberties. In any case, given the general interdependence between the two, it may not be meaningful to differentiate them, except under very specific

3. For a brief discussion of the question of individual rights and notions of communalism, see *infra* text at § I.B.

4. 3 MILTON R. KONVITZ, CIVIL RIGHTS, INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 312 (David L. Sills ed. 1968).

5. Shari'a encompasses moral and pastoral theology, ethics, high spiritual aspiration, and detailed ritualistic and formal observances; it includes all aspects of public and private law, hygiene, and even courtesy and good manners.

On the development of the concept, see FAZLUR RAHMAN, ISLAM 101-09 (1979). For an explanation of the sources and development of this comprehensive system, see ABDULLAHI A. AN-NA'IM, TOWARD AN ISLAMIC REFORMATION: CIVIL LIBERTIES, HUMAN RIGHTS AND INTERNATIONAL LAW ch. 2 (1990) [hereinafter AN-NA'IM, TOWARD].

circumstances.⁶

The thesis of the paper is that various normative traditions may legitimately pursue different approaches to realizing the shared ideals of human dignity, liberty and well-being.⁷ As appropriate means to legitimate ends, however, these approaches must remain open to criticism and reform in order to ensure and improve their practical ability to realize these ideals. I believe that effective reform can only be undertaken within the framework of each tradition and in accordance with its own internal criteria of legitimacy. This applies to the theoretical formulation of reform proposals, as well as to the political struggle for their implementation. Nevertheless, I submit that cross-cultural interaction can contribute to stimulating those theoretical formulations and to supporting the political struggle for their implementation. This must be done, however, with proper understanding of, and sensitivity to, the internal legitimacy and dynamics of the process of reform.

By focusing on Islamic constitutional theory and practice in this paper, I am not implying that this is the only available ideology or operative force pertaining to civil rights in the Muslim world today. Space does not permit a detailed explanation of the political situation in, or the constitutional and legal system of, individual Islamic countries. But I would, however, strongly emphasize that the beliefs and practices of contemporary Muslims, like those of other peoples in the world, reflect a wide range of ideological orientations and must continue to respond to many practical considerations and concerns. Despite the recent dramatic rise in what is commonly known as Islamic fundamentalism, the realities of the plural societies of the Muslim world, and of global political and economic relations, preclude the implementation of a totalitarian ideology, be it "Islamic" or otherwise.

6. Another reservation against using the term "civil liberties" is that it suggests an emphasis on "negative rights" as opposed to "positive rights"; that is, imposing restraints on the government without providing for its duty to provide economic and social rights. Although this view of civil liberties is changing, the "negative" association persists in popular usage.

It is meaningful to make this distinction in the American context because, although the basic civil liberties of Black Americans were constitutionally guaranteed since the end of slavery, their civil rights were violated for a long time. Serious civil rights issues remain in relation to women and racial minorities.

For a schematic description of civil liberties, including positive rights, see 3 ROBERT G. MCCLOSKEY, *CIVIL LIBERTIES*, INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 307, 308 (David L. Sills ed. 1968).

7. In this paper, I assume that these are shared ideals without attempting to substantiate or argue for this assumption. It may be said that it is more appropriate to speak of "overlapping" rather than "shared" ideals because the latter term implies a conscious awareness of agreement on these ideals which may not be the case in practice. I prefer to use the term "shared" because I believe that, on reflection, such conscious awareness of agreement on these ideals can be identified within most human societies today.

Nevertheless, it is equally true that the *Islamic dimension* of the political, constitutional and legal situation in any predominantly Muslim country is, and will always be, extremely important. Thus, safeguarding and enhancing civil rights in Islamic societies requires an understanding of, and working with, the Islamic dimension of the internal legitimacy and dynamics of these rights in those societies. According to the rationale of Islamic discourse, the experience of the original Muslim communities of seventh century Arabia and the Middle East is the ultimate historical moment for Muslims up to the present day. This Islamic frame of reference is commonly believed to be central to political and constitutional discourse among millions of Muslims today, indeed to the legitimacy of government in a growing number of Islamic countries. It is therefore reasonable to assume that this Islamic frame of reference is integral to the moral justification of civil rights, and to the struggle for their protection in the modern context.

The key to conducting constructive discourse about civil rights in the Islamic constitutional tradition, I suggest, is the candid admission of the historical contradictions and ambivalence inherent to the subject itself, and an appreciation of the underlying causes thereof. I find this admission and appreciation to be essential for evolving a legitimate conception of civil rights in Islamic constitutional theory, and for implementing this concept in the modern states of the Muslim world.

In its origins and historical formulations, the Islamic constitutional tradition did not, and could not have, provided in detailed and institutional arrangements for the full range of civil rights in the modern sense of the term. A religious tradition originating in the Middle East of the seventh century could not have articulated and implemented a predominately secular constitutional concept emerging primarily from the political struggle in Europe and North America since the eighteenth century.⁸ To maintain otherwise would involve a distortion of either the facts of Islamic constitutional history or the concept and principles of civil rights, if not both. This does not mean that there is no Islamic rationale for civil rights. In my view, a correct understanding of the nature and evolution of Islamic constitutional theory, and of the concept and principles of civil rights, will permit the development and imple-

8. It should be noted that the evolution of the modern concept of civil rights was not exclusively secular since the need for religious toleration and co-existence played an important role in the inception of the concept. See generally JOHN LOCKE, A LETTER CONCERNING TOLERATION (1955).

I am not discounting the importance of the antecedents and recent development of civil rights in other parts of the world. But it cannot be doubted, I believe, that the modern term derives from primarily Western intellectual and political developments over the last two hundred years.

mentation of a mutually supportive relationship between the two in modern Islamic societies.

In order to present and argue for this thesis in its proper context, it is helpful to begin by explaining the notion of the challenge of realizing the shared ideals of human dignity, liberty and well-being referred to earlier. In terms of the basic premise of the paper, I submit that these ideals should constitute the substance of the right to self-determination for all human societies. The ability to realize them should therefore be the criterion by which any ideology is evaluated and reformed, if need be, through the process of internal legitimation adopted here.

I. THE CHALLENGE OF REALIZING SHARED IDEALS

Subject to further clarification below, I wish to explain what I mean by the challenge of realizing shared ideals. In my view, the pursuit of the ideals of dignity, liberty and well-being is universal to all human societies. The matter is complicated, however, by the fact that perceptions of dignity, permissible limitations on liberty and the conditions believed to be conducive to well-being vary from one society to another. Even within the same society, these perceptions differ not only over time, but also at any given point in time as a result of the competing, if not conflicting, interests of various segments and groups within that society. In other words, the content and implications of these ideals are relative to, and contestable within, a given society in its specific historical context. Thus, the universality of these ideals is subject to the circumstances of political struggle and the dynamics of power relations within society at a given point in time. Each society is faced with the challenge of constantly specifying the meaning of these ideals for practical purposes, and of realizing them in the daily lives of its own members.

The term civil rights, as it is commonly used today, signifies a certain liberal and/or social democratic approach to realizing the ideals of dignity, liberty and well-being in the context of the modern nation-state. It presupposes the existence of this state and its institutions, and is intended to primarily protect the individual against encroachments by the state and its organs and officials. According to this view, as the model of the nation-state becomes universal [that is, as the entire world evolves toward state societies] so should this particular approach to civil rights become universally applicable, regardless of its liberal pedigree.⁹ This reasoning would be valid, in my view, only if the proposed approach is appreciative

9. I am paraphrasing here the comments of Rhoda E. Howard in relation to human rights (which I believe apply to civil rights) *stated in*, HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES: A QUEST FOR CONSENSUS 81 (Abdullahi A. An-Na'im ed. 1992).

of, and sensitive to, global cultural diversity in relation to the precepts, institutions and mechanisms of civil rights. I would also emphasize that the need for a civil rights regime in a given state society must be legitimized and rooted in the local culture(s) of that society.

A. *Purpose and Context of Civil Rights*

As indicated earlier, my working definition of civil rights focuses on the rights of the individual to political participation, equality before the law and freedom from discrimination. The basic justification of these rights, in my view, is the universal principle of reciprocity. This principle, also known as the "Golden Rule," indicates that since every person should treat others as s/he would like to be treated by them, s/he should concede to them the same civil rights s/he claims for herself or himself.¹⁰

In practical terms, moreover, human experience to date has shown these rights to be necessary for economic and social development and justice, as well as for the proper functioning of political regimes.¹¹ As illustrated by the recent collapse of the totalitarian Marxist regimes in Eastern Europe and the Soviet Union, and the ensuing exposure of their corruption and inefficiency, civil rights provide vital safeguards for a valid process of determining and implementing policies which are best suited to serve the most widely held view of the public good. Even those whose view of the public good is not thereby implemented are best served by civil rights regimes because under them they would have a fair chance to achieve some degree of political power or otherwise influence policy in their favor. Where practice does not conform to this theory because power relations, economic interests and other factors distort and frustrate the process, the answer is surely more protection of civil rights, not their repudiation.

This common wisdom is also reflected in ideological and constitutional thinking throughout the world. Almost all constitutions in the world today incorporate these rights, and every political ideology claims their protection to be its immediate, or at least long term, objective. Even dictatorial regimes usually attempt to justify the abrogation or limitation of these rights as an "unavoidable temporary measure" in the interest of some alleged public good such as national security or economic development, and promise to restore them as soon as possible. It is true that such justifications are

10. For an elaboration on this principle as the justification of human rights, including civil rights, see AN-NA'IM, TOWARD, *supra* note 5, at 162-64.

11. See generally Rhoda E. Howard, *The Full-Belly Thesis: Should Economic Rights Take Priority over Civil and Political Rights? Evidence from Sub-Saharan Africa*, 5 HUM. RTS. Q. 467-90 (1983).

rarely, if ever, valid, and that the fulfillment of the promise to restore civil rights is sometimes postponed under one pretext or another. But the attempted justification and alleged pretext for postponement themselves show that the validity of civil rights cannot be openly denied even by those who violate them.

Reference has already been made to the importance of the context in determining a society's response to the challenge of realizing the ideals of dignity, liberty and well-being of its members. That is to say, the policies and practices of a society in this regard are influenced by historical, cultural, socio-economic and political factors and power relations at play in that society at a given point in time. This context influences a society's choice of a particular rights regime, or preference for a rights/duties approach that emphasizes communal interests over individual rights.

I would strongly emphasize, however, that this context itself is constantly changing through the interplay of internal struggle and external influences. The dynamics of internal cultural, socio-economic and political relations and shifts in power relations alter perceptions of what the shared ideals mean and how to implement those perceptions in practice. It should also be noted that the dominance of certain perceptions within a society does not mean that they are the only ones, or that dominated perceptions have no impact at all on public policy and practice. Often, apparently dominant perceptions maintain their political advantage by making "concessions" to other perceptions within society. Moreover, the culture as a whole usually offers its adherents a range of options or legitimate choices. These features of internal discourse may be referred to as "the ambivalence and contestability of culture."¹²

This internal discourse is constantly influenced by the society's external relations and dialogue(s) with other societies. Classes or groups within society who are dissatisfied with existing perceptions and norms will seek ways of changing or adjusting them in order to modify or replace the political or economic regime or priorities of their society with new proposals in pursuit of the shared ideals of dignity, liberty and well-being. In so doing, these classes or groups are influenced by what is happening in other societies; and may also enlist the support and assistance of external "allies" in their internal struggle. These two inter-related processes is what I call "the internal discourse" and "cross-cultural dialogue" of human/civil rights.¹³

12. See *Toward a Cross-Cultural Approach to Defining International Standards of Human Rights: The Meaning of Cruel, Inhuman and Degrading Treatment or Punishments*, HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES: A QUEST FOR CONSENSUS, *supra* note 9, at 19-27.

13. My thesis of cultural legitimacy of human rights, which applies to individual civil and political rights, is *explained in*, HUMAN RIGHTS IN CROSS-CUL-

B. Communalism and Individual Rights

It may be argued that, by focusing on the civil rights of individuals, I am overlooking the fact that some societies emphasize the "duties" of individuals to the community, rather than their rights against it. Given the basic premise of this paper that societies have the right to seek their own paths to self-determination, what if a society wishes to emphasize the public interest, as defined by collective or group rights, over individual civil rights? It is often asserted that Islamic cultures emphasize the importance of the public over the private good, and subordinate the rights of the individual to the interests of the community.¹⁴ If (or to the extent that) this is true, does it mean that these cultures are not committed to *individual* civil rights? Would it be appropriate to seek to induce these cultures to change their attitudes and norms in order to share a commitment to individual civil rights?

Subject to further elaboration in the sections on Islamic constitutional theory and civil rights below, I believe that the following observations are relevant in response to these questions at this stage of my analysis. The assumed communalism of Islamic societies is plausible and acceptable only in traditional settings of small scale social and political organization based on kinship and ethnic networks of personal relationships. A purely, or even primarily, communalist conception of the relationship between the individual and the community/state is simply untenable under modern conditions of large scale and complex social and political relations.

As correctly stated by Ann Mayer, Muslim authors who assert traditional communalism in support of the argument that individual civil rights are inappropriate in the modern context of the Muslim world proceed from a false assumption to an unwarranted conclusion. First, they fail to appreciate that the model of communal solidarity is not distinctively Islamic, it "reflects the features commonly found in societies before the intrusions of industrialization and urbanization." Second, these authors jump from a description of the subordination of the individual that was widely accepted in traditional (including non-Islamic) societies, "to the unwarranted conclusion that Islamic doctrine calls for such subordination even in

TURAL PERSPECTIVES: A QUEST FOR CONSENSUS, *supra* note 9, at Intro., ch. 1 & Concl.; HUMAN RIGHTS IN AFRICA 159-79 (Abdullahi A. An-Na'im and Francis Deng eds., 1990).

14. This assertion is made by some Muslim writers without supporting it with specific evidence or detailed information. See, e.g., M.F. Al-Nabhan, *The Learned Academy of Islamic Jurisprudence*, 1 ARAB L. Q. 391-92 (1986); A.K. Brohi, *The Nature of Islamic Law and the Concept of Human Rights*, HUMAN RIGHTS IN ISLAM, REPORT OF A SEMINAR HELD IN KUWAIT 48 (Int'l Commission of Jurists 1982); Abdul A. Said, *Precepts and Practice of Human Rights in Islam*, 1 UNIVERSAL HUM. RTS. 73, 74 & 77 (1979).

the drastically changed circumstances of contemporary states, where the power of the central government is immeasurably enhanced over what it was in the medieval era."¹⁵

Furthermore, it seems to me that the communalism thesis confuses the *ethics* of communal solidarity with the need for effective legal safeguards against the abuse of power and/or violation of rights. I believe that, generally speaking, the socialization processes of all human societies seek to instill in individuals a sense of obligation to the community and subordination of his or her private interest to that of the collectivity. Such socialization may be stronger or more effective in some societies than others, but this does not mean that legal safeguards for the rights of the individual are unnecessary. In my view, the rationale of this socialization process is that the rights and interests of the individual will be sufficiently protected through communal solidarity. Even when this is believed to be the norm rather than the exception, legal safeguards and remedies are essential for concrete cases or situations where individual rights are violated. In this way, I maintain that communalism and civil rights regimes are compatible, indeed complementary.

In light of my analysis so far, I now propose to briefly address the following questions: Should the process of adapting civil rights regimes, or adopting new ones, be totally relativist, in that each society should be left completely to its own internal standards and devices? Or should it be universalist in the sense of leading to a particular kind of regime for realizing the shared ideals of dignity, liberty and well-being, at least under a given set of circumstances? If the process is to be relativist, what should other societies do when they perceive serious deprivations or deviations from the shared ideals in the practice of a given society? If it is universalist, which society sets the standards for each set of circumstances, and why should other societies accept its judgment?

If it is cast in these terms, I would not know how to resolve the relativism/universalism dilemma. On the one hand, as a human being concerned with the fate of others and dependent on their concern for my fate, I worry about what societies might do to powerless or disadvantaged individuals and groups. Yet, I find it objectionable for one society to dictate or impose the standards to be implemented by other societies. But, in my view, the issue should not be presented as an either/or proposition in the first place. I would seek to resolve the relativist/universalist dilemma by promoting a model of cross-cultural interaction whereby one society may and

15. ANN E. MAYER, *ISLAM & HUMAN RIGHTS: TRADITION AND POLITICS* 62 (1991). For a similar critique of claims of African scholars that individual human rights are inappropriate in the African setting, see *HUMAN RIGHTS IN AFRICA*, *supra* note 13, at 159-83.

can influence the concept or content of the civil rights regime of another society, without dictating to it. This can be done, I suggest, through what I referred to earlier as cross-cultural dialogue, which, in turn, will feed into and support internal discourse within the culture or society in question.

In summary, my approach is premised on the following propositions about the nature, context and evolution of civil rights:

i. The universality of commitment to human dignity, liberty and well-being does not resolve the ambivalence and contestability of cultural norms and priorities because perceptions of these ideals and ways of realizing them vary from one society to another, as well as within the same society at a given point in time or over an extended period. The context in which these ideals are perceived and realized changes in response to internal and external factors. In adapting to changing circumstances, a particular society's conception and implementation of a modified or new regime is unlikely to conform to that of other societies because each society adapts in accordance with its own history and culture. While it might be possible to find parallel changes and adaptation, it would be unrealistic to expect them to be identical, and misleading to present them as such.

ii. Culture is of paramount importance to civil rights in two ways: as the source of the concept and normative content of the particular civil rights regime, and as the context within which civil rights norms are interpreted and applied. The belief that individual civil rights should be respected and protected, as well as the specification of those rights, mechanisms and processes for their implementation, should emanate from the values and attitudes of the people concerned. To the extent that this is the case, civil rights may come to be respected and protected through the spontaneous behavior of the people and the natural functioning of their social and political institutions, with minimum controversy or coercive enforcement. Where (or to the extent that) this is not the case, it would still be possible, and in my view desirable, to strive to supplement or enhance the legitimacy and efficacy of civil rights within the culture in question. This should be primarily done through the process of internal cultural discourse, by utilizing and reconstructing normative resources in favor of greater respect and protection of civil rights. Such internal discourse can be supported through cross-cultural dialogue which is consistent with the guidelines suggested earlier.

iii. To the extent that individual civil rights of some segments of society are protected in traditional settings, that is achieved in informal and indirect ways, e.g., through the processes of mediation and consensus. But in those settings, equal protection is not usually accorded to disadvantaged groups or classes, such as women and

religious or ethnic minorities. As the context changes (through, e.g., demographic changes, urbanization and the formalization of the structures and institutions of the state), there will probably be greater awareness of the inadequacy of traditional concepts of individual rights and the mechanism for their protection. Previously deprived groups or classes may begin to assert and struggle for their individual civil rights, and others may become dissatisfied with the scope of the civil rights they already have, demand more rights, and/or more appropriate enforcement mechanisms. All of this is likely to lead to the modification of the existing regime, or adoption of a new one. While influenced by the experiences of other societies, the modified or new regime will be peculiar to the society in question as the product of its history and culture.

iv. This does not mean that the process of adapting existing regimes or adopting new ones should be exclusively relative to the particular society. Each society should be concerned about the status of, and seek to influence events in favor of greater respect for, civil rights in other societies. By the same token, each society should remain open to reciprocal influence by other societies in this regard. Both aspects of this process of mutual support for civil rights must be done, however, with the utmost sensitivity and understanding of the internal dynamics of the evolution of civil rights in other societies in accordance with their own indigenous criteria of legitimacy.

II. ORIGINS AND DEVELOPMENT OF ISLAMIC CONSTITUTIONAL THEORY

In view of the vast geographic and demographic extent of the past and present Muslim world, and the tremendous richness and complexity of the Islamic tradition,¹⁶ it is not possible to attempt here a comprehensive discussion of civil rights in Islamic constitutional thought. It may in fact be inaccurate to speak of a single Islamic constitutional tradition because there have been many distinctive juridical systems and political experiences over time and

16. Originating in Arabia around 610, Islam expanded to cover the whole Middle East within a few decades. During the next century, the Muslim world extended from Spain through North Africa and the Middle East into Northern India and beyond. Having lost Spain to Catholicism by the end of the fifteenth century, Islam is now the predominant religion in much of Africa and Asia. Depending on the criteria used in the classification, about thirty to forty countries in the world today identify themselves as Islamic countries populated by about one billion people. On the history and culture of the Muslim world, see generally THE CAMBRIDGE HISTORY OF ISLAM (P.M. Holt, et al. eds., 1970); MARSHALL G.S. HODGSON, THE VENTURE OF ISLAM (1974); IRA M. LAPIDUS, HISTORY OF ISLAMIC SOCIETIES (1988); RAHMAN, *supra* note 5.

place.¹⁷ For the purposes of this paper, however, it will suffice to provide a brief theoretical survey of Islamic constitutional thought, its evolution, present status and the issues facing it in the Muslim world today. Against this background, I will focus on issues of civil rights in the modern context.

As indicated earlier, the Islamic frame of reference is commonly assumed to be the experience of the original Muslim communities of the seventh century, especially that of the community and state established by the Prophet in Medina, a town in western Arabia, around 622 and continued by the first generation of his followers (*sahaba*) for the next four decades.¹⁸ Patterns of individual and collective behavior, models of political relationships and legal institutions commonly ascribed to that period continue to be held as the Islamic ideal to the present day. It is therefore reasonable to take the practice of the Medina community of 622-660 as the most authoritative source of Islamic constitutional theory, and its state as the ideal model.

While decrying deviations from that theory and model in the practice of subsequent generations, and seeking to justify and rationalize them with reference to the need to adapt to changing circumstances, present-day Muslims also greatly revere the jurisprudential and political thought of scholars and jurists of the first three centuries of Islam.¹⁹ In fact, what is accepted today as authentic Shari'a is based on the work of those founding jurists as the authoritative transmitters and interpreters of the traditions of the earliest Muslim communities. It is therefore important to take this literature into account in tracing the development of Islamic constitutional theory. At another level, however, since Muslims must continue adapting to changing circumstances, previous patterns of adaptation are instructive in evaluating present patterns of individual and collective behavior, and in evolving Islamic political and legal institutions.

17. See generally KEMAL A. FARUKI, *THE EVOLUTION OF ISLAMIC CONSTITUTIONAL THEORY AND PRACTICE FROM 610 TO 1926* (1971) [hereinafter FARUKI, *EVOLUTION*]; DUNCAN B. MACDONALD, *DEVELOPMENT OF MUSLIM THEOLOGY, JURISPRUDENCE AND CONSTITUTIONAL THEORY* (1972).

18. This stage of Islamic history is commonly known as the reign of the Four Right-guided Caliphs which ended by the death of Ali and coming of Mu'awya to power. Four years before his death in the year 690, Mu'awya secured the succession of his son, thereby setting the precedent of hereditary monarchy which was followed by the Umayyad, Abbasid and other dynasties for several centuries. T.W. ARNOLD, *THE CALIPHATE* 22ff (1966).

On the constitutional history and nature of the first Islamic state of Medina, see FARUKI, *EVOLUTION*, *supra* note 17, at 16-36; MOHAMED S. EL-AWA, *ON THE POLITICAL SYSTEM OF THE ISLAMIC STATE* 26-62 (1980).

19. See generally AHMAD HASAN, *THE EARLY DEVELOPMENT OF ISLAMIC JURISPRUDENCE* (1970); JOSEPH SCHACHT, *THE ORIGINS OF MUHAMMADAN JURISPRUDENCE* (1959).

A. *The Constitutional Theory of the Medina State*

It is somewhat a contradiction in terms to speak of the constitutional theory of the Medina state. The selection and powers of the ruler of that state, and the manner in which he exercised them, did not contemplate the institutions and processes of modern constitutionalism, such as effective limitations of powers through political and judicial accountability. It is still useful to review and evaluate the main features and principles of that state in constitutional terms because that state continues to be raised by powerful political forces as the model to be implemented by Islamic countries today.

Muslims, past and present, conceive of the Medina state as a religious state established and ruled by the Prophet Muhammad who, according to Muslim belief, was guided by Divine Will through revelation. In modern constitutional terms, the Prophet was the original sovereign and sole human source of law and political authority in the Medina state. Moreover, the subjects of that state are believed to have been the ultimate Muslim community of devout believers who were the embodiment of the ideal Islamic behavior under the immediate instruction and supervision of the Prophet himself. By definition, therefore, the exact model of the Medina state cannot be fully replicated. Yet, that model is supposed to forever provide Muslim communities with the concepts, institutions and mechanisms of government under Shari'a. What guidance can be drawn from the constitutional features of the Medina state as an Islamic model, and what are the concepts, institutions and mechanisms which should be implemented if that model is to be followed today?

The key constitutional features of the Medina state derive from the central role of the Prophet as the ultimate source of validity and legality, who was operating in the context of a traditional tribal society. In that setting, it was natural for the first Muslims to accept the complete unfettered political and legal authority of the Prophet as the patriarch of the community, especially since he was believed to be guided by divine revelation. Thus, it was simply inconceivable for the Prophet's political and legal powers to be restricted or challenged by any human agency.

Upon the Prophet's death, his successors (caliphs) were selected by a very small group of leading Muslims, or appointed by the preceding caliph, and then confirmed by the general Muslim population through a mass oath of allegiance known as *by'a*.²⁰ From the legal constitutional point of view, the caliph enjoyed absolute powers for life because, once *by'a* was given, there was no

20. ARNOLD, *supra* note 18, at 19-22; FARUKI, *EVOLUTION*, *supra* note 17, at 16-19.

mechanism for withdrawing or restricting it. This is illustrated by the fact that three (Umar, Uthman and Ali) of the four caliphs of the Medina state were assassinated. Due to the lack of the concept and mechanism of peaceful transfer of political power, the whole Muslim community was engulfed in civil war after the assassination of the third caliph, Uthman, and throughout the reign of Ali until his assassination and the establishment of the Umayyad dynasty by military force in 661. Thus, the Medina state lasted no more than thirty years after the Prophet's death, and ended in total civil war.²¹

Although the caliphs did not enjoy the Prophet's religious authority, they in fact exercised the full range of his political and legal powers.²² In this way, the concept of absolute rule was entrenched by the lack of any legal mechanism for the accountability of ruler to the ruled. This is true, in my view, despite the existence of the notion of *shura* as an instrument of popular political participation. As I have explained elsewhere, both the textual sources and historical practice of *shura* made it an advisory function since the caliph had complete discretion whether or not to seek advice, on which matters, and was not bound by the advice given.²³ This does not mean that the notion of *shura* cannot be evolved into a modern Islamic constitutional principle whereby the government of the day will be representative of, and responsive to, the will of the governed. In fact, this is precisely the sort of development many Muslims are calling for today. To achieve this result, however, the concept must be clarified and disassociated from its limited historical usage.

It should be noted that I am concerned here with the lack of limitation of powers and accountability as legal concepts and institutions, rather than as anthropological phenomena. Space does not permit detailed analysis of the realities of political and social relations in the early Islamic era.²⁴ In any case, I do not find such an exercise particularly helpful in evaluating the implications of tradi-

21. For a brief survey of these events, see *id.* at 16-23.

22. Khalid M. Ishaque, *Al-Ahkam Al-Sultaniya: Laws of Government in Islam*, 4 ISLAMIC STUD. 293 (1970).

The caliphs were not original human legislators in the same sense the Prophet was before them because, as decreed by verse 33:40 of the Qur'an, divine revelation ceased with the Prophet's death. However, as the ultimate rulers of the community, the caliphs had the power to determine the authoritative interpretation of relevant texts of the Qur'an and Sunna as well as to exercise original law-making powers in matters not specifically covered by the Qur'an and Sunna. For an explanation of this point, see AN-NA'IM, TOWARD, *supra* note 5, at 77-78.

The Qur'an is the scripture which Muslims believe to be the final and conclusive divine revelation. It is cited in this paper by number of chapter, followed by number of verse. Sunna is the record of utterances and traditions attributed to the Prophet.

23. *Id.* at 78-80.

24. See, e.g., LAPIDUS, *supra* note 16, at 11-53.

tional Islamic political theory as it applies in the modern context. This is due to the fact that the recent radical transformation of Islamic societies, and their local and international environments, make the patterns of political participation and power relations of the early Islamic era largely irrelevant, if not counter-productive. For example, to the extent that there was political participation in the sense of consensus and mediation to minimize conflict in a traditional setting, that practice did not normally include women and non-Muslims. In my view, neither is that traditional model of tribal participation appropriate for the state societies of today, nor is the exclusion of women and non-Muslims acceptable from a civil rights point of view.

B. *Evolution and Present Status of Islamic Constitutional Theory*

In view of the manner in which the Umayyad Dynasty was established in 661 and ruled the expanding Muslim empire until 750, that period of Islamic political history can only be described as secular. Whether in the direct appointment of a successor by the ruling calif, the administration of the state, adjudicating between competing Arab and non-Arab political forces, and so forth, the Umayyad caliphs pursued purely pragmatic secular politics. It is true that the caliphs utilized Islamic sentiments, particularly in the struggle against the external enemies, and performed the public functions of religious leaders, "but these were more gestures of practical politics than religious conviction."²⁵

Despite the secular orientation of the Islamic state at the time, and perhaps because of it, that period witnessed the emergence of speculative or theoretical Shari'a jurisprudence. Denied effective political and judicial power, the *Ulama* (scholars and jurists) began to develop Shari'a as an ideal model of the comprehensive Islamic system.²⁶ Notwithstanding brief periods when the *Ulama* were allied with the rulers or were closely consulted by them, especially during the early Abbasid era,²⁷ the formative stages and subsequent development of Shari'a were characterized by a speculative theoretical orientation. The theory of Shari'a and practice of Muslims did coincide in some matters of daily administration of justice, especially in the fields of family law and inheritance, but not in political

25. FARUKI, *EVOLUTION*, *supra* note 17, at 28.

26. *Id.* at 29.

27. The Abbasids Dynasty was established in the year 750 after the overthrow of the Umayyads by military force. *Id.* at 32. To legitimize their revolt against the Umayyads, the Abbasids appealed to religious sentiments and asserted the primacy of Islam in the affairs of the state. *Id.* Nevertheless, their government "borrowed heavily from or was influenced by Sassanid ideas of an absolute monarch with super-human qualities." *Id.*

matters and affairs of the state.²⁸

Thus, the dichotomy between the theory of Shari'a and Muslim practice through the ages is strongest in constitutional issues. This resulted in the emergence of two contradictory views of constitutional theory. The predominant view tended to make concessions to political expediency or "necessity" in the interest of maintaining the unity and cohesion of the Islamic state.²⁹ As long as the rulers maintained an acceptable level of commitment to Shari'a in other fields, Ulama of this group were willing to accept and rationalize the rulers' absolute political powers and emphasized the subjects' duty of obedience in order to avoid *fitna* (political upheaval and civil war).³⁰ According to this position, subjects should obey the ruler except when that would entail violation of Shari'a. But since this group of Ulama took an extremely restrictive view of when this might happen in concrete and practical terms, and rulers could always maintain that their policies were in fact consistent with Shari'a,³¹ it was not possible to justify political opposition or dissent as such.³² Even if the right to political opposition existed in theory, there was no mechanism for its lawful exercise in practice.³³

The other, minority view, simply disregarded reality in favor of maintaining an ideal model in which rulers fully comply with the dictates of Shari'a as indicated to them by the Ulama, thereby securing the rights of all subjects.³⁴ By theorizing exclusively on what *ought* to be the case, this group of Ulama simply avoided the

28. *Id.* at 33-34; AN-NA'IM, TOWARD, *supra* note 5, at 31-33.

29. This dominant view was represented by Ulama such as al-Baqillani (d. 1012), al-Baghdadi (d. 1037), al-Mawardi (d. 1058), al-Ghazzali (d. 1111). For a review of the ideas of these Ulama see, FARUKI, EVOLUTION, *supra* note 17, at 43-52 and 56-66; ERWIN I.J. ROSENTHAL, POLITICAL THOUGHT IN MEDIEVAL ISLAM 27-61 (1958).

30. ARNOLD, *supra* note 18, at 48-50; FARUKI, EVOLUTION, *supra* note 17, at 35-36; H.A.R. GIBB, CONSTITUTIONAL ORGANIZATION, LAW IN THE MIDDLE EAST 14-16 (M. Khadduri and H. Liebesney eds., 1955).

31. As previously indicated, the ruler had an effective monopoly on what the position of Shari'a is on a given issue. AN-NA'IM, TOWARD, *supra* note 5, at 77-78. There was no independent arbiter, the equivalent of a modern Supreme Court, to adjudicate between the ruler of the day and the opponent of any of his policies or practices.

32. This is the dominant view in that branch of theoretical Shari'a dealing with constitutional matters and affairs, known as *al-siyasa al-shar'iya* (politics in accordance with Shari'a). On this branch of Shari'a, see N.J. COULSON, A HISTORY OF ISLAMIC LAW 129, 132-34, 147, 161, 172, & 184-85 (1964); JOSEPH SCHACHT, INTRODUCTION TO ISLAMIC LAW, 48-56 (1964).

33. M. Khadduri, *The Juridical Theory of the Islamic State*, 41 MUSLIM WORLD 184-85 (1951).

34. The primary example of this group of Ulama is Ibn Taymiyya. See generally OMAR FARRUKH, IBN TAYMIYYA ON PUBLIC AND PRIVATE LAW IN ISLAM OR PUBLIC POLICY IN ISLAMIC JURISPRUDENCE (1966); see also G.E VON GRUNEBaum, ISLAM: ESSAYS IN THE NATURE AND GROWTH OF A CULTURAL TRADITION 68 (1955); MALCOLM H. KERR, ISLAMIC REFORM: THE POLITICAL AND LEGAL THEORIES OF MUHAMMAD ABUDH AND RASHID RIDA 220 (1966).

whole question of what happens when rulers fail to implement the ideal model. As observed by Coulson, the "supreme paradox, which leads to an outright nullification of this pious ideal, lies in the fact that the Shari'a fails to provide any guarantee that government will, in practice, assume this ideal form, and that, far from ensuring the existence of practical remedies against the ruler's abuse of his recognized powers, it [Shari'a] simply counsels acceptance of such abuse."³⁵

While these inadequate views of the relationship between the individual and the state persist to the present day,³⁶ the realities of political and social power relations have been drastically transformed throughout the Muslim world.³⁷ As a result of the colonial intrusion of the late nineteenth century and other external influences as well as internal political and social developments,³⁸ the Muslim world is now constituted as separate independent nation states.³⁹ Western secular law has effectively displaced Shari'a in almost all of these states, especially in constitutional and public law matters.⁴⁰ Even countries like Saudi Arabia, which maintained Shari'a as their constitutional and legal systems, have more recently adopted some of the power structures and legal concepts of modern nation states.⁴¹

Despite these changes, the theoretical commitment to implement Shari'a has persisted throughout the Muslim world. This apparent paradox is explained by Anderson as follows:

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 inviolate 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 that law to the circumstances and needs of contemporary life.⁴²

35. N.J. Coulson, *The State and the Individual in Islamic Law*, 6 INT'L & COMP. L. Q. 55-56 (1957).

36. See AN-NA'IM, TOWARD, *supra* note 5, at 94-97; MAYER, *supra* note 15, at 52-71.

37. See FARUKI, EVOLUTION, *supra* note 17, at 55-93 for a discussion on constitutional thinking and developments from the end of the Abbasid era (1258) to the Ottoman and Mughal period (1500-1700).

38. See *id.* at 112-200 for a review of developments within the Muslim world and reaction to the Western intrusion.

39. See generally JAMES PISCATORI, ISLAM IN A WORLD OF NATION-STATES (1986).

40. J.N.D. ANDERSON, LAW REFORM IN THE MUSLIM WORLD 1-2, 33 (1976); COULSON, *supra* note 32, at 161; HERBERT LIEBESNY, THE LAW OF THE NEAR AND MIDDLE EAST 56 (1975); .

41. Bryant W. Seaman, *Islamic Law and Modern Government: Saudi Arabia Supplements the Shari'a to Regulate Development*, 18 COLUM. J. TRANS-NAT'L L. 413 (1980).

42. ANDERSON, *supra* note 40, at 36.

Although I believe that this explanation is valid, it is now clear that many Muslims feel that the logic of necessity is weakening as the political independence and economic prosperity of Muslim peoples increase in this age of self-determination. As illustrated by the dramatic rise of Islamic resurgence in most parts of the Muslim world, demands for the complete and immediate application of Shari'a are gaining in political power and influence.⁴³ To many Muslims, the issue is no longer whether or not to apply Shari'a, it is rather how to apply it in ways that are consistent with the national and international circumstances of today. I will briefly address this question in general constitutional terms before turning to its specific implications for civil rights.

C. Islamic Constitutionalism in the Modern Context

In light of the above analysis, it is clear that the fundamental challenge facing Islamic constitutional theory is how to transform the traditional concept of personal religious legitimacy of political power into conceptually and effectively limited institutional authority. As I will show in the next section, there are very serious civil rights objections to traditional formulations of Shari'a. But even if those objections are adequately redressed through Islamic law reform, the question remains: If Shari'a is supposed to be the guardian of rights, how will the "correct" view of Shari'a be identified and implemented in concrete situations?

The Iranian revolution of 1979 has clearly illustrated, in my view, the inadequacy of the traditional approach, even when there is the political will to implement it.⁴⁴ On the premise that the essential function of an Islamic state is to implement the will of God as expressed in Shari'a, it is reasoned that the most qualified Ulama should be constituted as guardians over the constitution to ensure that the state complies with the dictates of Shari'a.⁴⁵ This is the first and only modern application of the notion that the Ulama should act as the institutional guardian over the state (known in Arabic as *wilayat al-faqih*, *vilayat-i-faqih* in Farsi). As I have indicated elsewhere,⁴⁶ this notion reflects a deeper and more profound ambivalence in Islamic constitutional theory about the issue of sovereignty.

43. AN-NA'IM, TOWARD, *supra* note 5, at 2-4.

44. On the events and developments of the Iranian revolution, see SHAROUGH AKHAVI, IRAN: IMPLEMENTATION OF AN ISLAMIC STATE, ISLAM IN ASIA: POLITICS AND SOCIETY 32-40 (J. Esposito ed. 1987).

45. See the subtitle "The Mandate to the Just Clergy" and Articles 4 and 5 of the Iranian Constitution of 1979, reprinted in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 9 (Albert P. Blaustein and Gisbert H. Flanz eds., 1980).

46. AN-NA'IM, TOWARD, *supra* note 5, at 81-84.

The logic behind the Ulama's guardianship of the state is that, since Muslims attribute ultimate sovereignty to God, they must submit to the intermediate sovereignty of the Ulama as the human agents of divine sovereignty.⁴⁷ Even if one accepts the dubious proposition that a group of persons can act as the human agents of God, there is bound to be disagreement on who those persons are or ought to be. In any case, members of that group will disagree among themselves in carrying out that function. Both aspects of guardianship by the Ulama will therefore involve political considerations and processes. As illustrated by experience in Iran since the revolution,⁴⁸ the Ulama's guardianship of the state is nothing more or less than a fiction designed to hide the realities of political struggle for power. Given this state of affairs, the protection and promotion of civil rights become imperative in any modern state, be it openly secular or so-called Islamic.

While it may have somewhat different connotations or emphasis' in international law, constitutional law, political theory and so forth, sovereignty always signifies the highest governmental, legal or political authority in the state.⁴⁹ For analytical purposes, however, it may be helpful to distinguish between the sovereign of a given state and the bodies, organs or institutions to which that sovereign may delegate certain aspects or functions of sovereignty in specific circumstances. According to common Muslim belief, God is the Sovereign of any Islamic state.⁵⁰ For all practical purposes, however, it has always been recognized that there must be a human agent of the Divine Sovereign. All Muslims agree that the Prophet was the sole human agent of the Divine Sovereign during his lifetime, and there is perhaps common agreement that the caliphs of

47. This notion is not peculiar to Shi'i constitutional theory, but also seem to underlay the ideas of prominent Sunni Ulama, such as Ibn Taymiyya who enjoys great influence in Saudi Arabia and many other Islamic countries. The same logic would seem to apply in both cases: since the essential function of the state is to implement Shari'a, why not appoint the Ulama as guardians to ensure that the state fulfills its obligation?

48. The Iran model seeks to minimize the dangers and problems of disagreement among the Ulama by providing for a single person as the ultimate holder of the mandate of guardianship. But as can be seen in the express terms of Articles 5 and 107, the 1979 Constitution could not avoid providing for disagreement among the Ulama on the fundamental question of the selection of that person. Thus, the political nature of this "institution" remains in the selection of this uncrowned king, as well as in performance of his functions and dealings with the different organs of the state, his subsequent relationship with the Ulama, and so forth.

49. See FRANCIS W. COKER, *Sovereignty*, 14 *ENCYCLOPEDIA OF THE SOCIAL SCIENCES* 265 (Edwin R.A. Seligman ed. 1930); BERNARD CRICK, *Sovereignty*, 3 *INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES* 77 (David L. Sills ed. 1968); *BLACK'S LAW DICTIONARY* 1252 (1979).

50. This is the common understanding of one of the main themes of the Qur'an as expressed in, e.g., verses 2:110, and 3:26-27. See H.A.R. GIBB, *MOHAMMADANISM* 39 (1955).

the Medina state were legitimate successors of the Prophet in that role.⁵¹ But that does not answer the question of who is, or ought to be, the human sovereign today. More significantly, the experience of early Muslims provides little assistance on practical questions such as how the modern equivalent of the caliph is to be selected, whether and how he can be made accountable for his conduct today.⁵²

Whether inspired by, or in response to, the Western notion of popular or people's sovereignty, some modern Muslim authors have suggested that the agent of divine sovereignty should be the whole *Umma* (the Muslim nation or community), rather than a single person or group of persons.⁵³ Provided the *Umma* is understood to include all the citizens of the state on completely equal terms, this idea can form the basis of a modern Islamic constitutional theory because it is fully consistent with both religious doctrine and the aspirations of Muslims for responsible representative government. As I will explain in the next section, however, this requires Islamic law reform to remove all features of inequality of women and non-Muslims under Shari'a.

A modern Islamic constitutional theory would also require the development of adequate mechanisms and institutions for the election and accountability of government, and other features of modern constitutionalism. As suggested earlier, this can be done through the development of the notion of *shura* into a binding principle of representative government rather than merely discretionary consultation.⁵⁴ Civil rights are needed not only in order to evolve and elaborate this modern concept of *shura*, but also for the proper implementation of the ensuing constitutional theory.

Finally, some reference must be made to the question of separation of religion and state, and its implications to a modern Islamic

51. MAJID KHADDURI, *WAR AND PEACE IN THE LAW OF ISLAM* 10 (1955).

52. The masculine pronoun is used to indicate that, according to the prevailing view of Shari'a, the ruler of an Islamic state should be a man. I do not share this view of Shari'a, but I must admit that, despite recent experience with the election of women Prime Ministers in the Islamic states of Pakistan and Bangladesh, masculinity remains a prerequisite for the head of an Islamic state in the minds of the vast majority of Muslims today.

53. See generally MUHAMMAD B. AL-MUTI'I, *HAQIQAT AL-ISLAM WA USUL AL-HUKUM* (ARABIC: THE TRUTH ABOUT ISLAM AND THE FOUNDATIONS OF GOVERNMENT, 1344 HJRI); TAJ AL-DIN AL-NBAHANI, *AL-DAWLA AL-ISLAMIYA* (ARABIC: THE ISLAMIC STATE) 1952.

For a concise statement of this proposal in terms of representative constitutional government, see ABD AL-QADIR AUDA, *AL ISLAM WA AWDA'UNA AL-SIYASIYYA* (ARABIC: ISLAM AND OUR POLITICAL AFFAIRS 81-82 (1980)).

54. This development would require the reinterpretation of the relevant verses of the Qur'an, mainly 3:159 and 42:38, in accordance with a new principle of construction. See AN-NA'IM, *TOWARD*, *supra* note 5, at 52-68 for a proposal of such a principle of construction and its prospects today.

constitutional theory. In my view, it would be unrealistic, if not counter-productive, to expect Muslims to replicate the Western principle of separation of church and state. Neither Islamic doctrine nor the historical experience of Muslims would permit the evolution and implementation of the Western model in this regard.⁵⁵ Nevertheless, I also believe that the universality and centrality of Islam as a factor in the lives of Muslims does not preclude the evolution of a modern Islamic constitutional theory. To achieve this objective, however, it is necessary to undertake fundamental Islamic law reform to address the civil rights issues indicated below. I believe such reform to be entirely possible, indeed imperative, today.⁵⁶

III. CIVIL RIGHTS IN MODERN ISLAMIC CONSTITUTIONAL THEORY

Even if these issues of modern Islamic constitutional theory are resolved satisfactorily, there remain some serious specific civil rights problems with historical formulations of Shari'a at the theoretical level. I submit that the same modernist orientation and reform technique applied to the general constitutional questions raised above can also be employed to resolve these theoretical civil rights problems. In this section, I will present a brief survey of some of these problems, and then focus on the civil rights situation in present day Islamic countries.

A. *Shari'a and Civil Rights*

It must first be emphasized that, like English common law and other legal systems, the general rule of Shari'a is that people are guaranteed freedom of action (or inaction) unless, and only to the extent that, action (or inaction) is prohibited or restricted by the provisions of Shari'a itself.⁵⁷ In this sense, there are no theoretical limitations on civil rights under Shari'a except in specific cases, some of which are highlighted below. This apparently categorical general rule is rendered ambivalent and confusing by the diffused nature of Shari'a and great extent of disagreement among the Ulama who sometimes hold significantly different, if not diametrically opposed, views on the position of Shari'a on a given issue or

55. This view is shared by most Western scholars of Islam. *See, e.g.*, JOHN L. ESPOSITO, VOICES OF RESURGENT ISLAM 3-5 (John L. Esposito ed., 1983); BERNARD LEWIS, *The Return of Islam*, RELIGION AND POLITICS IN THE MIDDLE EAST 9 (Michael Curtis ed. 1981); DANIEL PIPES, IN THE PATH OF GOD 4ff (1983); JOHN VOLL, *Renewal and Reform in Islamic History: Tajdid and Islam*, 32 (1983).

56. For a full explanation and substantiation of this position, see AN-NA'IM, TOWARD, *supra* note 5, at 69-100.

57. *See* COULSON, *supra* note 32, at 82-84; HASAN, *supra* note 19, at 34-39; RAHMAN, *supra* note 15, at 83-84.

situation.⁵⁸

Muslims are therefore often uncertain about whether they have the right to act or refrain from action under Shari'a, and can consequently be manipulated in one way or another by rulers and their allies or supporters among the Ulama. Such manipulation is not only more likely in civil rights matters because that tends to serve the political interest of rulers, but is also more effective in view of Shari'a's emphasis on the subject's duty to obey the ruler in order to avoid political upheaval. As indicated earlier, this state of affairs makes it harder for political dissidents or opponents of the government of the day to justify their position from a Shari'a point of view.

Beside the generally inhibiting effect of this state of affairs on the civil rights of all citizens, women and non-Muslims are subjected to further restrictions under historical formulations of Shari'a. Briefly stated, the inequality of, or discrimination against, women and non-Muslims include the following features:⁵⁹

Women: Verse 4:34 of the Qur'an has been taken to establish a general principle of men's guardianship (*qawama*) over women, thereby denying women the right to hold any public office involving the exercise of authority over men. While jurists differ in their views on the extent of denying women access to public office, none of them would grant women equality to men in this regard. By virtue of this general principle (together with certain specific provisions of the Qur'an and Sunna), women suffer much discrimination in family law, inheritance, and so forth.

Under the same general principle of *qawama*, and as a result of the interpretation commonly given to various verses of the Qur'an (e.g., 24:31 33:33, 53 and 59), Shari'a restricts the right of women to appear and speak in public or associate with men. Thus, although women have the same freedom of belief and opinion enjoyed by

58. COULSON, *supra* note 32, at 47-51; KEMAL A. FARUKI, ISLAMIC JURISPRUDENCE 166-94 (1975).

It has always been believed that it is improper to attempt to codify Shari'a because no view can be accepted as authoritative enough to be codified and enforced. In common Muslim belief, disagreement among the Ulama is greatly valued as a feature of flexibility and Divine grace, and individual Muslims should have freedom of choice among different views as a matter of conscience. SCHACHT, *supra* note 32, at 68 n.1.

59. I have explained and substantiated in detail these and other features of inequality and discrimination against women and non-Muslims under Shari'a in AN-NA'IM, TOWARD, *supra* note 5, at chs. 4, 5 & 7. See also Abdullahi A. An-Na'im, *The Rights of Women and International Law in the Muslim Context*, 9 WHITTIER L. REV. 491 (1987); *Religious Minorities and the Limits of Cultural Relativism*, 9 HUM. RTS. Q. 1 (1987).

For a detailed discussion of these issues in the broader context of human rights, see generally MAYER, *supra* note 15, at chs. 5-7.

men, their opportunity to exercise this right is greatly inhibited by restrictions on their access to the public domain.

Non-Muslims: According to the strict theory of Shari'a, non-Muslims are not entitled to remain within the territory of an Islamic state except under a special status of *dhimma*. This status guarantees them security of life and property, freedom of religion and communal autonomy subject to the jurisdiction of the Islamic state in public affairs. As such, non-Muslims are free to organize and conduct their private and communal affairs, but they have no right to hold any public office which involves the exercise of authority over Muslims.

Non-Muslims are also subjected to various types of discrimination in their dealings with Muslims. For example, whereas Muslims may propagate Islam among non-Muslims, and conversion to Islam should be actively encouraged by the state, non-Muslims have no right to propagate their faith, at least among Muslims, and conversion away from Islam is a capital offense under Shari'a.

Other examples of inequality and discrimination against women and non-Muslims can be cited, but my purpose here is to illustrate the sort of civil rights problems which will arise should Shari'a be applied today. Some advocates of Shari'a today point to reports of a few examples of participation by leading Muslim women, and the role of non-Muslims in the administration, as evidence of practical equality and non-discrimination. These, I submit, were the exceptions which prove the rule. Without going into questions about the historical accuracy of these reports and the level and extent of such participation, the fact remains that there was no legal and institutional basis for it under the strict rules of Shari'a.

Moreover, I submit that whatever political or sociological justifications may have existed in the past for these aspects of Shari'a, they are no longer valid in the context of the modern Islamic state. This view appears to be shared by the majority of Muslims today, as evidenced by the fact that the national constitutions of most Islamic states now provide for equality and prohibit discrimination on grounds of gender or religion. Many Islamic countries are also parties to international human rights treaties which require equality and non-discrimination. It is true that Islamic countries rarely live up to the level of their constitutional or international civil rights commitments, but that is a common failure of non-Islamic countries as well.

While emphasizing the need to understand and combat the underlying causes of this common failure, I find it significant that many Muslims around the world express commitment to the values of constitutionalism and civil rights. To assist these Muslims in honoring that commitment, I suggest the implementation of inter-

nal Islamic law reform in order to resolve the general constitutional issues raised earlier and to achieve complete equality for women and non-Muslims as a matter of Shari'a.⁶⁰ Such reform, I suggest, will contribute to the process of legitimizing and indigenizing the values of political participation, accountability and equality before the law, thereby enhancing the prospects of civil rights in Islamic societies. But this theoretical contribution can only be implemented in the context of the concrete circumstances of the Muslim world today.

R. Civil Rights in the Present Muslim World

As indicated in the Introduction, this paper's focus on issues of Islamic constitutional and civil rights theory should not be taken to imply that Islam is the only available ideology in the Muslim world. Muslims in fact subscribe to a wide range of ideological orientations, and their constitutional and legal systems must respond to issues and concerns shared by other developing nations. Although I believe that Islamic discourse is extremely important in any predominantly Muslim country today,⁶¹ I must emphasize that it is by no means the only one even in those countries which claim a totally Islamic identity, be it of the traditional type such as that of Saudi Arabia, or of the revolutionary variety, as in the case of Iran.

Moreover, there is such a vast range of perceptions and practices of Islam among Muslim peoples, that one cannot speak of Islamic discourse as a common feature of these societies except at a very high level of abstraction and generalization. The role of Islam in political, constitutional and legal systems of Islamic countries should be seen as integral to the role of culture as the local setting underlying the social production of meaning.⁶² While Islam as a culture has spread globally, it also became locally restricted, thereby producing vastly different perceptions and practices of the same religion.⁶³ "In other words, there is no universal Islam, but a

60. See generally AN-NA'IM, TOWARD, *supra* note 5, at ch. 3, for a detailed Islamic methodology of reform and its application to all issues of inequality and discrimination.

61. As evidenced by the size and depth of literature, the importance of Islam is appreciated by many scholars and observers of Islamic countries. The most recent works on the subject include: ISLAM AND THE POLITICAL ECONOMY OF MEANING: COMPARATIVE STUDIES OF MUSLIM DISCOURSE (William R. Roff ed. 1987); ISLAM, POLITICS AND SOCIAL MOVEMENTS (Edmund Burke, III and Ira Lapidus eds., 1988); HENRY MUNSON, JR., ISLAM AND REVOLUTION IN THE MIDDLE EAST (1988); *Islam and Politics*, 10 THIRD WORLD Q. 235 (1988).

62. CLIFFORD GEERTZ, INTERPRETATION OF CULTURE 193-233 (1973).

63. For an explanation and illustration of this phenomenon, see generally CLIFFORD GEERTZ, ISLAM OBSERVED: RELIGIOUS DEVELOPMENT IN MOROCCO AND INDONESIA (1971).

variety of local Islamic cultures."⁶⁴

In light of these caveats on the limitations of the analysis of this paper, I now wish to focus on the realities of civil rights in Islamic countries. The countries of the present Muslim world are governed by a wide variety of regimes. At one end of the spectrum, there is the traditional absolute monarchies of Saudi Arabia and the Gulf states, limited or "constitutional" monarchies in Morocco and Jordan, and military/single party dictatorships, as in Iraq and Syria. While Iran presents the only example of an ideologically "Islamic" civilian government, the military dictatorship of the Sudan is generally believed to be also ideologically Islamic and perhaps preparing to follow the example of Iran. At the other end, some Islamic countries, such as Pakistan, Bangladesh and Malaysia, enjoy a reasonable, though somewhat precarious or temporary, degree of democratic constitutional government.

The vast majority of the governments of the Muslim world have very little regard for civil rights, but in most cases the rationale of this oppression is not observance of the teachings of Islam or the application of Shari'a as such. For example, the strongly secular regimes of Iraq and Syria are most notorious for their suppression of civil rights, and the ruling elite in Indonesia have consistently violated the civil rights of Islamic groups as well as those of communists and left wing activists. However, civil rights violations are expressly linked to an Islamic ideology in countries like Iran, the Sudan and Saudi Arabia. Both secular and theocratic types of regimes, however, often invoke "Islamic" arguments to legitimate their repressive policies in the name of political stability, national security and liberation and so forth.

Given the historical ambivalence of Shari'a on crucial constitutional issues and its violation of the civil rights of women and non-Muslims, coupled with the present circumstances of the politics of Islamization in some countries,⁶⁵ one can only conclude that the relationship between Shari'a and civil rights is rather negative. Nevertheless, recalling my earlier analysis of the contestability of culture, I believe that since Shari'a is an *historically conditioned* interpretation of Islamic sources, a modern reinterpretation is possible and desirable today. In this light, I maintain that Islam can and should still be used as a valuable cultural resource to legitimize and enhance civil rights in Islamic societies.

64. BASSAM TIBI, *The European Tradition of Human Rights and the Culture of Islam*, HUMAN RIGHTS IN AFRICA, *supra* note 13, at 104, 113.

65. See, e.g., *Religious Freedom in Egypt: Under the Shadow of the Dhimma System*, RELIGIOUS LIBERTY AND HUMAN RIGHTS IN NATIONS AND RELIGIONS, 43 (L. Swedler ed. 1986); Abdullahi A. An-Na'im, *Constitutionalism and Islamization in the Sudan*, 36 AFR. TODAY 11 (1989).

Despite the apparently poor status of civil rights in Islamic countries, I do not believe that the situation is hopeless. In the same countries, there are powerful modernist forces which are asserting their civil rights. I suggest that these forces can greatly enhance their position by enlisting Islamic support for their legitimate claims. This is both crucial because of the political and moral force of Islam in those countries, and possible to achieve by applying a modernist reinterpretation of Islamic sources.⁶⁶ In terms of the thesis of this paper, the struggle for civil rights in Islamic countries should utilize the processes of internal discourse and cross-cultural dialogue to realize the shared ideals of dignity, liberty and well-being for all.

IV. CONCLUSION: COOPERATION IN REALIZING SHARED IDEALS

Finally, I wish to conclude with a summary of my thesis and offer some reflections on the theme of this symposium in light of the internal critique of the Islamic constitutional and civil rights tradition presented in this paper.

I argue that all human societies should strive to realize the shared ideals of human dignity, liberty and well-being. Different approaches to achieving this end may be justified by historical context and material, social and political circumstances of each society at any given point in time. For example, traditional societies tend to emphasize the public good over the private good, and to subordinate the rights of the individual to the interests of the community. This approach may well be more conducive to realizing human dignity, liberty and well-being in the historical context and circumstances of a particular society. But as the context and circumstances of that society change, it should adapt its approach accordingly, including the re-adjustment of the relationship between the individual and the community.

This does not indicate a deterministic evolutionary approach whereby "late" developing societies are simply following the path previously set by "advanced" societies. Each society should have its own manner of adaptation to changing circumstances and adjustment of the relationship between the individual and the community. On the other hand, cultural autonomy in this adaptation and adjustment process does not mean complete isolation from the influence of other societies. Such influence is usually unavoidable, and should be used constructively by reflecting due respect for, and sensitivity to, internal legitimacy and dynamics of change and reform in each society.

66. For a full statement and substantiation of this argument, see generally Abdullahi A. An-Na'im, *Human Rights in the Muslim World: Socio-Political Conditions and Scriptural Imperatives*, 3 HARV. HUM. RTS. J. 13 (1990).

While it is true that modern formulations of civil rights emerged from the Western liberal tradition, their underlying values of dignity, liberty and well-being are shared by Islamic societies. In adopting modern civil rights regimes, and adapting them to their own cultures and circumstances, Islamic societies are merely responding to the challenge of realizing ideals they already share in the modern context. This, however, is an exceedingly difficult and delicate task. It requires philosophical and conceptual clarity consistent with the criteria of internal cultural legitimacy; development of legal institutions, mechanisms and remedies; and the commitment of the political process to these goals and policies.

A decent respect to the opinion(s) of Muslim peoples means accepting their choice to retain the central role of Islam in their lives (if and to the extent that they wish to do so), and supporting them in evolving their own regimes of civil rights in that context. Muslims are entitled to pursue their own model(s) of constitutionalism and civil rights within the framework of an Islamic ideology. The negative relationship between Shari'a and civil rights should not lead to the conclusion that Muslims must abandon Islam and adopt a purely secular ideology in order to secure civil rights. Such a proposal is both objectionable to Muslims as a matter of principle, and unrealistic in practice.

Since Shari'a is simply a historically conditioned interpretation of Islamic sources, it should be possible to evolve an alternative interpretation which will legitimate and effectuate civil rights in the modern Muslim context. But the task of evolving and implementing this modern interpretation must be undertaken by Muslims working within their own cultural traditions. Others may support that internal discourse, but they should not try to preempt it by seeking to impose their own standards and models.

