Islam and Human Rights in Practice

Perspectives across the Ummah

Edited by

Shahram Akbarzadeh and
Benjamin MacQueen

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Questions over the compatibility of Islam and human rights have become a key area of debate in the perceived tensions between 'Islam and the West'. In many ways, discussion over the stance of Islam in relation to such factors as gender rights, religious freedom, social and political freedoms, and other related issues represents a microcosm of the broader experience of how Muslim and 'Western' communities interact and relate.

This volume seeks to engage with the various debates surrounding Islam and human rights, in particular, challenging assumptions of a 'standard' or 'essential' Muslim perspective on human rights. Through a survey of the experiences of Muslim communities across the globe (the *ummah*), this volume highlights the dynamic way Muslims understand and incorporate human rights into their personal, social and political experiences.

From conceptual discussions on the issues of gender rights and religious freedom, to examining Muslim communities from South East Asia, Central Asia, the Middle East and North Africa, leading global experts bring forth key insights into the way in which Muslim communities live and experience human rights. The potential for deeper engagement with this issue is critical, as it opens possibilities for more profound understanding and tolerance.

Associate Professor *Shahram Akbarzadeh* researches the politics of Central Asia and the Middle East, political Islam and US relations with the Muslim world. He is Deputy Director of the National Centre of Excellence for Islamic Studies at the University of Melbourne.

Benjamin MacQueen is a Post-Doctoral Fellow at the University of Melbourne. His research focuses on political transformation in the Middle East and conflict resolution theory and practice. His publications focus on Islamic political thought, conflict resolution and the international relations of the Middle East and North Africa.

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Contributors

Shahram Akbarzadeh is Associate Professor and Director of the National Centre of Excellence for Islamic Studies, University of Melbourne. His research interests include Islam in Australia, the Middle East and Central Asia. Among his latest publications are (with Abdullah Saeed) *Muslim Communities in Australia* (Sydney: University of New South Wales, 2001), *Uzbekistan and the United States* (London: Zed Books, 2005), *Islam and Globalization* – 4 volumes (London: Routledge, 2006) and (with Kylie Baxter) *US Foreign Policy in the Middle East* (London: Routledge, 2008).

Shamsul Amri Bin Baharuddin is Professor of Social Anthropology and is currently the Director of the Institute of Occidental Studies (IKON) at the National University of Malaysia. He researches, writes and lectures extensively on the theme 'politics and culture in developing countries' with an empirical focus on the Malay-speaking Islamic region of South-East Asia. Besides his award-winning book *From British to Bumiputera Rule* (1986), which has been reprinted three times (latest in 2004), he has also written numerous articles on Islamic Revivalism in South-East Asia.

Rebecca Barlow graduated with a BA(Hons) in international relations and global politics from Monash University in 2005. Since 2006 she has been undertaking her PhD research and working as a research assistant focusing on the rights of Muslim women, the international human rights system and Middle Eastern politics. Rebecca's PhD focuses on the Iranian women's movement and the implementation of international human rights law in the Islamic Republic of Iran. Significant focus lies on the ideology and activism of lawyer and Nobel Peace Prize Laureate Shirin Ebadi, a devoted Muslim who has advocated for secular forms of rights-based governance.

Greg Fealy holds a joint appointment as Fellow and Senior Lecturer in South-East Asian Politics at the Research School of Pacific and Asian Studies, and the Faculty of Asian Studies, Australian National University, Canberra. He specializes in Indonesian politics, particularly political Islam and radical movements. His recent publications include: *Ijtihad Politik Ulama: Sejarah NU, 1952–1967*, *Joining the Caravan? The Middle East, Islamism and Indonesia* (co-authored with Anthony Bubalo), and *Voices of Islam in South-East Asia: A Contemporary Sourcebook* (co-edited with Virginia Hooker).

Dr Benjamin MacQueen is an Australian Research Council (ARC) Post-Doctoral Fellow at the National Centre of Excellence for Islamic Studies, University of Melbourne. He completed his PhD in 2006 at Deakin University, focusing on conflict resolution and the role of political culture on the form and legitimacy of peace agreements in Lebanon and Algeria. Currently, he is working on a major ARC project exploring the impacts of US foreign policy on political transformation in the Middle East and Central Asia. He previously served as a research fellow on an ARC-funded project exploring Muslim perspectives on global justice and the possibilities for accommodation and reform within the structure of the United Nations. He is the author of various articles and chapters examining political transformation in the Middle East, conflict resolution, as well as the role of external powers in the Middle East.

Dr William Maley is Professor and Director of the Asia-Pacific College of Diplomacy at the Australian National University, and has served as a Visiting Professor at the Russian Diplomatic Academy, a Visiting Fellow at the Centre for the Study of Public Policy at the University of Strathclyde and a Visiting Research Fellow in the Refugee Studies Programme at Oxford University. A regular visitor to Afghanistan, he is author of *Rescuing Afghanistan* (London: Hurst & Co., 2006), and *The Afghanistan Wars* (New York: Palgrave Macmillan, 2002); co-authored *Regime Change in Afghanistan: Foreign Intervention and the Politics of Legitimacy* (Boulder: Westview Press, 1991), and *Political Order in Post-Communist Afghanistan* (Boulder: Lynne Rienner, 1992); edited *Fundamentalism Reborn? Afghanistan and the Taliban* (New York: New York University Press, 1998, 2001); and co-edited *The Soviet Withdrawal from Afghanistan* (Cambridge: Cambridge University Press, 1989) and *From Civil Strife to Civil Society: Civil and Military Responsibilities in Disrupted States* (Tokyo: United Nations University Press, 2003).

Patricia Martinez is an Associate Professor and a Senior Research Fellow for Religion and Culture at the Asia-Europe Institute and the Head of Intercultural Studies, University of Malaya, Malaysia. Associate Professor Martinez has been awarded a number of fellowships at various institutions including the East-West Centre in Hawaii and Fulbright Awards at the South-East Asian Studies Centers of Stanford University as well as Ohio University. She is on the International Board of Directors of the Islam and Pluralism Project, Indonesia, as well as a member of the International Advisory Council of the Toda Institute for Global Peace and Policy Research, Japan. She has also served as a consultant to the United Nations for a government of Indonesia/UNICEF pilot education project. Associate Professor Martinez's work is focused mainly on Islam in Malaysia with an additional interest in South-East Asia. She has also participated actively in inter-religious dialogue in both Indonesia and Malaysia. Associate Professor Martinez has conducted extensive fieldwork in Malaysia and Indonesia, and preliminary fieldwork in Mindanao, the Philippines.

Ann Elizabeth Mayer is an Associate Professor of Legal Studies and Business Ethics at the Wharton School of the University of Pennsylvania. She has also taught at Georgetown, Princeton and Yale. She earned her PhD from the University of Michigan, in 1978. She obtained a Certificate in Islamic and Comparative Law from the School of Oriental and African Studies, University of London in 1977, a JD from the University of Pennsylvania in 1975, an MA from the University of Michigan in 1966 and a BA from the University of Michigan in 1964. Her research areas include Islamic law in contemporary Middle Eastern countries; problems of constitutionalism and the rule of law; and international human rights law. She has critically examined claims that respect for cultural diversity and religious laws requires exemptions from international human rights law, with particular attention to issues of women's rights. She has published extensively in scholarly journals and edited collections, and the fourth edition of her book *Islam and Human Rights* was published in 2007.

1 Framing the debate on Islam and human rights

*Shahram Akbarzadeh and
Benjamin MacQueen*

Is Islam compatible with human rights? This fundamental question has generated a large body of literature addressing the question from different, often opposing, positions. The literalist reading of Islam emphasises the gaps between the limits of tolerance and acceptability in the Quràn and Hadith on the one hand, and internationally-sanctioned standards for human rights. The status of women and religious freedom are often the two key area of contention. This approach, for example, highlights specific passages in the Quràn that articulate the position of women in matters of legal judgment, inheritance and in the family setting. The impression of an unequal standing for men and women in these matters is inescapable. What is more, inequality can turn into something much graver as issues relating to religious freedom bring into question the physical safety of Muslims who may wish to leave Islam (Saeed & Saeed 2004). Leaving the faith is condemned as apostasy and is punishable by death. Taking away life is the ultimate punishment, and in direct violation of the right to life. In a literalist reading of Islam, there is little room to negotiate human rights, as clear injunctions contravene the normative framework of the international human rights regime.

It is perhaps ironic that the literalist reading of Islam has been adopted by two very distinct groups. On the one hand some traditionalist Muslim leaders, as well as Islamists, have taken up a hostile attitude toward the idea of a human rights regime because that is seen as nothing more than a cover for a neo-colonial attempt at regaining domination over the Muslim world by Western powers. The fact that the normative framework of the human rights regime emerged in the halls of the United Nations where Western powers tend to set the agenda is seen as proof by the human rights sceptics of a Western conspiracy. And the principles enshrined in the Universal Declaration of Human Rights were seen as contravening the Shari'a. Accordingly, this Declaration (adopted in 1948 by the United Nations)

was rejected by Saudi Arabia as un-Islamic (Morsink 1999; Mayer 1999).[1] This perspective is shared by groups like the Taliban in Afghanistan, or the trans-national Islamist group Hizb ut-Tahrir which argue that Islamic junctions in the text are perfect and eternal.[2] Adopting anything that contradicts or deviates from them, therefore, is forbidden.

The above position rests on the belief that the Quràn and Hadith are immutable. Emphasising the timeless and eternal nature of Islamic junctions presents a challenge for its application in the contemporary era, some fourteen centuries after their articulation. In the literalist approach, this challenge is dismissed as irrelevant while insisting that holy injunctions cannot be continuously modified to suit changing times. Doing so, they may argue, would devoid Islam of its content and leave an empty shell. Indeed some Islamists use the very point regarding the temporal modification of Islam to criticise ruling regimes. For example, the famous father of Islamism Sayed Qutb, rejected the Egyptian regime for allowing society to astray from the path of Islam and permitting Islam to be contaminated by contemporary influences (Khatab 2002).

In a mirror image of this literalist approach to Islam and human rights, critics have presented the two as poles apart and insisted on the incapacity of Islam to reform itself. Authors such as Bernard Lewis and Daniel Pipes have argued that Islam contradicts modern human rights norms and conventions as it reflects the norms and conventions of the seventh-century civilisation of Arabia. In an ironic twist, they add their voice to the literalist Islamic approach by insisting on the static nature of Islam. For instance, Lewis has argued that there is an inherent resistance to democratic governance as the notion of a 'corporate or majority decision' through electoral means is an 'alien' concept in many Islamic societies, with violent contestations, in this view, seen as the norm (2005: 36). Echoing the literalist approach to Islam, Lewis insists on the incompatibility of Islam and modernity.

Resonating such a theme, Daniel Pipes, former appointee by the Bush Administration to the United States Institute of Peace, leads the charge in seeking to highlight what he claims is the 'historically-abiding Muslim imperative to subjugate non-Muslim peoples' (2006). The conclusion Pipes draws is that 'ultimately, there is no compromise' with Muslim communities and what he sees as the inherent absolutist drive of the religion, one that, in his own words, asks the question of whether 'the West [will] stand up for its customs and mores, including freedom of speech, or will Muslims impose their way of life on the West?' (Pipes 2006). The literalist correlation between these two groups is a profound irony, however, one that appears lost on such ideologues.

The literalist approach to Islam has not gone unchallenged. Abdullah Saeed, among others, has argued that there is nothing certain and undeniable about the literalist approach. The text, the holy book of Quràn, is a compilation of disparate versus that where revealed to Prophet Muhammad over more than two decades. Often they referred to specific cases and could be seen as contradictory. How is one verse to be given precedence over the next? Reading the text invariably involves a certain degree of interpretation and choice. According to Saeed, there is nothing certain in the certainly claimed by the literalist readers of the text (2006: 153). In recognising that, Saeed advocates recognition of human agency and an acknowledgment of the context to help give meaning to the text. Such contextulisation offers new opportunities for exploring the relevance of Islam to contemporary conditions and the challenges faced by Muslims today.

The above recommendation holds significant promise on the question of compatibility between Islam and human rights. An increasing number of Muslim thinkers in modern times have tried to move away from ideological rigidity, emphasising instead the essence and core values embedded in the holy text. In this perspective, restrictions on women and religious freedom which are conventionally applied in most Muslims societies, are challenged as contradictory to the essence of Islam. Accordingly, Islam is seen to be founded on the principle of unity between God and the humankind; piety and personal devotions are key to the ideal Islamic state. This approach places the individual, the Muslim believer, as the conscious actor on the centre stage, and may therefore be called the humanist approach. In this vein Ali Abootalebi, a former associate of the Iranian President Muhammad Khatami, has argued in favour of 'freedom of thought and expression, including freedom from government control and suppression' (1999). In this approach, state-imposed gender segregation and dress code policing which directly affect women in Iran and Saudi Arabia are dismissed as over-zealous interpretations of the faith.

Similarly, authors such as Abdullah Ahmed An-Na'im have argued for the religious neutrality of the state in Muslim communities. For An-Na'im, Islamic thought can be injected with renewed vitality and flexibility through the process of *ijtihad* as a means to maximise the ability of Muslims to exercise their human agency (2000: 96). In other words, this perspective focuses on the need for Muslim communities to reconcile with the human rights regime, not to manipulate the concept of human rights to further particular social interests. This allows for Muslim communities to engage with the human rights regime on their own terms. This also helps undermine the view of human rights as a 'Western' concept imposed on Muslim communities. This approach contains significant implications for

the idealised Islamic state. In the words of Khaled Abou El Fadl, the Quràn 'does not specify a particular form of government' (2004: 5). In a direct challenge to the literalist reading of Islam, especially that adopted by Islamist groups, El Fadl insists on the importance of values: justice, consultative government, mercy and compassion are essential values for Muslim policy.

The humanist approach in Islam offers significant promise, not only in Muslim majority societies enthused by the prospects of establishing an Islamic state but also for the Muslim diaspora. One of the challenging features of globalisation in the latter part of the twentieth century has been the movement of a significant number of people from the Muslim world to territories that have traditionally been regarded as foreign. Muslim settlements in Europe, the United States, and in subsequent years Canada and Australia, have presented difficult questions to migrant communities and their hosts regarding the precedence of one rule over another. In other words, to what extent should Muslim minorities in the West follow and obey secular law? In the literalist perspective, the dichotomy of Shari'a versus secular law is absolute. But the humanist approach to Islam moves beyond the apparent dichotomy and questions the assumed contradiction between the two. Tariq Ramadan, perhaps the best known author on this matter, has argued that the Western-style secular law is very much inspired by the same core values that rest at the heart of Islam. Writing on the question of being a good citizen and a Muslim in Europe, Ramadan has emphasised the principles of fairness, equity and justice as common to Islamic jurisprudence and secular law (which is ironically inspired by Judea-Christian traditions). Consequently, he sees no contradictions between the two (Ramadan 1999, 2002).

In this approach, Muslims in the West can abide by secular rules that govern their country of adoption without fear of violating Islamic principles. The liberal and tolerant nature of European states facilitates this interpretation because it allows significant freedoms to individuals to pursue their interests, beliefs and traditions. In other words, individual liberties enshrined in liberal democracies offer sanctuary to the Muslim diaspora. It is important to note here that Western liberal democracies meet the qualifications set out by El Fadl for legitimate political authority. In some cases, however, the humanist position on the compatibility of secular law and Islamic principles faces serious challenges, as became evident in France under the new law banning hijab at schools. This ban, which came into force in 2004 appeared to reverse the tolerant traditions of France and put Muslim girls wearing hijab and their families in a difficult dilemma: either remove the hijab to attend school or keep the hijab and be excluded

from public education. Some French Muslims have responded by weighing the costs and benefits of the alternatives and opted to stay in the education system, even if that means removing the hijab.[3] For most French Muslims, however, that is not an acceptable compromise.

Islamic reformism which is at the heart of the humanist approach is still in its infancy and stumbling from one challenge to the next (Piscatori 2002). An ongoing issue that is still to be addressed by reformist thinkers in Islam is the position of non-Muslims in Muslim societies. To what extent does the humanist interpretation of Islam, which emphasises the intrinsic values of individual piety and freedom to pursue a personal path to divinity may be applied to non-Muslim individuals and minority groups? More specifically, what role is set aside for non-Muslims in Muslim majority states?

The question of compatibility between Islam and human rights in Muslim majority states is an urgent and topical issue, partly because most such states in the Middle East suffer under the yoke of authoritarian rule while the United States has made democracy promotion and protection of human rights its top mission in this oil-rich region. The most immediate beneficiaries of any move towards greater freedoms tend to be Islamist groups in opposition, which might explain why the latter has adopted a conciliatory (sometimes enthusiastic) position towards human rights, freedom and democracy.

Appeals to values of liberalism and human rights by Islamist groups have precipitated a debate in policy and academic circles about the relationship between political expediency and principles. Are Islamists using human rights as a pretext to push their own agenda that is inherently intolerant and totalitarian? Or in the words of Neil Hicks, Director of the Human Rights Defenders' Protection Initiative at the Lawyers Committee for Human Rights in New York 'is it conceivable that we might have human rights activists who are Islamists, that is to say Islamist human rights activists?' (Hicks 2002: 362). There are no easy answers to these questions, which helps explain why the debate appears to go round and round with no end in sight. One response that is often favoured in Western policy circles is that Islamist groups such as Hamas and Hizbullah or the Muslim Brotherhood are only interested in human rights because they draw immediate benefits from them. There is no doubt that an effective protection of human rights, which entails the promotion of individual liberties, offers direct benefit to Islamist groups that have been pushed to the margin by authoritarian regimes. The Muslim Brotherhood in Egypt is ready to burst out on the political scene the minute Hosni Mubarak's regime loosens its grip on power. Observers witnessed a taste of things to

come if Egypt opted for political openness and protection of civil liberties when the banned Muslim Brotherhood managed to register strong results in the 2006 municipal elections. Egypt's flirtation with contested elections, however, appears to have been short lived - especially when faced with the embarrassing prospects of electoral defeat. In this, Hosni Mubarak has the tacit approval of the US Administration.

The Palestinian experience of 2006 has served as a reminder of the risks political openness could pose to ruling regimes. The surprising Hamas victory in the January 2006 parliamentary elections brought to office an Islamist group that was more known for its zeal against Israel than a commitment to human rights and democratic principles. Hamas was the obvious beneficiary of two related processes in the Palestinian society: a record of nepotism and incompetence by the Palestinian Authority and a broad desire among Palestinians for international recognition through a public demonstration of commitment to democracy. The landslide victory of Hamas, however, presented the international community with a difficult choice. The decision to break off ties, and more importantly aid to, the Hamas-dominated Palestinian Authority by the United States and the European Union was justified in terms of not-dealing with terrorists. As far as Western policy makers were concerned, the fact that Hamas had gained power through the ballot box was immaterial. What was critical was the belief that Hamas was genocidal towards Jews and had no interest in promoting democracy and human rights (Akbarzadeh, 2006).

The international boycott on Hamas had a devastating impact on the livelihood of the Palestinian population, which in turn intensified the rivalry between Hamas and Fatah culminating in the June 2007 take over of Gaza Strip by Hamas militia and the collapse of the faltering coalition government. The critics may have been right in arguing that Hamas would not play by the rules, and not respect the imperatives of popular will. But Hamas did not get a chance to prove them right.

The presumption that Islamists value the ballot box only once, ie. when they gain power through elections, has led some analysts to dismiss them as political charlatans who deserve to be kept out of the democratic system. In relation to Muslim Brotherhood, Katerina Dalacoura suggests, they defend human rights 'because they are concerned with protecting their own rights, as individuals and as an organisation. They also defend rights because they are intent on presenting a picture of a moderate and respectable movement' (2007: 128). In contrast, other observers have pointed to the modifying effects of participation in the open political process of winning votes. Respect for rule of law, human rights and civil liberties may not be the primary motivating factor for Islamists. Indeed, these

principles may be of peripheral interest to Islamist groups that are driven by a utopian desire to institutionalise an Islamic state. Yet the fact that the idealised Islamic state remains a 'work in progress', and Islamists often find themselves facing the constrains and imperatives of government once in power suggest that they are not as closed to democratic rule as they are assumed to be. In fact as Olivier Roy has pointed out, Islamists and conservative Muslims feel compelled to use the language of human rights to justify their political ambitions (Roy 2004: 32). The key question is whether this practical adoption of human rights discourse translates into a conceptual rethinking of the relationship between Islam and human rights.

Reconciling Islamic rule with the principles of human rights and democratic governance cannot be an overnight achievement, especially when it involves fundamental questions about the worth of the individual. As it turns out the conceptual realignment to reconcile Islam and human rights tends to lag behind empirical cases. The Turkish experience, for example, offers a sustained case where religiously-inclined politicians continue to conduct themselves with due respect for human rights and democratic rule. In the 1990s, under the leadership of Neçmettin Erbakan the Refah Party managed to secure an electoral victory in 1995 (Yavuz 1997). For the first time in modern Turkish history an Islamic party won power. Although this electoral victory was short-lived, because the Turkish military stepped in to curb what it viewed as a direct threat to Atatürk's heritage of secularism, it did signify a major development. Refah's performance was later emulated by a successor party. The Justice and Development Party which won office in 2002 and again in 2007 has tried to remain faithful to the Islamic heritage of Turkey and bring back Islam into the public domain without violating rule of law and democratic conventions. These practical steps towards uniting Islam and democratic governance and human rights, however, have yet to be digested and conceptualised by observers.

Addressing the gap between the reality of diverse Muslim experiences with human rights and the conceptualisation of these experiences governs this volume. Starting with the lived experiences, contributors to this volume explore the relationship between Islam and human right devoting special attention to key issues of gender equality and freedom of religion.

The intense examination of women's rights in Islamic thought has given rise to a vibrant debate that is challenging to previously entrenched modes of thought. Such dynamism, according to Ann Elizabeth Mayer, has led to the reformulation of the bases of enquiry into women's rights and their relationship to the sources of Islamic law, a shift away from a reliance on juristic interpretations to define and determine rights and privileges in

Muslim communities. This is reflective of a broader trend whereby discussion on women's rights in Muslim communities is accommodating a diversity of voices, most notably Muslim women's voices. In this milieu, new alliances are emerging between women's rights activists, intellectuals and Islamic scholars and jurists who are contesting and reformulating the very bases of Islamic thought on the rights and roles of men and women in Muslim communities.

An illustration of this can be found in the challenge to established gender norms in the Islamic Republic of Iran. In particular, resistance to the officially-sanctioned discriminatory regime pertaining to gender rights in Iran, one largely based on a conflation of biological differences and social roles, has not only persisted since the 1979 Islamic Revolution, but gained ground in recent years. Here, Rebecca Barlow outlines both a religious and secular-oriented approach to securing equal, universal and inalienable rights for Muslim women. Religious-oriented feminists in Iran argue for a review of the sources of Islamic law that is consciously women-centric as a means to balance to the prevailing patriarchal understandings present in Iran and many other Muslim communities.

However, according to Barlow, this endeavour is inherently limited as it has not been able to meaningfully alter Iran's prevailing status quo in terms of gender-based and broader political and social norms in Iran. Alternatively, secular-oriented feminists present a more "anti-systemic" approach to women's rights, seeking to operate apart from the touchstones of legitimacy in the Islamic republic, namely, focussing not on reform of Islamic doctrine *per se*, but looking at global debates and the development of universal norms related to human rights as the basis from which to develop equitable gender rights and roles in Muslim communities. This is illustrative of the diversity of voices from within Muslim communities and how approaches to key questions related to human rights are tackled in a myriad of ways.

Gender rights, alongside religious freedom, are crucial elements in the discussion over the possibilities for synergy or divergence between Islam and human rights. These issues are often presented as examples of a potential mutual exclusivity between Islam and prevailing global human rights norms. The modes of engagement examined above belie this assertion. However, what is also essential is the active support of these issues by effective social and political organisations. This is a highly problematic task in situations of political and social turmoil. Here, Iraq is particularly vulnerable to these pressures, particularly since the 2003 US-led invasion and occupation where the state and society has been in a caught in a cycle of violent social discord.

The new political space that was opened after the removal of the Saddam Hussein regime raised the possibility for new and inclusive approaches to the questions of gender rights and religious freedom to be enshrined in the new Iraqi constitution. In spite of this, the volatile political and security situation has put the prospect for this in real jeopardy. In particular, Benjamin MacQueen and Shahram Akbarzadeh highlight how the new Iraqi constitution has fallen victim to the sectarian tensions that now characterise the political landscape of the country and its new political institutions. This has affected the status of gender rights and religious freedom in the new Iraq constitution in terms of an abandonment of universal personal status law in favour of the implementation of community and sectarian legal codes as a means for keeping the various sectarian leaders involved in the political process.

This highlights the vulnerability of human rights and human rights activists in Muslim communities as they not only face entrenched forces resistant to such change, but also the volatilities of regional and global political influences that tend to have an amplified affect in Muslim communities, particularly in the context of the post-11 September global environment. A corollary of this relates to the lack of political freedoms in a number of Muslim states, particularly those in the Middle East and North Africa region. Despite its questionable intellectual basis and selective application, the democracy promotion policy of President George W. Bush has thrown the spotlight on the lack of democratic freedoms and traditions in this largely Muslim region. The squeezing of political space by autocratic regimes has seen the emergence of new political alliances, drawn together in opposition.

The alliance between Egypt's Muslim Brotherhood, the single largest opposition movement to the regime of Hosni Mubarak, and human rights NGOs is representative of such a movement. However, Benjamin MacQueen illustrates how this relationship currently exists primarily as one of functional cooperation, where the Muslim Brotherhood draws on the considerable legal assistance of human rights NGOs in their on-going struggle with the Mubarak regime, whilst the NGOs seek to use their relationship with the Brotherhood to buttress their negligible domestic popularity and support. This functional relationship, whilst potentially one that could mount a serious frontal challenge on Mubarak's grip on power, has not fully engaged with key ideological divisions between the two movements. The ability of both Islamist movements such as the Muslim Brotherhood and human rights NGOs to forge deeper relationships in crucially important Muslim communities such as Egypt will be telling as to the potential for the development of movements that cannot only lever

open sorely needed political space, but do so in such a way that is both legitimate and inclusive.

As the cases of Iran, Iraq and Egypt highlight, the presence of a robust rule of law backed by key institutions such as an independent judiciary and a functioning and representative state apparatus alongside social movements championing human rights are key elements in ensuring the enshrinement of civil, political and social rights as well as promoting dialogue, understanding and synthesis with Islamist movements and Islamic doctrine. It is the substance of this interaction which is crucial however, not merely the existence of rhetorical statements on co-operation between human rights movements and Islamist organisations.

William Maley amply illustrates such a need in his examination of the discrepancies between the human rights protections enshrined in the new Afghan constitution and the lack of human rights protections for Afghan citizens. The violence and political vacuum faced by Afghanistan over the past three decades, issues exacerbated by consistent patterns of external intervention and invasion, have undermined the rule of law in the country. This situation persists today, where despite the commitment to a highly progressive form of human rights established in the new Afghan constitution (*Qanun-e asasi*), the human rights situation on the ground is uncertain at best. Indeed, Maley points to deeper difficulties of seeking to establish a human rights regime in post-conflict communities, a situation relevant to Afghanistan as it is to Iraq, Sudan, Somalia, even Lebanon and Algeria, where the need for political stability may require overlooking human rights abuses of figures and movements deemed vital for the establishment of a functioning state.

Apart from the legacies of internal or regional conflicts, many Muslim states also have to contend with their colonial heritage; one that has left a legacy of multifaceted social divisions and states compelled to create, forcibly if needs be, forms of social and political unity. In this context, Shamsul A.B. urges observers to take note of the context in which particular debates concerning state formation, human rights, and Islamic identity compete and co-exist. This is not a claim of cultural relativism, quite the opposite. Instead, Shamsul A.B. uses the example of Malaysia's complex legal landscape, highlighting how a range of different legal systems have become embedded in various parts of this South-East Asian nation, affecting the way Malaysian citizens interact with ethnic identity, political authority, human rights, and claims to legitimacy referential to Islam.

The issue of community diversity, particularly that of religious freedom and its enshrinement in the Malaysian constitution, is one of immense complexity and division, as revealed by Patricia Martinez. Indeed, a detailed

examination of the Malaysian case reveals how discussions over human rights and their relationship to Islamic doctrine, specifically through the lens of religious freedom in Malaysia, is one that is largely confined to elites who, whether defined as reformist or conservative, have been reticent to engage in a thoroughgoing dialogue. Outside elites, "ordinary" people's perceptions vis-à-vis human rights issues are largely framed by personal experience, a mix of place, position, and heritage.

Taking note of the specificity of context and its impacts on Islam and human rights, Greg Fealy examines the attitudes of Indonesian Islamist movements. Such an endeavour, whilst seemingly counter-intuitive, is an essential task in terms of fleshing out any discussion of Islam and human rights, particularly in light of the growth in support for such movements in recent decades. What is evident in the Indonesian case, particularly in reference to movements which seek a comprehensive implementation of the Shari`a in Indonesia, is the shaping of their views by feelings of threat and persecution, This has driven many of these groups to take a hard line on human rights issues, particularly those of religious freedom and gender equality. However, Fealy contends, this is a view that is lacking in intellectual depth and historical awareness, particularly in reference to Indonesia's rich tradition of religious pluralism and social organisation.

As James Piscatori has noted the contribution of Islamic reform is inconclusive. There certainly are very clear indications that groups committed to an Islamic vision view the protection of human rights and aspects of liberal democracy to their advantage and would, therefore, promote them. To what extent is this opportunistic? Only time can tell. Meanwhile, it is important to avoid deterministic conclusions about Islam and human right and acknowledge that Islam is a living and flexible religion that is (re-) interpreted by each generation. This vibrancy can only be a source of hope for the future.

Notes

1 It is interesting to note that the United States of America has also refused to join the international human rights regime. Washington's failure to sign the Universal Declaration of Human Rights is linked to the reluctance of US leadership in recognising any authority to judge American citizens over and above US laws.

2 This is also a view echoed in the Universal Islamic Declaration of Human Rights issued by the Organization of the Islamic Conference on 19 September 1981 and the Cairo Declaration on Human Rights in Islam on 5 August 1990.

3 Interestingly, the Grand Imam Sheikh Mohamed Sayed Tantawi of Al Azhar University in Egypt endorsed this position (Rakha 2005).

2 The reformulation of Islamic thought on gender rights and roles

Ann Elizabeth Mayer

Introduction

This paper proposes that Islamic thought on gender rights and roles has embarked on a particularly dynamic phase, one where reconsideration of laws affecting women now has far less of a preoccupation than it formerly had with technical problems of reforming the heritage of Islamic jurisprudence. Muslim opinion now often emphasizes reformulating questions rather than using traditional methodologies to determine answers. The focus has increasingly shifted to broad policy issues relating to the role that women should play in contemporary societies. Rather than following the strategies typically seen during the mid-twentieth century, when reformers tinkered with inherited juristic rules, many Muslims currently attempt to derive foundational Islamic concepts from the Qur`an and example of the Prophet, asking how these apply to women's concerns. Bold challenges are made to the monopoly that jurists with advanced training in the Islamic sciences seek to maintain defining Islamic rules; expertise in the intricacies of juristic treatises and the associated methodologies carries less weight.

Various ideological factions now participate in what are often heated public debates about women's place. The whole discussion of women's rights has become more democratic, more open to popular input. Educated women insist on having a voice in defining rules that affect their lives. Because women tend to have backgrounds unlike those of learned Islamic jurists, their participation lays fresh groundwork for rethinking gender issues in Muslim societies, especially since women know how their own lives have been dramatically affected by socio-economic changes. Women have taken the lead in promoting Islamic feminist ideas but have been joined by male intellectuals and Islamic clerics, among whose number one finds some extremely bold advocates of feminist approaches to the

Islamic sources. In addition, the exposure to international human rights law and the pressures of globalization have changed the framework for discussions. With old verities under siege, Islamic thought regarding gender is evolving quickly.

From reform to reformulation

To explain the significance of recent trends, experiences from the author's youth can help encapsulate how current discussions of women's rights differ from the way that personal status reform was formerly approached. When the author was a student at the School of Oriental and African Studies in the 1970s, studying along with many Muslims from Africa and Asia under eminent authorities on Islamic law in contemporary societies like Norman Anderson and Noel Coulson, the focus was still on personal status reform, modest adjustments made within the framework of Islamic jurisprudence. The assumption was that the contours of Muslim women's status were overwhelmingly determined by their role inside the family. Our chronic preoccupation was the degree to which tools of Islamic jurisprudence could be utilized to reduce women's disadvantages without doing violence to the Islamic tradition.

We studied how the vast corpus of Islamic jurisprudence worked out by jurists following different schools afforded reformers the chance to select and recombine rules that were more favorable to women.[1] (Of course, we also considered procedural initiatives, which did not directly challenge Islamic rules, such as setting minimum ages for registration of marriages or requiring judicial approval for contracting marriage with a second wife.) In this context, the reforms embodied in the 1956 Tunisian Code of Personal Status and Iran's Family Protection Act of 1969 seemed exceptionally bold achievements, even though they did not give women equality in rights.

In that environment, Islamic law was not viewed as having the potential to afford women legal equality, equality being a principle associated with radical secularist projects like those of Marxists in Central Asia or of secular nationalists like Kemal Ataturk in Turkey. Principles of international law were off the radar. In our lectures and discussions, the notion that Muslim women could ignore the admonitions of senior jurists and appeal to international human rights to challenge laws grounded in the Islamic tradition was never put forward – not even tentatively.

According to the mentality of that era, it seemed natural that the process of devising reforms in Islamic personal status law should be controlled by men, who dominated the political and legal establishments

and all Islamic institutions. Thus, for example, the 1956 Tunisian Code of Personal Status emerged from a process inaugurated when a group of jurists prepared a draft code based on comparative listings of rules of personal status law taken from Maliki and Hanafi jurisprudence. Then, President Bourguiba's government set up a project for drafting a new code under the auspices of a committee meeting under the supervision of Tunisia's Sheikh al-Islam – with contributions from the Sheikh of Tunisia's top Islamic university, the Zeituna. This committee consulted the draft code, the laws of Egypt, Jordan, Syria, and the late Ottoman Empire, eventually producing Tunisia's new personal status code, which was submitted to the government and enacted into law (Mahmoud 1987: 152). All of this was done under the leadership of Bourguiba, an extremely powerful nationalist figure and the hero of Tunisia's struggle for independence. The authority of the resulting product essentially rested on a combination of his charismatic authority and the prestige of eminent Islamic personages, who approved the reforms as consonant with an enlightened understanding of Islam.

It is instructive to contrast the model of Tunisian reform with the way that initiatives to enhance women's rights currently proceed. But, before some specific cases are reviewed, a brief summary is in order to indicate some of the factors that account for why today's discussions of women's rights are so different.

The influence of the 1979 Women's Convention (CEDAW)

Today educated people in Muslim countries routinely refer both to Islamic law and international human rights law. They may be of very different minds regarding how Islam relates to international human rights law, but they acknowledge the relevance of the latter. The prestige of international law has grown, and it unequivocally calls for ending discrimination against women. The awareness that equality is the international standard prompts many Muslims to examine critically inequalities that are said to be mandated by Islamic law, while other Muslims respond by trying to defend discriminatory rules by recasting them as benign measures designed to protect women, the family, and morality.

The fact that international human rights law is now routinely referred to both by governments of Muslim countries and by their citizens inevitably engenders debates over whether international human rights law needs to be adjusted to take into account conflicting rules of Islamic law – or the reverse. For Muslims like Iran's Nobel Laureate Shirin Ebadi who treats all laws that deny women equality in rights as *ipso facto* defective, the

reliance on criteria set by international law naturally entails challenges to interpretations of Islam that dictate according women second class status. Muslims like Iran's ruling clerical elite, who cling to ideas grounded in medieval jurisprudence or misogynist Islamist views, naturally reject the model of equal rights for women. However, human rights supporters and supporters of retaining discriminatory rules of Islamic provenance are being forced to recognize that both the international and Islamic systems must be taken into account, functioning as coexisting and competing frames of reference in discussions of Muslim women's rights.

The fate of Iran's proposed Committee on the Elimination Discrimination against Women (CEDAW) ratification provided a perfect illustration of how international law enters into domestic struggles over women's rights. Vigorous public debates raged in Iran during 2003 about Iran's proposed CEDAW ratification, as the parliament considered whether to vote in favor of ratification. This was not a case of secularists facing off against those upholding Islamic principles; senior Islamic clerics could be found on both sides of the issue, proving that Islam itself was not necessarily the obstacle to accepting CEDAW. Facing the disapproval of clerical hardliners, the Iranian parliament nonetheless strongly approved ratification, only to have the ratification thwarted in August 2003 when the Council of Guardians nullified the parliamentary decision on the grounds that the convention violated Islamic law and the constitution in numerous ways (Dareini 2003). When the decision of the people's elected representatives to accept the Women's Convention was overridden by unelected clerics, this conveyed to Iranians that national policies opposing women's equality reflected the dominance of hardline theocrats rather than necessarily reflecting Islamic requirements.

Even a country like Saudi Arabia, which in many ways is deeply estranged from the philosophy of human rights, has undertaken actions that acknowledge the authority of international human rights law. It energetically lobbied to secure a place on the UN Human Rights Commission, to which it was appointed in 2001, making it tricky for the government to follow its earlier pattern of treating the international human rights system as culturally inappropriate for use in Muslim countries. It is now a member of the new UN Human Rights Council. In 2000 it ratified the Women's Convention, and the fact that it entered major reservations did not alter the fact that it had acknowledged the authority of the convention.

Globalization and relativization

Globalization affects the perspectives of Muslims generally as they are exposed to and engage with new global systems. Globalization is particularly

important for Muslim women, giving them enhanced educational opportunities and expanded access to the media, to email, and to the Internet, enabling them to stay abreast of new trends and to engage in exchanges with women around the globe, learning about laws in other Muslim countries and about how their sisters have critiqued the ways that they are being treated. They have the chance to share their experiences and discuss their insights in international women's forums like the 1995 Beijing Women's Conference. Via these activities Muslim women have been prompted to examine how women's treatment derives from harmful gender stereotypes, outworn traditions, and systemic problems characteristic of patriarchal societies found in countries around the globe.

As Muslim women compare experiences, they notice that what their governments say that Islam requires regarding women often contradicts what other governments are telling their citizens about Islamic requirements. In the course of this process national versions of Islamic law tend to forfeit their authority as definitive models of Islamic requirements, which embolden women to call for upgrading their own national laws at least to give them the level of rights and freedoms enjoyed by women in other more progressive Muslim countries.

The rise of women's human rights organizations

Despite the repressive systems that prevail in most Muslim countries, civil society often flourishes. Governments feel under siege due to criticisms by domestic NGOs of their poor human rights records. Funding from foreign governments and international institutions has assisted some human rights NGOs to have a greater impact than they otherwise would. The international connections that these NGOs establish can be invoked by governments in efforts to discredit them, but they also mean that governmental attempts to crush NGOs are somewhat inhibited, because such attempts can engender criticisms from international human rights NGOs and sanctions from foreign governments. Where women's status in Islam is concerned, effective human rights activism has reshaped the way issues are formulated, meaning that discussions are increasingly carried out in terms of women's human rights.

Women's human rights NGOs have actively exploited the opportunities afforded by the CEDAW system to exert pressure on their governments for compliance with CEDAW. Submitting shadow reports that critique their governments' attempted justifications for discrimination against women, Muslim feminists have been effective in undermining governmental claims that Muslims' religious beliefs call for restricting women's

rights and freedoms. Via the shadow reports, they can present their views that their religion, correctly understood, upholds women's equality (see Mayer in Haddad and Stowasser 2004). This public embarrassment exerts pressure on governments to reconsider inherited Islamic rules that discriminate against women.

The spread of Islamic feminist ideas

The ideals of Islamic feminism have won wide currency over the last decades. Islamic feminism contests the notion that equal rights for women is a secular and/or Western idea in conflict with Islamic tradition, proposing that Islam originally intended to afford women equality – meaning that it was in advance of other civilizations in this regard (see Moghadam 2005).

Simplifying a bit, one could say that Islamic feminism typically involves mining the Islamic sources for evidence that Revelation and the Prophet envisaged women as equal partners in the new community. At the same time it entails downgrading medieval jurisprudence as man-made and time-bound interpretations of the sources that distorted or misread the original principles of Islam. From this perspective, true Islam endorsed equality – or, in some versions, approximate equality – for Muslim women. Islamic feminism enables Muslim women to remain within the ambit of Islamic principles while demanding equality in rights.

Policy-Driven interpretations of the Islamic sources

Even where Muslims involved in the debates about the rights of women in Islam do not specifically invoke the principle that the Islamic sources should be interpreted in accordance with the goals of Islamic law (*maqasid ash-shari`a*), they seem increasingly disposed to think in these terms. That is, the trend is to place emphasis on ascertaining the broad policies underlying Islamic law and to determine the rules applicable to specific cases accordingly. Deciding what are basic Islamic goals and values involves making judgments in areas where average Muslims feel more competent offering input than they do regarding the technicalities of medieval Islamic jurisprudence. This shift in focus has had the impact of democratizing the debates and empowering the public to challenge the readings of highly-trained jurists. Not well equipped to deal with this shift, jurists may propose policy rationales for discriminatory rules that the Muslim consensus will find flimsy and unpersuasive.

An example would be the rationale offered by Saudi clerics for barring women from driving cars, that the ban is necessary to serve the goal of

upholding Islamic morality. As critics argue, this policy rationale is weak, because in practice Saudi women commonly wind up being alone in their cars with drivers from the migrant labor workforce, men who are not only not related to their women passengers but who may not even be Muslims. Surely, they argue, a Muslim woman's chastity would be far safer in a locked car that she was driving herself.

In general, such policy-driven readings of the Islamic sources combine well with Islamic feminist readings. Thus, for example, extrapolating from the active participation of women in the wars and politics of the early Islamic community and the fact that leaders of that community, including the Prophet, showed respect for women's opinions and invited their input in decisions, Muslims can derive a general principle that Islam intended for women to be partners in the venture of Islam, not a subjugated and segregated underclass. If one accepts this principle, it provides one basis for challenging restrictions on women's rights and freedoms.

This policy-driven approach is generally less successful in the area of inheritance law, where there are extensive details in the Qur`an regarding how to apportion estates among various categories of claimants. The specificity in the text, with women in most instances only being allowed to claim one half the amount claimed by men inheriting in a similar capacity, makes it more difficult (though not impossible) to construct arguments that Islam intended men and women to inherit on an equal basis. Thus, for example, the progressive reforms made in Moroccan personal status law in 2004 did little to change the discriminatory features of inheritance law.

Major socio-economic changes

Increasingly, Muslims find that their national laws on personal status are based on gender models that have ceased to fit evolving socio-economic conditions in their societies. The medieval Islamic jurisprudence, still influential in many countries, reflected jurists' rigid convictions about gender roles. They took for granted that women's life naturally would centre on domestic life, being concerned with procreation and childcare and catering to their husbands' demands. They expected that men were and should be the providers and that women were and should be housebound dependents. In this scheme, it was not surprising that married women were obligated to show obedience to their masters/husbands; one could say that the husband paid and the wife obeyed. To the extent that women's lives in the past conformed to this domestic model, Islamic rules would not have seemed as problematic as they do today when many factors have resulted in a significantly changed environment where

the viability of old stereotypes about gender roles is crumbling (see Katulis 2004).

Men and women find their respective roles in the family altering as women work outside the home and make vital contributions to the family budget, sometimes earning more than their husbands. As women acquire educations and professional qualifications, their opportunities expand at the same time that their ability to define their self interest grows. The more equitable international human rights model of the family seems more attuned to contemporary circumstances, and it consequently grows in influence.

The rise of Islamism and Islamization

The political impact of Islam has enormously expanded as Islamist movements treating it as an ideology have won large popular followings. Islamist movements have managed to come to power in a few countries and to influence laws and policies in others. Even where Islamists do not control governments, one sees official initiatives to enhance regime legitimacy by co-opting Islamist slogans and programs. The language of politics, which several decades ago was commonly shaped by nationalist and/or socialist ideologies, is becoming more infused with Islamic terminology and concepts.

One of the main goals of Islamist movements has been to reinstate Islamic law – although there is no consensus on what this entails. To date, when Islamists have gained control of governments, one of their central goals has been curbing women's freedoms, often in the name of enforcing Islamic rules and morality. In the most extreme case, that of the Taliban's takeover of Afghanistan, women were demoted to the status of chattels. Frequently, Islamists have resorted to primitive gender stereotyping to devise policy rationales to justify discrimination against women, a perfect example of which was the dismissal of Iranian women judges from office after the Islamic Revolution on the grounds that women's natures made them unsuited for judicial tasks.

With political Islam and Islamic feminism simultaneously flourishing, the result has been a polarization of positions on women's rights; abrasive public exchanges often occur. Typically, advocates of women's equality have been deeply hostile to Islamist movements and vice versa. Islamic jurists are not necessarily on the side of the Islamists. For example, Iran's outspoken dissident clerics have often denounced the Iranian regime's policies where these violate women's human rights, treating these as deformed and illegitimate readings of Islam (see Mir-Hosseini & Tapper 2006).

There can also be convergence. Ironically, as dissident Islamist movements have endeavored to exploit democratic openings for their own political goals, they have increasingly appropriated ideas from human rights groups to widen their appeal, sometimes including invoking ideals of women's empowerment. At the same time, most feminist activists evince a determination to present their agendas as respectful of Islam.

Recent controversies over gender rights

The foregoing has summarized factors affecting Islamic thought on gender rights and roles. In the following section, various recent scenarios are discussed with the aim to illustrate and substantiate the characterizations presented above.

Syria

How today's struggles over women's rights can evolve into public brawls was well illustrated by confrontations in Syria in 2006 (Imam 2006). By that juncture, it had become clear that Syrian women's activism was changing the dynamics of discussions of women's rights. Rania Tlass, president of the National Association for Promoting Women's Role, reported that the association had held lectures for women 'to inform them of their rights and encourage them to confront abuse and violence they suffer from' (Global Sisterhood Network 2006). Women's rights activist Riad Salem stressed that her group, the Association of Social and Civilian Initiative, was 'seeking to eliminate injustices against women which are away from the spirit of Islam, justice or human rights' (Global Sisterhood Network 2006). Speaking as if backward understandings of Islam were the obstacle, she asserted that her group relied on 'enlightened religious references' (Global Sisterhood Network 2006). Salem indicated that they engaged in continuous dialogue with legislators, lobbying for the cause of enhanced rights for women. Like many feminists, she used the illogic and incongruity of rigid rules of medieval jurisprudence to try to discredit them, citing an absurd case where the rules on marriage guardianship for women had meant that a 60-year-old woman had to submit to the guardianship of her 18-year-old son in order to be able to contract a valid marriage.

As Syrian women mobilized to challenge discriminatory laws in 2006, this provoked strikingly mixed reactions on the part of Islamic clerics, illustrating the gulf separating clerics comfortable with feminist ideas and those who were outraged that any women would dare challenge traditional

juristic rules. Conservatives were incensed when the activists distributed questionnaires to screen public opinion on women's issues and to solicit views on discriminatory laws. Among the questions were ones requesting reactions to the rules allowing husbands to divorce their wives without their knowledge or approval and allowing them take second wives without informing their original spouses. The questionnaire also included queries about unequal treatment of men and women in inheritance and honor crimes, in which only men went unpunished. Offended conservative clerics considered that the right response was personal attacks and threats, charging the activists with being prostitutes, atheists, and infidels, even calling for them to be killed. Syria's Grand Mufti Sheikh Ahmed Hassoun was more accommodating, filling out the questionnaire, opining that clerics should engage in dialogue with the activists, and claiming that women's rights needed to be reformulated. The progressive cleric Sheikh Jawdat Said expressed outright sympathy for the activists, asserting that 'clinging to unfair laws against women and hiding behind Islam was the result of our backwardness which shows that we do not know our history or our religion' (Global Sisterhood Network 2006). As is often the case, there was a cacophony of clerical voices purporting to speak on behalf of Islam, with prominent Islamic jurists articulating diametrically opposed positions. In contrast to the major fractures in the Islamic establishment, the women's rights activists could articulate a coherent vision of an Islam that combined justice and human rights.

Gulf Cooperation Council (GCC) countries

Showing how women human rights activists are building transnational coalitions, in a conference held in Bahrain in October 2005 activists from countries of the Gulf Cooperation Council (GCC) – Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the United Arab Emirates (UAE) – and from Yemen met and called for their governments to reform existing laws that discriminate against women and to adopt laws to safeguard women from violence. Participants called for raising the awareness about rights and responsibilities within the family, wanting these to be considered in relation to women's rights. They urged their governments to review laws on nationality, housing, social security and other laws and to introduce new legislation where appropriate to ensure equality and non-discrimination. In particular, they called for women to be enabled to take part in the process of decision-making in issues related to them. Participants also called on GCC countries to ratify CEDAW and for ratifying countries to review their reservations. As frequently happens these days, there was

cleric sympathetic to feminism who was ready to speak out to support the women's demands. A consultant on Islamic studies, Sheikh Sadeq Jibran, asserted that 'there is a need for additional Islamic studies to address misconceptions about what is contradictory to the Islamic shari`a. This issue must be urgently addressed because it may lead to more misunderstanding of the contents of the CEDAW' (quoted in Amnesty International 2005).

Bahraini women have engaged in high profile activism in campaigning for expanded rights. They have worked to persuade Bahrainis that it is time to wrest control of family law from traditionally-educated Islamic jurists and to get a new and more equitable family law enacted. Their campaign shows how women's activism, international human rights law, globalization, and policy-driven approaches to Islamic law have combined to alter the climate for considering proposals for enhanced rights for women. A campaign was launched in November 2005 by the official Supreme Council for Women for the codification of Bahrain's family law, only to encounter resistance by conservatives. Instead of having enacted one codified national family law, Bahrain has retained separate family courts for Sunnis and Shi`a in which judges are left to decide cases according to their own interpretations of Islamic jurisprudence. Women's rights activists complain that judges abuse the discretion that they enjoy to resolve cases in ways that are unfair to women. In January 2006, the Bahraini women's rights activist Ghada Jamsheer, the head of the Committee on the Women's Petition (CWP) that was campaigning for the promulgation of a national family law, spoke out to attack the bias and unfairness of judicial decisions made under the existing system. This made her the target of lawsuits by judges in Islamic law courts, who charged her with insulting them. Her response was to emphasize the political nature of the opposition to the adoption of a national family law and to deny any intent to break from Islam. She complained that:

> the real problem is with those who have their personal interests and keep lying about the nature of the family law and the purpose of women's associations. They claim that women's rights activists are atheists and that they are promoting debauchery. This is totally ridiculous and we have always insisted that the law must be based on the tolerant precepts of Islam.
>
> (Toumi 2006a)

The activists decided that the most promising course of action was to seek international support for their campaign, quickly winning support from the international NGO Women Living Under Muslim Laws (WLUML)

(see WLUML 2006a). A delegation of Bahraini women activists, led by Ghada Jamsheer, traveled in the period 27 April–5 May 2006, to London and Geneva to highlight the need for reform in family law in Bahrain. In London they met with women's groups and parliamentarians and visited the Foreign Office and the office of Amnesty International. In Geneva they met UN human rights officials. The delegation presented a complaint to the United Nations, urging implementation of a May 2005 recommendation by the UN Human Rights Committee calling for Bahrain to codify its family law (Khonji 2006). Clearly, despite the risk of aggravating the hostility of their opponents, they saw it to their advantage to put an international spotlight on their cause. Worried about the safety of the activists, Women Living Under Muslim Laws made an international appeal for letters in support of the Bahraini women's group, warning that the CWP members could be targeted for retaliation after their trip to Europe to advertise the plight of Bahraini women (WLUML 2006b).

In the same period (but independently of the activists' trip to Europe) Bahrain became further enmeshed in the UN system; on 9 May 2006, it was elected to the new UN Human Rights Council. Bahraini human rights activists announced that membership on the council obligated Bahrain to make advances in human rights. Ghada Jamsheer asserted that it meant that the proposed family law should be approved, that changes should be made to Bahrain's Islamic court systems, and that women should be given more opportunities to sit in high-ranking, decision-making positions (Hameed 2006).

In April 2006 Bahrain experienced one of the sharp conflicts that commonly arise between changing social realities that alter women's roles and the rigid stereotypes of Islamists seeking to uphold traditionally distinct gender roles, ones supposedly mandated by Islam. A proposal in parliament that would give women and men equal opportunities to serve in the diplomatic corps abroad was attacked by Islamist parliamentarians as 'impractical and against family values' (Toumi 2006b). Significantly, the Islamist opponents of expanding women's role in the diplomatic service phrased their goals as being benign ones of protecting women from unsuitable levels of stress in difficult foreign service careers and upholding morality. For example, in voting down the proposal Islamists asserted that:

> the nature of the diplomatic mission is very demanding and does not suit women. In fact, this nature conflicts with women's home and family duties, especially that diplomats make long travels and stay away from their families for long periods of time.

> (Toumi 2006b)

They expressed concern that diplomats attended receptions and functions in non-Muslim countries and interacted with men, admonishing that 'We should make sure that our women are not forced into such settings' (Toumi 2006b). That is, they did not cite juristic authority for excluding women from diplomatic roles but offered rationales reflecting stereotypes about women's fragility and their susceptibility to male sexual predations.

The gender stereotypes and prejudices of Bahrain's Islamists did not take into account how women's roles were changing. On 8 June 2006, Sheikha Haya Rashed Al Khalifa, a Bahraini diplomat who was a prominent lawyer and women's rights advocate, was elected UN General Assembly President, the first woman from the Middle East ever to reach this exalted office. In a speech to the General Assembly, Sheikha Haya pledged to fight injustice against women around the world. She claimed that 'their suffering drives me to work with you to find suitable solutions to alleviate their pain and uphold the principles of the UN charter, which emphasizes fill respect for human rights' (Wadhams 2006).

With the appointment of a Bahraini woman's rights advocate to this eminent post in the UN system, Bahrain's Islamists were placed in an awkward position. Bahrainis could observe men who themselves lacked anything like the stature and competence needed to qualify for the presidency of the UN General Assembly invoking primitive gender stereotyping to establish that women were unsuited for diplomacy – at the same time that Sheikha Haya had been chosen by diplomats from around the globe to preside over one of the UN's central institutions.

The Bahraini case offered had a dramatic illustration of how the controversy over women's rights and gender roles had moved to the centre of the political stage, where there was effectively a tug of war between conservative clerics and Islamists on one side and women's rights activists on the other. The women's rights activists interacted with and relied on the UN system and international linkages. With Bahrain now more closely tied to the UN system than ever before and its women's rights activists in the international spotlight, it will be harder for the government to resist the augmented pressures for adjusting to UN principles of equality for women, entailing rethinking Islamic rules on family law.

Morocco

For an Arab country, Morocco is relatively democratic and has an exceptionally vigorous civil society. Its energetic human rights and women's NGOs have long campaigned for reforms in its conservative personal status law (see Ghazalla 2001). Trying to calm this agitation as well as to

placate overseas critics of discriminatory Moroccan laws, King Hassan II enacted some minor reforms in 1993. However, he put strict limits on how far reforms could go, asserting that in his role as the guardian of Islam, he had to uphold the requirements of the religion. That is, he spoke as if there were significant conflicts between Islam and women's equality (Mayer 1993).

Soon after he came to the throne in 1999, King Hassan's successor Muhammad VI indicated his interest in enhancing women's rights. He consistently spoke as if there were no viable cultural or religious grounds for denying human rights and as if expanding women's rights was essential to realize the goal of enhancing Morocco's prospects for development. According to Muhammad VI, Islam was not the obstacle. He identified Islam with justice, a justice that did not accept the wrongs suffered by Moroccan women. A typical statement of his came in his speech to the Moroccan parliament on 10 October 2003, when he asked rhetorically 'How can society progress while women, who represent half the nation, see their rights violated as a result of injustice, violence and marginalization, notwithstanding the dignity and justice granted them by our glorious religion?' (Moudawana-Family Law Code 2003).

Under the king's auspices, a committee with participants from diverse backgrounds worked to craft a new law, with a coalition of women's NGOs having significant input in the process. In 2004 a new reformed version of personal status law won parliamentary approval, breaking with Morocco's long heritage of Maliki jurisprudence, which was heavily infused with patriarchal values and essentially reduced women in many areas to the status of minors under male tutelage. Under the new law, the husband and wife share joint responsibility for the family, and the wife's traditional obligation to obey her husband has been eliminated. Women are no longer placed under the guardianship of male relatives. The minimum age of marriage is set at 18 for both men and women. Women have the same right as men to obtain divorces; both must go through the courts. A husband must pay all monies owed to the wife and children before a divorce can be registered, and divorcing spouses must share property acquired during marriage. The husband's ability to take more than one wife is severely restricted. Women have the right to impose conditions in marriage contracts requiring that the marriage be monogamous. Even where there is no such condition, the first wife must be informed of her husband's intent to marry a second wife, the second wife must be informed that her husband-to-be is already married, and the first wife may ask for a divorce on the basis of harm occasioned by the husband's second marriage. A woman is able to retain custody of her children under a broader range of situations, including the event of remarriage or moving

out of the area where her former husband lives – thus ending a situation where child custody automatically reverted to the father in certain circumstances regardless of his fitness as a parent. In a modest reform in inheritance rules, grandchildren on the daughter's side have the same right to inheritance as grandchildren descended from the son of the deceased (Women's Learning Partnership 2004). Although women's rights were significantly advanced by the 2004 reforms, there was no provision for complete equality, and discriminatory features of inheritance law were retained. As already indicated, policy rationales for curbing discrimination are less effective when explicit Qur`anic texts stand in the way.

In the aftermath, the politics of women's rights took on intriguing dimensions. Nadia Yassine is a prominent figure in the Islamist faction al-`Adl wa`l-Ihsan. Yassine had led Islamists in a mass demonstration in 2000 in Casablanca protesting the proposed reforms in personal status law, a demonstration that had been countered by a sizeable but smaller feminist demonstration in favor of the reforms held in Rabat. As often happens, Islamists opted for upholding discriminatory rules associated with the Islamic tradition and publicly condemned feminist projects. However, once the reforms proved to have widespread popular appeal, Yassine did a radical about face. Yassine apparently assumed that her ambitious campaign to establish herself as Morocco's prospective new leader entailed eclipsing the king as an advocate for women leading to her belatedly professing her belief that Islam accorded women full equality. The author has observed this remarkable shift during a panel at Harvard Law School on 14 April 2006, when the author served as a commentator on her presentation on 'Legal Reform in Morocco: Views of a Moroccan Feminist Dissident'. Addressing an audience that included many Moroccans, Yassine spoke as if she had been in the forefront of women's campaign for expanded rights. Yassine sought to explain away her leadership of the 2000 Islamist protest against the proposed reforms in personal status law as having been dictated by tactical concerns, portraying her own philosophy as being one sympathetic to women's claims for equality. Indeed, she insisted that under the Prophet, Muslim women had enjoyed full equality, so that giving women equality would merely restore to them the rights that had originally been part of the Islamic project. She spoke as if she was confident that invoking the Prophet's example and blaming the Umayyad dynasty for, as she asserted, distorting the Islamic message and enslaving women were sufficient to prove her point, as if she had no need to present further arguments or evidence. That is, although an Islamist, Yassine did not seem interested in the details of Islamic jurisprudence pertaining to women but opted for a strategy typically espoused by Islamic

feminists, one of circumventing jurisprudential hurdles by appealing to sources dating from the Prophet's era.

Sudan

In April 2006, another Islamist leader hardly known for supporting human rights did a startling about face, effectively appropriating Islamic feminist ideas. In this case, it was the prominent Sudanese Islamist Hassan al-Turabi, who had long made common cause with Sudanese military dictators, who pursued retrograde Islamization programs. Taking positions that were so radical in the Sudanese context that he was quickly branded an apostate by Islamic jurists, Turabi went on the record as stating that Islam accorded women fuller rights than did Western cultures, that women were equal to men, that a Muslim woman could marry a Christian or a Jew, and that she could lead communal prayers. Moreover, he asserted that a woman's testimony was worth the same as a man's – and could be worth even more in areas where she had greater expertise. He made a general appeal for women to be allowed to enter all fields of activities including politics, art, sport, culture, and sports.

In an interview, Turabi explained his positions in a way that implied that he had chosen to appropriate Islamic feminist ideas, which emphasize the Islamic sources and downgrade medieval jurisprudence. He asserted 'The modern and contemporary Islamic discourse on women lags far behind the authentic Islamic rules and principles' (Asharq al-Awsat 2006). He pointed to policy rationales for his ruling that a Muslim woman could be married to a Christian or a Jew. His concern was a case where a would-be American convert to Islam was warned that her conversion would entail divorce from her non-Muslim husband. Turabi objected claiming that 'such an attitude in fact causes many women to be reluctant to convert', adding that the conversion and Islamic conduct of the wife could have positively influenced the non-Muslim husband, an influence that the Muslims of the West needed (Asharq al-Awsat 2006). He also dismissed the authority of the jurisprudence that called for prohibiting Muslim women from marriage with non-Muslims, saying that the rulings 'were issued during periods in which political disputes between Muslims and non-Muslims were taking place. On the other hand, the author could not find a single word that prohibited such marriage in either the Qur`an or the Sunnah.' (Asharq al-Awsat 2006) He continued:

> I believe that marriage between a Muslim woman and a non-Muslim man is valid since nothing in the Qur`an or Sunnah dictates otherwise

> ... I cannot say this type of marriage is prohibited based on the accu-
> mulated teachings of past scholars.
>
> (Asharq al-Awsat 2006)

He made similar comments regarding the established rule barring women from leading communal prayers, indicating that later customs had superseded the original Islamic principles:

> Who prohibited that in the first place? It was your customs and traditions and not Qur`an or Sunnah and your customs that preferred her prayers at home and not in the mosque. There was a female companion of the Prophet who led men in prayer. When there is a pious woman, she should lead the prayers and whoever is distracted by her beauty should be deemed sick. We do not look at an Imam's white beard or ugly face but we listen to the content of what he says.
>
> (Asharq al-Awsat 2006)

That in 2006 Turabi suddenly decided to espouse such progressive stances on women's rights in Islam prompts speculation that he had sensed that his political prospects would brighten if he positioned himself as a supporter of women's equality. It was as if he worried that a bandwagon was taking off and he needed to hurry to clamber aboard to avoid being left behind. If Turabi can be seen as a kind of political weathervane, his siding with critics of discriminatory rules suggests that he calculated that Islamic feminism would be the wave of the future.

Iran

All the trends under discussion here have manifested themselves in Iran. When in October 2003 the Iranian human rights lawyer Shirin Ebadi was awarded the Nobel Peace Prize, this seemed to be an effort by the Nobel Committee to use the prestigious prize to strengthen her hand at the expense of hardliners who had in the past imprisoned her and had kept threatening her life to try to stifle her human rights advocacy. Iranians longing for democracy and human rights celebrated the award, but, illustrating the polarization of Iranian opinion, Iran's hardliners reacted with bitter condemnations of Ebadi. Following the regime's line, Friday prayer leaders all across the country denounced Ebadi and her Nobel Prize (Mir-Hosseini 2003). Knowing that feminists were routinely attacked as atheists and apostates, in her Nobel award lecture on 10 December 2003, Ebadi went

out of her way to position herself as a Muslim believer who identified her faith with core values like justice, considering it supportive of democracy and women's rights, and whose grievances were directed at patriarchal cultures, not at Islam. Her comments included:

> The discriminatory plight of women in Islamic states, too, whether in the sphere of civil law or in the realm of social, political and cultural justice, has its roots in the patriarchal and male-dominated culture prevailing in these societies, not in Islam. This culture does not tolerate freedom and democracy, just as it does not believe in the equal rights of men and women, and the liberation of women from male domination [fathers, husbands, brothers...], because it would threaten the historical and traditional position of the rulers and guardians of that culture.
>
> (Ebadi 2003)

On 25 April 2006, Iran's President Ahmadinejad, a fervent Islamist, surprised onlookers by suddenly seeming to accept the legitimacy of women's protests against the rule barring them from access to sports stadiums. In a typical effort to make discrimination appear to be serving beneficial policy goals, Iran's theocracy had claimed that the bar was needed to uphold Islamic morality. Apparently hoping to court popularity with Iran's restive and disaffected young women, Ahmadinejad announced that women should be allowed to attend sporting events, proposing that, if there were problems of social corruption, women should not be blamed, since men were also at fault (Slackman 2006). That is, he took the hardliners' policy rationale for excluding women – that crowds of male spectators were too rowdy and foul-mouthed for women to be present – and turned it around, implying that women were being unfairly penalized for the bad behavior by men in the stadiums. This announcement of a policy reversal by the elected president provoked a round of intense denunciations from high ranking clerics. Eventually, Ayatollah Khamene`i stepped in to call for the overturning of the new policy, and Ahmadinejad capitulated to the head of Iran's clerical hierarchy. The incident clearly illustrated how in the wake of Islamization decisions on Islamic rules affecting women could become political footballs to be kicked this way and that by figures with different agendas.

Iran's hardliners may have failed to calculate how retrograde their policy would appear at a time when Iran was participating in the World Cup games in Germany, when Iranians watching the games would be

reminded that elsewhere in the world women fans were free to cheer on their teams. Already in 1998, Iranian victories in the World Cup had prompted frenzied mass celebrations in Tehran, in which women had charged into the streets, ripped off their veils, and exultantly danced alongside men. The would-be enforcers of Islamic morality had been forced to recognize in 1998 that these popular demonstrations of defiance were too large to quell. In 2006 the emotional experience of following the fortunes of Iran's soccer team threatened to intensify resentments of the second class status that the regime accorded to Iranian women in the name of safeguarding Islamic morality.

In early June an international petition circulated in advance of a planned Tehran protest against discrimination against women scheduled for 12 June 2006, International Women's Day, anticipating a crackdown and encouraging women outside Iran to register in advance their support for the protesters. Infuriated by the large demonstration and the challenge to its discriminatory policies, Iran's clerical regime courted the condemnation of the international community by having police violently attack the demonstrators. Treating this peaceful public rally demanding equality for women as intolerable defiance, the regime sent a squadron of women police officers to beat the demonstrators with batons, spray pepper spray in their faces, handcuff them, and drag them off – often by their hair – for detention and interrogation. The harshness of the regime's crackdown aptly illustrated the extreme polarization of Iranians over issues of women's rights. Significantly, Iran's clerical rulers, supposedly there to ensure that the country was governed according to Islamic jurisprudence, opted for violent repression of women's rights activists rather than to attempts to persuade their critics by arguments grounded in Islamic jurisprudence.

Many major international human rights NGOs followed the lead of Human Rights Watch, which denounced the violent suppression of the demonstration and called on the Iranian government to release all detainees without delay, end its harassment and intimidation of human rights activists, abide by its international obligations to respect freedom of assembly, and prevent and punish police brutality (Human Rights News 2006). In an excellent analysis of recent women's rights activism in Iran culminating in the 12 June demonstration, Ziba Mir-Hosseini concludes that the activists have two powerful new weapons:

> First, the gender awareness that the Islamic Republic has unwittingly fostered, and, second, cyberspace. The 12 June protest was planned and conducted via websites and blogs. Even if, unlike in 2005, the

state crushed the rally, the Internet continues to disseminate worldwide the words of the protesters and images of the brutal treatment they received.

(Mir-Hosseini 2006)

Kuwait

An apt example of the fluidity of positions on women's rights and Islamists' readiness to adjust their positions based on purely political considerations came up in Kuwait in June 2006. Islamists in Kuwait's parliament had long fought against women's determined campaign to obtain the vote, claiming that women voting violated Islamic teachings. However, in May 2005 women were at last given the right to vote. In the run up to the June 2006 parliamentary elections, one of the Islamists who had invoked Islam to deny the suffrage to Kuwaiti women simply whitewashed his earlier stance, pretending that he had always supported women's right to vote. This sudden about face was not grounded in a new interpretation of the Islamic sources but in pragmatic calculations; after the 2005 change, women outnumbered men in the electorate, and this Islamist candidate now needed to compete for women's votes (see Fatah 2006). His publicly proclaimed belief that Islam precluded women from voting in no way deterred him from doing what was politically expedient.

Conclusion

Several decades ago, reforms in laws affecting women in Muslim countries proceeded at a decorous, measured pace in a process that reflected a preference for piecemeal adjustments backed by juristic authority. However, as recent developments indicate, the situation has become much more fluid and turbulent than it previously was. Dramatically contrasting ideas about women's status are being promoted by rival political factions, with all sides typically claiming Islamic authority for their positions. In the public square Muslims carry out battles over gender issues, with the more powerful side being able to impose its views. That is, outcomes are directly and obviously tied to the political fortunes of the competing factions rather than to carefully crafted jurisprudential arguments.

At the same time that clashes are occurring, there are also signs of convergence that should attributed to the growing influence of Islamic feminism and women's international human rights. The increasing enmeshment of Muslim societies within globalized systems also exerts

pressures for adjusting to a world in which treating women as second class citizens is regarded as anomalous. There is still potent, even fierce opposition in Muslim countries to loosening the constraints on women, but the utility of appeals to Islam as bulwarks against change is diminishing. More and more Muslims now confidently assert that core Islamic values support the principle of equal treatment for women. As the conviction that Muslim women were meant to be equal percolates through Muslim societies, Muslims – sometimes including Islamic clerics and Islamist leaders – increasingly seem disposed to disregard medieval juristic treatises and to turn to foundational values of their religion to resolve conflicts over gender issues, finding in these values support for enhancing women's rights. These developments create a climate that is propitious for fresh starts, encouraging Muslims to adopt new ideas about how the message of Islam pertains to women. This does not mean that Islamic feminists have won the day, but it does suggest their movement has taken on momentum and that their opponents are being placed on the defensive.

Note

1   As an example, in countries where the Hanafi school prevailed, a typical reform was to borrow more liberal divorce rules from Maliki jurisprudence. Hanafi law made it all but impossible for a woman to obtain a divorce over her husband's objections, a situation that caused extreme hardship and seemed inequitable, given that men enjoyed the unfettered right of extrajudicial termination of their marriages. Wanting to facilitate women's access to divorce, reformers in Hanafi countries could resort to the rules of the Maliki school, equally orthodox, which allowed a woman to obtain a judicial divorce based on establishing that she had been harmed or on grounds of severe marital discord, provided that she gave up certain financial claims. Men still had a much easier time terminating their marriages, but women's disadvantages were lessened by the borrowing of Maliki rules. In the context of the mindset that prevailed decades ago, such modest initiatives seemed progressive.

3 Women's rights in the Islamic Republic of Iran: the contribution of secular-oriented feminism[1]

Rebecca Barlow

Introduction

A cornerstone of the conservative gender ideology of Iran's clerical elite is the conviction that biological differences between men and women are cause for them to have different roles and functions in society. Different roles and functions translate to different (read unequal) legal rights. Notwithstanding the discriminatory gender policies of the state, Iranian women have refused to renege on their claims to equal rights. In the face of intense political pressure to withdraw from the public arena, women in the Islamic Republic have maintained a foothold in the political, social and legal realms. Importantly, many of the women who have been most successful in this manner have presented a feminist resistance that does not fully oppose the form of the Islamic state. Religious-oriented Iranian feminists emphasize that the problems faced by modern Muslim women are a result of misguided male interpretations of Islam's holy texts, rather than a result of Islam itself. In order to establish women's rights, religious-oriented feminists engage in woman-centered re-readings of Islam's holy sources. These women place particular stress on the spirit, as opposed to the legal letter, of Islam. They deem the former to be capable of unlimited expansion to meet the rights-based needs of the modern Muslim woman (and man).

Religious-oriented feminism is a valuable and valued enterprise amongst Iranian women. However, in terms of the quest to secure inalienable human rights for Muslim women, it is a somewhat limited project. This became clearer than ever during the reform era in the Islamic Republic in the late 1990s and early 2000s. Many religious-oriented feminists became aligned with official government reformists. Within the latter's approach to change, an emphasis was placed on remaining ideologically legitimate in the eyes of the state in order to remain active and advance one's cause. However, the establishment has demonstrated a lack

of concern for, or active unwillingness to address, the issue of women's rights regardless of whether such demands are framed within the Islamic paradigm or not. This indicates that the Islamic state is less concerned with religion than it is with the maintenance of the status quo. The experiences and eventual demise of the reform movement suggested the incapacity of the Islamic state to accommodate meaningful change.

However, this has not deterred religious-oriented feminists in their task. On the contrary, it has prompted them to examine the discontents of their approach to women's rights, and engage in a working synergy with their secular-oriented counterparts. In contrast to religious-oriented women, secular-oriented feminists define their project outside the political boundaries of the Islamic state. Secular-oriented feminists suggest that there may be some ideological links between Islam and patriarchy. As such, they do not focus their energies on attempts to reform the *shari`a* legal code, arguing instead that it is an inappropriate framework for the formation of laws in the twenty first century. Secular-oriented feminists turn towards international human rights law as the basis upon which Iranian women's rights should be built. A number of factors indicate that secular strategies may be able to make increasingly valuable contributions to future feminist activism in Iran.

These include the demise of the reform movement, demographic changes, and a widespread psychological move away from the specific grievances issuing from Iran's revolutionary years. Young Iranian women desire a state that will provide economic opportunity and more cultural opening. Along with veteran feminists, they have increasingly faced the limits of theological exercise, and emphasized the possibility that Islam may exist as one component of women's identity alongside many (potentially non-religious) others. This chapter will present an outline of what secular strategies may have to offer Iranian women as they continue their quest to equal rights.

Religious-oriented feminism and the evolution of the reform movement

In the late 1990s religious-oriented feminists became closely associated with the Iranian reform movement (see Moghadam 2002: 1138 and Mogahadam 2005). In May 1997, the liberal cleric Muhammad Khatami won a landslide victory at the election polls and cemented a position as President, leader of the reform movement, and the nation's number one hope for meaningful change. Khatami sought to convince the clerical leadership that for the regime to remain vital, it would have to accommodate the basic rights and freedoms of its constituency. He believed that this enterprise

did not necessitate regime overhaul. Rather, it could be achieved vis-à-vis an internal process of reform. Khatami relied on a pragmatic interpretation of Islam's scared texts, and highlighted democratic and egalitarian impulses within Islamic doctrine in order to justify his proposals for change to the ulama. This presented religious-oriented feminists with an obvious tactical and strategic partner. According to Elaheh Rostami Povey, the overwhelming support that Iranian women afforded Khatami sprung from their belief that 'under his presidency women's issues could be fought for more easily' than under the conservative candidate Nateghe Nouri (Povey 2001: 49). However, this belief mismatched the reality of what was about to unfold on the ground.

Opportunities for religious-oriented feminists to make significant gains for women's rights during the reform era rested on the possibility that the ulama might eventually yield their orthodox reading of Islam to the more enlightened version of the faith proffered by Khatami and his backers. This possibility proved to be a non-event. Although reformist parliamentarians dominated the *Majlis* (parliament), the conservative-dominated Guardian Council repeatedly exercised its veto power to block legislation that would cause even the slightest change to the status quo. The stalemate that emerged between reformists and conservatives at the turn of the century stemmed from the Iranian—Islamic principle of *velayate faqih*: governance of the most learned Islamic scholar. This principle accords the ulama a privileged role in governing the Islamic state, and ensures that the Supreme Leader – ostensibly God's representative on earth – has the "final say." It effectively relegates other branches of the government, including the parliament, to function as optional extras to a predetermined political agenda.

Khatami's meeting with this seemingly insurmountable obstacle to reforming the system from within provided religious-oriented feminists with an important warning. The experiences and evolution of the reform movement revealed the structural resistence to change embedded in the Iranian state system. This is not merely an unintended symptom of the Islamic state, but rather an inherent *function* of government. Yet both government reformists and religious-oriented feminists define their ideologies and conduct their work within the boundaries, and according to the rules, of this framework. For this reason government reformists have been subjected to criticism for continuing to work within what appears to be a 'politically bankrupt regime' (Akbarzadeh 2005: 36). Similarly, in the past religious-oriented feminists have faced some scrutiny for inadvertently lending legitimacy to what is a systemically patriarchal form of governance.

The weight of these charges became clear when the relationship between religious and secular-oriented feminists reached a low point 2000. In April that year, a cohort of intellectuals, journalists, activists and reformists gathered in Berlin to discuss the direction of the reform movement after Khatami won a second victory in the February elections earlier that year. The Berlin Conference was approved by the Islamic authorities, but later deemed "un-Islamic" as a result of agitation by Iranian opposition elements in exile. Ten reformists were subsequently charged with 'acting out against the internal security of the state and disparaging the holy order of the Islamic Republic' (Sick, Keddie & Karimkhany 2001: 129). As the state dealt out punishments to conference participants, it became obvious that secular women activists were being dealt with more harshly than their religious counterparts.

During the conference, two leading secular-oriented feminists – lawyer Mehrangiz Kar and publisher Shahla Lahiji – had criticized the slow process of the reform movement and argued that religious domination over civil law was a serious threat to women's human rights (Povey 2001: 66). These women were then subjected to a closed-door trial and spent two months in prison (Kar was in fact held in solitary confinement). Renowned lawyer Shirin Ebadi defended Kar and Lahiji in court, and was subsequently also imprisoned. In contrast, religious women who had participated in the conference, such as Shahla Sherkat (editor of the Islamic feminist magazine, *Zanan*) were accorded public trials and faced fines but no terms of imprisonment. According to a number of commentators, the harsh penalties dealt out to secular-oriented feminists in the aftermath of the Berlin Conference was a broad human rights issue pertaining to the Islamic state's treatment of women and non-Muslim minorities at large, rather than a one-off result of these women's participation in a conference-gone-wrong (Sick, Keddie & Karimkhany 2001: 132).

In a series of interviews with Iranian feminists, Povey observed that their sentiments were in line with this interpretation of events. Secular-oriented feminists felt that their treatment at the hands of the state following the Berlin Conference merited condemnation on behalf of their religious-oriented counterparts. However, the latter declined to display overt support for Kar and Lahiji. Lahiji commented that 'this was an interesting experience that showed the limits of our cooperation' (Sick, Keddie & Karimkhany 2001: 66). Arguably, what it also highlighted were the limitations of religious-oriented feminist strategies. Under the perception that a non-confrontational relationship with the state would be the best way to continue their work, religious-oriented feminists refrained from supporting women who had expressed outright dissent from the Islamic state.

However, it was precisely these women whose human rights needed urgent attention. Furthermore, by labeling the conference and its participants "un-Islamic," the state demonstrated a failure to accept the native authenticity and effectively deal with feminist skepticism of the establishment.

The discontents of remaining within the ideological boundaries of the Islamic state became clear to again in 2003. That year, Shirin Ebadi was awarded the Nobel Peace Prize in recognition of her ongoing struggle for human rights (particularly those of women and children) within the Islamic Republic. The state's official response to Ebadi's award was negative. The conservative press sought to diminish the importance of the prize by treating it as a minor new item; some newspapers aligned with the hardliners' factions did not even carry the story, or criticized it if they did (Mostaghim 2003). This kind of reaction to the most prestigious award in the realm of human rights and peace is disturbing. What is interesting is that throughout her career as a lawyer, Ebadi has refrained from directly challenging the Islamic regime. Ebadi self-identifies as a secular-oriented feminist: she does not wear the veil when it is not required, and in her autobiography (published outside of Iran for a Western audience) Ebadi has revealed that she is in favor of the separation of mosque and state. Ebadi has also scrutinized the fact that she is required to consult seventh century Islamic law (the *shari`a*), rather than the Universal Declaration of Human Rights to argue her legal cases (Ebadi 2006b: 50–2 and 112–8).

Nevertheless, she does so within Iran in order to remain active in her work and challenge the clerical establishment on its own grounds. On numerous occasions in interviews and speeches, Ebadi has been careful to explain that her work is apolitical: she is committed to interpreting the law to improve women's status, but is not concerned with engaging in direct political protest against the regime. Despite Ebadi's non-confrontational stance, the Islamic state chastised her winning of the Nobel Peace Prize. Even more alarming than the state's official response to Ebadi's Nobel Peace Prize was that of Iran's reformist President Khatami. He declined to make any substantive link between the reasons for Nobel Committee's awarding of the prize to a female lawyer and the reality of the Iranian context (that is, the patriarchal practices and abuse of human rights perpetrated by the Islamic state). Instead, he suggested that the prize was 'totally political' (BBC 2003a). When asked why he did not officially congratulate Ebadi, Khatami replied 'Do we have to issue an official message about whatever happens in this country? In my opinion, the Nobel Peace Prize is not very important; of course, the prize for literature is important, but the one for peace is not'. (BBC 2003a)

These responses indicate the extent to which Khatami perceived it necessary to distance himself from processes and influences external to the Islamic Republic's official establishment. It is within the state that the reform movement defined and legitimized its project. Therefore it was to the state that Khatami expressed his loyalty, rather than to a female lawyer who sought to diminish the patriarchal impulses of that state 'We [the reformists] hope Ms Ebadi will completely pay attention to the interests of the Islamic World and Iran and do [sic] not let her achievement to be misused at all' (BBC 2003b). Khatami's lukewarm response to Ebadi's Nobel Peace Prize is indicative of the lackluster extent to which the reform movement is able and committed to improving the status of women in Iran. It also raises questions of the extent to which religious-oriented feminists aligned with the reform movement and who work within the Islamic state can assist the cause of women who, like them, work towards ending discrimination against women, but unlike them, have been reprimanded by the state.

Cooperation between religious and secular-oriented feminists in the post-reform era

The low point that struck the relationship between religious and secular-oriented feminists during the reform years did not have a lasting effect. On the contrary, the seeming lack of concern and commitment on behalf of the state and government reformers towards Iranian women prompted both religious and secular-oriented feminists to develop a working synergy in order to advance their struggle for women's rights. Cooperation between these two feminist camps in Iran is not a new phenomenon. Despite their ideological differences, religious and secular women alike have tended to coalesce around individual issue areas in order to support one another and help improve the plight of Iranian women in whatever ways possible.

The women's press has played the key role in this respect, providing a forum for debate and discussion between and amongst Islamic and secular feminist camps. For example, secular-oriented feminists such as Mehrangiz Kar have often been invited and have made contributions to the feminist magazine, *Zanan*, which focuses primarily on reinterpreting the Islamic canon from a woman's perspective. As editor of the magazine, Shahla Sherkat's philosophy is that 'women's issues in Iran are so complicated that we [religious and secular-oriented feminists alike] must start from somewhere we could agree with each other and work through until we arrive at areas of disagreement' (Povey 2001: 62). This approach to cooperation has been useful, but it is also limited. It falls short of dealing

with critical areas of contention. As a result, what may appear to be relatively unproblematic disagreements in times of stability and advancement are allowed to become fissures during periods of turmoil – as was demonstrated by the lack of overt support for secular women in the aftermath of the Berlin Conference.

The events that transpired during this testing time sat uncomfortably with both religious and secular-oriented feminists. As a result, editor and publisher Noushin Ahmadi Khorasani – widely noted for her collaborative efforts between ideologically diverse feminist forces – brought together author Lily Farhadpour and publisher Mahboudbeh Abbas-Gholizadeh. Together, these women produced the book *Zanan Berlin* (*Women of Berlin*), which sought to demonstrate that 'through a realistic and objective analysis it is possible and it is necessary to fill the gap between different forms of feminisms in Iran' (Povey 2001: 67). The new approach to feminist cooperation envisaged in *Zanan Berlin* tended towards confronting and dealing with areas of demonstrable differences, rather than remain focused on areas of agreement as past attempts at cooperation had done. The new round of collaborative impulses incited by *Zanan Berlin* appears to have taken on a particular nature according to the broader political context and timing of the book's publication.

On the one hand, the form of cooperation that has been unfolding between Iran's feminist forces since the early 2000s indicates a profound willingness and ability on behalf of religious women to critically examine the discontents of their approach to establishing women's rights within the boundaries of the Islamic state. Abbas-Gholizadeh, for example, has openly 'criticized herself and other Islamist women for the long rift they had with secular women, and she has urged unity over the critical issues facing Iran's women' (Moghadam 2005). This kind of critical positioning was no doubt spurred as the ill-fate of the reform movement became clear. By 2000, the powerful elite of Iran's clerical establishment had proved unwilling to accept any change in the status quo. In 1996, one year before Khatami began his Presidency; there were fourteen female members of the *Majlis*. In 2000, three years into the era of apparent reform, this number had actually decreased slightly to eleven. Faezeh Hashemi was one of those women who lost their seats. Reflecting on her experiences, she noted the profound difficulties and began to question the expediency of working within a patriarchal system:

> I lost my seat because of party politics. My position as a woman who had been involved in women's issues was completely ignored because my position as a member of *Majlis* was seen as a political issue. Women's issues and political issues are interrelated,

but political issues in the form of formal politics have damaged women's issues.

(Povey 2001: 51)

These sentiments were intensified amongst women at large one year later. In 2001, Khatami refused to include *any* women in his new cabinet, prompting 'an outburst of anger among women' (Povey 2001: 52).

Concurrent to these developments in the experiences of religious-oriented women, the new round of feminist cooperation that has been developing since 2000 has also taken on the complementary colors of secular thought. Secular-oriented feminists have increasingly revealed their own hopes that the post-reform years might witness a tilt towards a secular framework for women's rights on behalf of religious-oriented feminists. In 2001, Mehrangiz Kar expressed herself as such, opining that 'with the existing Constitution it is impossible to talk about the equal rights of women and men and the rights of citizens … I hope that in the long term Muslim [i.e. religious-oriented] feminists will come closer to us' (Povey 2001: 65). Similarly, at the First International Congress on Islamic Feminism (held in Barcelona, October 2005) Valentine M. Moghadam proffered that a secular framework for women's rights in Iran 'will soon be adopted by many Islamic [i.e. religious-oriented] feminists, too. This is because their project of reinterpreting Islam and challenging patriarchy cannot be realized within the theocratic framework currently in place in the Islamic Republic of Iran' (Moghadam 2005). There is some evidence to suggest that a pro-secular tilt may be an important characteristic of future feminist activism within Iran. Basing her observations on fieldwork undertaken in 2001, Povey noted that:

[Now], both religious and secular women agree with each other that men should not be allowed to marry four wives and an unlimited number of temporary wives, as is suggested by the *shari`a*. In the 1970s, under the secular state of Pahlavi, when secular women raised the same issue, many religious women's response was that this is a religious issue and is not the concern of non-believers. In 2001 many religious women argue that this law does not apply to today's Iranian society.

(Povey 2001: 57)

In the concluding remarks of her study, Povey noted that secular-oriented feminism 'is getting its strength back and is challenging … the limitation of the Islamic state and institutions on gender issues – the limitation of the reforms and the feminist reading of the *shari`a*' (Povey 2001: 59). If this

observation is true, then there is a critical question at hand: what do secular-oriented feminist strategies have to offer Iranian women?

What do secular-oriented feminist strategies have to offer Iranian women?

Secular feminists are not anti-Islam. Rather, they are anti-*Islamism*. Whereas the term "Islam" refers to one's personal belief system, the term "Islamism" pertains to the politicization of that belief. Although these terms are interrelated, they are nevertheless analytically distinct (Moghadam 2001: 43). Moghadam has made a useful distinction between what she calls a "secular feminist" and a "feminist atheist." According to this paradigm, secular feminists are highly critical of the political mobilization of Islam by fundamentalist regimes. However, unlike feminist atheists, secular feminists are not opposed to Islam as a religious practice (Moghadam 2001: 42–5). Haideh Moghissi has also sympathized with those women for whom Islam is a 'response to spiritual needs in a world increasingly engulfed in spiritual impoverishment' (Moghissi 1999: 141). She has made a distinction similar to Moghadam's when she differentiates between a "Muslim feminist" and an "Islamic feminist." According to Moghissi, the former activist may adopt Islam as her personal faith, yet leave behind the Islamic legal framework when she works towards establishing human rights for Muslim women (Moghissi 1999: 141). In contrast, an Islamic feminist extends her personal faith in Islam into the political and/or legal realms, contending that the *shari`a* is a legitimate and adequate legal framework for achieving feminist goals.

These distinctions are important. Secular-oriented feminists turn towards the international human rights framework, as opposed to the "divine" laws of Islam, for both the theorization and practical realization of their rights. Choosing between these two conceptual bases for women's rights is not tantamount to a choice between one's rights and one's faith. Secular Iranian women are not necessarily atheists; some are devoted Muslims. Furthermore, the new round of cooperation between religious and secular-oriented feminists in the post-Khatami years has reaffirmed an important recognition on behalf of secular women that Islam remains a valuable axis of orientation in Iranian women's lives. In the past, some secular women eschewed religious-oriented feminist strategies entirely. Early debates between religious and secular women largely revolved around whether or not it was even possible to conceive of an Islamic form of feminism without the latter term losing its meaning entirely. However, more recent discussions on behalf of secular women have posited religious-oriented strategies as

an important and valuable component in the quest to secure human rights for Iranian women.

Iran's legal framework is not based on Islam *per se*. Rather, it is based on an explicitly patriarchal interpretation of Islam's holy sources. Religious-oriented feminism is useful for contesting the legitimacy of Iran's discriminatory and oppressive laws on the same terms of the men who implement them. Therefore, although secular-oriented feminist strategies may have increasingly promising offers to make Iranian women, it is equally as important to emphasize that religious strategies are, and will remain, an important contribution to the debate on women's rights in Iran. On the conceptual level, religious arguments for women's rights are charged with relevancy. Religious-oriented feminists stress the egalitarian, compassionate and humanistic underpinnings of the Islamic faith. This is a valuable and valued enterprise for both male and female members of Iranian society, whether they may be in favor of a secular form of governance or not. The value of Islamic arguments for women's rights and gender equality is not under question. What is more uncertain is: one, their political expediency in a theocracy that refuses to accept any interpretation of the faith other than its own fundamentalist version; two, their ability to independently address the full range of practical rights-based needs of the modern Iranian woman; and three, their practical resonance with the emerging generations of Iranian female youth.

Islam is not the only, and not necessarily the most important, axis of orientation in the lives of all Iranian women. In this respect, the demographics of the country are vitally important. The early revolutionary years in Iran were filled with idealism and hope that Islam (or, more appropriately, *Islamism*) would present the cure for all societal ills engendered by and experienced under the Shah's pro-Western, secular form of governance. This was a time when Islamic "authenticity" and ideological "correctness" were paramount personal and social attributes. The concept of the *gharbzadeh* woman – a morally-corrupt "Western doll" – was central to the cultural purification process instated by Ayatollah Khomeini; her rejection was an exercise taken up by significant sections of Iranian women. However, these concepts – in particular the coupling of secularism with Western neo-imperialism, moral decay and corruption – no longer resonate to such an extreme extent with the new generations of Iranian youth. Iranian youth (defined by the United Nations as those aged between 15 and 24 years) represent the most prominent bulge in Iran's population pyramid (United Nations 2003). Young Iranian women and girls were not witness to the heady years of the 1979 revolution. Measures of "Islamic-ness" do not concern them as much as their social and economic realities: Iranian women are currently grappling issues such as unemployment,

unaffordable housing, family breakdown, and towards the more extreme end of the scale, prostitution and drug addiction. Valentine M. Mogahdam believes that:

> a feminist re-reading of the Qur`an will not resolve these problems or help formulate the strategies for a rights-based development model … Islamic feminists need to acknowledge that as important as their theological exercise is, an equally important feminist activity is to draw attention to the systematic discrimination that women have faced at the hands of the Islamic state, and call for the restoration and expansion of women's civil, political, and social rights.
>
> (Mogahdam 2005)

The problems of a model for women's rights that is based solely on the textuality of Islam's holy sources can be demonstrated on a number of grounds. One important example is the issue of complete or absolute gender equality, which is more appropriately understood in the dominant Islamic paradigm as gender complementarity.

The Islamic notion of gender complementarity derives from a communally-based understanding of rights. An Islamic set of human rights – derived from the Qur`an and the Sunna, and codified in the *shari`a* – is generally understood by its Muslim advocates to offer a more nuanced set of rights and responsibilities for both men and women in comparison to the international framework on human rights. The latter is charged with implementing individual human rights at the expense of the well being of the larger community. Communitarian agendas prescribe particular roles for the members of whatever particular group is in question, ostensibly to ensure the effective functioning, moral cohesion and replication of society at large. If Muslim men and women play different but synergistic roles within their communities, it follows that they should be subject to different laws and regulations – that is, they should be privy to different yet complementary sets of rights.

On face value, this notion of equality as complementarity may read as unproblematic, or perhaps even enlightened. Understanding the particular needs of women, as well as the specific forms of discrimination carried out against them were issues that were initially overlooked when human rights laws were codified as international laws vis-à-vis the United Nations framework in the early decades second half of the twentieth-century. In the formative years of the International Bill of Human Rights (IBHR) "equality" between men and women was based on a sameness of treatment approach. This "sameness" was based on a male norm. Therefore, it did nothing to remedy the systematic disadvantages that women suffered due to the sole

fact of being female. On the contrary, using sameness of treatment as a basis for equality obscures the inherent male bias of society at large, thereby concealing the subordinate status of women to men therein.

However, the Islamic notion of gender complementarity presents number of problems. The spiritual basis of Islam is profoundly humanistic. Religious-oriented feminists have been highly successful in locating clear egalitarian impulses within Islamic sources. Their emphasis on the transcendental message of Islam is an extremely valuable contribution to the modern debate over women's rights in Muslim communities. However, locating particular women-friendly versus and precepts in the holy texts does not necessarily deal with the issue of religious doctrine at large. Throughout Islam's historical evolution, patriarchal traditions and customs have come to be enshrined as vital "Islamic" precepts. Many of these traditions and customs have their root in the classical period of Islam's evolution, the seventh century, during which time the *shari`a* was formulated and consolidated as the central source of Islamic jurisprudence. As a result, dominant interpretations of the *shari`a* tend to result in the creation of a gender hierarchy, in which women occupy subordinate status to men. Within this paradigm, women are considered to be inferior to men in terms of rationality and emotional control.

Thus, according to conservative Islamic opinion, a crucial factor in the maintenance of social cohesion in Muslim societies is men's control over women. *Shari`a* laws dictate gender segregation, and restrict women's roles to being dutiful wives, mothers, and daughters. It is these patriarchal values and practices that determine a woman's status as an acceptable member of society in many Muslim communities. Iran's religious-oriented feminists eschew these traditional notions of the "good Muslim woman." Whereas conservative forces refer to many patriarchal traditions and customs as "Islamic," religious-oriented feminists consider these distinct from, and inconsequential for the primacy of, the transcendental message of the faith itself. It is with this attitude that religious-oriented feminists attempt to reform and modify the dominant Islamic framework on women's rights.

However, historical precedent indicates that it is not the spiritual basis of Islam that translates into official policy when religion is placed in the political arena. Rather, by maintaining that Islam may have a defining role to play in the political realm, religious-oriented feminists must eventually confront and deal with the existing *letter* of Islam. Whilst this may not be an impossible task, it is indeed highly problematic. According to Haideh Moghissi:

> the *shari`a* distinguishes between the rights of human beings on the basis of sex [and religion]. The *shari`a* unapologetically discriminates

against women and religious minorities. If the principles of the *shari`a* are to be maintained, women cannot be treated any better, women cannot enjoy equality before the law and in law. The *shari`a* is not compatible with the principles of equality of human beings.

(Moghissi 1999: 141)

Thus, although strategies for women's rights that remain confined to the Islamic framework are both relevant and useful to Iranian women, they may not provide an entirely adequate approach to ensuring complete gender equality as the term has come to be understood in its modern day usage. Relying primarily on the location and emphasis of particular egalitarian precepts within Islamic doctrine may be a precarious basis on which to build a framework for women's rights. It is for this reason that cooperation and collaboration between Iran's ideologically diverse feminist forces presents opportunity for real advancement in the debate over women's status in the Islamic Republic.

As a result of demographic changes, disregard for the legacy of the revolution, and desires for a state that will provide economic opportunity and more cultural opening, there are some indications that religious-oriented feminists may increasingly tilt towards recognizing the limitations of theological exercise. Concurrently, a psychological move away from the turmoil and devastation of the post-revolutionary years may also assist secular women in their quest to develop a working synergy with religious women. Ahmadi Khorasani has observed that many religious and secular women:

of the older generation have a fear of losing their identity or betraying their own class culture if they cooperate with each other. But the younger generation is more open to face the challenge and have less fear of the other.

(Povey 2001: 67)

It is these young women – reflective and flexible in ideology – who are considered to be a critical catalyst for the future development of women's rights in Iran.

As greater numbers of Iranian women find the Islamic system to be non-responsive to their current needs and personal goals, the international framework for human rights offers promising and practical prospects. In contrast to the prescribed roles embedded in the conservative Islamic notion of gender complementarity, the United Nations Convention on the Elimination of all forms of Discrimination Against Women (CEDAW, adopted by the General Assembly in 1979) offers the most nuanced notion

of gender equality of all modern human rights treaties. Article 2(f) of the convention not only requires states to modify or abolish existing laws and regulations that legitimate gender inequality, but also to do the same for any 'customs' or 'practices' that discriminate against women (United Nations 1979a). Article 5(a) clarifies this obligation, by stipulating that states should:

> modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or in stereotypes roles for men and women.
>
> (United Nations 1979a)

Furthermore, the concept of gender equality stipulated by CEDAW is no longer based on the sameness of treatment approach. The United Nations' early approach to achieving gender equality has been remedied such that it is now based on the corresponding notion of non-discrimination. Feminists generally measure discrimination in terms of the extent to which one is disadvantaged, rendered powerless, or excluded from participation in society. CEDAW was the first treaty to recognize that corrective measures would be required to address the subordinate position of women globally; that the particular nature of discrimination against women merited a particular legal response. Throughout the development of women's human rights law, the global women's movement has sought to inject the United Nations' human rights discourse with a woman-centered consciousness that rejects using a male norm as a reference point for all humanity. Women's human rights, enshrined in international law, are a set of rights that are drawn from women's own perspectives of what is central to their basic integrity as human beings, and their own experiences of what constitute violations against their humanity.

Despite the sophisticated content of international women's human rights law, its adoption into the Iranian context (and other Muslim societies) is commonly presumed to be an impossible or untenable enterprise. Yet many Iranian women have been considerably forthright in advocating international human rights law. Behind this advocacy is an implication, at least on behalf of secular-oriented feminists, that one can remain devoted to Islam a personal system of faith, yet reject an official place for religion in the political arena. This contention is often regarded as "un-Islamic" or non-indigenous, on the basis that Islam is in fact "a complete way of life." That is, there exists a widespread belief that Islam and secularism are incompatible,

because Islam itself dictates the merging of religion and state. This belief suggests two things. Firstly, that every aspect of life and all legal matters for Muslim peoples in Muslim societies have already been determined by religion. Secondly, and by extension, it must be the case that all social and legal affairs in Muslim societies are indeed conducted in strict accordance with Islam. Neither of these suggestions corresponds with reality.

The reality of the Islamic legal code, the *shari`a*, is that it represents a (male) human attempt to interpret and codify the primary sources of Islam into a secondary source. *Shari`a* law is applied inconsistently both within Muslim societies and between them. Within various countries throughout the Muslim Middle East, existing laws derive from a number of various sources, including religion, ex-colonial powers, modern secular systems of governance, and local customs and traditions. For the most part, public sectors are governed by laws that have been inherited from ex-colonial powers, or adopted from secular systems of governance. It is laws pertaining to the family and personal matters (that is, those laws that most affect women) that remain regulated by the *shari`a*.

Furthermore, in the vast array of Muslim contexts 'Islam bears the unmistakable imprint of the regional culture and of traditions that either pre-date Islam or have been absorbed through subsequent developments and influences' (Shaheed 2004: 7). For example, female genital mutilation is virtually unheard of in Muslim societies outside of Northern Africa and Egypt, where it is also practiced by non-Muslims, and yet explicitly promoted as an Islamic injunction (Helie-Lucas in Howland 2001: 23). Thus, depending on the political inclinations of the powers that be, Muslim societies do have the ability to incorporate new and/or foreign ideas and laws into existing and ostensibly "Islamic" systems. The dominant notion of Islam as a "a complete way of life" appears contestable: the incorporation of secular international human rights law into Iran would not necessarily strip that society of all meaningful Muslim form or content.

In fact, it is quite logical to consider that a secular state might serve to ensure the vitality and endurance of Islam in Muslim societies. Sudanese scholar Abdullah An-Na`im has provided key theses in this regard. An-Na`im believes that 'Muslims need the protection of human rights, and political and social space secured by secularism to live up to the ideals of their own religion', namely egalitarianism, humanitarianism, social justice, and compassion (An-Na`im 2003: 39). An-Na`im has explained how conceptualizing the state as the guardian of secularism and secular human rights frees up the mosque to be a site of worship, praise and reflection, rather then a contested political arena. In contrast, as soon as religious ideals are carried into the political arena – that is, transformed into laws that need to be actively

enforced – that religion is deprived of its normative and independent moral and ethical resonance.

An-Na`im's analysis suggests that there is a certain synergy between secularism and religious practice and belief, thereby challenging the conventional understanding of secularism and religiosity as dichotomous poles. This understanding of secularism and Islam as being diametrically opposed was embedded in the Iranian psyche during the Shah's rule, and became a defining feature of the formative years of the Islamic Republic. A corollary assumption – particularly in official Iranian discourse of the time – was that the West, represented by the United States, was the embodiment of immorality, and propagator of neo-imperialist projects to overtake and control the non-Western world. The societal upheaval that resulted directly from Iran's traumatic past encounters with Western forces and secular systems of governance is a reality. However, the rejection of the international human rights framework on the grounds that it is Western in origin and ideology is a conceptually constrained argument.

In the latest round of cooperation between Iranian feminists, religious and secular-oriented women appear to be attempting to help each other overcome the grievances of Iran's revolutionary years. The concept of "universal human rights" finds a ready home in the western philosophical tradition. However, international human rights law represents a non-static, dynamic framework that remains under constant expropriation and development by state parties from all regions of the globe. According to Laith Kubba, 'there is nothing in the origins and nature of Islam itself' that precludes capitalizing on enlightened concepts that have become the common heritage of humankind:

> tracing exactly where and how modern modes and orders evolved is less important than weighing their intrinsic merits … this [latter] approach seeks to take advantage of the best humanity has to offer, precisely for the sake of pursuing such high Islamic ideals and virtues such as truth, justice, charity, brotherhood, and peace.
>
> (Kubba 2003: 48)

Arguably, the international framework presents Muslim women with a set of rights that are present, but perhaps less guaranteed, within the Islamic framework. Human rights as they emanate from the United Nations have three major characteristics. One, human rights are universal: every human being everywhere has them. Two, they are equal rights: one is either human and has these rights, or not. Three, human rights are inalienable: one cannot stop being a human, and therefore one cannot stop being privy to these rights. The source of human rights is found in their name.

They are not derived from law, statute, custom, or contracts. Rather, they are derived from the inherent moral nature of being a human person. Therefore, fundamental human rights principles cannot be watered-down according to particular political impulses of the powers that be.

In contrast, a framework for women's rights that derives solely or primarily from Islam takes the political risk of remaining hostage to patriarchal application of *shari`a* laws. Notwithstanding the inherent value of feminist re-readings of Islam's holy sources, there is no guarantee that an enlightened interpretation of the faith will be one that is effectively extended into the political realm. Since its inception in the seventh century, Islam has been subjected to differing interpretations and has spawned numerous schools of thought such that it is difficult, if not impossible, to talk about one "true" Islam. The tradition of *ijtihad* – which remains alive in the Shi`ite tradition – allows for intellectual reinterpretation and innovation of Islam's holy sources. In particular, *ijtihad* allows for the application of human reason to the *shari`a* legal code, in order to ascertain whether or not certain injunctions are applicable or suitable to modern situations.

On the one hand, the availability of Islam for independent reinterpretation is a good thing. The tradition of *ijtihad* underpins religious-oriented feminist strategies, which have generated awareness and emphasis on Islam's egalitarian impulses, in both Muslim and non-Muslim societies. On the other hand, however, if Islam is available for perpetual reinterpretation, and if no-one person or group can lay claim to representing the one "true" Islam, then it may be a precarious basis on which to derive a framework for women's rights. Shirin Ebadi, who has struggled for women's rights within the confines of Iran's Islamic framework for decades, has made a sharp note of this problem:

> *Ijtihad* frees us by removing the burden of definitiveness – we can interpret and reinterpret Quràance teachings forever; but it also means clerics can take the Universal Declaration of Human Rights home and argue about richly it for centuries. It means it is possible for everyone, always, to have a point. It means that patriarchal men and powerful authoritarian regimes who repress in the name of Islam can exploit *ijtihad* to interpret Islam in the regressive, unforgiving manner that suits their sensibilities and political agendas.… This does not mean that Islam and equal rights for men and women are incompatible; it means that invoking Islam in a theocracy refracts the religion through a kaleidoscope, with interpretations perpetually shifting and mingling and the vantage of the most powerful prevailing.

(Ebadi 2006b: 191–2).

The dominant interpretation of Islam advocated by Iran's clerical elite places strong emphasis on those Islamic precepts that tend towards the creation of gender hierarchies. Religious-oriented feminists have challenged this patriarchal interpretation of Islam vis-à-vis woman-centered re-readings of Islam's holy sources, and by emphasizing the transcendental message of Islam, as opposed to specific *shari`a* ordinances. This is a valuable enterprise, but on its own it may not be enough to secure inalienable human rights for Muslim women. Although religious-oriented strategies may bring advances to the quest for equal rights in Iran, these may remain somewhat precarious in nature: a framework for women's rights that derives solely or primarily from the Islamic canon allows for the perpetual possibility that those rights might be denied under changing political circumstances.

Conclusion

In terms of the quest to secure inalienable human rights for Iranian women, religious-oriented strategies are valuable, but to some degree limited. The demise of the reform movement suggested the incapacity, or active unwillingness, of the Islamic state to accommodate meaningful change. This calls into question the expediency of a feminist project that remains within the ideological boundaries of the Islamic state. Despite highly valuable contributions to the debate on Iranian women's rights on behalf of religious-oriented feminists, the Islamic Republic shows little signs of moving towards an enlightened concept of gender equality. This reality begs the question: how much political weight does a feminist reinterpretation of the Islamic canon hold in a theocracy in which the powers that be refuse to accept any resounding relevancy or validity of that interpretation?

The contribution that religious women have made to advancing the debate on women's rights in Iran may be most likely exploited to its full capacity in a secular state. It is within a state whose role it is to ensure the fundamental human rights of all its citizens (including the rights to freedom of religion and belief) that the egalitarianism inherent to the transcendental message of Islam can be respected and protected as part of a personal system of faith, without being hijacked by political processes and quests for power. In this light, the post-reform a cooperation between Iran's diverse feminist forces presents a significant advancement in the quest for women's rights in the Islamic Republic. This cross-ideological cooperation suggests that we might increasingly be able to think about conceiving religious and secular-oriented feminist strategies along a continuum, rather

than two poles of a strict dichotomy – which implies that religion and secularism are indeed incompatible.

The international framework for women's human rights offers Iranian women a notion of gender equality that may exist, but would be far more difficult to guarantee in the Islamic paradigm. Religious-oriented feminists have had some success in locating woman-friendly precepts within the faith. However, the Islam of Iran's conservative clerical elite envisions a world built on a gender hierarchy in which women occupy a subordinate status to men. The spirit of Islam is profoundly humanitarian. However, throughout patriarchal traditions and practices have found their way into Islam's legal canon. It is with these more problematic injunctions that religious-oriented feminists must deal if they are to maintain that Islam has a formal role to play in the political arena. The international framework for women's human rights offers Iranian women a set of inalienable human rights on the basis that they are and always will be dignified human beings. A framework for women's rights that is derived solely or primarily from Islamic sources might always be hostage to competing (less enlightened) interpretations of the faith, and conservative understandings of what it is to be an acceptable and accepted female member of a Muslim society. Importantly, secular-oriented feminism does not dictate that Iranian women must choose between their rights and their faith. It is on this basis that a pro-secular tilt might increasingly inform feminism within the Islamic Republic in the future.

Note

1 In much of the literature on feminist activism in the Islamic Republic (and Muslim societies at large) the two groups of women described in this chapter are referred to as "Islamic feminists" and "secular feminists" respectively. I prefer not to use these terms, as they tend to suggest that these streams of activism occur within definite, and mutually exclusive, boundaries. Although this reflects some historical reality in the Iranian context, in recent years the women widely referred to 'Islamic feminists' and 'secular feminists' have demonstrated to converge in terms of ideology, goals, and strategies. I find the terms 'religious-oriented' and 'secular-oriented' feminists more conducive to conveying the fact that although it may be possible to identify women as belonging to one or the other of these schools, they should be thought of as ideological 'starting points' for activism, rather than as a strict indication of the confines of that activism and where it is intended to lead. Furthermore, both secular *and* religious-oriented Iranian feminists should be considered analytically distinct from conservative religious women, such as those in the current Parliament, who identify with the gender ideology of the state. According to Ebadi (2006a) 'in order not to show their fundamentalism' some conservative religious women 'are hiding behind terms such as Islamic feminism'.

4 Islamic reformism and human rights in Iraq: gender equality and religious freedom

Benjamin MacQueen and Shahram Akbarzadeh

Introduction

Since the invasion and occupation of Iraq in 2003, the considerable scrutiny of the new Iraqi constitution has focused on the issues of sectarianism and political centralization. However, other areas of tension are also evident. In particular, the issues of gender equality and religious freedom are crucial areas for discussion, particularly in the context of the broader discourse of Islam and human rights. Gender equality and religious freedom are the two most contested areas of debate between advocates of the universal human rights regime and those seeking to develop and infuse an Islamic perspective on human rights. The debates concerning these issues in the formation of the new Iraqi constitution provide an illustrative example of possible compromise between perspectives that are often posited as mutually exclusive.

Gender equality is under stress in the new Iraqi constitution, but a visible civil society movement champions it both domestically and internationally with clear precedents for the reconciliation of Islam and international human rights standards. Religious freedom, particularly the right of Muslims to convert to other religions or adopt a secular lifestyle, is also under pressure. Here, there is room for the opening of dialogue to protect those who want to convert *from* Islam through radical reformist discourse on religious freedom and human rights in Islam whilst maintaining the Islamic character of the constitution. However, this debate is hampered by the ethnic/identity overtones of this debate in the country, particularly in the early stages of power acquisition after the fall of the Saddam regime. Also, the issue of religious freedom in terms of apostasy does not have the support of visible and active civil society movements as is the case with those who support strengthening gender equality in Iraq.

The Iraqi constitution takes important steps in terms of enshrining rights on gender equality and religious freedom in Iraq. However, there are

serious weaknesses in the document in terms of the potential abandonment of personal status laws in favor of community and sectarian law. In addition, the constitution does not recognize the links between political status and religious freedom. The debate concerning the place of human rights in the constitution needs to work from a position of critical engagement with both Islamic approaches to human rights and the international rights regime in order to enshrine a series of rights for Iraqis that are both legitimate and resilient.

Islam and human rights

The debate surrounding Islam and human rights centers on the applicability of human rights in non-Western contexts (Berween 2003: 129). Implicit in this is the idea amongst a number of Islamic scholars and activists that human rights, as articulated in the 1948 Universal Declaration of Human Rights (UDHR), the 1976 International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) are largely a product of "Western" historical experiences. Consequently, the discussion has centered on the applicability of human rights to Islamic societies. This is not to posit a homogenous discourse, but this general sketch does peg the broad parameters of debate. Within this, there is a wide range of positions as to the validity of human rights norms is Islamic societies. Four main approaches to this issue can be identified: an "Islamization" of human rights; pragmatic reforms within the framework of the shari`a; critical reconceptualization of the shari`a; and political secularism in Islam (Bielefeldt 2000).The first position, a "status quo" or "traditionalist" stance, does not critically engage with the details of the human rights regime, instead it simply denies the issue any controversy. That is, proponents of this view claim that there is no necessity for a critical debate as 'human rights have always been recognized in the shari`a', thus, it provides an absolute and final blueprint for a human rights program (Bielefeldt 2000: 103–4). Conceptually, this approach found its contemporary voice through the work of Abul A`la Moudoudi and his proposition that the non-discriminatory nature of Islam provides the ideal basis for respect for human rights (Maudoudi 1988).

More recently, the Organization of Islamic Conferences (OIC) has given specific voice to this perspective through the Cairo Declaration on Human Rights in Islam. The Cairo Declaration, released at the OIC summit on 5 August 1990, states from the very outset that humans are bound through 'their subordination to Allah' and Islam 'is the guarantee for enhancing … dignity along the path to human integrity'

(OIC 1990: Article 1-a). Thus, it is fraternity through religion that provides the basis for the bestowal of human rights.

Despite the inclusion of a range of tenets akin to those in the UDHR, the Cairo Declaration contains key differences that show how it lacks any critical engagement with human rights discourse. The most prominent of these lie at the end of the document which state, respectively, that 'all rights and freedoms stipulated in this Declaration are subject to the Islamic shari`a' and 'the Islamic shari`a is the only source of reference for the explanation or clarification of any of the articles of this Declaration' (OIC 1990: Articles 24-5). Thus, the Cairo Declaration does not critically engage with the global human rights regime as enshrined in the UDHR, instead, simply claiming that Islamic doctrine is complete in its perspectives on human rights issues. As such, the traditionalist stance on the Islam and human rights debate offers little in terms of promoting cross-cultural understanding.

The second categorization is one prominent in Muslim societies globally, what Bielefeldt describes as consistent with the 'tradition of humanitarian pragmatism' even though 'conceptual differences between *shari`a* and human rights may yet remain unsettled' (Bielefeldt 2000: 106). This pragmatism has centered on the difference between theory and practice in the implementation of, for instance, *hudd* punishments (Schacht 1964: 120). This approach has manifested itself not so much in prominent Muslim intellectual thought, but instead through state practice over several centuries. For instance, the legitimacy of polygamy has remained but authorities within the vast majority of Muslim communities have discouraged its practice. Such changes generally take several generations to take shape and are organic in that the necessity for reform stems from circumstance rather than ideology.

Departing from these perspectives, the radical reformist approach to the debate concerning Islam and human rights seeks to engage in a 'courageous and frank criticism' of the shari`a that leads *not* to a dismissal of Islamic law but its reappraisal in the contemporary global environment (Bielefeldt 2000: 108). This is a process, described by Rahman, as an acceptance of 'existing society as a term of reference' in the understanding and application of Islamic law (Rahman 1966: 136). This approach has primarily sought to attenuate the tendency to equate shari`a strictly with traditional jurisprudence (*fiqh*), emphasizing it as an 'ethical and religious concept rather than a legalistic one' (Bielefeldt 2000: 108). Such an approach is illustrated in the work of prominent reformist scholar, the Sudanese academic Abdullah Ahmed An-Na`im. An-Na`im proposes a new hermeneutic approach to understanding the Qur`an and the shari`a that differentiates

between the earlier revelations in Mecca and the latter revelations in Medina. The core of An-Na`im's approach proposes that the earlier revelations (in Mecca) contain the core theological messages of Islam while the latter, which are more elaborate and legalistic, are more responsive to the specific historical circumstances of the time (An-Na`im 1990: 54). Whilst not contesting the 'divine character' of these latter revelations, they need to be viewed in their historical context (Bielefeldt 2000: 110).

This differentiation serves as a mechanism by which certain Islamic principles act as immutable values whilst others serve as '*examples* of an Islamic way of life within a particular historic context' that can be interpreted and applied by Muslims in changed historical circumstances (Bielefeldt 2000: 110). Such an approach serves as a blueprint for many radical reformists in the Muslim community in their efforts to develop alternative interpretations of Islamic law that can constructively and critically engage with the human rights regime. Indeed, such an approach has gained increasing currency amongst civil society groups throughout the Muslim world in their efforts to promote political reform that is grounded in a local context whilst also being responsive to global norms.

The final position in this typology is that of political secularism. This is not to be confused with "ideological secularism" that seeks to remove religion from the public arena. Instead, this approach argues that it is possible to differentiate between the prophetic and political roles of the Prophet Muhammad, whereby the religious and the political themselves can be separated. This perspective has received little currency amongst Muslim communities, but has been championed in small pockets of the Muslim intelligentsia. Central to this argument is an objection to the use of religion to validate temporal political activity; an act they argue is akin to idolatry. Instead, humans must accept their finite circumstance and not 'instrumentalize' religion for 'the purposes of power politics' (Bielefeldt 2000: 113–4). An implicit form of this can be seen to resonate in the Arab Middle East where the idea of cultural unity through Islamic identity has been promoted through secular political systems based on civil law codes. This was particularly prominent up to the 1970s and 1980s in states such as Egypt, Algeria, Syria, and Iraq.

This typology is useful as it gives nuance to the debate concerning Islam and human rights. However, it is important to see how such approaches manifest themselves in relation to specific events. The formation of the post-Saddam era constitution in Iraq provides such an opportunity, particularly in terms of the activities of radical reformist groups and their efforts to promote a reformist agenda on key human rights issues. Two such issues sit at the centre of this debate concerning, those of gender rights and

religious freedom. These two are key points of tension as they present apparently immutable areas in terms of compromise between Islam and human rights. Thus, before turning to the case study it is important to outline the tension surrounding the issues of gender rights and religious freedom.

Overlapping universalities?

The issues of gender equality and religious freedom are key points of debate on Islam and human rights as they involve the most difficult areas of mutual accommodation (Brems 2004: 18). The challenge rests in the "inclusive universality" of both systems. The international human rights regime has effectively set the parameters of what is acceptable and what is not. In contrast, Islam also contains clear injunctions on the *halal* and the *haram*. Both systems regard their ideological parameters as set and internally consistent. The question is, therefore, whether there is an overlap between these systems which claim universality.

The UDHR and ICESCR are both unequivocal in their outline of gender equality. The UDHR states, in Article 2, that 'everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as … sex' and the ICESCR states, in Article 3, that state parties must 'ensure the equal rights of men and women to the enjoyment of all economic, social and cultural rights'. However, there is intense disagreement within Islamic scholarship over the status of women as accorded by the Qur`an and the shari`a. Many `ulama and jurists claim that women have been given a subordinate status to men whilst 'modernists' in Islamic scholarship believe that 'the holy book accords equal status to both sexes' (Engineer 2004: 1).

In order to explore the Islamic position it is helpful to break down the issue of gender quality into a series of elements which make up the stance of the Qur`an and the shari`a. In terms of human dignity, there is minimal disagreement over the equality of the sexes. Central to this is the declaration in the Qur`an that all humans were created from a 'single soul' (4:1), thus no gender implicitly enjoys superiority over the other. This is compounded by many other Qur`anic references that focus on the equality of all humankind, regardless of gender. However, moving beyond this basic element, the idea of absolute equality becomes more problematic when the concept of gender complementarity is introduced. In particular, the idea of gender complementarity relates to the specific social functions of men and women rather than dignity or religious status (William & Chrisman 1993). Debates concerning gender rights are not new in Muslim societies, but have been pronounced particularly at times of rapid social change. In terms of the contemporary debate, there has been significant attention on what

Deniz Kandiyoti identifies as 'Muslim women as the bearers of the "backwardness" of their societies' in the eyes of Western observers and Western-oriented reformers (Kandiyoti in Afkhami 1995: 20–1). This is a process that often inspires local reaction whereby certain social and cultural practices relating to gender rights and restrictions are elevated 'into symbols of cultural authenticity and integrity' (Kandiyoti in Afkhami 1995: 21; see also Ahmed 1992). Advocates of women's rights in Muslim countries have typically struggled to gain both resources and recognition for their efforts (Kandiyoti in Afkhami 1995: 26). This weakness stems, in part, from the broad range of views within the discourses on women's rights in Islam. The diversity of Muslim opinions in Iraq reflects the breadth of debates at the regional level between secular feminists, reformists, to 'Islamist women who fully endorse the dictates of the shari`a' (Kandiyoti in Afkhami 1995: 26).

Similar to gender equality, international human rights mechanisms are clear in their assertion of religious freedom in terms of the right to practice and convert. Article 18 of the UDHR states that:

> everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

This is echoed in Article 18 of the ICCPR which adds that 'no one shall be subject to coercion which would impair his freedom to have or adopt a religion or belief of his choice'. Article 27 of the ICCPR states that minority communities 'shall not be denied the right, in community with the other members of the group, to enjoy their own culture, to profess and practice their own religion, or to use their own language'.

The statement within Article 18 of the UDHR concerning the right to 'change … religion or belief' is of primary importance here as it touches on the controversial area of apostasy in Islam. Saeed and Saeed contend that the right to religious freedom 'is perhaps the oldest human right recognized internationally' (Saeed & Saeed 2004: 10). However, such freedom is seen as violating the tenets relating to apostasy in Islam. This provides an area of heated discussion as the treatment of apostasy 'has not differed essentially from its conceptualization in the second century of Islam' to the present time (Saeed & Saeed 2004: 1). It is an immutable law, and one that prescribes the harshest of *hudd* punishments.

The scale of punishments is contested among Muslim scholars, as it is based not on Qur`anic law but on the traditions of the Prophet (*hadith*)

(Saeed & Saeed 2004: 2). The debate within Islam over apostasy centers on the severity of punishments, not the illegality of the act. Some scholars claim that there is no Qur`anic basis for the application of the death penalty for apostasy and, in addition, that freedom of religion is a basic principle of Islam (Al-Naqib 1997: 595). Saeed and Saeed argue that capital punishment for apostasy was originally limited to acts of high treason, but has been hijacked subsequently by those seeking to apply it to conversion from or renunciation of Islam (Saeed & Saeed 2004: 2–3).

Prior to the emergence of international norms enshrined through the UN, religious freedom in Islam acknowledged the "people of the book" (Jews and Christians) who are regarded as the recipients of early revelations in the form of the sacred texts. Judaism and Christianity, both monotheistic, have more in common with Islam than other religions and are, therefore, privileged. The Islamic notion of freedom of religion was traditionally applied to "revealed religions." Historically (particularly prior to WWI), Muslim rulers demonstrated a far greater degree of tolerance to all religions than warranted in Islamic law for political expediency. The deciding factor for Muslim rulers was whether their subjects were law-abiding and pledged loyalty to their authority. This contractual system assured a significant degree of social harmony and averted internal strife, allowing religious freedom to non-Muslims in pre-modern times (Lapidus 2002: 197–217). With the advent of the nation-state system, most states with Muslim majorities have developed constitutions that, *de jure*, allow religious pluralism without discrimination.

However, neither the core Islamic texts nor the constitutions of many modern Muslim states deal explicitly with the conversion of Muslims to another religion. The OIC declarations on human rights, particularly the Cairo Declaration, echoes this by not giving the specific right of an individual to leave Islam but only granting the right of individuals to have 'religious freedom' (OIC 1990: Articles 10, 22a, 22b). Religious freedom in the Cairo Declaration is more concerned with the protection *for* Muslims in the face of increased Christian evangelical and missionary activity than a concession for the freedom to convert from Islam or practice Islam according to local custom.

In terms of intellectual approaches, three perspectives have emerged. First, the pre-modern position of no conversion from Islam with the penalty of death for apostasy; second, the use of this system with some form of limitations; and third, the total freedom 'to move to and from Islam' (Saeed & Saeed 2004: 88). The first position is dominant amongst Muslim scholars and thus allows no room for accommodation of Article 18 of the UDHR. The second position, evident in the work of scholars

such as Moudoudi, is that the punishment must stand but that the declaration of apostasy must come from the state. That is, to turn ones back on Islam in a Muslim political community is tantamount to treason, thus deserving of capital punishment administered by the state. The third perspective corresponds to the position taken by radical reformers and secular Muslims. The radical reformist position takes issue with the religious legal basis for the penalty, arguing that either the death penalty for apostasy is not outlined in the Qur`an, and the apostate will be judged upon their natural death (Saeed & Saeed 2004: 94–5). Opposition to the death penalty is central to the secular perspective. This stems from a call for the imposition of a civil law code that would protect freedom of religion.

The invasion of Iraq and the post-Saddam Iraqi constitution

Bearing this debate in mind, discourses concerning human rights in Islam acquired significant relevance beyond academic discourse following the fall of Saddam Hussein's regime in 2003. The state-building project in the post-Saddam era opened up the political arena to a full range of players subscribing to very diverse ideologies. In this context, the articulation of the new Iraqi constitution has been a critical test of the ability of various forces to converge over the role of Islam in Iraqi public life, and particularly its position vis-à-vis gender equality and religious freedom. However, the continuing instability in Iraq, along with the efforts of conservative elites to pursue their agenda, one often backed by the occupying forces as they enlist their support to enhance Iraq's security prospects, places the future of gender equality and religious freedom in Iraq at risk.

Gender rights and religious freedom under Saddam Hussein

The situation for women and minority religious communities under the regime of Saddam Hussein is a contested subject. Secular personal status laws up to the 1990s governed both areas. Iraqi laws on religious freedom and gender equality were based on the 1959 Personal Status Law. According to the international solidarity network, Women Living Under Muslim Laws (WMULM), this was 'one of the most progressive family laws in the Middle East' (WLUML 2005). This law was updated in 1970 with a new constitution. Article 19 of the 1970 Iraqi Provisional Constitution guaranteed equal gender rights by civil law. The new constitution and its

protection of gender equality came into force following the seizure of power by the Ba`ath Party in 1968.

The status of women was further affected when the government-sponsored General Federation of Iraqi Women (GFIW) replaced women's civil society groups that existed before the coup (such as the Women's Empowerment Society, the Kurdish Women's Association, and the Iraqi Women's League) (HRW 2003: 1). The GFIW facilitated the training of women for placement in various spheres such as industry, public service, and agriculture. This move stemmed from the labor shortage faced by the new regime due to successive wars. Gender equality was an important part in encouraging women to join the workforce. This was a deliberate attempt to tap into the potential pool of an industrial labor force and political base that women represented.

The expansion of women's rights in Iraq at this time to promote state-led development is a pattern that is repeated in many Muslim states. The necessity of mobilizing women's labor as well as using the image of women's labor force participation as a sign of social progress has framed the efforts at women's emancipation in countries such as Egypt, Syria, Tunisia as well as Iraq (Kandiyoti in Afkhami 1995: 22). Ironically, the increased rates of women's participation in the labor force, the professional sphere and in political life has been the source of a conservative backlash within Muslim societies, particularly in times of economic recession and high male unemployment (Mernissi 1988: 8–11). This backlash became public in the constitutional debate of the post-Saddam era.

The Ba`ath regime, however was undeniably repressive and intolerant of dissent. State sanctions against religious and ethnic communities, dissidents and intellectuals also affected women (HRW 2003: 1). Women's conditions suffered a blow in the wake of the 1991 Gulf War which brought UN sanctions on Iraq. In the 1990s the ruling regime was under siege and obsessed with its survival. This led the regime to buttress its legitimacy by seeking to 'embrace Islamic and tribal traditions as a political tool in order to consolidate power' (HRW 2003: 3–4). This reinforced the patterns that undermined the status of women. An unintended consequence of the sanctions was the retraction of state services for women, particularly education. For instance, as school places shrunk, families focused on granting access for boys ahead of girls (HRW 2003: 23). Therefore, whilst women were subject to the systemic violence of Saddam's dictatorship, their status was formally enshrined in civil law and they had access to full marriage, inheritance, employment, and other rights. Since 1991 and especially since 2003, there has been a notable regression in the formalized rights for women in Iraq, particularly in terms of the growing conservative religious influence in the country.

Invasion, occupation and human rights in Iraq

On 11 October 2002 the United States Congress passed the "Authorization for Use of Military Force Against Iraq Resolution of 2002," permitting President George W. Bush authorization to use military force if the Iraqi regime of Saddam Hussein was deemed to have not relinquished his alleged possession of weapons of mass destruction. Instigated by US pressure, the UN passed resolution 1441 on 9 November threatening 'serious consequences' if Iraq did not comply with previous disarmament obligations (United Nations 2002).[1] After intense diplomatic pressure and negotiations, President Bush addressed the US people on 17 March 2003 to declare that Iraq had not met its obligations. This declaration came despite protests from the Iraqi regime, the UN weapons inspection committee and the International Atomic Energy Agency that Iraq had complied with the disarmament procedure.

Consequently, on 20 March 2003 the United States, in cooperation with the United Kingdom and the so-called "coalition of the willing"[2] launched "Operation Iraqi Freedom." The initial military operation was quick, leading to the fall of Baghdad on 9 April and the formal removal of Ba`ath Party rule on 1 May 2003. However, even with the capture of Saddam Hussein on 13 December 2003 the occupation forces have faced an ongoing resistance in the form of Ba`ath Party loyalists, Islamist insurgents, and other armed groups that continue to challenge the foreign military occupation of Iraq.

This insurgency has sought to cripple the occupying powers and derail the process of political transformation instigated by the coalition forces. This process has made progress despite the significant armed challenge to its presence. In June 2004, limited sovereignty was transferred from the Coalition Provisional Authority (CPA) to the appointed caretaker government under Iyad Allawi. Allawi's government served until the first post-invasion election on 31 January 2005. This new elected body was charged with drafting the new constitution for post-Saddam Iraq by 15 August. After several delays, the draft was approved on 28 August and on 15 October 2005 the Iraqi constitution was approved in a referendum by 16 of Iraq's 18 provinces. Views on the significance of this moment have differed widely, from a dismissal of the document as enshrining division in the country and as a recipe for future disaster to those who see it as a triumph for the nascent electoral process and laying the foundations of democracy and prosperity in Iraq.

The deterioration of the security situation under the American occupation has seen an escalation of violence against women, particularly rape and physical abuse. The Iraqi Ministry of Public Works and Social Affairs has

reported a significant increase in cases of physical and sexual abuse against women (WLUML 2005). The reported cases are put in stark relief in light of comments by various NGOs which state that these cases reflect only a small proportion of the overall instances of sexual and physical abuse. The lack of reporting of cases, it has been argued, is due to the threat of honor killings and pressures from the families of victims (WLUML 2005). In addition, there are charges against the government for inaction and fostering an environment conducive to the continuation of such acts. For instance, Juan Khalaf of the National League for Women's Rights in Iraq has stated that 'women are being raped and sexually abused and instead of the government increasing our power to judge and defend ourselves, they are just decreasing it, trying to keep us out of politics and the important sectors of society' (quoted in WLUML 2005).

The picture in relation to religious minorities was also mixed. The regime of Saddam Hussein conducted systematic campaigns of aggression toward various religious groups in the country, particularly the Shi`a community of Baghdad and Iraq's south. In addition, the regime also sought to annihilate the military capacity of the large Kurdish community in the north of the country. However, the status of religious minorities, notably the "ChaldoAssyrian" population as well as the Yezidi population did not suffer as a specific target of the Hussein regime's wrath. These communities benefited from the enshrinement of rights in Iraqi civil law.

The tension between religious and ethnic communities in Iraq has heightened markedly since 2003. Outside the most notable triad of Shi`a—Sunni—Kurdish competition for power in the post-Saddam era, the promotion of shari`a law as the basis for a future Iraqi constitution has caused concern amongst Iraq's Christian and secular population. In addition, the tensions between the ChaldoAssyrian and Kurdish communities in the north, particularly around the mixed city of Kirkuk, has led this group to seek the enshrinement of religious freedom as a method for protecting their small community from being subsumed in larger territorial units within a prospective federal structure.

Drafting the constitution

Following the US invasion and occupation of Iraq, the Transitional Authority Law (TAL), drafted by the Coalition Provisional Authority (CPA), was introduced on 8 March 2004 and served as the "Supreme Law of Iraq" until the ratification of the Iraqi constitution by referendum on 15 October 2005 (CPA 2004). The two most prominent Iraqi participants in the CPA helping to draft the TAL were Faisal al-Istrabadi, a former

US State Department Advisor and Iraqi UN *charge d'affaires*, and Salem Chalabi, nephew of former pro-US Iraqi exile Ahmad Chalabi and head of the criminal tribunal charged with trying ex-President Saddam Hussein (Marr 2005).

The US was heavily involved in the formulation of the TAL. This posed problems for the legitimacy of the law as the US sought to impose its own vision for what the future political structure of Iraq should look like. According to Noah Feldman, advisor to the CPA on the formulation of the TAL, the US 'did try to effect substantive outcomes in this document by exercising its own influence' (Plumer 2005). In this, efforts were made to ensure women's participation in the prospective constitutional formation process (Al-Marashi 2005: 139).

The TAL set out the parameters for the drafting of the constitution by the Transitional National Authority (TNA) elected in January 2005. The 30 January polls for the TNA saw the election, out of 275 seats, of 140 members of the predominantly Shi`a United Iraqi Alliance (UIA) of which the SCIRI was the dominant member. The Kurdish Constitutional List (KCL), an alliance of the Kurdish Democratic Party and the Patriotic Union of Kurdistan gained 75 seats and Al-Iraqiyyun ("the Iraqis") of Iyad Allawi gained 14 seats. The various Sunni parties gained 17 seats as a result of a widespread Sunni boycott of the poll, the Iraqi Turkmen Front (ITF) gained three seats and the National Mesopotamia List representing Iraqi Christians, gained one seat (Al-Marashi 1995: 141). This parliament was charged with appointing the 55 member committee which would draft the constitution. Members of the UIA (28) and KCL (15) dominated the Constitutional Committee (CC). The CC also contained eight members of Al-Iraqiyyun and four members representing the Turkmen, ChaldoAssyrian, and Yezidi communities. Later on, 17 new Sunni members were appointed to the CC in an effort to promote Sunni inclusion in the drafting process (UN 2005: 2). The TAL provided for a 25 per cent quota for women's representation in parliament. There were 10 women on the final 72 member CC (Wong 2005).

This drafting process was short as the constitutional drafting committee had less than three months to complete its task (ICGb 2005: 2). The TAL contained some promising provisions in relation to the issue of human rights. Whilst the opening articles declared the centrality of Islam to the political structure, Article 22 of the TAL declared that Iraqis shall 'enjoy all the rights that befit a free people possessed of their human dignity, including the rights stipulated in international treaties and agreements'. At face value, these provisions stood in contrast to the declaratory significance of Islam to the post-Saddam political system. The protection of 'all rights' in

Article 22 seemed to suggest a modest effort to temper ideological limitations contained in the Constitution's preamble or apply a liberal interpretation of Islam. However, the Iraqi constitution that emerged in August stepped away from these provisions and took a woefully ambiguous position on gender rights and religious freedom.

The CC had its first meeting on 24 May and set itself a 15 August deadline. This speedy drafting of the constitution was hoped to undermine the insurgency and foster a democratic process. There is broad consensus, however, that 'in the end, none of these goals was met' (Brown 2005c). The final draft was presented on 28 August but the draft itself did not achieve consensus on the key issues of the role of Islam as a source of law, the political structure of the state (namely the issue of federalism), or even the name of post-Saddam Iraq. The draft constitution was pushed through by the Kurdish and Shi`a delegates in the face of vehement objections from the Sunni delegation (ICGb 2005: 2).

During the final stages of the drafting process, representatives of the smaller communities along with the Sunni representatives were largely excluded as the Shi`a and Kurdish delegations pushed ahead to produce a document by the August deadline (ICGb 2005: 3). The final drafting process took place 'behind closed doors', excluding both the Sunnis and the minority delegates, even those from the large blocs such as the United Iraqi Alliance (ICGb 2005: 3–4). This led the Sunni delegates to withdraw from the drafting process on 28 August, just before the final agreement (Cragon 2005). The completion of the constitution on 28 August came after a 13-day delay from the original deadline of 15 August. The draft was further amended on 13 September by the speaker of the National Assembly without the approval of the body (Brown 2005b: 1). However, these amendments (federal vs. regional control over water sources, comments on the identity of the Iraqi state, the application of international human rights treaties) were adjusted so that only minimal changes affected the constitution (Worth 2005).

Efforts to rush through the drafting process were backed by the US who focused on the speedy completion of the draft. This was largely a response to the domestic pressures in the US that began to turn against the continued troop presence in Iraq during 2004 and 2005. As a result, the constitution contains a number of controversial elements. The first are the provisions for decentralization. For instance, the constitution allows for two governates (other than Baghdad) to join and form a region with the vote of a simple majority, as well as allowing two regions to merge into a new region. The status of Kirkuk, previously protected like Baghdad and prevented from joining other regions, was dropped from the TAL on the formation of

the constitution. This was a major setback for the minority groups (Turkoman, ChaldoAssyrian, Arab) and a major win for the Kurdish delegation (ICGb 2005: 6).

The application of international human rights treaties proved to be a highly contested issue in drafting the constitution (ICGb 2005: 4). Some within the CC argued that the omission of references to international human rights treaties in Article 44 would actually strengthen the position of international human rights treaties as the article stated that they would be subsumed to the limits of the constitution. This was a highly suspect argument leading to the retention of this article in the final draft.

Earlier drafts of the constitution envisaged a restrictive application of international human rights treaties in Iraq. For instance, a draft circulated in July 2005 stated that international human rights treaties would be observed in Iraq 'so long as these do not contradict Islam' (Article 22) (Brown 2005a: 7). This article echoes the Cairo Declaration in subsuming the application of human rights treaties but uses the more ambiguous reference to "Islam" rather than to the specificities of Islamic law. Article 44, instead, places restrictions on the application of human rights treaties only if they 'run contrary to the principles and rules of (the) constitution'. Originally included in Article 44, this commitment to international human rights treaties was put up for omission in the 13 September referendum.

The international response to the new Iraqi constitution was mixed. For instance, the International Crisis Group describes it as 'a weak document that lacks consensus … the worst possible outcome' the product of a 'rushed constitutional process (that) has deepened rifts and hardened feelings', laying the groundwork for further sectarianism and heightening the risk of civil war (ICGb 2005: 1–3, parenthesis added). The European Union issued a measured statement in response to the constitutional drafting process, welcoming the 'continuing political transition … including drafting a constitution, holding a referendum and elections for a constitutionally elected government' (EU 2005). However, this was coupled with a statement expressing 'great concern over the deteriorating security situation in Iraq since the end of combat operations' (EU 2005). For international Arab/Muslim groups, gender equality and human rights took a back seat in comparison with they regarded to be the urgent task of securing Iraq's stability and avoiding regional repercussions. The Arab League has been staunchly opposed to the wording of the constitution, particularly to the references that limit links between Iraq and the community of Arab states. One League official stated that Arab diplomats are trying to convince Iraqi politicians 'to ensure that the Arabism of Iraq is stressed in the Iraqi constitution' (quoted in Al-Jazeera 2005). The League Secretary-General,

Amr Moussa, described it as a 'recipe for disaster', comments that followed up his earlier warning that attacking Iraq would 'open the gates of hell' in the region (quoted in Young 2005).

However, Moussa's comments offered no constructive alternative path for the country. Indeed, Moussa and the Arab League are viewed with skepticism within Iraq due to their notable absence during the early phases of the constitutional formation process. The withdrawal of the Sunni delegation from the constitutional drafting process on 28 August seemed to vindicate the League's warnings. The Sunnis called for a more active involvement by the League in the run-up to the 15 October referendum where the UN helped make the League largely irrelevant (Al-Jazeera 2005). In response, the League initiated a reconciliation conference to bridge the gap between the League and the emerging Iraqi leadership in the Governing Council.[3]

The OIC has been more restrained in its response, focusing on the need to formulate an inclusive document for the political restructuring of the country. It makes little reference to the prospective Islamic character of the charter, instead calling for the formation of a document that does not lead to the 'exclusion of any component of the population of Iraq from the process of decision-making on the future of the country' (OIC 2005). The OIC position represents a status quo stance in terms of not seeking to focus on the formation of the new Iraqi constitution as an opportunity to critically engage with the debate on Islam and IHR. Instead, it is concerned with stability in regards to an inclusive approach as the best way to avoid further disruption in the war-ravaged country.

There has been an alternative critical response from the international arena. An-Na`im has declared that the constitution 'is not a workable document … (it has) brushed their differences under the carpet and crafted language that they could vote for. It's a time bomb that will explode as soon as its enacted' (quoted in WLUML 2005). This perspective is echoed from within Iraq by "liberal" Shi`ite cleric Iyad Jamal Din who claims that the constitution 'tries to preserve human rights, but within a choking religious society that is a clone of the Iranian system'. This will lead, he argues, to 'a dark society controlled by extremists' (quoted in WLUML 2005).

This differs from the statements of both the US administration and their representatives in Iraq. Former-US Ambassador to Iraq Zalmay Khalilzad has stated that the constitution is laudable as a 'synthesis of Islamic traditions with the universal principles of democracy and human rights' (quoted in WLUML 2005). These sentiments were echoed by Bush himself when he stated that 'the constitution is one that honors women's rights and freedom of religion' (quoted in Pollitt 2005). Both Khalilzad and Bush's statements

are overly-optimistic when one examines the specific tensions in the document in terms of gender rights and religious freedom. There is no real "synthesis" of Islamic traditions with the international human rights regime as the constitution is too ambiguous. This ambiguity contains the seeds for future discord particularly in terms of the wide range of issues left untouched by the constitution.

Gender equality and the new Iraqi constitution

During the drafting process, tensions were rife between secularists, reformists (both moderate and radical), and conservative Islamists over gender rights in the constitution. The former group, represented by such organizations as the New Horizons for Women, an umbrella organization headed by Neba Hamid, the Organization of Women's Freedom in Iraq headed by Houzan Mahmoud, and the US-based Women's Alliance for a Democratic Iraq headed by Basma Fakri, sought either a removal of references to Islamic law or its substantial modification in the constitution.[4] The latter, represented by such groups as the Muslim Women's Federation (Ittihad al-Mar`a al-Muslima) headed by Mahdiya Abd al-Lami and Salama Sumaysim alongside prominent figures in religious, social and political organizations sought a traditionalist interpretation and application of shari`a (Al-Sarraj 2005).

Therefore, the debate over gender issues in the Iraqi constitution largely centered on the role of Islam in the political life of the country. In particular, there was concern over whether the enshrinement of shari`a would 'automatically deprive Iraqi women of their rights' (Al-Marashi 2005: 153). Ibrahim Al-Marashi[5] has described this debate as somewhat alarmist in that whilst some elements of the new constitution may annul provisions of the 1959 Personal Status Law, other provisions work to enhance the rights of women (Al-Marashi 2005: 153–4). However, there is a danger in the removal of the previous personal status law as it had raised the ire of many conservative religious groups since its inception (Brown 2005b: 6).

It is important to note that the constitution lacks specific provisions dealing with gender *equality*. However, there are a series of general provisions that relate to gender rights in Iraq. First, Article 14 states that 'Iraqis are equal before the law without discrimination because of sex, ethnicity, nationality, origin, color, sect, belief, opinion or social or economic status'. Article 18 gives Iraqi women the right to pass their citizenship on to their children even if the father is not an Iraqi citizen. This provision was a victory for gender rights activists as it was not included in any previous Iraqi statute. However, there is no provision for Iraqi women to pass their citizenship on

to their husbands (Brown 2005: 7a). In addition to this specific measure, the constitution outlines general principles to enhance gender equality and women's participation in the political sphere. Article 20 states that 'citizens, male and female, have the right to participate in public matters and enjoy political rights, including the right to vote and run as candidates'.

There was pressure to remove the quota system guaranteeing a 25 per cent female representation in the Iraqi parliament, first enshrined in the TAL, from the constitution. However, pressure from a variety of women's rights groups prevented this from taking place. This has come through in Article 48 which seeks to promote the inclusion of women in the political structure of the country whereby the 'elections law aims at achieving a representation percentage of women that is not less than one quarter of the council's members'. Another controversial area where activist groups achieved success was the inclusion of provision seeking to outlaw domestic violence. Not included in either the TAL of earlier drafts, Article 29 states that 'violence and abuse in the family, school and society shall be forbidden'. This was the first time that domestic violence was criminalized in Iraq.

Despite these provisions, the constitution lacks specific mechanisms to ensure full protection of gender equality as stated in the UDHR. The draft makes no mention of the 1959 law, instead referring to the settling of matters in line with the religious beliefs of each community (Pollitt 2005). Article 39 is at the heart of the controversy. It states that 'Iraqis are free in their adherence to their personal status according to their own religion, sect, belief and choice, and that will be organized by law'. The constitution does not explicitly do away with the 1959 Personal Status Law but it allows for the application of sectarian law in relation to issues of personal status such as marriage, divorce, inheritance, and various judicial matters. This has been seen as a dangerous trajectory for gender rights in Iraq as the use of "sectarian law" within communities promotes the possibility of arbitrary imposition of retroactive laws against women. Article 39 is a rewording of Article 14 of the earlier draft constitution that stated 'personal status shall be included in the law in accordance with the religion and the sect of the person' (Brown 2005a: 5). Both Articles, including the tempered Article 39, undermine the enshrinement of universal personal status contained in the 1959 Personal Status Law bode ill for the position of Iraqi women's rights. A former member of the constitutional panel and leading Iraqi academic, Professor Suha Azzawi has stated that 'Iraqi women will lose so much if this constitution is passed' (quoted in WLUML 2005).

Brown argues that instead of a single code for all personal status law in Iraq, the constitution now offers a 'menu of choices' depending on 'religion,

sect, belief and choice' (Brown 2005b: 6). There is an assumption that if citizens choose to act according to the provisions of the 1959 law, they would be able to as it is not abrogated. However, as the law is outlined largely in communal rather than individual terms, the pressure to act according to the status law of each community is likely to be great, particularly in rural areas. In addition, the ambiguity of personal status in Iraq is compounded by the lack of lucidity surrounding what judicial system will implement personal status law. There is no clarity in terms of whether the state will be responsible for the establishment of separate court systems for each community or whether this will be the responsibility of the community leaders. There is also no clarity in terms of whether a citizen can select different provisions from different codes and how disputes are to be settled if disputants claim to be working under different personal status codes. Brown has noted that these very problems are what led many Middle Eastern states to initially adopt uniform Personal Status Laws even in the face of charges of encroaching on religious freedoms (Brown 2005b: 7). In its efforts to accommodate all groups, the constitution has created further confusion for the status of women in the complexity of Iraqi society, a far more intricate mixture than the Shi`a—Sunni Arab—Kurd trichotomy.

The debate between the different positions on this provision highlights the divisiveness of this Article, and how the traditionalist groups have succeeded in implementing their vision for personal status in Iraq over the radical reformists. For instance, the traditionalist Muslim Women's Federation countered the reformist demands as contradictory to Islam. Head of the Federation, Mahdiya Abd al-Lami stated that the group sought to pursue 'justice, not equality' (Al-Sarraj 2005). This position was premised on the contention that if primacy was given to gender equality in personal status through the constitution then women would lose their ability to act in their designated roles in the family. The focus on the main- tenance of the family structure (Article 29) where the state is to 'preserve its (the family's) existence and ethical and religious value' buttresses this contention. Another member of the Muslim Women's Federation, Salama Sumaysim, has taken a more conciliatory tone by acknowledging the misuse of Islamic law over the years to promote patriarchal structures in Islamic societies. However, the parameters for the 'dialogue' that Sumaysim calls for have shifted due to the imposition of sectarian law (Al-Sarraj 2005).

The formal promotion of women in public institutions, formal equality in personal status law as well as protection from the arbitrariness of sectarian law are key factors in any democratic society. These safeguards

are especially important in Iraq since women constitute 60 per cent of the population due to successive wars (Fakri 2005). Yet, the constitution of post-Saddam Iraq falls short of those human rights yardsticks. This shortfall is partly due to the minimal role of women's lobby groups, especially those with liberal leanings, in the drafting of the new constitution. This enraged groups like the Iraqi Women's Movement which accused 'prominent Iraqi political forces' of deliberately neglecting women in the constitutional draft (Al-Marashi 2005: 154).

Indeed, during the drafting process, there was a manipulation of the quota system whereby existing male members of the Provisional Authority were designated the responsibility of choosing women to sit on the drafting committee. It was argued by leading women's rights activists in an open letter to Ambassador Bremer that women who were chosen to fill the quotas were those whom they 'knew they could intimidate and control' (National Council of Women's Organizations 2003).[6] In addition, the quota system fell short of requiring the appointment of women to key institutional positions in the judiciary, the executive, as well as in the ministry.

Basma Fakri has articulated the core of these concerns from the perspective of the radical reformist group (Tully 2005). In particular, there are concerns in terms of the application of personal status provisions within sectarian law. Despite this, these groups do not seek the removal of references to Islamic law in Iraqi political life where 'Iraqi women are not opposing Islam' (Fakri 2005). Fakri argues that Islam is a 'great source and guide for inspiration' for all Muslim Iraqi men and women, but Islamic law must be utilized as 'one among many sources' administering gender rights in post-Saddam Iraq (Fakri 2005). Iraq is a signatory to a number of international treaties affecting gender rights, including the UDHR, the ICCPR, and the ICESCR treaties. The constitution does not refute these commitments. But references to sectarian and Islamic law make Iraq's adherence to these international treaties problematic.

Religious freedom and the new Iraqi constitution

Similar to the tensions concerning the issue of gender equality issues surrounding religious freedom proved highly complex during the constitutional drafting process. Again, Islam and its role in the political life of post-Saddam Iraq was at the heart of this complication. The issue of religious freedom affects all of Iraq's confessional and ethnic communities. Outside the dominant Shi`a, Sunni Arab and Kurdish communities, Iraq has a significant Turkoman population who are largely Sunni but also include a smaller number of Shi`a groups. In addition also Iraq has diminutive but

long-standing Catholic and Christian communities, the largest of which are the Chaldean community as well as the Syrian Catholics and Syrian Orthodox, Armenian Catholics and Protestants, along with smaller groups constituting 3–5 per cent of the total population. In addition to these groups, Iraq also has an ancient Sabaen—Mandean community in addition to the Yezidi community around the city of Mosul.

The Turkmen have historically been excluded from the political process in Iraq. In 1977 the Ba`ath regime allowed only Arab and Kurdish nationality to be registered in the national census. The 1990 constitution stated that the 'Iraqi people are Arabs and Kurds only'. This echoed patterns of exclusion as early as 1958 where the post-independence constitution stated, 'the Arabs and the Kurds are the participants in the homeland'. Only in 1997, the Turkmen were allowed to register as 'New Arabs'.

The post-Saddam political system has done little to address the need to recognize and include the ethnic and religious minorities in Iraq. The new constitution echoes the 1958 constitution in focusing on the Arabs and Kurds as the only constituents of Iraq. Those provisions in the Interim Constitution that allowed for education in minority languages (particularly Turkmen) have been abrogated by the enforcement of Kurdish dominance in the north. This has been particularly notable in Kirkuk. The Mandaean community was left without a representative in the constitutional drafting committee but had a committee member appointed along with 15 Sunni members on 5 July 2005 (ICGb 2005: 2). For the other groups, they sought to ally themselves with the various lists in the elections. For instance, 'the Yezidis … ran on the Kurdish list' whilst the 'representatives of the Christian/Assyrian/Chaldean/Syriac and Armenian communities predominant in the north either ran on their own (small) lists … Sunni Turkomans had their own list, whilst Shi`ite Turkomans joined the United Iraqi Alliance' (ICGb 2005: 2).

The constitution led to mixed results for the religious communities and the enshrinement of rights. The position of Islam as 'a basic source of legislation' where 'no law can be passed that contradicts the undisputed rules of Islam' (Article 2) was tempered with the declaration that 'the full religious rights for all individuals and the freedom of creed and religious practices of people like Christians, Yezidis, and Mandaean Sabaens' shall be protected (Article 2). This was an important concession when placed in relation to the controversial Article 39 which allowed personal status law to be organized by each community. Thus, community groups appear to have gained supremacy over personal self-determination. Despite this, efforts to undermine the unity of the Christian and other minority position in the drafting process overshadowed these concessions for religious freedom.

There was much consternation amongst the Iraqi Christian community concerning Article 122 which declared the Chaldean and Assyrian communities as separate. This article enshrined a formal division in the community. This has been controversial as, in October 2003, the leaders of the various Christian communities in Iraq met at the 'Chaldean Syriac Assyrian Conference' in Baghdad where they agreed on the use of the label ChaldoAssyrian to refer to the entire community (AINA 2005; Naby 2005: 1). This was done so that the community would have a stronger bargaining position in any future negotiations on the political future of Iraq such as the constitutional drafting process.

The core issues for the ChaldoAssyrian community in this have been to strengthen their status in relation to their position in Kirkuk. However, the Kurdish leaders, particularly the KDP, have been active in seeking to promote division within the ChaldoAssyrian community and due to their high degree of control over the constitutional drafting process, they were able to undercut the ChaldoAssyrian community's attempt at formal political unity. Whilst Article 122 appears to be a concession to the ChaldoAssyrian community, it is in fact a move to undermine the community's unity through a formal enshrinement of division (see AINA 2005).

Another critical issue is the question of apostasy. Article 7 takes an important step through the criminalization of entities or trends that advocate, instigate, justify, or propagate racism, terrorism, (and) *takfir* (declaring someone an infidel). Yet, the constitution says nothing about the right to choose one's own religion. Religious freedom, including the freedom of choice in religion, has traditionally been lacking in the Middle East and the new Iraqi constitution does not move beyond generalities to protect it.

Adherence to Islam has traditionally been seen as a cornerstone of national identity and ruling regimes have exploited this presumed connection for political gains (Saeed & Saeed 2004: 105–7). The issue of religious freedom, in this respect, is highly important as it can be used for these alternative means as it has been in other Islamic societies and states (Saeed & Saeed 2004: 107). In a similar manner, the adoption of a secular lifestyle has been seen by some Muslims as 'an indirect "Christianization" of their societies', particularly through the influence of a globalized Western culture (Saeed & Saeed 2004: 109; Sadri & Sadri 2000: 160–2). This rejection of the West also extends to criticisms of democracy in the Muslim world where support for such political models is seen as tacit support of Western dominance. Consequently, supporters of democracy are accused of apostasy by radical Islamic groups. Indeed, for many Muslims the issue of apostasy is closely linked to the Western colonization of

Muslim lands. The process of colonization brought with it concerted attempts to spread Christianity leading to fears that Islam was under attack. Harsh punishments for apostasy have been a response to this fear (Saeed & Saeed 2004: 117).

The post-Saddam constitution does not allow for charges of apostasy against Muslim groups. The constitution does not lay down a strict inter-pretation of Islam (Sunni or Shi`a, Isma`ili or Mu`tazili) that can provoke the imposition of apostasy punishments for other Muslim sects. However, there is no effort to address the other area of controversy where a Muslim may seek to leave the faith. This is an area covered by the UDHR but not by the more "conventional" or "traditionalist" views on Islam and human rights, such as the Cairo Declaration. There are vague provisions in the new constitution that seem to hold out the possibility of separate courts for each religious community (Pollitt 2005). This is a major concern as it implies the application of religious law to all within a specific community, even if they are secular. It also threatens to roll back common law applicable to the entire population.

Conclusion

The removal not only of a regime but of an entire state structure represents a new course in US foreign policy. In doing this, the United States, along with its coalition partners, the UN, as well as all regional and global bodies have an obligation to the Iraqi people to ensure that the new political structures introduced enable a constructive, pluralist, and peaceful future. An essential element of this is an engagement with the issue of human rights for the Iraqi people and its protection in the new constitution.

The new Iraqi constitution is a compromised document. It was put together by an unlikely group of people with widely different agendas, all of whom had their ethnic/sectarian interests to protect. These competing interests collided at the intersection of Islam/human rights and the result was a compromise deal that included some aspects from the competing programs of every delegation, without satisfying any of them completely. The constitution, whilst making important progress, is in real danger of reverting into a traditionalist understanding of the relationship between Islam and human rights. This is particularly pronounced in relation to the issue of gender rights where universal personal status laws can be replaced with the laws of particular sectarian communities with minimal government oversight. Religious freedom stands in a stronger position, particularly in terms of limits on the use of apostasy injunctions against Iraqi Muslims and non-Muslims.

Notes

1 Iraq's disarmament obligations refer to UNSCRs 660, 661, 678, 686, 687, 688, 707, 715, 986 and 1284.
2 At the time of the invasion, the US and UK were joined by 46 other states in the coalition as 'publicly committed' partners.
3 The reconciliation conference took place between 19–21 November in Cairo and went some way to re-establish the relevance of the Arab League in terms of influence over the situation in Iraq.
4 The New Horizons for Women (www.ihcenter.org/groups/nhfw), the Organization of Women's Freedom in Iraq (www.equalityiniraq.com) and Women's Alliance for a Democratic Iraq (www.wafdi.org).
5 Ibrahim Al-Marashi was the author of 'Iraq's Security & Intelligence Network: A Guide & Analysis', the article from which the Blair government plagiarized to compile their 'intelligence dossier' as justification for invasion.
6 This letter was signed by Dr. Maha Al Sakban (Secretary, Diwanyiah Women's Association), Sawan Al Barrak (President, Hillah Women's Association [also called Fatima Zahra Women's Rights Association]), Bahija Mahdi (President, Karbala Women's Association), Dunia Kareem (Coordinator, Al Kut Women's Association), Rabab Mahmud (Coordinator, Najaf Women's Association), Salah Muhsen (male) (Chair, Hillah Human Rights Association), Asaad Fadhil (male) (Chair, Human Rights and Democracy Center in Diwaniyah), Muhanad Al Kinani (male) (Chair, Human Rights Watch in Karbala), Ali Al Shaibani, (male) (Chair, Human Rights and Democracy Center in Najaf), Ala Talabani (High Council for Iraqi Women, Co-founder), Lina Abood (Al Nahda Association) and Hadil Hassan Kudeir (Iraqi Women's League).

5 The reluctant partnership between the Muslim Brotherhood and human rights NGOs in Egypt

Benjamin MacQueen

Introduction

The Muslim Brotherhood and human rights NGOs (non-government organizations) have found common ground for contesting the highly exclusive nature of politics in the Arab world's largest state. Some observers have sought to highlight this co-operation as the emergence of a permanent, unified opposition in Egypt, a form of liberal Islamic political activism under the joint tutelage of these two movements. However, this optimism may be premature. This chapter explores how, since 1952, Egypt has witnessed the entrenchment of single-party authoritarian rule with minimal space for the expression of political opposition. Methods of restricting political pluralism have changed over time from overt state repression to more subtle methods of co-option and legal manipulation, each seeking to achieve the same result, the neutralization of opposition. Currently, the Muslim Brotherhood remains potentially the single most viable opposition to the regime despite its illegal but tolerated status. Alternatively, human rights NGOs are highly vocal and visible in their criticism of the regime, despite a marked lack of domestic support within Egypt. It is the legal expertise of human rights NGOs and the domestic popularity of the Muslim Brotherhood that has resulted in these two groups finding increasing common ground and means of cooperation. This co-operation is expressive of restricted space for political action, rather than a deeper engagement and dialogue between human rights organizations and the Muslim Brotherhood. In other words, this co-operation is functional, leaving key areas of dispute between the two groups untouched.

From Nasser to Mubarak

Both human rights activists and Islamist organizations faced a hostile environment immediately after the Free Officers' Coup of 1952 and Gamal

`Abd al-Nasser's ascendancy to the Presidency in 1954. Nasser successfully undermined the first post-coup President Neguib who had presented himself as a campaigner for enhancing Egypt's human rights environment. However, Nasser's main target was the Muslim Brotherhood (MB). Nasser formally created a one-party state in 1953, dissolving all political parties and solidifying this with the creation of the Arab Socialist Union (ASU) in 1963 as the single ruling party. In 1955, he outlawed the MB, an organization that had been a part of the Free Officers' Coup but which had fallen out with the ruling military elite over charges and counter-charges of deceit and betrayal (Abdel-Latif 2002).

The state's assumption of control over the political sphere was mirrored in the religious sphere, with all religious courts abolished and the extension of state control over religious institutions. Whilst Nasser was a secularist, he did not attempt to exclude religion from public life. Instead, he promoted a state-sponsored version of Islam that incorporated the key state priorities ("Arab nationalism" and "Arab socialism"). Indeed, this was an effort to marginalize the political role of Islam in the face of the promotion of Arab nationalism, an attempt to help legitimize the state's socialist priorities. This placed the MB in a particular bind as Nasser adopted many of the same themes in his state Islamic program as the MB promoted prior to 1952. In particular, the MB focused on the 'economic and social dimensions' of Islam over issues such as individual rights, themes used by Nasser to legitimize his brand of Arab socialism (Dalacoura 2003: 119). The hijacking of the progressive elements of the MB's platform by Nasser during the 1950s and 1960s forced the organization to adopt a far more conservative brand of ideology as they re-emerged through the 1960s and 1970s.

In addition to this more subtle form of repression, Nasser twice sought to directly confront and eliminate the MB during his Presidency. First, after an alleged MB-led assassination attempt in 1954 Nasser outlawed the organization. The core of its leadership was executed and thousands of its members were imprisoned. Ironically, Nasser also used this as a pretext to oust Neguib as the leader of the Free Officers movement by accusing him of co-operation with the MB. The second effort came in 1965 when Nasser imprisoned the revived leadership of the organization, including then-leader Hassan al-Hudaybi and the radical ideologue Sayyid Qutb (Campagna 1996: 279).

Upon Nasser's death in 1971, his successor Anwar Sadat initiated a concerted shift away from his predecessor's political and social priorities towards an emphasis on 'liberalization and human rights … religion and the quest for authenticity' (Dalacoura 2003: 120). In this regard, religiosity and liberalism emerged and became increasingly intertwined through

the 1970s. The growth of religiosity in Egypt at this time grew as much in opposition to the regime as it did in response to the regime's promotion of it. This was also true of the growth of liberalism and support for human rights, particularly amongst the Egyptian elite. Religiosity in Egypt, like most of the Middle East, experienced a "revival" during and after the 1970s. This revival emerged partly as a result of the post-Nasser change of ideological grounding initiated by Sadat. However, Sadat was not able to monopolize this process, with counter-trends emerging. By the late 1970s, there was a strong Islamist theme emergent in Egypt, containing both pro- and counter-government trends.

With Nasser's death, 'human rights and political liberties once again became a focus on public debate' with MB re-emerging in the political sphere (Dalacoura 2003: 115). Sadat's *infitah* reform program enhanced the MB's growing political presence, with the reforms paving the way for political liberalization with the development of various political parties. In addition, the judiciary in Egypt managed to gain a measure of freedom from the all-powerful executive, opening a channel through which groups and parties pursued grievances against the state. Sadat signaled an effort to address human rights concerns in Egypt with the 1971 Constitution. This was followed later with the signing of the International Covenant on Civil and Political Rights in 1982 and the UN Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment in 1986. With the re-emergence of Islam and liberalism, particularly human rights activism, after Nasser as alternatives to the previously dominant ideology of secular, state-centric development, there were many efforts to bring the two together and present both as "authentic" in the Egyptian political sphere. Sadat was overtly religious in rhetoric, whilst also seeking to promote himself as sympathetic to civil and political rights. His blend, however, was not consistent and paid little reference to the key players in Egypt's Islamist or human rights movement.

President Mubarak has been far more ambiguous in his approach to both the MB and the human rights movement in Egypt. Coming to the Presidency after the assassination of Sadat by the radical Islamic Jihad in 1981, Mubarak initially tolerated the MB, allowing the organization to access political roles in particular areas, notably professional syndicates, university campuses and student unions, charitable and voluntary organizations (Campagna 1996, Al-Awadi 2005: 62). This worked to the detriment of the regime, with the MB seeking to extend its influence through the elections to syndicate boards and student unions as well as through the provision of social services. The MB began to fully develop their presence in the syndicates after 1982. Egypt has 22 professional syndicates with

a total, by the end of the 1990s, of 3,500,000 members. The MB targeted five of the six most politically active syndicates (medical, engineering, pharmacy, science, and law) with the journalist's syndicate being the only one where they have achieved minimal success. Interestingly, in none of the syndicates has the MB sought to challenge for syndicate leadership, instead, they have 'consistently supported the elected presidents, who, in every case, were government candidates, in return for those candidates' mediation with the regime on the Brotherhoods' behalf' (Fahmy 1998: 553). Whilst the MB has had success in the syndicate elections, the actual importance of the syndicates in political terms is debatable. Specifically, the syndicates are controlled by the regime, they have low voter turnout within each profession (between 10 per cent and 45 per cent have the right to vote within each syndicate), and they are highly factionalized. Therefore, the weakness of the syndicates vis-à-vis the regime puts the MB achievements in perspective, whilst also highlighting the regime's success in tolerating dissent when it is manageable (Fahmy 1998: 562).

During the 1980s and 1990s, the social service networks and programs of the MB became highly visible. Room was given to the organization, along with some liberal and leftist organizations, as Mubarak sought to counter the threat posed by radical Islamist groups after the 1981 assassination of Sadat. The height of this cooperation came with the MB's participation (albeit in coalition with other parties) in the elections of 1984 and 1987. The cooperation was also fostered by a new generation of MB activists on university campuses who were less directly influenced by the ideology of Sayyid Qutb (Al-Awadi 2005: 63). In time, the provision by the Brotherhood gradually exceeded those of state services. The MB therefore developed a much higher level of 'social legitimacy' than the state (Al-Awadi 2005: 62). The state, recognizing this, reversed its tolerant stance and sought to undermine the influence of the organization through direct repression and exclusion from the political sphere. However, as the legitimacy of the state has steadily eroded, Egypt faced a mounting political crisis where the MB, as the most socially legitimate movement, has come under ever-increasing repression from the regime.

Additionally, through the late 1980s, the MB gained control of the student unions of all of Egypt's major universities (Al-Awadi 2005: 64). This put the regime on notice that the organization was gaining critical political momentum. This came to a head in the 1990 parliamentary elections which all parties except the ruling National Democratic Party (NDP) and the leftist Tagammu` boycotted in protest to restrictive electoral laws (Al-Awadi 2005: 71). This boycott greatly angered Mubarak with the MB subsequently tried twice to gain official recognition as a political party,

in 1994 and 1996, both times being denied by the state. The impetus for this came from the MB members who had success in syndicate elections and wishing to transfer this to the political realm. By this time, the regime shifted to a more overt policy of repression against the MB. Mass arrests took place in 1995 after the regime blocked the participation of the MB in syndicate and student union elections in 1993.

Up to this point, human rights NGOs and the MB occupied differing areas of Egypt's political landscape. Human rights NGOs had become increasingly visible on the international stage, attracting a considerable degree of external funding. Ideologically, they remained at odds with the MB over specific issues, most stemming from the status of individual and community rights as well as gender equality and religious freedom. Since this time, however, the MB and human rights NGOs have been forced together due to the shrinking political space in Egypt rather than drawn together on the basis of common ideology. Despite the re-emergence of liberalism and Islamism in Egypt during the 1970s, Mubarak's increasing restriction of political pluralism in Egypt through the late 1980s and 1990s squeezed alternative political groups into functional, albeit awkward, co-operation. Hafez abu Sa`ada, Secretary-General of the Egyptian Organization for Human Rights (EOHR) has echoed this in stating that human rights NGOs and the MB 'speak a common language' on issues of political persecution but confront 'tremendous gaps' when dealing with 'human rights on the basis of international conventions' (quoted in Grünert 2003: 146). This is the core of the problem facing the opposition in Egypt. It has been driven into a space where ideologically-diverse groups are given no chance to forge a firm foundation for co-operation and mutual agreement; instead, they are forced into a rearguard action where survival is paramount. Islamist and liberalism both have a long history in Egyptian political culture and discourse, with the potential to develop in mutually-reinforcing ways. However, the regime has restricted political pluralism through co-option and direct repression forcing the viable opposition groups into functional co-operation with little room for the development of further integration.

Legal mechanisms for the repression and co-option of opposition

The regime's concerted efforts to stifle the growth of opposition parties in Egypt represents a 're-entrenchment of authoritarianism' raising the question of whether 'Egypt's democratization process has ended' (Stacher 2004: 215). Whilst some openings in the political system were made in the 1980s, they

have been effectively closed by the late 1990s, with the trend continuing since 2000. In retrospect, one can identify how the authoritarian structures in Egypt were not dismantled during the liberalization process of the 1980s. This is most evident with the trend away from liberalization under Mubarak in the 1990s, where these structures were revived and enforced. In effect, it was not a liberalization process, but a government-controlled political opening which could be reneged at any time, and which has been since the 1990s.

Three mechanisms have been employed by successive regimes to restrict the political sphere in Egypt, the Political Parties Law (Law 177/2005), the Law of Associations (Law 82/2002) and the Emergency Law (Law 62/1958).[1] Each of these establishes the limits of political space in Egypt and each can be controlled by the powerful executive without consultation to limit political freedoms, particularly the formation of parties, the activity of NGOs and the incarceration of opposition figures.

The Political Parties Law has been the key mechanism used by the regime to undermine the electoral potency of the MB. With the MB banned since 1954, the regimes of Nasser, Sadat and Mubarak have used a variety of means to dominate the "official" political realm. In 1974, Sadat split the ASU into three wings, a leftist, centrist and rightist faction, before elevating each to party status in 1976. This created the NDP, Tagammu` and the Ahrar Party representing these three factions respectively. In the wake of this, in 1977 Sadat past Egypt's first Political Parties Law (Law 40/1977) which stated that 'Egyptians have the right to create political parties and every Egyptian has the right to belong to any political party'.

Despite this apparently liberal rhetoric, the law itself placed a series of restrictions on the formation of political parties outside the three successors to the ASU. Central to this was the creation of the Political Parties Committee (PPC) which still serves as the President's tool for regulating access to the Egyptian political system. The PPC controls the registration of new parties, can halt licenses of existing parties, restricts existing parties through an ability to close party newspapers without consultation, and close parties if they are deemed to be acting contrary to the national interest. In addition, the law set out four criteria that had to be met for the Committee to even consider an application for party formation. These are the "uniqueness" of the party (i.e. that it differs from other existing parties); that its program should not cause a danger of domestic division; that it agrees to uphold the principles of Egypt's peace treaty with Israel; and that the party not be a reincarnation of previously banned parties. These sweeping powers are controlled at the behest of the executive where the President appoints six of the seven members of the PPC with the

seventh coming from the Shura Council, a council which is appointed by the President.

Law 40/1977 was amended by Law 177/2005 with some modifications such as parties only having to notify the PPC of their initiation (with the PPC given 90 days to object) rather than having to apply to the PPC and wait for their decision. The amendments also expanded the PPC from seven to nine members; however, the President still selects all but one. Other amendments increased the difficulty of parties gaining registered status, with 1,000 rather than the previous 50 signatures required from 'at least 10 governorates with no less than 50 members from each (of the 10 governorates)' (quoted in HRW 2007: 7). In addition, the law broadened the PPC's powers allowing it to act against a party if it is deemed not to add to the political life of Egypt or if its activities are a threat to national unity. If a party is deemed by the PPC to have violated these tenets, then it can be dissolved and its assets liquidized and redistributed amongst existing parties. This has proven a particularly effective tool of co-option where existing parties have been less than willing to object to another's disillusion when they are receiving funds from this.

Despite Article 5 of the Egyptian Constitution declaring the country a multi-party democracy, the Political Parties Law enables the executive to maintain total control over who enters the political arena. The criteria established by this law, particularly the prohibition on individuals entering the political arena if they have been criminally sentenced, are under custody, have been imprisoned, or if they have been dishonorably dismissed from the public service enables the regime to tacitly eliminate potential rivals from political contention, a particularly effective tool when used in conjunction with the Emergency Laws, outlined below, that enable the regime to make arbitrary arrests and hold people in custody without charge for indefinite periods. The Political Parties Law operates at the behest of the President and, by extension, the NDP where 'the ruling party has the right to select its opposition, on its own terms' (Sabbahi quoted in HRW 2007: 9).

For the MB, its current shape is largely centered on its struggle to gain official recognition in the context of the restrictive Political Parties Law (Al-Awadi 2005: 77). This has had an impact on its rhetoric and the focus on its efforts, a factor which pushes it towards human rights NGOs as fellow residents in semi-unofficial non-violent opposition suffering arbitrary state repression. The MB has organized its tactics around gaining official recognition first and foremost. It has sought to define itself in opposition to the regime, as supporting democracy in an authoritarian state and supporting human rights in the context of human rights violations

by the state. For their part, during the 1990s, human rights NGOs were viewed favorably by the regime as they helped buttress its position vis-à-vis the Islamists. However, this support ceased once these groups started to be more critical in their view of the regime, and particularly after the NGOs began to create links with Islamist groups and champion their cases in the legal system.

The grouping together of the MB and human rights NGOs stems from their position, according to Albrecht, as 'anti-systemic opposition' where groups 'play by the political rules and work within the political system but question the regime's core principles' (Albrecht 2005: 378, parenthesis added). Both groups operate in this semi-legitimate way as not to provoke the regime into a similar crackdown that was implemented against the radical Islamists during the 1990s under the cover of the Political Parties Law. The operation of the MB in student unions and syndicates has been an effort in this mould. Elite individuals, largely academics, lawyers and members of the media are also part of this anti-systemic opposition. Whilst they gain considerable publicity, particularly from outside observers, these individuals and the groups they have formed have very little influence within Egypt. They are largely secular, middle to upper—middle class, and university educated (Hicks 2002: 387). The MB appeals mainly to urban middle and lower classes with the working classes and rural people traditionally supporters of the left and segments of the urban poor attracted to more radical Islamist organizations. As such, it has been successful in many of the professional syndicates (traditionally a reserve of the middle classes) and has appeal to lower echelons of the state bureaucracy. Therefore, the MB is largely a middle class-run organization, the constituency that would normally be amenable to "liberal" forms of Islam. As a result, 'there is no constituency for liberalism in Egypt and, for this reason, there is no constituency for Islamic liberalism either' (Dalacoura 2003: 139). The state and the MB are mirrors of each other, both removing any room for Islamic liberalism to take hold. This leads to an ironic situation where the Brotherhood, responding to government repression, use the rhetoric of human rights for protection, but, without this repression, would leave human rights discourse behind.

Here, it is interesting to examine what the MB has stated in terms of its attitude to the international human rights regime. Article 77 of the MB's 1952 draft constitution states that 'people are born free, equal in dignity, rights and liberties without any discrimination based on origin, language, religion, or color [sic], and they have to treat one another as brethrens' (MB 2006a). This is reiterated in article 78 which states that 'each individual has the right to live freely, enjoying equality, security and safety, as

secured by law' (MB 2006a). In terms of freedom of religion, article 88 states that 'each individual has freedom of thought, ideology, and religion' (MB 2006a). It is interesting here that the word *individual* is used rather than people. The MB is at pains to point out that theirs is a civic rather than religious notion of citizenship. The organization has declared its wish to establish a 'civil' not 'religious' party (MB 2006b). They distinguish between these two concerning, amongst other items, the issues of rights. Specifically, the MB declares that a civil party 'acknowledges liberties as well as civil, political, economic, social, and cultural rights' of all citizens and where 'human rights are acknowledged for Muslims and non-Muslims equally' (MB 2006b).

The second mechanism for control over the political sphere in Egypt, the Law of Associations (82/2002), particularly relevant to human rights NGOs, is another example of how the Egyptian regime has established a system whereby a measure of tolerated opposition serves to legitimate the regime rather than challenge it. The Law of Associations governs the formation, powers, funding, composition and scope of NGOs in Egypt. The original Law of Associations, Law 32/1964, was drafted by Nasser and imposed powerful mechanisms for the regulation or organizations and highly restrictive measures on their formation. The law also enabled the regime to veto the creation of NGOs as well as decide on the composition of the organizations' board of directors and their decision-making structures. Most controversially, the regime could dissolve any organization at any time without specifying the rationale. This was notably implemented in 1982 when Mubarak closed the increasingly influential "Arab Women's Solidarity Association" or prominent women's rights activist Nawal el-Sa`dawi (HRW 1992).

Amendments to the law were introduced in 1999 (Law 153/1999), partially the result of growing public pressure led by human rights NGOs such as the EOHR. These amendments, however, imposed greater restrictions on NGO formation and activity with all NGOs declared illegal unless they registered with the Ministry of Social Affairs (Grünert 2003: 140). Those who belonged to unauthorized organizations were liable for prosecution that could result in a jail term. This was, again, a useful tool for the regime in light of the Political Parties Law where imprisonment meant virtual disqualification of that individual taking any part in Egypt's political system in the future. In addition to these amendments, NGOs had to fulfill a number of other requirements to achieve official recognition, namely that they join the official Federation of NGOs, a state-run institution, and that the state appoints a member of the organization's governing board. Article 11 of Law 153/1999 also prohibited all activities

of a 'political nature' on the part of NGOs with all foreign funding, the main source of NGO finances, having to pass through the Ministry of Social Affairs before it could be granted to NGOs. Thus, the day-to-day activities (through the appointment of a board member) and the incoming and outgoing financial independence of all NGOs in Egypt were controlled by the regime.

The vehemence with which the regime was prepared to pursue the suppression of human rights organizations was illustrated by the prosecution of academic and human rights activist Saad Eddin Ibrahim in 2000. Eddin Ibrahim, head of the Ibn Khaldun Centre for Development Studies at the American University of Cairo was charged and sentenced to prison for receiving foreign funds without permission in 2000 (overturned after eight months) and again in 2002. There was a particular importance for the regime in targeting Ibrahim as he holds dual American—Egyptian citizenship; therefore, it was a signal to the international community that regardless of who they are, the regime will act with strength to limit NGO, particularly human rights NGO activities.

Law 153/1999 was overturned by the High Court in 2000 and replaced by Law 82/2002, the current Law of Associations. Despite the High Court ruling, the new law was even harsher in its restrictions on NGOs that its predecessor. Currently, the government can arrest any member of an NGO which is not officially authorized by the regime or which receives funding that has not been approved by the regime. The new law also allows the regime to disband NGOs by decree from the Ministry of Social Affairs rather than the courts as well as requiring all NGOs to re-register with the Ministry of Social Affairs, with many long-standing NGOs having their new applications rejected.

After the 1980s, Egypt boasted over 16,000 NGOs and civil society organizations. However, most of these existed on paper only, with around 200 having an active political (mostly human rights) agenda. Similar to the political system, the 'NGO sector is controlled by a mix of co-optation, legal restrictions and repression' (Hicks 2002: 384). The manipulation of the NGO sector is 'based on dialogue and co-option much more than on direct intervention and oppression' (Hicks 2002: 385). The Interior, Justice and Foreign Affairs ministries deal directly with human rights NGOs and also communicate with the state security forces (*amn al-dawla*) as a form of intimidation and control. They set limits for what human rights NGOs can and cannot deal with. In particular, human rights NGOs are forbidden from criticizing Mubarak and his inner circle, criticizing the military, discussing issues related to Egypt's Coptic community, engaging in debate over Egypt's relationships with Israel, Saudi Arabia and the United States as well as Egypt's obligations under international law

(Hicks 2002: 385). The regime has more success in co-opting NGOs because of their limited appeal amongst the Egyptian population. This is important in helping to explain why human rights organizations have sought to engage the MB, even if it has meant their isolation from external funding. Specifically, it has allowed or potentially allows these elite, highly limited groups to tap into a greater well of domestic awareness and support.

The regime has been successful in co-opting most opposition parties into maintaining the status quo through control over the allocation of resources (Albrecht 2005; Kassem 1999). In particular, the single-party regime controls the mechanisms for party approval and legalization as well as the resources needed to establish the party and for distribution to its constituents. As a result, legal parties must participate in the political process, lending it legitimacy, in order to gain access to resources (Stacher 2004: 219). Opposition parties and NGOs must be restricted from gaining autonomy through access to significant resources in order to preserve the status quo. In this way, the government uses compliant opposition parties and NGOs to strengthen the status quo, and deflect potential criticism from outside that they are not pursuing a process of liberalization. In addition, the government is able to promote fragmentation amongst opposition parties by enhancing their ideological divergence. That is, in order to gain the regime's attention to enhance their probability of accessing resources, parties often promote specific, even exaggerated ideological platforms in the prospect that the regime may seek to promote this platform for its own ends (i.e. secularism, liberalist, leftist ideology, etc…). This enhances the gaps between existing parties, precluding their effective cooperation in seriously challenging the regime. In other words, the Egyptian regime:

> permits, or even promotes, the emergence of opposition while, at the same time, co-optive and clientelist arrangements serve as the primary control mechanisms. Political opposition in Egypt, thus, serves functions entirely different from those in liberal democracies where opposition comprises an alternative to the incumbents in a competitive contest for power … A co-opted opposition serves as an instrument to control society and moderate social dissent.
>
> (Hicks 2002: 379)

There is a range of opposition parties outside the ruling NDP: the Wafd, the Ahrar (Liberal) Party, the National Progressive Unionist Party (Tagammu`) and the Arab Democratic Nasserist party (ADNP). However, electoral legislation has ensured that the NDP remains dominant and that opposition parties remain weak and fractured. In effect, the parties are

co-opted and repressed into insignificance except for giving the veneer of multi-party democracy in Egypt.

During the 1950s and 1960s, in the wake of the split in the MB's ranks between followers of the group's leader Hassan al-Hudaybi and radical Sayyid Qutb, the organization presented divergent views. Since this time, the moderate camp has made a dramatic shift towards the incorporation of human rights into its platform since the 1970s, with the enshrinement of human rights in the MB's policy platform. This can be interpreted not so much as a purely ideological shift but as a result of the political environment they operate in where 'the Muslim Brothers defend human rights because they are concerned with protecting their own rights, as individuals and as an organization' (Dalacoura 2003: 128). This espousal of human rights, however, is often critiqued as superficial, a 'compromise of form rather than content' (Dalacoura 2003: 128). This is particularly evident in the stance of the MB on religious minorities and on women and women's issues. It is therefore an attempted synthesis of Islam and human rights with rights coming off second best.

After 11 September 2001 it was the human rights NGOs that challenged the regime over their imprisonment of large numbers of Islamists. However, this move often left them without both the financial and moral backing of external partners. This led to many within the movement withdrawing or reigning in their activities. Some, however, have sought to strengthen their position by fostering links with liberal Islamist individuals and organizations as a way of broadening their appeal within Egypt. This has not mitigated the significant divergences between many Islamists and human rights NGOs when they encounter issues to do with defining the basis of rights. The NGOs have come in for criticism for being overly reliant on external sources of funding. Indeed, some critics have alleged that the NGOs work solely for the interests of their external supporters; however, the international donor community has moved further away from the human rights NGOs in Egypt due to their activities in relation to Islamists as well as a perceived detachment from the majority of the population in Egypt. Donors perceive NGOs as simply running 'businesses' rather than productive, connected projects to enhance human rights in Egypt (Grünert 2003: 147).

The post-11 September environment has added extra weight to the third of the regime's tools for controlling political opposition and pluralism in Egypt, the Emergency Laws. This law has undergone a series of changes since its introduction in 1958. It was dormant until the 1967 war with Israel when it has been renewed every year with the exception of a period between May 1980 and the assassination of Sadat in October 1981.

In late 2005 the laws were relaxed somewhat, however, this was quickly reversed with the strong showing by the MB (running as independents) in the first round of national elections.

The Emergency Laws are by far the most visible and controversial tool used by the regime in their limitation of political freedoms and human rights in Egypt, and they serve as the clearest grounds for co-operation between human rights NGOs and the MB. These laws effectively suspend Egypt's obligations under the ICCPR including the prohibition on torture, on arbitrary arrest, detention and incarceration, on restrictions on freedom of movement, as well as on freedoms of organization and association (EOHR 2003). The Egyptian constitution allows for the head of state to declare a state of emergency whenever there is a perceived threat to public order or security. In addition, it allows the President to circumvent the civil court system and specify cases that are to be heard in front of special military tribunals. In recent years, Mubarak has cited the lingering presence of radical Islamist movements as the rationale for the consistent renewal of these emergency laws, with the backing of the United States in the context of the "War on Terror."

The Emergency Laws restrict the basic human rights of Egyptians, alongside the Political Parties Law and the Law of Associations. They allow for arrest without charge, prolonged pre-trial detention of suspects, their families and associates, with such arrest leaving them excluded from being involved in the political arena in the future. Once in custody, suspects face the danger of torture and scare food and medical attention. The EOHR has documented many cases of such activity on the part of the regime, directed both at political parties and NGOs (see EOHR 2002).

Conclusion

It is this environment where the MB and human rights NGOs have been forced together in a restricted and highly regulated political space. However, this co-operation is purely functional, with the environment leaving no room for either side to explore possibilities that may exist in enhancing dialogue over the issues of Islam and human rights. Therefore, it is not that Islam and human rights are incompatible, or that there is no prospect for a political synthesis of the two emerging, however, it is the case that the current scenario of cooperation between the MB and human rights NGOs in Egypt is the outcome of functional cooperation rather than a deeper engagement.

This cooperation *may* lead to a more intense connection in the future, but this would require a far more substantial effort at bridging ideological

divides than currently exists. The current cooperation is a by-product of the all-pervasive power of the executive branch in Egypt, where politics is defined by the actions of Mubarak and his close supporters. Essentially, there is little to no politics outside this realm, with the state able to co-opt or repress any efforts to establish alternative fields of debate and discourse, especially meaningful engagement between the Muslim Brotherhood and human rights NGOs. The cooperation between these two groups, therefore, is a survival tactic.

Notes

1 Copies of these laws can be found through the Egyptian government's website: <www.egypt.gov.eg/english/laws/>

6 Human rights in Afghanistan

William Maley

Introduction

In January 2004, a Constitutional "Loya Jirga" or "Great Assembly," held in the Afghan capital Kabul, adopted a new constitution (*Qanun-e asasi*) for Afghanistan which embodied a rich array of human rights protections. These covered matters such as the liberty of the subject, freedom of the press, and gender, and in formal terms gave Afghanistan one of the most progressive constitutional frameworks to be found anywhere in the Muslim world. Article 7 even provided that the state 'shall observe the United Nations Charter, international treaties and conventions that Afghanistan has ratified, and the Universal Declaration of Human Rights'. However, amongst ordinary Afghans, a pervasive skepticism remains about human rights protections in their country: as a taxi driver remarked to the author in March 2007, 'there is no rule of law' (*dawlat-e qanun nest*). It is therefore useful to explore what might account for the discrepancy between the robust protections that exist in constitutional texts, and the cynicism that marks daily life. That is the broad objective of this chapter, which opens with some brief observations on the nature of human rights, and moves on to discuss Afghanistan's unhappy human rights history, tracing the patterns of abuse both in earlier eras and then in recent times—under the communist regime from 1978 to 1992, during the period of Mujahideen rule from 1992 to 1996, and under the Taliban from 1996 to 2001. These abuses, it is argued, reflect above all the failure of the idea of the rule of law to take root in Afghanistan. The chapter concludes by discussing developments since 2001, and argues that until a culture of legality is embodied in consolidated institutions, the human rights situation will remain precarious. Yet there is a paradox here, which is potentially troubling in a wider range of situations: the success of a state-building process on which the long-term protection of human rights depends may require that one turn a blind eye to the past misbehavior of potential "spoilers" with the capacity to wreck a state-building process at the outset.

Justice, in other words, is a human institution, and as a result will likely be imperfect in the ways in which it is applied.

Human rights thinking

The idea of "human rights" owes its origin much more to political developments in Europe and America than in the Muslim world. Western political thought itself has complex roots which go back at least to the Ancient Greeks, and reflects myriad influences during intervening periods, but the vocabulary of "rights" is a relatively recent arrival on the scene. The term "rights of man" was used by Jean-Jacques Rousseau in his 1762 essay *The Social Contract*, and this terminology was subsequently taken up both by revolutionaries in France, and after 1789 by Thomas Jefferson in the United States, as well as the cosmopolitan essayist Thomas Paine (see Hunt 2007: 22–6). As an element of political rhetoric, the idea of rights swiftly found a place in the vocabulary of political agitators and activists. From the outset, however, the idea of rights was also somewhat controversial. In an essay written in 1795, Jeremy Bentham described the idea of 'natural rights' as 'nonsense upon stilts' (Hunt 2007: 251), capturing an unease about the ontological status of rights that has persisted to the present day. Theoretical discussions of rights continue to fill the pages of journals concerned with social, political and moral philosophy, and the language of rights is as entrenched as that surrounding other normative concepts such as freedom and justice. Key issues for discussion include the foundations of rights-claims, the question of whether rights must be matched by duties, and more recently the issue of the status of "collective" or "cultural" as opposed to "individual" rights.

Islamic political thought has been dominated by concepts other than rights. The Qur`an itself is not a direct source of political theory, and at best one can glean from it normative ideas that are suggestive but hardly definitive where politics is concerned. Subsequent discussion, however, saw a number of concepts examined at elaborate length by jurists and essayists, including justice (`adl*) and freedom (*hurriya*) (see Kamali 2002; Lewis 1988: 111). The notion of rights enjoyed no such prominence, and was more a source of apologetics (Hashmi in Hashmi 2002: 148–72), although some writers have sought to derive lists of rights from various Qur`anic verses (Enayat 1982: 131–3). The expression *huquq al-ibad* has been used to mean "rights of man", but as Patricia Crone points out, the sense of this term is rather specific:

> When the jurists spoke of human rights (*huquq al-adamiyyin/al-ibad*), they meant the claims that individuals had on each other, not rights

vested in human beings by virtue of their human nature. The opposite of human rights were God's rights (*huquq Allah*), meaning the claims that the Muslim community as represented by the ruler had on them.

(Crone 2004: 281–2)

Islamic political thought is in this respect notably less individualistic than Western thought. That said, the commonest use of the term human rights in contemporary politics is to describe *positive* rights embodied in the law of a state, or in international law. It is with rights in this sense that this chapter will henceforth be concerned. Positive rights differ from merely philosophical conceptions of rights in that they are recorded in an authoritative text, whether it be in statutory form (such as the English Bill of Rights of 1689), constitutional form (as in the US Bill of Rights), or in the form of an international resolution or treaty. From this last category, one can find a particularly rich vein on which to draw, and there is now available such a wide range of "rights-granting" instruments that increasingly there is a need to explain how different "rights" can be reconciled with each other. In addition, a range of mechanisms have been developed through which rights can be promoted and violations of rights exposed, creating not only a veritable industry of specialists on human rights, but real tensions between advocates and the states which often advocates see as the principal threats to the rights of their own subjects.

The most famous human rights instrument is almost certainly the Universal Declaration of Human Rights, which was adopted by the United Nations General Assembly on 10 December 1948 in Resolution 217 A (III). Ironically, this resolution is not technically binding in character (in contrast to decisions of the UN Security Council, which *are* binding under Article 25 of the Charter of the United Nations), but it has attained an almost mythical status as a codification of those rights-claims which at the time struck a majority of the UN membership as being of fundamental importance. The Declaration was a product of the UN Human Rights Commission, which was chaired at the time by Eleanor Roosevelt, but had a membership representing a range of different cultures; and the Commission in turn drew on an extensive study by UNESCO of diverse attitudes to human rights (Ishay 2004: 16–18). The 28 articles of the Declaration spanned both political freedoms and "economic" and "social" rights. This led some critics to see it as *dirigiste* or even socialistic in tone (Hayek 1982: 101–6), but it undoubtedly reflected the sentiment of the time that increased attention to economic and social matters was required if the conditions that had led to the rise of dictatorship on the shoulders of the Great Depression were not to be repeated.

Since the drafting of the Declaration, a range of further human rights instruments have been developed, by which Afghanistan is now bound. On 22 March 1956, Afghanistan acceded to the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. It subsequently became a party to most of the "core" international human rights treaties: on 24 January 1983 it acceded to both the 1966 International Covenant on Civil and Political Rights, and the 1966 International Covenant on Economic, Social, and Cultural Rights; on 6 July 1983, it acceded to the 1966 *International Convention on the Elimination of All Forms of Racial Discrimination*; on 1 April 1987 it ratified the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; on 28 March 1994 it ratified the 1989 *Convention on the Rights of the Child*; and most recently, on 5 March 2003, it ratified the 1979 Convention on the Elimination of All Forms of Discrimination against Women. These instruments, considered together, impose a dense array of obligations on the states which have accepted them as binding in international law. While some might see such obligations as a derogation from the sovereignty of the state, it is perhaps better to see the ability to accept them as a reflection of state sovereignty, since it is free and autonomous actors whose consent is truly binding.

Paralleling these instruments is a range of institutions directed at enhancing the honoring of human rights obligations. For each of the core treaties, there is a monitoring body of experts to examine states' compliance with their obligations; for example, the Human Rights Committee deals with the requirements of the International Covenant on Civil and Political Rights. Beyond these are plenary bodies such as the United Nations Human Rights Council, the Office of the United Nations High Commissioner for Human Rights, and a range of Special Rapporteurs appointed to analyze either the situation in a particular country, or a particular issue-area. The International Committee of the Red Cross plays a pivotal role in monitoring the conditions of detainees, especially those held pursuant to the laws of armed conflict. But perhaps most important of all are the non-governmental organizations which have emerged to monitor the human rights performances of states. These include advocacy bodies such as Amnesty International and Human Rights Watch, and bodies that combine emergency relief, political analysis, and advocacy, such as Médecins sans Frontières. In the modern world, these agencies speak with powerful voices.

Afghanistan before 1978

The historical process of state-building in Afghanistan, as in many other countries, was carried out using a mixture of negotiation and violence. This process evinced little respect for human rights in the modern sense of the term. Until the twentieth century, ordinary Afghans were treated very much as subjects of rulers, rather than citizens of a polity. The consequence was that state-building involved levels of violence that would be utterly unacceptable in the climate of the twenty first century.

Afghanistan as a territorial unit began to take shape in the eighteenth century, during the rule of Ahmad Shah Durrani (1747–72), but the structures of rule which prevailed at the time were decidedly pre-modern, based on courtiers rather than bureaucrats, an *ad hoc* rather than standing army, and state revenues in kind rather than in cash. This prevailed for much of the nineteenth century as well (Noelle 1998), but with the accession to the throne of Amir Abdul Rahman Khan in 1880, the structures of the state began to take more consolidated form (Kakar 1979). However, the violence which accompanied this process was very considerable. While the word 'pacification' has been used by a distinguished Afghan historian to capture some of the processes of the expansion of state power during this period (Kakar 2006), the processes on occasion involved extreme brutality. The historian Jonathan Lee argues that the reign of Abdul Rahman 'was an unmitigated disaster for the ordinary citizen of his country', and documents the Amir's 'Reign of Terror' in searing detail, with perhaps 5,000 executions a year taking place on average during his twenty years on the throne. Prisoners were bayoneted, blown from cannons, hanged, crucified, disemboweled, sawn in two, strangled, and dragged behind horses (Lee 1996: 543–62). There is some evidence that the Amir may have been suffering from a metabolic disease which affected his mental stability (Lee 1991: 209–42), and the paranoia which he sometimes displayed evokes memories of a later despot, Stalin, who similarly used terror as a means of bolstering his position.

Fortunately, the situation under Abdul Rahman's successors moderated considerably. His son Habibullah—who had been on the receiving end of his father's rage at various times—was a much more moderate figure, and Habibullah's son Amanullah, who occupied the throne from 1919 to 1929 was strikingly modernist in his political orientation. This led to a range of measures which in contemporary terms would be seen as human rights initiatives, notably the abolition in 1921 of slavery, a protection then built in to the 1923 Constitution. Articles 8–24 of the Constitution set out an

extensive and impressive list of rights, including 'personal liberty' (Article 9), freedom of the press (Article 11), the 'right to organize private companies' (Article 12), and the 'right to an education at no cost' (Article 14). In addition, dwellings and homes of all Afghan subjects were deemed 'sacrosanct' (Article 20), and all types of torture were prohibited (Article 24) (Poullada 1973: 277–89). This was a major innovation; as one observer has written, 'for the first time the constitution and some of these laws legally acknowledged the fact that citizens had rights in relations to the government, and that they had equal rights without discrimination' (Shahrani in Banuazizi and Weiner 1986: 47). Unfortunately, the wider political climate proved unaccommodating to the raft of political reforms which Amanullah sought to implement. In 1929, he was overthrown by a Tajik commander from the north of Kabul, who in turn was overthrown before the end of the year by a Pushtun general, Nadir Khan, who took the throne and ruled until his assassination in November 1933 when he was succeeded by his 19-year-old son Zahir.

The so-called Musahiban dynasty remained in power in various guises until the communist coup of April 1978—first under Zahir Shah, who held the throne until July 1973, and thereafter, during the short-lived "Republic of Afghanistan," under Zahir Shah's cousin Muhammad Daoud, who had served as Prime Minister from 1953 to 1963, and mounted a palace coup against the monarch when he was in Europe for medical treatment. However, Afghanistan's human rights situation was to vary considerably during this period. From 1929 to 1946, the Afghan Prime Minister was Muhammad Hashim Khan, a brother of Nadir, who after 1933 was the main power in the land, and ruled in a notably authoritarian manner. The left-liberal historian Mir Gholam Mohammad Ghobar wrote a blistering account of Nadir's and Hashim's years in power which detailed the use of torture and summary executions as devices for the consolidation of the dynasty's power (Ghobar 2001). Hashim, accurately described as 'domineering and dictatorial' (Saikal 2004: 106), made active use of an internal security service. His half-brother Shah Mahmoud Khan, who succeeded as Prime Minister when ill health forced Hashim's resignation, was more moderate in his approach, and his years of power saw a loosening of the political system. This was not strongly sustained during Daoud's premiership, but his modernizing agenda tended to divert attention from some of the darker sides of his rule.

The decade from 1963 to 1973, embracing the period of so-called *Demokrasi-i naw* ("New Democracy"), witnessed a fresh freeing-up of the political system, under the banner of an impressive array of formal rights set out in Articles 25–40 of the 1964 Constitution. This document stated,

inter alia, that 'Liberty is the natural right of the human being' (Article 25); that every Afghan 'has a right to travel outside Afghanistan and return to Afghanistan according to the provisions of the law' (Article 26); that 'Property is inviolable' (Article 29); that 'Freedom of thought and expression is inviolable' (Article 31); that 'Afghan citizens have the right to form political parties, in accordance with the terms of the law' (Article 32); that 'education is the right of every Afghan' (Article 34); and that 'work is the right and precept of every Afghan who has the capability to do it' (Article 37) (Constitution of Afghanistan 1964). Crafted with great care, this constitution reflected a genuine desire on the part of key members of the political elite to develop a modern framework for politics. However, in practice, it was not quite as revolutionary as it appeared on paper. The Political Parties Bill was never formalized as law, negating the thrust of Article 32, and the performance of the "New Democracy" governments was in key respects quite disappointing, setting the scene for Daoud's 1973 coup and the renewed authoritarianism which followed it. This saw political opponents incarcerated, and some even killed, including former Prime Minister Mohammad Hashim Maiwandwal, murdered in prison in 1974.

What was striking about the attempts to protect human rights under both the 1923 and 1964 Constitutions was the mismatch between aspirations and the instruments to achieve them. Afghanistan obtained a constitution, but not a *constitutionalist political order*, for the latter has two additional dimensions which make up the core of constitutionalism: the separation of powers and the rule of law. Together, these require that laws be prospective, that they be general rather than particular in their scope, and that enforcement of law be in the hands of an independent, accessible and unbiased judiciary. As the great French thinker Montesquieu argued, 'there is no liberty, if the judicial power be not separated from the legislative and the executive' (Montesquieu 1949: 152; see also Vile 1967; Brennan and Hamlin 2000: 211–54). They also require a cultural ethos of fidelity to law and hostility to arbitrary power. Such a culture notably failed to take root in Afghanistan, and this helps explain why what happened after the 1978 coup proved so ghastly.

The communist regime

From 1929 to 1978, Afghanistan was the most peaceful country in Asia. All this changed dramatically with the coup. Over the next decade, Afghanistan experienced bloodshed on an unprecedented scale, with an estimated 876,825 unnatural deaths between 1978 and 1987, representing over 240 deaths every day for ten years straight (Khalidi 1991: 101–26).

While many of these deaths were war-related, rather than the product of human rights violations *per se*, there is no doubt that the coup also inaugurated an era of very serious human rights abuses. The new Marxist rulers—first Nur Muhammad Taraki (1978–79) and Hafizullah Amin (1979), and then, following the Soviet invasion of Afghanistan in December 1979, Babrak Karmal (1979–86) and Dr Najibullah (1986–92)—were all heavily influenced by the Soviet model, which had accommodated massive purging (during the so-called *Ezhovshchina*, or "Great Purge," of the 1930s), and heavy-handed coercion of dissent during the Brezhnev era after 1964 (Conquest 1990; Karklins 1987: 321–41). This created a uniquely unpropitious climate for human rights, and the sinister atmosphere was captured early in a remark attributed by Amin to Taraki: 'Those who plot against us in the dark will vanish in the dark' (Asiaweek 1978: 40).

The oppressive inclinations of the new regime were reinforced by oppressive structures and oppressive practices. It was served initially by a secret police known as the "Afghan Interests Protection Service" (*Da Afghanistan da Gato da Satalo Edara*) headed by Asadullah Sarwari, which according to one source received direct support from East Germany (Rubin 2002: 114). Following the Soviet invasion, it was reconstituted as the "State Information Service" (*Khedamat-e Ettalaat-e Dawlati*), known colloquially by its acronym KhAD. It was headed from 1980 to 1985 by Dr Najibullah, and then in January 1986 became the Ministry of State Security (*Wizarat-e Amniat-e Dawlati*), under Ghulam Farouq Yaqubi, who committed suicide when the communist regime collapsed in April 1992. The record of these organizations was extremely grim, and from the day of the coup itself, perceived 'enemies' were rounded up, creating unimaginable anguish for the families of the victims (Gauhari 1996). Terror was frequently deployed as a device by which to boost the regime's position. However, as a tactic this was to prove counterproductive, as the atrocities of the regime's agencies simply intensified the opposition which it confronted (Maley in Bushnell, Shlapentokh, Vanderpool and Sundram 1991: 113–31). The resistance to the regime from Mujahideen forces, especially following the Soviet invasion, thwarted its efforts to consolidate its rule, and set the scene ultimately for the withdrawal in 1989 of Soviet forces, and for the disintegration of the regime once aid from the USSR ceased to flow.

The human rights violation of this period was extensively documented in analytical reports (Amnesty International 1983, 1984, 1986; Human Rights Watch 1991), and a number of studies assembled powerful individual testimonies as to what had occurred (Barry 1980: 171–234; Laber and Rubin 1988; Gossman 2005). In addition, a range of reports from a UN

Special Rapporteur on Human Rights in Afghanistan put details to a wide international audience of what was happening (United Nations 1985, 1987a, 1987b, 1988, 1989). Together they painted a chilling picture of events on the ground, albeit with variations over both space and time. Mass killings took place in both rural and urban areas. In early 1979, the 444 Commando Force under Saddiq Alamyar massacred large numbers of residents of the village of Kerala in Kunar, and in June and July of the same year, Hazaras in the Kabul neighborhood of Chindawol were similarly rounded up and slain (Gossman 2005; Barry 1980). Following the Soviet invasion, atrocities continued to proliferate, and gruesome eye-witness accounts pointed to the scale of rights violations. Brutal tortures were used by KhAD in Pul-e Charkhi prison on the outskirts of Kabul, and in centers such as Sedarat and KhAD-e Shashdarak. Even women were not exempt. School girls were shot during student demonstrations near Deh Mazang in Kabul in April 1980. Fahima Nassery, a mathematics teacher at the Aiasha-i Durrani High School in Kabul, was arrested in May 1981. Her account of her experiences makes for harrowing reading:

> I was taken to a room where I witnessed the most horrible sight of my detention. Cut fingers, noses, ears, legs, hands, breasts and hair of women were piled there. In one corner, a decayed corpse was lying. The smell of blood and the decayed corpse were intolerable, I remained in that chamber of horrors until the following morning.
>
> (Rahimi 1986: 108)

The regime's accession to international human rights instruments plainly meant very little to it.

Two significant points flow from this narrative. The first is that yet again, human rights suffered as a result of the near total absence of the rule of law and an independent judiciary. While some within the legal system were covert supporters of the Mujahideen and used their positions to try to protect captured members of the resistance, *public* justice in any meaningful sense was virtually impossible to obtain. This precisely mirrored the Soviet approach to law, which basically treated it as an instrument for the exercise of state power, rather than as a constraint on the state, and resulted in a significant gap between law and reality (Ioffe 1985: 164–77). Second, the effects of this era were not only felt at the time. They persist in the form of low levels of civic trust, a lack of confidence in judicial institutions, and a disposition to rely on self-help strategies rather than the dubious protection of "the law." None of this makes the protection of human rights any easier.

One final broader point deserves mention. When the communist regime collapsed in April 1992, it also exposed the broader breakdown of the Afghan state. The new rulers of Afghanistan inherited the symbols of state power, most prominently a capital city, but they did not inherit functioning bureaucratic agencies with the capacity to extract and redirect resources, or the degree of legitimacy required to mobilize the population. Instead, the coercive instrumentalities of the state, most importantly the Afghan Army, fragmented, and in the process littered the landscape with militias with no ethos whatever of respect for human rights. This dismal inheritance blighted the prospects of the new Mujahideen government, and set the scene for bitter struggles to control the remaining symbols of state power. This was exactly what came to pass.

The Mujahideen era

The removal of the communist regime inaugurated a complex period of political struggle which remains much misunderstood. At the outset, it is important to note that, contrary to what is often thought, the fall of the communist regime led to a significant drop in the number of unnatural deaths in the country. The UN Special Mission to Afghanistan in a 1994 report noted that 'most of the country, at least two thirds, was at peace' (United Nations 1994). It was easy, however, to lose sight of this development, for two reasons. First, Kabul rapidly was engulfed by conflict of a kind from which it had been largely protected up to that point. Second, whilst mortality declined, predation by armed groups against civilians persisted in a number of parts of the country. Nonetheless, the scale of this should not be exaggerated, for as Anthony Davis has pointed out, the claim that most of the areas which the Taliban were to seize after their occupation of Kandahar were 'racked by lawlessness and anarchy' was a 'pervasive myth' (Davis in Maley 1998: 55).

The turmoil in Kabul reflected the confluence of three phenomena. The first was the breakdown of the state, as mentioned above. The second was the intensity of divisions between the Mujahideen groups that had moved to Kabul in April 1992 pursuant to an elite settlement crafted in Peshawar with Pakistan as broker (Maley 2002: 197–9). The Mujahideen had never been a unified force, and reflected the extreme social and cultural complexity of Afghanistan as a whole (see Rubin 1988: 184–264; Naby in Magnus 1985: 59–81; Naby in Banuazizi and Weiner 1986: 124–54; Naby 1988: 787–805; Roy 1990; Fuller 1991; Olesen 1995). The various groups had different ethnic bases, had core support networks in different parts of the country, reflected diverse currents of thought (ranging from royalist to

moderate Islamist to radical extremist), and had leaders who on occasion were personal rivals or antagonists of long standing. The third phenomenon was meddling by external forces, of which by far the most disruptive was the backing of Pakistan's Inter Services Intelligence directorate (ISI) for the radical *Hezb-e Islami* ("Party of Islam") led by Gulbuddin Hekmatyar. Together, these factors led to a severe breakdown of order in the capital. From mid-1992, Hekmatyar began a campaign of rocket attacks on the city, a classic "spoiler" tactic which led President Burhanuddin Rabbani to describe him as a 'dangerous terrorist who should be expelled from Afghanistan' (BBC summary of World Broadcasts FE/1461, B/1, 17 August 1992), and from the beginning of 1994, the violence reached shocking new heights, which saw large tracts of the southern parts of the city reduced to rubble and ruin. Amnesty International was later to conclude that the death toll from the battle for Kabul was 25,000 (Amnesty International 1995: 33). While this represented on average 23 deaths a day, less than one-tenth of the level of unnatural deaths in Afghanistan in the decade after 1978, it had a deep impact on outside observers, since the deaths were in the capital rather than in remote rural areas.

Another reason why the impact of these deaths was so great was that both Afghans and the wider world had higher expectations of the Mujahideen. Their struggle against the Soviet occupiers and the USSR's communist surrogates had been genuinely popular in much of the country, and enjoyed strong support from many Western leaders. In power, however, at least some of the Mujahideen fully vindicated Lord Acton's famous warning about the tendency of power to corrupt. The hope that Islam would prove a unifying moral force binding the Mujahideen together was frustrated. Instead, sectarianism surfaced as one of the driving factors underpinning the struggle for Kabul, although the more potent driving forces were political.

Sectarian hostility was particularly apparent in the clashes between forces of the *Hezb-e Wahdat*, an Iranian-backed umbrella party of Shi`a which had been created in 1990 and which brought together many members of the Hazara ethnic group, and militants of the Sunni-dominated *Ittehad-e Islami* of Abdul Rab al-Rasoul Sayyaf. In December 2002, Ahmad Shah Massoud, as Defense Minister of the new "Islamic State of Afghanistan," moved to disarm *Wahdat*'s militias. The *Wahdat* response was to sign a formal alliance with Hekmatyar (Rubin 1988: 273), and, on 24 January 2003, to attack Massoud's forces when they were engaged in dealing with the threat from Hekmatyar (Akram 1996: 418). On 11 February 2003, forces of *Ittehad* and Massoud's *Shura-i Nazar* counterattacked massively. The result was carnage amongst civilians in the Hazara-dominated suburb

of Afshar. A United Nations report estimated that 200–300 were killed, and appeared to attach the blame largely to *Ittehad* forces (United Nations 1993b). Graphic testimony pointed to the savagery of the attacks (Rubin 2004: 82–8; Human Rights Watch 2005: 70–100), and Human Rights Watch concluded that the 'Ittihad troops apparently wanted to leave some evidence of their crimes—to terrorize the local population' (Human Rights Watch 2005: 89). While there is nothing to suggest that Sayyaf ever felt much guilt about the Afshar massacre, others in the Mujahideen's ranks recognized that serious transgressions were involved, and later in 1993, a government commission including civilians nominated by *Wahdat* was appointed to estimate civilian damage during the Afshar campaign. Its conclusions suggested that approximately 70–80 persons were killed in the streets of Afshar, 700–750 persons perished as captives of *Ittehad*, and 5,000 houses were looted (Human Rights Watch 2005: 95–7). While such findings offered small comfort to the dead, the mere fact that such a commission could be established suggested that at least some understanding of human rights was still in the air, although under deep threat from the more noxious gases that were floating around.

This is worth emphasizing, for one of the tragedies of this period was that the viciousness on display in Afshar was not an intrinsic feature of all Mujahideen. Within the ranks of the Mujahideen there were moderate as well as extremist figures, and many were disgusted by what happened during this period, even though they continued to serve with the Kabul Government in the knowledge that a victory for Hekmatyar would lead to a situation far worse. But if there is a lesson from these events, it is that civil strife is a perennial foe of human rights protection. Developing instruments to protect human rights is virtually impossible under a hail of rockets and artillery shells, and a culture of human rights protection is likely to fall victim to the struggle for survival. This dilemma proved agonizing for many Afghans at the time, and haunts quite a number to the present.

The Taliban

In September 1996, Kabul was seized by forces of the radical anti-modernist Taliban movement, which had earlier taken the southern city of Kandahar, the western city of Herat, and the eastern city of Jalalabad. The Taliban had been instrumentalized by Pakistan's ISI as an alternative to Hekmatyar's *Hezb-e Islami*, which had proved unequal to the challenge of holding and securing territory. The Taliban were directed by a *Shura* (council) headed

by Mullah Mohammad Omar, a Ghilzai Pushtun from Uruzgan province who subsequently took the title *Amir al-Muminin* ("Lord of the Believers"). Overwhelmingly from the Pushtun ethnic group, they comprised a mixture of religious students from madrassas in Pakistan which purported to teach in the Deobandi tradition, together with some Pushtun members of the communist *Khalq* ("Masses") faction, and other Pushtuns who joined out of ethnic solidarity (see Maley 1998, 1–28, 2002: 218–50; Marsden 1998; Rashid 2000; Griffin 2003). The Taliban were not an outgrowth of traditional Afghan society; rather, they reflected the extreme disruption to which Afghan society had been exposed over a considerable period of time. They were a quintessentially pathogenic force. It is therefore not especially surprising that once they had taken Kabul, they ran into almost immediate trouble over their approach to human rights issues. While the Taliban undoubtedly hoped to secure international recognition as legitimate rulers of Afghanistan, their attitude to international human rights norms was essentially dismissive. 'We do not', Mullah Omar stated, 'accept something which somebody imposes on us under the name of human rights which is contrary to the holy Qurà   nic law'. 'The holy Quràn', he went on, 'cannot adjust itself to other people's requirements; people should adjust themselves to the requirements of the holy Quràn' (Agence France Presse 1997).

The specific issue which proved so explosive in Taliban relations with the wider world was that of gender rights. The Taliban held to a rigid set of views on the position of women in Afghan society, sustained by the conviction that the arduous restrictions which they wished to impose on women were grounded in respect for a weaker sex. The effects, however, were devastating, especially for women in Kabul who since the late 1950s had been involved in public service and the professions in increasing numbers, and for households in which widows were the principal breadwinners (see Skaine 2002: 61–86). Gender issues became the main field of contention between the Taliban and human rights actors in the wider world. The pressures brought to bear on women ranged from the trivial to the extreme (see Dupree in Maley 1998: 145–66; Physicians for Human Rights 1998b, 2001). The approach of the Taliban to gender issues was also totally hypocritical. On the one hand, they were quite willing to execute women in public on charges of adultery. On the other hand, a detailed report in late 2001 recorded that 'hundreds of women were abducted, forcibly married, raped or sold into sexual slavery by Taliban fighters' (Burns 1996; Campell 2001: also see Hosseini 2007). Hitting the press only months before a US presidential election, these activities

virtually guaranteed that the US would be forced to distance itself from the Taliban, and effectively destroyed the Taliban's hopes of being accepted internationally.

The claim was sometimes made that the Taliban had brought "peace" to Afghanistan, but in reality they were an extremely violent movement: they brought "peace" to Kabul in the same sense in which Hitler brought "peace" to Warsaw when his forces overran it in September 1939. In seeking to extend their power, they did not hesitate to use the most barbaric forms of force. This was most dramatically on display in Mazar-e Sharif from 8–11 August 1998, when the Taliban embarked on a massacre which Ahmed Rashid described as 'genocidal in its ferocity' (Rashid 2000: 73). Rupert Colville, an official of the Office of the United Nations High Commissioner for Refugees (UNHCR), subsequently wrote an article to protest at how little attention the massacre received at the time in which he recounted what happened to the predominantly Hazara victims:

> Some were shot on the streets. Many were executed in their own homes, after areas of the town known to be inhabited by their ethnic group had been systematically sealed off and searched. Some were boiled or asphyxiated to death after being left crammed inside sealed metal containers under a hot August sun. In at least one hospital, as many as 30 patients were shot as they lay helplessly in their beds. The bodies of many of the victims were left on the streets or in their houses as a stark warning to the city's remaining inhabitants. Horrified witnesses saw dogs tearing at the corpses, but were instructed over loudspeakers and by radio announcements not to remove or bury them.
>
> (*International Herald Tribune* 1999)

The massacre was supervised by a Taliban leader, Mullah Abdul Manan Niazi, who used loudspeakers to inspire his followers to further heights of ferocity by denouncing them as heretics, and personally supervised the selection of victims for incarceration in containers (Human Rights Watch 1998). This was by no means the only massacre of its kind, but it was probably the largest single massacre in all the years following the April 1978 coup.

The Taliban's scornful approach to international norms made them a peculiarly difficult group with which to engage in any meaningful fashion. One observer compared the exercise to 'grasping smoke' (Keating 1997: 11–12), and further experience vindicated this conclusion, although individual Taliban representatives could be quite civil (see Maley 2000; Sharp 2003: 481–98; Kleiner 2006: 209–34; Donini in Minear and

Smith 2007: 153–73). Nonetheless, for some who sought to engage with the Taliban, it proved a searing experience, and none more so than the UN negotiators who on 13 May 1998 signed a Memorandum of Understanding with the Taliban which stated that 'women's access to health and education will need to be gradual' (quoted in Physicians for Human Rights 1998b: 39). This reflected a desire on the part of the UN team to strike a pragmatic compromise that would allow the delivery of some humanitarian assistance, but to embody it in a formal text was an act of considerable naiveté, which resulted in a scathing denunciation from Physicians for Human Rights, whose Executive Director stated that the UN 'endorsement of Taliban restrictions on women's basic rights to education and health care is a betrayal of international human rights standards and of the female population of Afghanistan' (Physicians for Human Rights 1998a) The lesson here was stark: while the Taliban could ignore international human rights norms, its interlocutors could not.

Developments since 2001

The overthrow of the Taliban in "Operation Enduring Freedom" did not simply mark the end of a particularly unappetizing regime; it also set the scene for the reimportation of international human rights norms into Afghanistan. Technically, Burhanuddin Rabbani remained President of the "Islamic State of Afghanistan"; his regime had retained control of Afghanistan's United Nations seat throughout the Taliban's occupation of Kabul, and the Taliban themselves had been recognized diplomatically only by their patron Pakistan, along with Saudi Arabia and the United Arab Emirates. Yet almost no-one believed that it would be possible to return to the status quo. While Kabul had been re-occupied in November 2001 by forces of the "National Islamic United Front for the Salvation of Afghanistan" (*Jabha-i Muttahed-e Milli bara-i Nejat-e Afghanistan*), set up to promote the ouster of the Taliban, it was without the charismatic leadership of Ahmad Shah Massoud, who had been assassinated by al-Qaeda agents on 9 September 2001. The question therefore was one of the process by which new political arrangements would be designed, implemented, and legitimated. This, fortunately, was an area where the United Nations was poised to provide assistance.

At a conference held in Bonn from 27 November–5 December, a range of non-Taliban Afghan political actors met under UN auspices to negotiate the terms of a settlement which could facilitate progress towards these state-building objectives. The result was an agreement which provided for the establishment of an Interim Administration to be chaired by a consensus

candidate, the moderate Pushtun Hamed Karzai; its elevation to the status of Transitional Administration following the holding of an Emergency Loya Jirga ("Great Assembly"); the drafting of a new Constitution to be finalized and endorsed by a Constitutional Loya Jirga; and the holding of free and fair elections for such key offices as the Constitution established. The significance of human rights was signaled prominently in the text: it provided for the establishment of an 'independent Human Rights Commission, whose responsibilities will include human rights monitoring, investigation of violations of human rights, and development of domestic human rights institutions'. This was the genesis of the state agency now known as the "Afghan Independent Human Rights Commission" (AIHRC).

The new Constitution of Afghanistan, like its predecessors from 1923 and 1964 contained a range of human rights protections. In addition to those noted at the beginning of this chapter, it set out in Articles 22–59 an extensive statement of citizens' rights and duties (see Yassari 2005: 269–329). At the outset, it stated that 'The citizens of Afghanistan — whether man or woman—have equal rights and duties before the law' (Article 22). It went on to require that 'No person shall be pursued, arrested or detained but in accordance with the law' (Article 27). According to Article 29, 'Torture of human beings is prohibited'. A further provision stated without qualification that 'The citizens of Afghanistan have the right to assemble without arms for legitimate peaceful purposes' (Article 36). According to Article 43, 'Education is the right of all citizens of Afghanistan'. While Article 48 provided that 'Work is the right of every Afghan', the following Article stated that 'Forced labor is forbidden', and that 'Children shall not be forced to labor'. Finally, the protection of human rights was given a constitutional foundation through the provision in Article 58 that:

> The State shall establish an Independent Human Rights Commission of Afghanistan to monitor the observation of human rights in Afghanistan, and promote their expansion and protection. Any person whose fundamental rights have been violated may file a complaint to the Commission. The Commission shall refer cases of violation of human rights to the legal authorities and assist in defending the rights of the complainant.

These might at first glance appear to be the products of a drafting process dominated by Westernized advisors, but survey evidence from 2006 suggests that at least some human rights are strongly supported in the mass population, which has had extensive and painful experience of rights violations. For example, 66 per cent of respondents strongly agreed

that 'everyone should have equal rights under the law, regardless of their gender, ethnicity or religion' and a further 24 per cent agreed somewhat (The Asia Foundation 2006: 39). Furthermore, 71 per cent agreed that 'women should be allowed to work outside the home' (The Asia Foundation 2006: 64). Further survey evidence would certainly be of value in mapping more precisely the attitudes of the broader population to human rights, but these data suggest that assumptions of innate conservatism might need to be reconsidered.

That said, there is one qualification to this robust statement of rights that needs to be taken into account. Article 3 of the 2004 Constitution provides that no law in Afghanistan shall contravene the 'beliefs and provisions' (*motaqidat wa ahkam*) of the sacred religion of Islam. This last provision represents a notable departure from the wording of Article 64 of the 1964 constitution, which referred to the more limited notion of 'basic principles' (*asasat*) (see Kamali in Yassari 2005: 23–43). This supplies a salutary reminder of an important general point: that the power to interpret the meaning of key rights is a crucial one. Yet interpretation of texts is inevitably a contestable undertaking. 'Any text,' writes Khaled Abou El Fadl:

> including those that are Islamic, provides possibilities for meaning, not inevitabilities. And those possibilities are exploited, developed and ultimately determined by the reader's efforts—good faith efforts, we hope—at making sense of the text's complexities. Consequently, the meaning of the text is often only as moral as its reader. If the reader is intolerant, hateful, or oppressive, so will be the interpretation of the text.
>
> (El Fadl 2002: 22–3)

For all the robust language of the Constitution, the human rights situation since 2001 has been a matter of ongoing concern for commentators on human rights issues, as well as for those charged with promoting respect for human rights within Afghanistan itself. A key issue has been that of the place of transitional justice in a new political order, and here there is a genuine tension between different objectives, each of them desirable. As one scholar has put it, 'Peace is forward looking, problem solving and integrative, requiring reconciliation between past enemies within an all-inclusive community. Justice is backward looking, finger pointing and retributive, requiring trial and punishment of perpetrators of past crimes' (Thakur in Thakur and Malcontent 2004: 287). The same author has argued elsewhere that 'Only the previously traumatized and war-torn societies

can make the delicate decisions and painful choices between justice for past misdeeds, political order and stability today, and reconciliation for a common future tomorrow' (Thakur 2006: 130). Unfortunately, this principle is difficult to operationalize when the political leadership that makes such decisions contains individuals who are suspected of past misdeeds, and therefore face a profound conflict of interest. In Afghanistan, the balance that has been struck has allowed individuals with grim records to remain in public life, lest they become spoilers. Thus Sayyaf, far from facing a tribunal to account for his conduct during the Afshar massacre, finds himself both an elected member of the lower house (*Wolesi Jirga*) in the National Assembly, and chair of its Foreign Affairs Committee.

Conclusion

A former UN staffer has claimed that 'sacrificing justice and respect for human rights in a vain attempt to achieve short-term stability is an unwise proposition, particularly in the Afghanistan context' (Niland in Donini, Niland and Wermester 2004: 61–82), and many observers would agree with such a conclusion. Stability for the long-term cannot be built on a foundation of impunity for the strong and misery for the weak. Yet the issue is rather more complicated than at first glance it might appear. First, it is not clear that the Afghan transition would have survived a vigorous attempt to detain and prosecute all suspects from Afghanistan's turbulent past. It is much cheaper and easier to be a wrecker rather than a builder, which is why spoiler problems in transition processes can prove so troubling. Second, the choice between stability and justice is not simply a choice between principle and pragmatism, but a choice between two meta-ethical perspectives: a *deontological* perspective, based on absolute concepts of right and wrong, and a *consequentialist* perspective, based the evaluation of actions in terms of the consequences which flow from them. The aphorism of Emperor Ferdinand I to "Let justice be done though the world perish" (*Fiat justitia et pereat mundus*) is a narrow one from a philosophical point of view. As so often is the case, progress in the sphere of rights will end up being negotiated rather than suddenly realized (see Azarbaijani Moghaddam 2007: 127–42).

In practice, the difficulty of pursuing transitional justice is entangled with the muddled experience of state-building more generally (Maley 2006; Suhrke 2006). One of the reasons that punitive justice cannot be defensibly applied is that the justice sector in general is so underdeveloped: political influence and corruption still play significant roles in shaping the outcomes of cases (Watson 2006). When an attempt to prosecute past crimes

was made - through the prosecution of the communist-era secret police chief Asadullah Sarwari - the result was an embarrassing shambles (Human Rights Watch 2006). There is a need for more creative approaches to this whole area. It would be useful to move away simply from the notion of prosecution, although this is often what a casual observer might take transitional justice to mean. The legal scholar Helen Durham has argued that justice processes have punitive, deterrent, integrative, and restorative dimensions, and that 'prosecution is not the only model for dealing with the past by states in transition' (Durham in Maley, Sampford and Thakur 2003: 145–60). Modern criminology likewise has highlighted the importance of re-integrative and restorative processes (Braithwaite and Pettit 1989; Braithwaite 1993), and these have now begun to be discussed in the Afghan context as well (Wardak 2004: 319–41). It is a discussion from which Afghanistan and Afghans stand to benefit.

Where, then, do human rights in Afghanistan stand? The answer is not clear, for the human rights situation is part of a wider tapestry of political and institutional change with an as-yet-uncertain future. Of Afghans surveyed in 2006, less than a quarter felt that things were going in the wrong direction (The Asia Foundation 2006). Yet insecurity, by which southern Afghanistan in particular is plagued, inhibits the promotion of human rights in numerous and palpable ways. And more broadly, the burden of decades of disruption remains awesome. This was captured in the sobering words of the Afghanistan Independent Human Rights Commission in its most recent annual report. Major obstacles, it concluded:

> consisted in the absence of the Rule of Law, the presence of a culture of impunity and the abuse of power by government officials along with a weak judicial system, slow process of legal cases, and the lack of reforms within the Government to improve the judicial and social system.
>
> (Afghanistan Independent Human Rights
> Commission 2007: 53)

These are the very problems which have afflicted the realization of human rights objectives in Afghanistan for the best part of a century. Thus, while Afghanistan and many Afghans have been struggling since 2001 to build a constitutionalist political order, there is still a long way to go.

7   Competing domains of control: Islam and human rights in Malaysia

Shamsul Amri Bin Baharuddin

Introduction

Many contemporary postcolonial societies are involved in, what we may call, the "modernization struggle," one which involves an attempt to strike a balance between economic development and political stability. The struggle is often complicated by the fact that these societies are burdened by a complex of internal social divisions, inherited from their pre-colonial, colonial pasts and those that have emerged during the post-colonial era. As nation-states, each of these postcolonial societies has to juggle constantly between domestic imperatives and global demands, a task often perceived by some of these societies' ruling elite as a political nightmare of gigantic magnitude.[1]

At the domestic level, the ruling elite, often internally fractioned and also challenged by a larger and equally fragmented intelligentsia, have not only to contend with the reality of cultural and religious pluralism but also to try and introduce "homogenizing" policies for the political ambition of creating a "united" society and nation. The latter is usually informed by an assumption, if an ideal and naïve one, that 'unity is uniformity' and articulated in the oft-mentioned phrase 'a united society begets a modern nation' (Shamsul A.B. in Tonnesson and Antlov 1996).[2] Sometimes, overzealousness on the part of the ruling elites, especially, in their drive towards modernization, have led them being charged by the international community, amongst others, for neglecting basic human rights and destroying nature, thus exposing their domestic activities to external scrutiny.[3]

In dealing with both the domestic pressures and international demands, and most important of all to ensure a smooth path towards modernization, these elites often propagate a "nationalist ideology" that they thought capable of bringing about cohesion and loyalty amongst the populace, an ideology which aims at increasing the rate of growth of the industrial

system of production through a program of "homogenization" of the education, skills and consciousness of the people. In other words, the ruling elite demand the people's loyalty and attachment to be directed towards the state and the legislative system rather than to other social collectives. In these circumstances, it is not uncommon for them to resort to the most familiar means of social control, namely, the "creative" use of the law (not dissimilar to the Patriot Act 2001 of the USA), in the name of "national interest" or "national integration." In some cases, they even mobilize the "security forces" to assist them in their "nationalist" endeavor. These often draw charges from some quarters of the international community as well the local one that they are being 'fascist' or 'authoritarian' (see O'Donnell and Schmitter 1989; Pred and Watts 1992; Fukuyama 2004, 2006).

The US- or Europe-based world media, often being the self-appointed, political and moral judge of postcolonial societies' ruling elites, reinforces this 'authoritarian' charge by constructing – indeed, some are highly distorted – and peddling news and images about it, in packages of 60 seconds, in the form of 'world news' (see Kellner 1992; Fialka 1992; Said 1997).[4] Reactions of these elites against such a charge are often simplistic and equally emotive. The most recent target of both the Western governments and mass media has been the Muslim majority countries, in particular, after the tragic events of 11 September 2001 that took place in the USA. Charges that these countries are harboring terrorists, encouraging terrorism or involved in grave abuse of human rights have been plenty that, in turn, brought about equally negative responses from the countries being so charged, some from the Middle East and others from the African and Asian regions.

As a consequence, within the said countries, an animated debate and discourse has emerged about the relationship between Islam and Human Rights that reveals, as a response, three major clusters of differing opinions, namely, the 'rejectionists', the 'modernizers' and the 'reformists' (Henkin 2000; Strawson 1997; Mayer 1999; International Crisis Group 2005).

The rejectionists argue that Allah's law is above all made-made laws. Therefore, the man-made Human Rights Law is only relevant if and when it is in conformity with the shari`a, otherwise it should be rejected outright. The modernizers accept the fact of the supremacy of Allah's law, mainly, in theoretical terms. But, however, for political expediency and economic functionality, they chose the secular Western model of governance as the most suitable for their "modernization project" aim at uplifting the quality of life within their societies. In this context, the

rejectionist's viewpoint becomes a minority opinion acceptable, in theory, to the modernizers. The reformists, on the other hand, are solidarity-makers and quite pragmatic in their approach. They prefer to highlight the importance of the shared concern for human dignity, justice and fairness expressed clearly both in Islamic and Western values. It is the compatibility between Islamic principles and Western rules, especially those that they felt strongly would serve for the greater benefit of human kind, is of utmost importance to the reformists who put matters of the "here and now" as equally important as those of the "hereafter."

The schematic outline on the variety of Muslim responses to the issue of Islam and Human Rights is only helpful in so far as it provides us a useful analytical entry into our effort to pursue further discourse, debate and elaboration on the specific empirical cases. Even so, it has its limitation too because not only the scheme is derived from an extrapolation of a plurality of experiences across the Muslim majority countries around the world, it also includes debate and discussion in the Muslim minority countries, especially, in the West (Australia included) (Ramadan 2005; Haddad 2002). There is a qualitative difference in the historical-structural as well as in the contemporary context between the experience of those Muslim majority and that of the Muslim minority countries. It is the experience of the former that this brief paper intends to elaborate, namely, the experience in the Malay-speaking world of a Muslim majority region of South—East Asia. Indeed, it is the largest single linguistic community of Muslims in the world, even surpassing the Arabic-speaking Muslims in the Middle East and some parts of Africa.

It is imperative, however, to locate our understanding on the debate and discourse on Islam and Human Rights in the South-East Asian region in its own *longue-duree* historical context because within this region there exist competing domains of control based upon different legal systems, each of which defines its own notion of human dignity, justice and fairness within its own constituency. Based on the Malaysian experience, the paper begins with an account of how the different legal systems came to be embedded in the region and had managed to co-exist until today thus creating the fragmented "domains of control" within social life in Malaysia, both in the public and private sphere. It is followed by a commentary on how these different sets of law, as a broad framework, have contributed to and became the parameters within which the protracted contest regarding the "domains of control" have taken place in postcolonial Malaysia, in particular, its impact on issues such as democracy and civil society, Islam and Human rights and the like, each of which has often been articulated and idiomized in terms of the cultural politics of ethnic identity.

Embedding of the "domains of control":
one State, three legal systems

Historians have divided the formation of the Malaysia state into three convenient chronological periods, namely, the pre-colonial (before 1791), colonial (1791–1957) and postcolonial (after 1957) periods (Andaya and Andaya 1982). Each period is characterized by a "pluralistic" legal system, in which a number of sets of rules and sanctions, relating to politics, economic, moral standards and social intercourse, co-existed and were practiced as frameworks of social organization and control. In other words, Malaysia's legal system has been determined by events and circumstances spanning a period of some 600 years (Aun 1990; Suffian 1978; Hickling 1987). Of these, three major historical events-cum-periods were largely responsible for shaping the current system. The first was the founding of the Malacca Sultanate at the beginning of the fifteenth century; second was the spread of Islam to South-East Asia and its subsequent entrenchment in the indigenous culture; and finally, and probably the most significant in modern Malaysia, was British colonial rule.

For more than a millennium, before the Malacca Sultanate was established (circa 1400), *adat*, or an indigenous justice system which is based upon a complex set of customary practices guided mostly by oral traditions, was the major framework within which the Malay feudal societies and numerous isolated indigenous social groups existed. However, since the literal meaning of the Malay word *adat* is "the accepted way," its scope of social meaning covers beyond the legal sphere and often used to mean "the indigenous way of life" thus Malay culture. After the arrival of Hinduism (circa 1st AD) and Buddhism (circa 7th AD), Hindu and Buddhist tenets were fused with *adat* and absorbed into the local cultures. So strong was the impact of both of these religions, especially amongst the ruling elites, that some of the Malay kingdoms, in fact, became "Malay—Hindu" or "Malay—Buddhist" kingdoms. This inevitably led to formation of a syncretic belief system, hence justice system too, amongst the indigenous populace.

Probably the most profound and lasting of the non-indigenous influence was the introduction of Islam in the Malay world from around the fourteenth century. It left a significant impact on indigenous *adat*. The establishment of the Malacca Sultanate and later its demise is critical in our understanding of the historical origins of the plurality of legal systems in present-day Malaysia. However, the adoption of the new religion did not result in the complete elimination of the pre-Islamic *adat*. On the contrary, the more prevalent Hindu customs and animistic traditions continued unabated. Islam was merely grafted onto the existing culture. Today, the

Hindu elements are still observed in the practice of indigenous cultures, such as in the celebration of marriages amongst the rural Malay folks as well as in the pompous traditional-style coronation of rulers in a highly Westernized urban context.

As Islam took a firm hold in Malacca and eventually became the state religion, Muslim laws were increasingly applied alongside *adat*. In other words, through a process of syncretization, the Hindu—Buddhist—Islamic elements were adapted, paralleled or rationalized to suit the pre-existing indigenous *adat*. However, since the feudal ruler became a Muslim and so was his court, the organization of his kingdom was dominated by Islam. The maintenance of law and order in Malacca was crucial to its prosperity as a trading port. The formal legal text of the Malacca Sultanate consisted of *Undang-Undang Melaka* (Laws of Malacca), or sometimes also known as *Undang-Undang Laut Melaka* (Maritime Laws of Malacca). The laws as written in the legal digests went through an evolutionary process and were improved and expanded by the different Malacca sultans. The legal rules that eventually evolved were shaped by three main influences, namely, the indigenous *adat*, Hindu—Buddhist tradition and Islam. The extent to which these laws were actually applied is unclear. However, some accounts of the administration of criminal justice can also be found in Portuguese and British accounts.

When Malacca was conquered and ruled by the Portuguese (1511–1641), then by the Dutch (1641–1824) and, finally, by the British (1824–1957), another non-indigenous system, namely, the Western legal system was introduced and applied in Malaysia, on top of the three traditions mentioned above. However, historians and legal scholars have argued that during the Portuguese and Dutch eras the Western laws applied by them made relatively little impact on the pre-existing pluralistic legal system as a whole other than upon the narrow realm of administrative structures. The local people continued to practice Islamic law and Malay *adat* because both the Portuguese and the Dutch did not interfere with local *adat* and belief system. This perhaps was true in view of the fact that the Malays remained Muslims and not converted to Christianity, either by the Portuguese or the Dutch during their rule of Malacca and other parts of Malaysia, for more than three centuries (1511–1824).

However, the British colonial rule (1824–1957) transformed the pattern of domains of social control in Malaysia forever, because, unlike the Portuguese and the Dutch, British control was not localized to Malacca. British colonialism affected the whole of the Malay peninsula and the North Borneo – a physical area nearly 50 times bigger than the then Portuguese and Dutch colonial territories in Malaysia – which includes

at least 10 Malay sultanates, rich mining areas (tin, gold, bauxite, etc…), millions of hectares of primary tropical forest, cash crop plantations and traditional rice fields, hundreds of towns, ports and market centers (big and small), and, most importantly, the large pool of multi-ethnic and multi-religious human resource. This inevitably demanded a systematic and more effective social organization and control system which could hold the political, economic and social diversity together.

The British, like in Africa, applied the "indirect rule" system of governance in Malaya whereby, for instance, the indigenous legal system was maintained but subsumed under the more dominant English common law. Therefore, matters pertaining to religion and *adat* was put under the jurisdiction of the Malay sultans, who headed each *kerajaan negeri*, or provincial government, and their chiefs. Even in *negeri* without sultans, the British instituted Native Courts run mostly by local chiefs under the guidance of British officers (Hooker 1972, 1978, 1988). The legal rules that eventually evolved in British colonial Malaya were shaped by four main influences, namely, the indigenous *adat*, Hindu—Buddhist tradition, Islam and English common law.

In practice, however, the legal system during the British rule was divided into three. Firstly, there was the "English common law" system which was accepted as the general legal system and was responsible to deal with all matters in the sphere of criminal justice affecting all citizens. In the sphere of personal laws it is only applied to immigrant non-Muslims (for instance, European, Chinese, Indian, etc…). The Muslims, largely Malays, were subjected to the Islamic laws, or shari`a, particularly, in matters relating to marriage, divorce and inheritance. Therefore, the shari`a laws formed the second legal system in British Malaya. The third legal system operating then was the *Adat* system, or the Customary or Native legal system, applied mainly in the areas of personal laws and, in a very limited context, in the sphere of criminal justice, too, of some groups of native peoples in the Peninsula Malaysia, Sabah and Sarawak (Richards 1964; Sandin 1980; Hooker 1980). The *Adat* legal system was a heterogeneous one because there were many distinct and large "native" or "tribal" groups, mostly non-Muslims, especially, in Sabah and Sarawak, each having their own tribal-specific *adat* codes, mostly in the form of oral traditions, applied in a localized context.

The only Muslim indigenous community that has its own *Adat* laws, based on *perbilangan* (memorized oral codes), and claimed that the communal *adat* land as its core, was the community of the so-called Minangkabau Malay's (a contested anthropological term) whose matrilineal society practiced *Adat Perpatih*. The British recognized and accepted

this claim. Members of this community were located in parts of Malacca and Negeri Sembilan (see Ibrahim 1995; Swift 1965; Peletz 1988, 1996). This is the only community in British Malaya (even to this day) which was affected by the three legal systems that existed then, namely, the English common laws, the Islamic/shari`a law and the *Adat* law. As a member of *Adat* Perpatih community, the author still remembers how this situation was best summarized anecdotally by my elders:

> if you commit a crime you go to the *orang putih'*s [lit. white man's] court, if you want to marry you go the Kadi [local Islamic official], and if you want your mother's *tanah pesaka* [lit. adat – communal land] after her demise, sorry, you can't it's your sister's, so says our *adat perpatih*.

During the postcolonial period, this three-tier legal systems continues to rule the social lives of Malaysians, especially, that of the indigenous Malay—Muslim as well as non-Muslim population. In summary, it could be said that, sociologically, for them no single cultural strain is pervasive; each has contributed its individual piquancy to create a singular if syncretic fusion. Therefore, this process is critical to the understanding of the indigenous cultures, for present-day indigenous values are compounded of a sometimes contradictory admixture of pre-Islamic custom, the purer precepts of Islam, and Western influences. The shaping of the indigenous people's values and to a great extent the rest of the Malaysian populace too, has been profoundly affected by these conflicting impulses.

Viewed in this context, particularly against the theme "Islam and Human Rights," Malaysia provides an interesting singular example as to how laws under radically different cultures and religions have co-existed for at least a millennium, found expression and shaped a particular society. In the Malaysian case, it is a society, which is a new entrant in the groups of world NICs that has been the subject of focus for international mass media, not only because of its impressive economic growth record but also owing to the vocal, assertive, self-imposed world statesman style which its former Prime Minister, Dr. Mahathir Mohamed, has adopted. For some countries of the South, Malaysia is an example they wish to emulate. For these reasons, Malaysian domestic affairs have been closely scrutinized by both local and international interests, be they investors, NGOs, regional and international organizations. The main criticism leveled at Malaysia relates, mainly, to its "human rights" and "ecological" records, for the former it has been labeled as having an 'authoritarian government' and for the latter as a 'destroyer of nature' (Swee-Hock and

Kesavapany 2006; Doolittle 2005). While it is not my intention here to defend or attack Malaysia, it is useful to examine these criticisms in the context of the present workshop theme to allow us to analyze the situation from an alternative analytical perspective, one which perhaps could privilege cultural variations, on the issue of Islam and Human Rights, perhaps for a wider application, beyond Malaysia.

The contemporary discourse on islam and human rights in Malaysia: contradictions and contestations

In the context of this chapter, it is argued that contemporary discourse on Islam and Human Rights in Malaysia has been, for all intent and purpose, about the interaction between two of the three "domains of control" discussed, namely, between, on the one hand, rules from the "shari`a domain," as applied by the different 13 shari`a provincial-level courts in Malaysia, and, on the other, those instituted within the "modern legal domain," particularly, the Malaysian Constitution and the Common Law courts. There has been hardly any discussion on the interaction between the *"Adat* domain" and the "shari`a domain," or between the "*Adat* domain" and the "modern legal domain."

The main focus of the mainstream discourse within the "shari`a domain" vs. "modern legal domain" was on the constitutional and legal implications of Islam in Malaysia with respect to fundamental liberties and particular reference to freedom of religion, conversion of non-Muslim minors to Islam, *hudd* law, "Islamic dress," offences against precepts of Islam, "*fatwa* making," on women, and Heads of State and Islam. These areas are highlighted because they involved cases in civil courts contesting fundamental liberties, and also debates in public domain, such as the recent one on a fatwa issued related to *kongsiraya*.

The problems revolved around the following themes: subjecting non-Muslims to Islamic law and principles; the problems of a dual legal system (shari`a vs. modern legal system) with attempts to demarcate jurisdiction but at the cost of fundamental liberties; the relevance of the "Islamic state" vs. "secular state" issue in rights adjudication. The courts appear to be in great confusion when dealing with the said cases which, in turn, suggest a conflict of application of Islamic laws and civil laws. However, it must be noted that these issues are not new. Many similar ones had appeared during the colonial period, especially, around the 1920s and 1930s, discussed and analyzed in great detail by such legal minds as the late Prof. Ahmad Ibrahim, who was an internationally recognized Islamic legal scholar and, subsequently, appointed as the founding Dean, Faculty of Law, University of Malaya, Kuala Lumpur.

In the last decade or so, court decisions relating to the above-mentioned issues have aroused a public perception the problem is one of Islam versus the non-Muslims. In a plural society such as Malaysia, these decisions tend to be perceived in ethnic terms as well, in particular, as a contest between Malays, who are constitutionally Muslims, and other ethnic groups. The fact that all Malays are Muslims, as stated by Article 160 of the Malaysian Federal Constitution, and not all Muslims are Malays (some Chinese and Indians) has also become a point of contestation, but mainly related to the special privileges enjoyed by the Malays and other indigenous groups. The non-Malays are unhappy over the special rights provision because they see it as contradictory to another provision in the same constitution on fundamental liberties, namely, of Article 8 on Equality.

What is pertinent in the whole discourse on Islam and Human Rights in Malaysia is that each of the "domains of control" has its own notion of human dignity, justice and fairness. It is obvious thus far that the focus and emphasis in the discourse in Malaysia has been between what is perceived as a sociologically homogenized Islam versus equally homogenized modern legal system. In that process very little attention has been given on the interaction between the *Adat* domain and the other two major/mainstream domains. It is so because the whole discussion is embedded in the cultural politics of ethnic identity that overwhelms both structural and phenomenological existence of social life in the country. By implication, there is little concern or effort to highlight about intra-ethnic differences, especially, in the realm human rights issues, in spite of the fact that the indigenous groups are made up of Muslim and non-Muslims. Once a while we hear the problem of overzealous Muslim proselytizers who tried to convert a particular Orang Asli community, who have already been converted to Christianity or Baha`ism, who, in turn, resisted with the support of proselytizers and sympathizers from the latter religious organizations.

Conclusion

As a conclusion, it could be argued that in Malaysia the debate and discourse which has emerged on the relationship between Islam and Human Rights reveals a strong reformist tendency as result of the cultural variations that exist in the community. The reformist route seems to be the most appropriate one to be taken in Malaysia because the multi-religious and multiethnic groups of leaders are essentially solidarity-makers and quite pragmatic in their approach. They prefer to highlight the importance of the shared concern for human dignity, justice and fairness expressed clearly both in

Islamic and non-Islamic (read) Western values. It is the compatibility between Islamic principles and Western rules, especially those that they felt strongly would serve for the greater benefit of human kind, is of utmost importance to the reformists in Malaysia. However, this doesn't mean that rejectionists and modernizers do not exist in Malaysia. They do, but remain at the margin of Malaysian cultural politics, within the Malay-Muslim group.

Notes

1 There are numerous accounts, academic and popular, on the struggle that postcolonial societies have to cope with long after their independence and the 'fire of nationalism' have abated. One of the best accounts thus far on this subject, pertaining to the experience of India in the 1990s, has been by Arvind N. Das (1994).

2 The Malaysian case is interesting here because in 1991 the then prime minister, Dr. Mahathir Mohamed, introduced what is now popularly known as 'Vision 2020' which basically is a statement on what he thinks Malaysia should be (or, Malaysia's nation-of-intent) in the twenty-first century, a modern, developed industrial society. In order to realize this 'vision' he considers the creation of a united 'Malaysian nation', or *Bangsa Malaysia*, to be critical both as the primary challenge as well as a sociological pre-requisite.

3 In Southeast Asia, the experience of the Philippines during the Marcos regime (and to a lesser extent the Indonesian one under President Suharto) has often been offered as examples. Similar cases are also found in Africa and Latin America. Perhaps (the USA-sponsored) Russia is also an interesting example for us to follow closely.

4 Of course, the classic example of how the Western mass-media, in collaboration with some advanced nations, could construct and peddle news purely for propagandistic sake comes from the Gulf War scenario.

8 Muslims in Malaysia: notions of human rights reform and their contexts

Patricia Martinez

Introduction

This chapter examines Islam, Reformist discourse and human rights in a particular Muslim nation – Malaysia – offering that the close analyses provided of a particular context could be usefully applied to other contexts in examining resonance and difference. This analysis examines the issue of freedom of religion in Malaysia – guaranteed by the Malaysian Constitution and articulated in the discourse of universal human rights, specifically focusing on debates around apostasy or the right of a Muslim to change his or her religion, the proposal and draft legislation towards an Interfaith Commission for Malaysia, and an initiative that describes itself as Article 11, a reference to the section of the Malaysian Constitution that stipulates freedom of religion. Focusing on the arguments, reasoning and language used, this chapter uncovers how those arguing for freedom of religion invoke the concepts and language of international human rights and its norms, while examining how opponents use the concepts, arguments and language of theology, a narrow vision or version of nationalism and national security, as well as racial elitism and domination as Islam and Malay ethnicity are conflated in the Malaysian Constitution. The discourse in essence could be described as a dialogue of the deaf: speaking beyond each other, or refusing to take the Other's position as a starting point. Through this examination, it will be revealed that an aspect of human rights in Malaysia – freedom of religion for Muslims and non-Muslims – is a more messy account, with even movements that fall well within the ambit of being "reformist" privileging other factors over fundamental rights and freedoms.

When approaching the issue of reform, human rights and Islam, it is crucial to avoid making symmetries of Islam and Muslims, rendering their enormous into monolithic arguments that essentialize or generalize.

In this regard, this paper proposes that in Malaysia some (and only some) elites[1] and reform movements[2] do speak about and enable a discourse on human rights. Reformists would also include the government and some among its political leadership as one could argue that Human Rights have never been more publicly mainstreamed than they are now despite continuing limitations including those of the Malaysian Human Rights Commission (SUHAKAM). Other elites on both sides of the political divide speak stridently in language, concepts and strategy that negate notions of rights, equality and fundamental freedoms and worse, actively engage in negating, demonizing and closing down the space to speak up about issues of human rights such as freedom of religion. Ordinary[3] Muslims know little or care little about human rights, and the discourse remains within the ambit of the elite. This will be demonstrated through the findings of a survey of Muslim Malaysians that indicate a growing conservativeness that has a negative impact on, for example, freedom of religion for Muslims. Finally, there are clear instances when civil society (both groups and individuals) itself has narrow concepts and strategies for enabling or claiming human rights. Sometimes the reformist discourse, also couched in the language of human rights, defeats a wider concept and paradigm of human rights by addressing just a narrow and immediate concern.

This paper addresses a particular focus – freedom of religion – and therefore is not doing sufficient justice to the vibrant, but also polemical and contentious discourse on Islam and human rights in Malaysia. The Annual Report for 2004 of the main human rights NGO in Malaysia, SUARAM (Suara Rakyat Malaysia) has a fairly extensive section on Islam and human rights which is entitled "Freedom of Religion," and it gives a better sense of the various issues beyond the few that can be dealt with in the limitations of a paper. The SUARAM annual report for 2004 features issues about Malaysia as an Islamic state and ensuing ramifications, freedom of religion and contentions over apostasy, legislating Islamic norms, values and morals, shari`a Family Law and polygamy (or more precisely, polygyny), the position and problems of non-Muslims, Islamization policies and ensuing legislation and action, and the status of *hudd* laws which have been enacted in the two north—east states of Kelantan and Terengganu.

Malaysia, Islam and human rights

In the government's 2,000 population census, Malaysia's population was 21,900,000 with 59 per cent of these as Muslim. There is a significant population of people of other faiths, mainly Buddhists (20 per cent),

Christians (9 per cent) and Hindus (6.5 per cent). Religion demarcates race, especially Islam and Malay ethnicity which are conflated because the Constitution of Malaysia defines a Malay as a Muslim, and endows special privileges to ethnic Malays. Islamic legislation can only be enacted at state, not federal level, because Islam is under the purview of the Sultans of Malaysia in what can be understood as the marginalization of both Islam and the hereditary rulers during British colonialism. This has evolved a bifurcation of power over laws in Malaysia in an increasingly adversarial dichotomy between the shari`a (as personal law for Muslims and originally mainly for marriage, divorce and inheritance) and the parallel legal system of English-style common law framed by a Constitution premised on the fundamental rights and freedoms envisaged in modern nation-states.

Islam in Malaysia is highly politicized as it has always been a key element invoked for political legitimacy even in the fight for independence from the British, but never more so than as in the past 25 years. Former Prime Minister Mahathir Mohamed harnessed the Islamic revivalism that swept the world. From the inception of his premiership in 1982, he invoked Islam to enable his modernizing agenda for the nation, making fidelity to Islam compatible with economic progress and technological development. However, this strategy also entailed mainstreaming Islam. Public discourse including the media were flooded with how policies, issues, and the evolution of the nation was sufficiently Islamic (thus heightening Islamic self-consciousness). Mainstreaming Islam also resulted in the rise of an Islamic bureaucracy so that Mahathir's political party could be seen to be more Islamic. This religious bureaucracy oversees the formulation and implementation of the shari`a as well as the various elements of an Islam deployed for legitimacy (see Martinez in Leong and Chin 2001; Martinez in Welsh 2004). Since political parties in Malaysia are mostly race-based (especially in the ruling coalition that has formed the government ever since independence in 1957) and cater to mono-ethnic constituencies, religion – especially Islam – defines and demarcates politics. Yet, a national survey conducted before the eleventh general elections of 2004 showed that religion was only identified as sixth in importance as a national issue, after transition of power, education, social problems, domestic political stability and national security and peace in that order (Martinez in Kin Wah and Singh 2005: 193).

The Constitution of Malaysia only describes Islam as the religion of the nation; it does not invest it with "Islamic state" status – a fundamental aspect of which would be the primacy of the shari`a over the common law system. Nevertheless, the one-upmanship between the two main Muslim

political parties – or the United Malays National Organization (UMNO) which leads the ruling coalition, and or Parti Islam SeMalaysia (PAS), the Islamic opposition party – which fight for the Malay vote, resulted in Mahathir declaring in September 2001 that Malaysia was an "Islamic state." Together with the growing Islamization of policies and governance over the years, this statement unleashed the ascendance of those who do in fact want the shari`a to be the main law of the land, or who see the recourse to Islam as an additional re-enforcement of Malay ethnic dominance (Martinez in Hock Guan 2003). Issues of contestation over Islamization have revolved around shari`a enactments and the implementation of various elements of 'Islamizing' policy and public life (Martinez 2001).

Malaysia is widely lauded as a modern, moderate Muslim nation. However, developments over the years have some Malaysians – both Muslims and non-Muslims – describing the attrition of this undoubtedly moderate and modern Islam because of the enactment and enforcement of what some consider arbitrary shari`a legislation, as well as growing orthodoxy.

The Human Rights Commission of Malaysia (SUHAKAM) addresses many relevant issues about the lack of or attrition of fundamental rights and freedoms that are presumed in a modern nation state's constitution and the endorsement of various UN Conventions and international instruments. However, SUHAKAM seems barely willing to deal with or address the issue of freedom of religion. It is one example of how elite, reformist-oriented institutions do not address all or adequately, significant human rights issues let alone enable ordinary people to express them. For example, in SUHAKAM's 2004 annual report, in over 11 pages there is a great deal on women's rights and the standardization of Islamic law, new Islamic family law legislation that is disadvantageous to women, outlining the SUHAKAM position and the response from the government. However, there is nothing on freedom of religion although there were already significant issues that were highlighted in the mainstream media. Freedom of religion as an issue or concern appears for the first time only in the latest annual report for the year 2005, but in a very brief one and a quarter page statement, under subsection 7 entitled "Freedom of Religion." The Report notes the Terenggannu Islamic Council's raids on the Sky Kingdom Commune of Ayah Pin, and that two of the commune's members who are self-declared apostates are seeking a ruling from the Federal Court on their right to freedom of religion under Article 11 of the Constitution.

There is also a paragraph in the December 2005 SUHAKAM annual report about a meeting with and memorandum from the Malaysian Consultative Council for Buddhism, Christianity, Hinduism and

Sikhism (MCCBCHS). The Majlis (or the MCCBCHS) is an NGO formed in 1980 by the main representative groups of the various non-Muslim religions (so for example, the Council of Churches Malaysia which is the umbrella organization for the mainstream Protestant churches and Evangelicals, as well as the Catholic Bishops Conference, are represented). The MCCBCHS makes representations about non-Muslims regarding issues of religion. The government deals with the MCCBCHS in terms of non-Muslim religions because there is no department, agency or ministry for other religions although there are many departments, agencies and ministries which represent Islam. The SUHAKAM report states that 'they (MCCBCHS) submitted that individual issues raised were not a matter of theological differences to MCCBCHS, but one of human rights and national unity in a multi-religious society' (Human Rights Commission of Malaysia 2006: 20). The report draws attention to the case of M. Moorthy who was buried in accordance with Muslim rites although his family contested whether he was in fact a Muslim, and concludes surprisingly (in the context of other clear recommendations to address problems, throughout the report) with the paragraph below that makes an observation about keeping the peace but that does not deal in any way with the problem raised formally with the Malaysian Human Rights Commission by the MCCBCHS:

> Religion is an extremely personal matter and it governs only that person's belief and behavior. The Federal Constitution guarantees the right of every person to profess and practice his or her religion and to propagate it. To comment on or criticize a religion – even if by someone professing the same religion or more so by someone of another religion – may cause uneasiness and lead to disruption of public order and general welfare in a plural society.
>
> (Human Rights Commission of Malaysia 2006)

There is nothing else in this section. Thus, here already one discerns the disjuncture explored in this paper: in the annual report of the institution for human rights in Malaysia, rights and fundamental freedoms are not being addressed. What emerges instead is a focus on and superficially expressed narrow concern for national security and unity in the language of much of Malaysian political discourse – which is to evade or silence discussion of "sensitive issues."

It is also clear that significant elites in Malaysia, who may be conscious of and/or employ the language of human rights, neither exhort nor enable all the fundamentals of what constitute human rights. Most of all,

although issues and concerns such as freedom of religion, equal access to redress for problems regarding the practice of non-Muslim religions, and justice for Muslim women in shari`a legislation are articulated and framed in the language and concepts of human rights, the responses are resourced in general invocations or expressions of religiosity (not even theology or resources in text and tradition), ethnic domination and politics.

It is also clear that most "ordinary" Muslims do not envisage their issues and concerns within the framework of Human Rights. The discourse using the language of "rights" is more often about ethnic dominance, special privileges stipulated in the Constitution of Malaysia for ethnic Malays and indigenous people (who are both referred to as Bumiputeras), with these special privileges referred to as "rights."

In the context of exploring the perspectives above, this chapter examines three current issues that have dominated public discourse in Malaysia since at least 2005; exploring competing, parallel discourses among those articulating positions. One side employs the language and concepts of Human Rights, with an ensuing response from detractors and opponents that is couched instead in the language and concepts of religiosity and/or racial particularity and domination, and the strategy of political manipulation such as setting up a straw man (i.e. making claims of the Other that do not exist) and then demolishing it rather than responding to the issues raised. This is what could be described as a dialogue of the deaf between those articulating/protesting an issue, and others responding to it. Therefore, this examines what is referred to in Malaysia as simply apostasy, intimating converting out of Islam or stating that one is no longer a Muslim; the civil society initiative proposing to the government of Malaysia, the formation of an interfaith council for Malaysia; and the letter of petition and seminars to reiterate constitutional guarantees of freedom of religion by the civil society coalition which describes itself as Article 11.

Reform Movements whose positions and statements analyzed include those whose main agenda is Human Rights – such as SUARAM and HAKAM (the Human Rights Movement of Malaysia), Sisters in Islam (SIS), the All Women's Action Movement (AWAM), and the Women's Aid Organization (WAO) as well as JIM (Jemaah Islah Malaysia), ABIM (the Islamic Youth Movement) and the MPF (Muslim Professional's Forum) who describe themselves as, and are largely perceived as reformist.

Apostasy

The issue of whether Muslims have freedom of Religion – or at least the freedom to change their religion – as guaranteed by Article 11 of the

Malaysian Constitution has revolved around conversion out of Islam by both those born into Muslim families and those who chose to convert as adults, and the ramifications for their non-Muslim children and families. The various cases, issues and concerns are often referred to in public discourse as "the apostasy issue."

The Malaysian Federal Constitution gives every citizen the fundamental liberty to profess and to practice his religion in peace and harmony. Article 3(1) of the Constitution declares that 'Islam is the religion of the Federation, but other religions may be practiced in peace and harmony in any part of the Federation' (Federal Constitution 2000: 19). Article 11 of the Constitution states in no uncertain terms that 'every person has the right to profess and practice his religion and, subject to Clause 4, to propagate it' (Federal Constitution 2000). In addition, Clause 4 specifies that state laws may be made to 'control or restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam' (Federal Constitution 2000). These guarantees of freedom of religion are in consonance with (but not stipulated as comprehensively as) Article 18 of the Universal Declaration of Human Rights which states that:

> everyone has the right to freedom of thought, conscience and religion; this includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.
>
> (United Nations 1948a)

At the core of the apostasy issue is the fact that there are essentially two sets of laws for Muslims – civil law which applies to all Malaysians, and shari\`a law – traditionally issues of marriage, divorce and inheritance. However, with Islamization of polity and governance over the years, shari\`a legislations enacted in the various states of Malaysia have increased their ambit beyond marriage, divorce and inheritance. In two states of Kelantan and Terengganu, *hudd* legislation has been enacted but is not implemented because under the ninth schedule of the Federal Constitution. It is Federal courts and not state legislation and courts which can hand down judgments for the death sentence, for example.

There is increasing contestation between notions of fundamental rights and freedoms as enshrined in the Constitution, and what is mandated under the shari\`a. The lacunae and overlaps between Islamic law or the shari\`a and the common-law system enshrined in the Constitution have become even more evident in high-profile cases before the Courts.

Among these is the issue of whether Muslims have full rights under Article 11 of the Malaysian Constitution that guarantees freedom of religion, because convictions under the shari`a that criminalize apostasy have been upheld, with the shari`a courts continuing to prosecute as Muslims, those who describe themselves as having renounced Islam and who have already served their prison sentence and paid fines as punishment meted by the same courts.

For example, in 1992, four disciples of a Muslim who has been described and prosecuted as a "deviant" were convicted and sentenced to two years of imprisonment. In 2000 these four persons were again brought before the shari`a High Court for not complying with the order to repent. At this trial, they informed the court that they had renounced Islam under the Statutory Declaration Act (1960) in 1998. The shari`a High court nevertheless convicted the four, and sentenced them to three years imprisonment. A month later, they were charged with apostasy. The persons sought declaratory relief at the Kota Baru High court which not only dismissed their applications but ruled that the four persons were still Muslims. The High court further claimed it had no jurisdiction over their case as they were still Muslims. The shari`a legislation in this state (as with most other states in Malaysia), has no provision enabling Muslims to renounce Islam. Apostates and deviants are largely charged for "insulting Islam" and/or disobeying shari`a legislation including *fatwa*. Although a *fatwa* is an opinion by a *Mufti* on a point of law, Malaysian shari`a legislations criminalize not only non-conformity but even criticizing or resisting a *fatwa*. More recently, the same followers and the "deviant" are now challenging the shari`a enactments with which they have again been prosecuted. Two of them are seeking a fresh declaration from the High Court in Kuala Lumpur that as a consequence of their having renounced Islam, the shari`a system has no jurisdiction over them, with an application to refer the same question to the Federal Court. Another plaintiff is challenging the power of the state legislation in terms of the ninth schedule of the Constitution, which only prescribes punishment for going against the precepts of religion (not its mediators, dispensers and arbiters) and which is being argued as a delimiting factor.

In 2004, the issue of the conversion of two children who were minors, without the knowledge of the non-Muslim parent who had been given custody of the children upon her divorce from their father raised considerable consternation among the non-Muslim population in Malaysia. The public uproar was reflective of growing non-Muslim concern about the way Islam impacts on them. The civil courts ultimately decided that the mother would retain custody of the children but that she was responsible for raising

them as Muslims although she herself was not a Muslim, rather than decide on the legality of the conversions. In another case which is representative of many similar cases that are outstanding in the courts of law, was the petition of Azalina Jelani (Lina Joy) who wanted the National Registration Department which issues Malaysians the important Identity Card (I.C.) document, to drop the word "Islam" from her I.C. The outcome of this case is still pending. To date, there appears to have been an increasing reluctance of the Federal Court to clarify fundamental questions on the right to personal faith, especially in the context of obvious contradictions between state Islamic laws and the Federal constitution.

The 2005 Annual Report of the Malaysian Human Rights Commission raises the issue of apostasy briefly. The complete response from the government of Malaysia reads as follows:

> The apostasy issue is not a new issue. The government has taken appropriate and harmonious steps in addressing this issue and the government has also explained this issue as well as the laws available to the various parties through various activities planned so as to create an understanding and to avoid the occurrences of apostasy. According to the teachings of Islam, a person who embraces Islam is obliged to adhere to its commandments and principles. Apostasy is an offence according to Islam, and punishment against it is obligatory.
>
> (Human Rights Commission of Malaysia 2004: 298–9)

In the government response to what had been raised under the rubric of fundamental freedoms and rights by the Malaysian Human Rights Commission, rights and freedom of religion are not addressed. Instead, the teachings of Islam are invoked vaguely and generally, with a moral admonishment that a person embracing Islam is obliged to adhere to its commandments and principles, claiming the controversial position that temporal punishment is obligatory for apostasy.[4]

Likewise, in an article entitled "IKIM[5] Views" published weekly in the English-language newspaper *The Star*, the writer who is described as a Senior Fellow at the Centre for Shari`a, Law and Political Science, first states he is responding to the uproar about apostasy and the right to freedom of religion. He describes apostasy in the first paragraph as 'apparently a human rights related issue … highly sensitive to the multi-racial and multi-religious character' and then states that 'all these threatening conse-quences are actually caused by ignorance' (*The Star* 2006). He explains that Islam is the most misunderstood religion in the world, touches on Islamaphobia, and states that it is unquestionable that Islam recognizes

human rights, long before the idea was developed in the modern secular West. He quotes the Cairo Universal Islamic Declaration of Human Rights that defines rights and freedoms as different in the Islamic context where one does not have the right or freedom to choose something that has been clearly defined as evil, false, wrong, incorrect or imperfect. He concludes:

> Muslims must understand that once they come into the fold of Islam, there is no question of leaving the faith or reverting to their earlier beliefs even if the reason for one to come to Islam in the first place ceases to exist.

<div style="text-align: right">(The Star 2006)</div>

The author is referring to the fact that the majority of those wishing to renounce Islam are adult converts who had to convert in order to marry because shari`a laws in Malaysia do not permit marriage with a non-Muslim. In sensationalizing the issue, the Mufti of the state of Perak is reported to have claimed to the Malay newspaper the *Utusan Malaysia* on 16 March 2006 that there are over two hundred and fifty thousand Muslims who have committed apostasy and over one hundred thousand have become Christians.[6] The Kelantan State Islamic Development and Mission committee chairman recently revealed that in efforts to convert the indigenous people, the Kelantan Government was offering RM10,000 to its missionaries who marry indigenous women, as well as free housing, a monthly allowance of RM1,000 and a four-wheel-drive vehicle (*New Straits Times* 2006). With such aggressive proselytizing, the issue of converts wishing to renounce Islam is a serious one.

   In addition, recourse to the Cairo Declaration or the Universal Islam Declaration of Human Rights (UIDHR) both of which declare religious freedom, do not reach the levels guaranteed in the Universal Declaration of 1948. The UIDHR follows the more conventional arguments for limited freedom as specified in pre-modern Islamic law. Article 10 of the UIDHR states 'Islam is the religion of unspoiled nature. It prohibits any form of compulsion on Man or the exploitation of his poverty or ignorance in order to convert him to another religion or to atheism' and thus does not specify that all citizens of a Muslim state have the right to religious freedom – rather the Cairo Declaration restates the Islamic legal position with regard to coercion (UIDHR 1981). The Arabic and English versions of the UIDHR differ on significant points. A number of the Articles regarding freedom of religion appear to be rather vague, and phrases used such as 'according to the shari`a' or 'so long as one remains within the limits prescribed by the Law' resonate with positions in pre-modern

Islamic law which have been interpreted as restrictive of the right to leave Islam (UIDHR 1981). As Ann Mayer states unequivocally, 'Islamic human rights schemes do not provide any real protection for the rights of religious minorities comparable to those found in international human rights law' (Mayer 1999: 139). In what are perhaps remarkable semantics for the word "freedom," the author of the IKIM article on freedom of religion describes it at the end of the article as:

> the freedom to practice a particular religion. Once one accepts Islam, if Islam forbids apostasy, not only other Muslims must observe it, but the followers of other religions that do not have such provision must appreciate and respect this position as well. This is actually the freedom of worship that must be perceived by all.
>
> (*The Star* 2006)

Other Muslim groups in civil society such as ABIM, JIM and the MPF take a similar position, with the exception of Sisters in Islam which is on record in 2000 as having two memoranda/press statements in protesting in strong terms the punishment of Muslims who renounce Islam. The political party PAS is on record in Parliament as introducing a private member's bill (by party leader Hadi Awang) to impose the death penalty for apostasy as a federal law. But PAS does not use only theological arguments; it uses racial dominance in warning about apostasy. It is on record as stating that:

> when a quarter of a million Muslims, who are Malays, become apostates, Malays will no longer be prominent. Perhaps they will be left like the Sakai, Semang [more politely referred to as *orang asli* and indigenous people] and others that are around now.
>
> (Harakah 2005: 5)

In addition, the magazine *Dewan Agama Dan Falsafah* exhorts the government in an article on Ayah Pin's teaching and issues of apostasy stating:

> the government should join forces with religious scholars in realizing Islamic law to eradicate deviants and apostates … a harsher punishment is extremely necessary. There is an absence of a special unit regarding the purification of the faith and deviant teachings which should be under the supervision of the enforcement division of the shari`a courts.
>
> (Dewan Agama dan Falsafah 2005: 11)

Nevertheless the 20 October 2005 confidential memorandum submitted by the MCCBCHS to the Prime Minister and his government describes the this as 'an instrument to expose the salient issues affecting non-Muslims, explore much-needed law reforms and initiate creative solutions to address the serious deprivation of a citizen's basic human right to profess and practice his/her religion of choice' (MCCBCHST 2005: 12). The contents of the memorandum are not premised on arguments invoking texts and arguments from religious sources including Islam, or race, or the politics of ethnic domination. The contents cleave to the language of the laws and Constitution of Malaysia, and the concepts and norms of international human rights.

The initiative towards the formation of an interfaith commission Malaysia (ICM)

In December 2000, the Malaysian Bar Council's Human Rights Committee organized a forum on freedom of religion. At that forum, a suggestion was mooted for a statutory body to deal with inter-faith matters. On 24 May 2003, 100 participants of a workshop entitled "Towards the Formation of an Inter Religious Council" unanimously recognized the need for the establishment of a statutory inter-religious body of an advisory and consultative nature. The primary objective of the proposed council was envisaged to be the advancement, promotion and protection of every individual's freedom of thought, conscience and religion for the harmonious coexistence of Malaysian society. In a brief six-point agreement, the participants set out the broad functions of the intended council, and emphasized for clarity that it should not have any adjudicatory functions. A large steering committee comprising civil society institutions including the Malaysian Consultative Council on Buddhism, Christianity, Hinduism and Sikhism (MCCBCHS), individuals and members of the Bar Council was established to organize a national conference to further discuss and implement the initiative. Both Muslims and non-Muslims were members of the steering committee.

A conference "Towards the Formation of an Interfaith Commission" (ICM) was held in Bangi, Selangor on 24 and 25 February 2005. It was attended by 175 participants from all over Malaysia, and the keynote address was given by the former de facto Minister for Law, Dato Seri Utama Dr. Rais Yatim whose Ph.D. is in Law but who is now the Minister for Culture and Heritage. The conference discussed a draft piece of legislation for the ICM, which was modeled along the existing Human Rights Commission of Malaysia or SUHAKAM that had been set up by

the government of Malaysia in 1999. The proposed ICM was explicitly provided to be only advisory, consultative and conciliatory and to have no adjudicatory powers whatsoever. The proposed ICM was intended only to be able to hold inquiries, engage parties who are in conflict in mediation, conciliation or negotiation in order to assist them to resolve their conflict and to publish reports. Significantly, the draft legislation stated that the proposed commission could only make recommendations, and had no coercive effect or powers of enforcement.

It is also significant that the draft bill included the application of some international norms which were defined in Section 2 of the draft bill, to include norms set out in six international documents. These are the Universal Declaration of Human Rights which was given statutory recognition by Section 4(4) of the Human Rights Commission of Malaysia Act 1999 (United Nations 1948a); both CEDAW (Convention on the Elimination of Discrimination Against Women) ratified by the Government of Malaysia in 1995 (United Nations 1979a) and the CRC (Convention on the Rights of the Child) also in 1995 (United Nations 1989a); the Declaration on the Elimination on all forms of Intolerance and of Discrimination based on Religion or Belief (United Nations 1981) and The Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities (United Nations 1992) which were both resolutions of the General Assembly of the United Nations after Malaysia joined as a member; and the Vienna Declaration and Programme of Action which was a resolution of the World Conference on Human Rights in 1993, and in which Malaysia participated (United Nations 1993a).

Those who attended the conference included Muslims and people of other faiths including minority groups such as the Baha`i community. However, the conference was boycotted by several groups and individuals who claimed that they represented "mainstream Islam." Among the reasons given for the boycott was that the ICM was a thinly-veiled disguise to derail the position of Islam as the official religion of Malaysia, to revise shari`a legislation, and for unqualified persons to interfere in matters of the Islamic faith.

Both the draft legislation of the proposed ICM and the various memoranda submitted by the MCCBCHS on the problems, needs and concerns of non-Muslims invoke the Malaysian Federal Constitution and notions and concepts of international human rights. The MCCBCHS memorandum on 'Problems faced by Non-Muslims in freely professing and practicing their respective Religions' submitted to SUHAKAM on 4 April 2002 cites in full Article 18 of the UDHR in the introductory page, together with relevant articles in the Malaysian Federal Constitution (SUHAKAM 2002).

The groups who opposed the ICM described themselves as "mainstream Muslims" coalesced as the Allied Coordinating Committee of Islamic NGOs (ACCIN) in which PERKIM Youth, ABIM Islamic Outreach, JIM, and the Persatuan Ulama Malaysia (PUM) were the most notable together with some other groups which comprise a few individuals or which are much smaller and/or not well known. The Islamic political party PAS (Parti Islam SeMalaysia) also opposed the ICM and ran articles in their newsletter *Harakah* and its website, *Harakah Daily*. Increasingly, the group "The Muslims Professional's Forum" (MPF) also spoke out against the ICM. The opposition was not disparate. A few statements and articles featured consistently and ACCIN was described as the signatory or source. One article and one statement is worth examining here from a booklet entitled "Bantah Penubuhan IFC" (Oppose the formation of the IFC). The detractors sometimes referred to the ICM as the IFC (Interfaith Commission) or the IRC (Interreligious Commission).

The article from *Harakah Daily* is in Malay, and entitled "IRC[7]: We object because Muslims could apostate after 25 February" and was posted on 16 February 2005, by someone using the pseudonym Umar Ziyad. The article names Muslim and non-Muslim lawyers who are counsel for those Muslims who have been charged in the shari`a courts with apostasy or who have suits before the courts regarding change of religion and for the "word" Islam to be removed from the Identity Card that all Malaysians must carry. The article then claims that 'among the main functions of the IRC will be to create a mechanism such as the rights of Muslims to apostate, and this surely will not be ignored by Muslims' (*Harakah Daily* 2005). The Article goes on to state that the proposed IRC:

> places importance on human rights regarding religion such as the right to leave a religion, the right to question any religion, no matter if they are a person of that religion or not. Besides threatening the religious harmony in this country, it is considered a rude action and must be stopped.

> (*Harakah Daily* 2005)

It is interesting that the argument or logic used renders the importance of the human right to freedom of religion synonymous with 'a rude action that must be stopped' thereby denigrating the seriousness or enormity of the issue. In addition, the description of the funding for the Conference of February 2005 by the Konrad Adenauer Foundation was stated as an act of cultural sabotage and so a chauvinistic, manipulative strategy

is discernible. The article which was later reproduced in the hard copy of *Harakah* also states that:

> the whole of the MCCBCHS memoranda reek of anti-Islam. Among their complaints and demands are that Muslims must be given the right to apostatize. Non Muslims have no right to bring up issues concerning Muslims. For Muslims, the freedom of religion must be interpreted according to the teachings of Islam and not against it.
>
> (*Harakah Daily* 2005)

The article continues that the initiative towards the formation of the ICM is hiding behind the name of humanity, and that the ICM intends to change shari`a legislation and interfere in the shari`a courts, and that the IRC 'could act as a court to the point that its sentences are enforceable' (Harakah Daily 2005).

The booklet entitled "Bantah Penubuhan IFC" has been distributed widely in mosques in Selangor and the Federal Territory and states in the back cover that it is distributed by ACCIN and gives the ABIM address for contact. The front page replicates the cover of the programme the ICM conference, with the words 'Islam is under threat. You must take action. Spread this information widely'. The objections to the establishment of the ICM are stated in question and answer style, with most of the material being either untrue, portraying the ICM as an entirely non-Muslim initiative to denigrate and diminish Islam. There are also statements which are a manipulation of the historical trajectory of the initiative towards the Interfaith Commission, of what was stated at the conference, and what is in the draft bill.

For example, the very first question asks 'What is the Interfaith Commission?' and the answer includes the statement that it will have:

> the legal power to change the teachings of Islam as a result of the pressure from the believers of other religions. This body will function akin to a court and all of its decisions are final on the religion on trial.
>
> (Bantah IFC 2005)

In what can be construed as a baseless untruth that is irresponsible if not an incitement to religious conflict, the answer to question four, 'What is the objective of the IFC's establishment?' is that 'The IFC's objective is to amend some basic teachings of Islam that will damage the faith of

Muslims and side with the interests of non-Muslims' (Bantah IFC 2005). Other statements in the booklet including claims that non-Muslims are demanding that *zakat* (Muslim tithe) be used for the needs of non-Muslims and that the 'IFC is clearly an anti-Islam commission'.

Question 6.ii states that the danger to Islam from the establishment of the IFC is that 'it will make Allah's law subservient to international norms invented by humans which adversely affect the faith' (Bantah IFC 2005) and first on the list is the 1948 Universal Declaration of Human Rights. The coalition of ACCIN that is listed as resourcing the booklet and indeed, the address provided in the back cover of the booklet, are of the Muslim NGOs such as ABIM and JIM. These are large, broad-based NGOs who also articulate human rights demands for Muslims in Iraq and Palestine and Muslim minorities in what constitutes "the West," and for human rights in Malaysia such as the repeal of the draconian Internal Security Act of Malaysia (ISA) which provides for detention without trial. Yet such manipulative demonizing of concerns about a fundamental right stipulated in the Constitution to the freedom of religion – resonant at a variety of levels with the UDHR – that most citizens of modern nation states have recourse to, does not qualify as reformists or reformist discourse enabling human rights, let alone "the voice of ordinary Muslims."

In the SUHAKAM annual report for 2003, it records holding two inter-religious dialogues, bringing together the MCCBCHS, JAKIM and IKIM. The report states SUHAKAM's suggestion to the Chief Secretary to the Government that the government of Malaysia forms an Inter-Religious Council in order to foster tolerance and respect towards other religions in Malaysia. The government's response, also recorded in the SUHAKAM Annual Report was that the government:

> is of the opinion that the formation of an Inter-Religious Council is not the only way to foster tolerance and to create a sense of respect towards other religions in Malaysia. The government constantly promotes these values through its actions and policies.
>
> (Human Rights Commission of Malaysia 2003: 279–99)

The response cites two workshops and the creation of a sex education module 'where the views of various religions were taken into account' and the National Service Programme, as examples of its proactive stance in fostering interfaith relations (Human Rights Commission of Malaysia 2003: 299). The government's response concludes by quoting JAKIM, or the Department for Islamic Development, essentially conflating the

JAKIM position with that of the multiracial and multi-religious government of Malaysia:

> From the viewpoint of the Department of Islamic Development Malaysia, JAKIM, it is of the opinion that it is not the appropriate time for the creation of an Inter-Religious Council, due to the fact that at the current moment, the relations between the different religions within the country are in harmony, all religions respect each other, all religions are given the freedom to practice their faith freely without disturbance consistent with the spirit of the Federal Constitution which gives the right and freedom for all religions to be practiced in peace and harmony.
>
> (Human Rights Commission of Malaysia 2003: 299)

The Article 11 initiative, the group opposing "liberal Islam"

The initiative that describes itself as Article 11 can be perceived as the cumulative outcome of the many issues that have emerged over freedom of religion and apostasy and the fierce opposition to the proposal for the formation of the Interfaith Commission of Malaysia or ICM. Interestingly, again, the Article 11 coalition that was formed in 2004 saw Muslims and non-Muslims, Malays and non-Malays converging formally. The catalyst was in April 2004 when the High Court in Kuala Lumpur granted custody of two minors aged two and four years to their Hindu mother, with the judge imposing one condition – that she was to raise her children as Muslims, failing which she would lose custody of the children to her estranged husband who had converted to Islam, and converted the two children as well. The Court had earlier dismissed an application by the Hindu mother for a declaration that the conversion of the children violated her parental right to co-determine the religious upbringing of the children. The reasoning of the Court was that it had no jurisdiction because the children were now Muslims and whether or not their conversion was legal was a matter for the shari`a courts. This case created uproar in the Malaysian media, on electronic discussions lists and on-line newspapers. Malaysiakini. "Shamala's case" as it is commonly known (the name of the Hindu mother is Shamala) forced the debate about the constitutional role of civil courts as the protector of the rights of ordinary citizens to their belief and the practice of their belief.

   The Article 11 initiative states that it focuses on the realization of the following principles as guaranteed by the Federal Constitution and human rights conventions: no citizen shall be discriminated [against] on the basis

of religion, race, descent, place of birth or gender; parents (both mother and father) are equal guardians and have equal say in all aspects of the upbringing of children; children shall be protected from any form of discrimination on the grounds of religion and in all cases, the interests of children shall be paramount; the freedom of thought, conscience and belief for all persons shall be fully respected, guaranteed and protected; every citizen has a responsibility to condemn discrimination and intolerance based on religion or belief; and every citizen has a responsibility to apply religion or belief in support of human dignity and peace (BADAI 2006).

The coalition addressed the supremacy of the Federal Constitution and the problems created by the Federal courts increasingly interpreting Article 121 Clause 1A as eliminating their right to adjudicate on issues of Islam, Muslims and conversion. Prior to 1988 and the insertion of Clause 1A, the High Court had jurisdiction over a person's religious status. This meant that until 1988 the High Court readily tried matters involving a person's religious status. However in 1988, a new clause was inserted in Article 121 of the Federal Constitution which stated that the shari`a courts were not inferior to the civil courts. Judges began interpreting the clause to mean that the civil courts could no longer intervene in any matter falling within the jurisdiction of the shari`a Courts. In the landmark case of would-be convert Soon Singh in 1999, the High Court ruled that only the shari`a court had jurisdiction over cases involving conversion out of Islam. Over time, decisions handed down by the Civil Courts seemed to abdicate in favor of shari`a courts even in dealing with cases involving non-Muslim members of a Muslim's family, hence the reiteration by the Article 11 initiative of the supremacy of the Federal Constitution and the guarantee of fundamental rights which the Courts are to protect and administer.

In June 2006, the coalition presented to the Prime Minister's department a petition letter that had over 20,000 signatures of citizens who were Muslim and non-Muslim. The letter states that its signatories call on the government and judiciary to uphold the supremacy of the Federal Constitution and reaffirm that Malaysia is a secular state and that the government to immediately take all necessary steps to remove the subjugation of the judiciary to the legislature and to return the judicial power of the Federation to the judiciary.

The Article 11 coalition decided to take the forum to other towns and cities in Malaysia so as to educate Malaysians about their rights and to create a groundswell of citizens who would remind the government and the judiciary about the supremacy of the Constitution. On 14 May 2006, the first of these was scheduled in Penang. It was disrupted by a few hundred protestors who carried placards stating that they opposed the

Interfaith Commission, and the Police asked the Article 11 forum to end prematurely instead of dispersing an illegal assembly (under Malaysian law). On 16 May those who organized the protest in Penang issued a statement entitled "The Anti-Interfaith Council – IFC – Body (BADAI) Penang," and the sub-heading was "BADAI's stand regarding the activities of the Article 11/IFC Group." It is important to note that the protestors had inserted their opposition to the Interfaith Commission in an initiative that is significantly different. Hafiz Nordin as chairman of BADAI claims that BADAI 'represents the whole of the Muslim community', and that it 'emphatically states: STOP any effort to insult the laws of shari`a and insult Islam in any sort of programmes and events in the whole country', threatening that 'I am giving the guarantee that this Article 11 group and its ilk will face a greater risk than what they faced on 14 May' (BADAI 2006).

Other statements include the demand:

> to respect Islam as the official religion of the State, and the Muslims who all this while have been very accommodating with other religions … that this group must stop its efforts to demand the freedom to commit apostasy through Article 11 of the Federal Constitution which then at the same time disputes Islamic law where every Muslim is absolutely forbidden from leaving their religion … [and that] BADAI is convinced that the shari`a court must be maintained because Islam is the only religion in this world that possesses comprehensive and complete laws that includes also personal matters for its people.
>
> (BADAI 2006)

The statement continues:

> BADAI, on behalf of the whole of the Muslim Community who loves the faith, CALLS OUT with all its heart: 1) That the YAB Dato' Seri Abdullah Badawi, as the Prime Minister of Malaysia, to NOT LISTEN to their demands even though they come with thousands of 'signatures', in order to maintain the harmony of interfaith society living in this State; 2) That the non-Muslim leaders of this group to not concern themselves with fighting shari`a law and Islam and instead they are obligated to join Islam to save them from the Torment of the Fires of Hell that was prepared by Allah: 3) That those who are already Muslims to not be in conspiracy with this evil agenda and to immediately repent to Allah as well as rejecting the beliefs based on thinking that is devoid of the Qur`an and the hadiths; 4) To be careful and cautious with the agenda of this group which is also masterminded

by individuals who have the façade of Islam but who profess the liberal, plural and secular beliefs; 5) That non-Muslim religious advocates are to refer to correct sources regarding points of confusion over Islam and not refer to liberal Islam groups such as Sisters in Islam and its ilk; 6) That the whole of the Muslim community assist and support the struggle of BADAI and NGOs who are together in this through any form of assistance and support.

<div align="right">(BADAI 2006)</div>

Claiming that the BADAI statement is for the purpose of maintaining the harmony of interfaith society but in the next point stating also that non-Muslim leaders are obligated to join Islam to save them from the torments of hell, are not conducive to a reformist discourse and/or a reformist movement that enables human rights or the voice of ordinary Muslims in articulating a human rights discourse. It is interesting to note that a possible precursor of point four about being careful and cautious with the agenda of individuals who 'have the façade of Islam but who profess liberal, plural and secular beliefs' were a few seminars on the dangers of liberal Islam, recognizing that for the first time, there were Muslims who were on the same side as non-Muslims over issues of freedom of religion and within Islam.

On 21 May 2005, a seminar on the dangers of liberal Islam was held. It had been widely publicized and drew participants from all over the country. The original title of the seminar was "Seminar Bahaya Islam Liberal" (Seminar on the Dangers of Liberal Islam) and it was jointly organized by the government-funded Malay language and publishing institute, Dewan Bahasa dan Pustaka (DBP) and the Kumpulan Karangkraf, the publishers of magazines such as *Majalah Dewan Agama dan Falsafah, Majalah I and Majalah Nur* which the DBP distributes. The seminar was as much a reaction to the ICM and growing assertions of the problems faced by non-Muslims as it was to two other widely-publicized issues. The first was the campaign that described itself as Malaysians Against Moral Policing (MAMP) that emerged in 2005 after a controversial raid in January by shari`a enforcement officials on a discotheque which is frequented by the elite. The second high profile issue that could be construed as "the danger of liberal Islam" was a widely-publicized Sisters in Islam (SIS) campaign in 2005 against amendments to Islamic Family Law shari`a legislation in the various states which would make polygyny even easier at a variety of levels, as well as make the issue of maintenance and property division even more contentious and difficult than it already is for the wife in a divorce.

During the 21 May 2005 seminar on the dangers of liberal Islam[8], the keynote speech was read out by the Director of JAKIM or the Islamic Development Department which is located in the Prime Minister's Department. Datuk Mustapha Abdul Rahman was in fact reading out the speech of the de facto minister for religion, Dato Abdullah Md Zin. It is important to note that the seminar was endorsed by JAKIM. The speech warned about a group of people who think that 'Muslim affairs, race, culture and the honor of the nation is not part of religion. Instead they think what is understood as religion only concerns about prayer, fasting, tithing and the Hajj'.[9] The speech also stated that the faith of Muslims in Malaysia was weak and that there was much ignorance, and that:

> liberal Islam clashes with the Qur`an and Sunnah. It is hoped that this seminar will impart awareness to the community to not be easily influenced by these groups, to preserve the true meaning of Islam and to prevent it from being misinterpreted.

The speech also refers to the Indonesian Jaringan Islam Liberal or JIL, and warns against how JIL 'do not accept the *Hadith* and do not believe in the *ulama*, and that this kind of thinking brings danger and is destructive to Islam'. The speech concludes by a reference to Amina Wadud leading Jumaah prayers in New York in an Anglican church, and how:

> Islamic liberals use a contextual approach and use *ijtihad*. This kind of thinking is very dangerous and could destroy faith and the social structure of this country. Besides that, they easily reject the Hadith because their thoughts and analysis are based on convenience, this thinking is biased towards using political laws that are aimed at realizing liberalism.

Yet again, the response to Human Rights issues is to racialize Islam, invoke monolith claims about Islam without any specific justification from text or tradition, and employ political strategy to manipulate and demonize.

Conclusion

It is unfortunate that much of the evolution, negotiation and contestation between Islam and notions of fundamental rights and freedoms that the nation-state's citizenry – both Muslims and non-Muslim – presume, are happening in the Courts of law which by their very dynamic are premised on an adversarial system. It is a system whose inherent polemics neither

encourage nor enable the imperatives of mutuality, and the process of education about issues and being enlightened by the Other. This has been impacted by the wider debate about Islamic human rights with religious functionaries preferring, understandably, what has been delineated as Islamic human rights in the Cairo Declaration of 1990 or the earlier UIDHR (1981). Apart from the limitations of these schemes that were discussed earlier in this chapter, any religious-oriented polity/governance/ majority will privilege its adherents and any attempt – however altruistic – to formulate full, equal rights for non-adherents (even within the said religion) will fail. Hence the continued relevance, (despite obvious limitations including cultural context) of international human rights norms.

In addition, these debates have been politicized so that Islam and human rights are not just co-opted eclectically for political legitimacy; this politicization has also sometimes entailed the distortion, avoidance and at times a superficial conformity to the justice and equality that reverberates in the ethos of Islam as well as international human rights norms. They have also been racialized, in a co-optation for politics or narrow visions and versions of nationalism, entailing also distortion, avoidance and at times superficial conformity to justice, equality and fundamental rights and freedoms as well as limited by some of its best reformist protagonists, with the best of intentions because of narrow concepts and strategies for enabling or claiming human rights. Sisters in Islam and Marina Mahathir are among the best and most consistent Muslim voices on human rights in Malaysia. Yet, in arguing about how Muslim women were being disadvantaged by amendments to Islamic Family Law, both premised their strongest protests in racial terms, arguing that Malaysian Muslim women were being rendered second class citizens in Malaysia compared to non-Muslim (and therefore mostly non-Malay) women. This rationalization was expressed during the same time as the public uproar over Moorthy when his non-Muslim wife could not get relief or remedy from both the Civil and shari`a courts; and in the context of Constitutional privileges for ethnic Malays who are defined, in the Constitution, as Muslims (Anwar 2006; Mahatir 2006).

These debates have also been silenced and unsupported by the majority of Malaysian Muslims. There have been many episodes of "silencing" of discussion let alone dissent. Policing for "deviance" and more significantly, periodically accusing individuals, both Muslim and non-Muslim of "insulting" Islam whenever they offer a opinion or position different from what is defined as normative by those with the power to do so, has contributed to many Muslims and others being afraid to speak up. Their lack of support by "ordinary Muslims" has stemmed from apathy or active efforts to emphasize the status quo of Islam in Malaysia. In a survey commissioned

by the author in December 2005/January 2006 of 1,000 Peninsular Malaysia Muslims (random sample premised on the 2000 Population Census), although 77.4 per cent responded "Yes" to the question: "Do you think Malaysians should be allowed to choose their religion?"; 97.7 per cent responded "No" to the question "Should Malaysian Muslims be allowed to change their religion?".

However, there are positive and constructive elements in the consonance, evolution, negotiation and contestation between Islam and international human rights norms and concepts in Malaysia. Briefly, over the past year, civil society groups and individuals in greater numbers and with greater frequency are both criticizing and challenging judgments handed down by the shari`a and civil courts and challenging both civil and shari`a courts about infringements on fundamental issues about freedom of religion that are guaranteed by the Constitution and within the ambit of international human rights norms. Although it has been argued that this is because of the cumulative effect of years of the status quo having refused to address these problems, credit must also be given to the Abdullah Badawi Administration which has provided latitude for discussion in public discourse and the mainstream media simply by not forbidding nor criminalizing such discussions and suits.

Some significant government departments are genuinely addressing the issue of freedom of religion. In May 2006, the Attorney General's office convened a meeting on Islam and human rights. In briefing those of us who convened working groups, the Attorney-General Abdul Ghani Patail asked us to get beyond rhetoric and help find real solutions to the issue of Islam, modern constitutions such as Malaysia's, and international human rights. Although the meeting was considerably constrained by very conservative participants from both the Middle East and Malaysia and some senior officials from the Attorney General's chambers who kept asking about wanting to punish apostates, there were powerful interventions by Hashim Kamali and Abdullah Saeed about the strong theological arguments (let alone humane, and rights-oriented arguments) for not criminalizing apostasy.

In initiatives such as the proposed Interfaith Commission and Article 11, it was a healthy development that for the first time, Muslims and non-Muslims are collaborating over issues that have and continue to divide the nation despite religion, specifically Islam, being rendered a primary source of the schisms which differentiate its citizens. In this focus on social justice and human rights issues, the nation is being both imagined and forged beyond the narrow contestations of race and religion. In the survey outlined above, it was hopeful and significant that 97 per cent

responded "Yes" to the question "Is it acceptable for Malaysian Muslims to live alongside people of other religions?"; 79 per cent responded "Yes" to the question "Should Malaysian Muslims learn about other religions in Malaysia?"; 83 per cent responded "Yes" to the question "Can Muslims participate in Interfaith Dialogue?"; and 76 per cent responded "Yes" to the question "If there is an Interfaith Council in Malaysia, should Islam be part of that council?."

Despite the claims made by some reformist groups and individuals with human rights platforms on behalf of "all Muslims" that freedom of religion and interfaith relations and a council were a threat and insult to Islam in Malaysia, it would seem that on the whole, the good sense of Muslims who are ordinary human beings responds otherwise. The challenge is to enable them to prevail.

Notes

1 I am using "elites" to indicate those who have access to and who feature in the public discourse on Islam in Malaysia. These would include the whole spectrum of protagonists from political leaders in government to NGO activists and individuals in Civil Society.

2 I rank among those who find the term "reformist" sometimes employed problematically, so I will continue to use the word, but in the meaning with the most latitude: that the reform is not about Islam the faith, but that "reformists" in Islam seek to change, modernize, and enlarge Muslims' engagement with their current realities, including even re-interpretation of the application of text and tradition.

3 I am using "ordinary" Muslims to indicate those who have do not feature or participate actively in the public discourse on Islam in Malaysia. They would include a whole spectrum of protagonists across class and education.

4 It is important to note that world-renowned scholars of Islam such as Abdullahi A. An-Na`im, Abdullah Saeed, Hashim Kamali and Mahmoud Ayoub among others have argued that there is no temporal punishment mandated in the Qur`an for Apostasy, and the single Hadith that is often invoked is weak (*da'if*, indicates the weakness of the chain of transmission or narration).

5 Acronym for the government institution IKIM (Institute for the Advancement of Islamic Understanding Malaysia) which has been entrusted with disseminating information on Islam, especially for non-Muslims and international audiences.

6 An informal source in JAKIM told the author these statistics were not true, but would not go on record about it.

7 IRC was a reference to the ICM as an Interreligious Council.

8 On the day itself the backdrop showed the term "bahaya" or danger replaced with "wacana" or discussion (so the title of the seminar was toned down to "a discussion on liberal Islam"), and this was fiercely protested in the first question posed by a member of the audience.

9 This is taken from a transcript of a tape-recording of the speech and the seminar.

9 Indonesian Islamist perspectives on human rights

Greg Fealy

Introduction

The literature on Islam and human rights in Indonesia has grown rapidly in the past fifteen years. Most of these writings have focused on liberal or pluralist interpretations of human rights advanced by Islamic intellectuals and leaders such as Nurcholish Madjid, Abdurrahman Wahid, Djohan Effendi, Dawam Rahardjo, Syafii Maarif, Ulil Abshar-Abdalla, Azyumardi Azra and Luthfie Assyaukanie. Apart from a large number of works in Indonesian, there is also a sizeable English-language literature from Western scholars, including Robert Hefner (2000), Greg Barton (2002) and Martin van Bruinessen (1996).

Much less attention, however, has been given to Islamist thinking on human rights. There are a number of reasons for this. First, many Western scholars have a normative preference for liberal over Islamist interpretations of Islam. They are attracted to what they see as the intellectual innovation of the liberal discourse as well as to its underlying values of tolerance, pluralism and moderate secularity. Some scholars not only analyse developments in liberal Islamic thinking but also openly endorse its aims. Two examples of this are Hefner's influential *Civil Islam* (2000) and Barton's *Gus Dur* (2002). Many of the pro-liberal writers are, perhaps not surprisingly, disapproving or disdainful of the Islamist viewpoint, believing it to rest in flawed understandings of Islam and also to represent a threat to Indonesia's tradition of religious pluralism and harmony. What is notable about this literature is that few scholars have closely studied the Islamist discourse, in particular considering the intellectual underpinnings of the Islamist outlook as it relates to human rights.[1] This neglect is more remarkable given the rising prominence of Islamism in Indonesia since Soeharto's downfall in 1998. Over the past eight years, Islamist groups have become increasingly active campaigning for the banning of so-called "heretical" and "deviant" sects, lobbying for the implementation

of shari`a-inspired laws at the national and district level, protesting against Western policies towards the Muslim world such as the Iraq War or Palestine, and protesting against 'moral threats' to the Islamic community.

This chapter will critically examine the discourse on human rights among Indonesian Islamists, especially regarding attitudes to Western human rights agendas, apostasy, inter-religious marriage and the regulation of places of worship and predication. It will seek to answer a number of questions relating to this discourse. First, what are its origins and to what extent does it draw upon or contribute to the international debate on 'Islamic' human rights? Second, what are the characteristics and intellectual quality of Islamist thinking on specific human rights issues confronting Indonesia? And finally, what is the degree of support enjoyed by Islamist human rights principles in the broader Islamic community in Indonesia? I will argue that Islamist thinking has been shaped significantly by perceptions of domestic oppression and persecution of Muslims, and that this is often cast in terms of non-Muslim conspiracies; the rich international discourse on human rights has had little impact in Indonesia. In addition, I contend that much of the Islamist human rights thinking lacks intellectual depth and awareness of the historical and contemporary problems encountered elsewhere in the Muslim world where proposals based on Islamic human rights principles have been applied.

For the purposes of this chapter, 'Islamists' are defined as those who seek to apply Islamic teachings not just as a religious and moral guide for private life but also as the framework for political, social, economic and cultural activities. Commitment to more comprehensive implementation of shari`a is a cornerstone of Islamism, but numerous Islamist groups support the creation of an Indonesian Islamic state and some seek to restore a global caliphate. In the Indonesian context, Islamism can take a great many forms, but this discussion will focus on Islamist political parties and activist groups. The main political parties in this category are the United Development Party (*Partai Persatuan Pembangunan*, PPP), the Prosperous and Justice Party (*Partai Keadilan Sejahtera*, PKS) and the Crescent Moon and Star Party (*Partai Bulan Bintang*, PBB). The major activist groups are the Islamic Predication Council of Indonesia (Dewan Dakwah Islam Indonesia; DDII), Islamic Defenders' Front (*Front Pembela Islam*, FPI), the Holy Warrior Council (*Majelis Mujahidin Indonesia*, MMI) and Hizbut Tahrir Indonesia (Indonesian Party of Liberation, HTI)[2]. These groups, in addition to their preaching and educational activities, are more likely to use direct action, such as demonstrations and protests. FPI has a reputation for using physical intimidation and attacks in pursuing their goals, where as organizations such as HTI eschew violence (Fealy 2004).

Indonesia, Islam and human rights

Indonesia, despite having the largest Muslim population of any country (190 million or 88 per cent of the total population according to the 2000 census), has played only a minor role in the international debate regarding Islam and human rights. None of the governments from the early 1950s through to the late 1990s were driven by an Islam-oriented diplomatic or human rights agenda. This was especially true of Sukarno's Guided Democracy administration (1959–66) and Soeharto's New Order regime (1966–98). Both governments were wary of Islamism, seeing it as a threat to their own political dominance as well as harmful to Indonesia's international interests (Sukma 2003; Fealy in Beeson 2004). Sukarno's diplomatic agenda focused on Indonesia's role in the Non-Aligned Movement (NAM) and in fostering closer ties to Communist Bloc nations such as China and Russia; 'Islam' was extraneous to both these goals. Soeharto sought to project an image to Indonesia's major aid donors and investors in the West and Japan of leading a secular, development-minded government, and repeatedly downplayed "Islamic" issues such as support Palestine or Muslim insurgents in Thailand and the Philippines. The four presidents since Soeharto – that is, B.J. Habibie (1998–1999), Abdurrahman Wahid (1999–2001), Megawati Sukarnoputri (2001–2004) and Susilo Bambang Yudhoyono (2004 to present) – have been somewhat more supportive of Islam-related agendas but foreign policy remains largely driven by non-religious, national interest concerns (Perwita 2006).

   This pragmatic, non-Islamist orientation has been evident in Indonesia's response to international human rights deliberations and covenants. Indonesia has, both by ASEAN and Islamic world standards, been diligent in accepting major human rights conventions over the past forty years. It has ratified 12 of the 16 main UN conventions (Maznah 2000), including the Universal Declaration on Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social, and Cultural Rights (ICESCR) and the International Covenant on the Elimination of All Forms of Discrimination Against Women (CEDAW). It has also played a role in the UN General Assembly debates on the ICCPR and ICESCR as a member of the Third Committee and later had an individual representative on the final committee formulating both conventions (Waltz 2004: 808).

   Indonesia has often been present at, though not a leading player in, the various initiatives to draft an Islamic-based human rights declaration or convention. Indonesia had representation at the 1990 meeting of Organization of the Islamic Conference (OIC) member foreign ministers which adopted the Cairo Declaration on Human Rights in Islam (CDHRI).

The CDHRI declared shari`a to be the 'only source of reference' for the protection of human rights in Islamic countries (OIC 1990). Prior to the 1993 World Conference on Human Rights in Vienna, Indonesia hosted a NAM conference in Jakarta to discuss the UDHR. Though not specifically Islamic in focus, a number of Muslim-majority NAM states strongly supported proposals for more culturally relativist approaches to international human rights, arguing *inter alia* that the UDHR did not take sufficient account of specific non-Western religious outlooks and principles (Littman 1999). Indonesia has also supported moves by some Islamic countries to amend critical reports of UN rapporteurs on the grounds that they were blasphemous towards Islam. Overall, though, Indonesia's record on international human rights conventions has been supportive of universalist notions of human rights and it has not sought to assert a specifically Islamic conceptualization of such rights.

Islamism in Indonesia

Although foreign media and some scholarly accounts give the impression that Islamism has risen dramatically in Indonesia in recent decades, most evidence suggests this is not the case (McGibbon 2006). It would be more accurate to say that Islamists have experienced fluctuating fortunes since Indonesia's independence in 1945, and that currently they enjoy localized success but only marginal gains at the national level.

There is a long history of Islamism in Indonesia, dating back to the so-called "Padri" movement in west Sumatra in the late eighteenth century and early nineteenth century. The "Padri" were pilgrims who had returned from Mecca committed to implementing Wahhabi-inspired reforms in their home regions. This aroused fierce resistance from traditional local Muslims who, with Dutch colonial support, waged war against the Padri from 1821, eventually defeating them in 1838. Thereafter, the Dutch closely monitored Islamist movements and suppressed those which it saw as either socially divisive or a political threat to colonial interests. Nonetheless, in a number of regions in the archipelago, Islamist activists succeeded in bringing about a more extensive enactment of Islamic law, sometimes accompanied by restrictions on religious freedom for nominal Muslims and non-Muslims.

For much of the time since independence in 1945, Islamists have focused their attention on Islamizing the constitution, though without success. On the eve of the proclamation of independence, Islamists persuaded secular nationalists and non-Muslims to agree to a seven-word clause in the preamble of the draft constitution which stated that there was an 'obligation for Muslims to implement shari`a Islam'. This "shari`a clause"

was part of a compromise by which Islamists agreed to accept a religiously neutral state ideology, Pancasila, the first principle of which stipulated "Belief in Almighty God." Immediately after independence, however, the Islamists were obliged to drop the shari`a clause from the new constitution after warnings that Christian regions might secede if the constitution was seen as favoring Muslims (Boland 1971). Repeated attempts in the late 1950s, late 1960s and between 2000–2002 to re-insert the shari`a clause into the constitution have been easily defeated.

Islamists have also had only limited electoral success. Despite the fact that almost 90 per cent of the electorate is Muslim, Islamic parties have never won more than 44 per cent of the vote in any of Indonesia's nine general elections. In the 1955 election, all six Islamic parties supported shari`a-ization and they received 43.9 per cent. In the six elections of the New Order period, political Islam was severely restricted by the regime and the "Islamic vote" never exceeded 30 per cent. Indonesia's two recent elections, in 1999 and 2004, have been free and fair, but again, the performance of Islamic parties was well below expectations – 37 per cent and 38 per cent respectively. Islamist parties, as opposed to the "pluralist" Islamic parties which do not advocate pro-shari`a policies, fared poorly, gaining just 16 per cent in 1999 and 22 per cent five years later. These disappointing results for Islamist parties came at a time when Indonesia is undergoing accelerated Islamization, evident in such things as rising mosque construction and attendance, the proliferation of Islamic symbols, dress and language, and the popularity of Islamic literature (Fealy in Akbarzadeh & Saeed 2003; Baswedan 2004).

In recent years, Islamist groups have won victories at the local level in various parts of Indonesia. In 2003, the central government granted the north Sumatran province of Aceh the power to implement comprehensively Islamic law as part of Jakarta's bid to undermine separatist sentiment. Since that time, the Acehnese government has introduced a wide array of shari`a statutes as well as creating a shari`a police force. In another 23 provinces and districts of Indonesia, local governments have enacted various types of shari`a-inspired regulations, ranging from "modest dress" codes and bans on gambling, alcohol and prostitution to Qur`anic literacy tests for Muslims seeking bureaucratic positions or standing for election to high office (Arskal in McLeod & MacIntyre 2006). While much attention has been given to this "de facto" local shari`a-ization, most of the nation's 460 districts have no specific Islamic bylaws and the central government retains the authority to control all religious affairs, excepting those of Aceh.

Islamist groups have also had some success in prompting government intervention on religious issues by use of direct action. FPI, MMI and

others have forces the closure of schools and mosques owned by "deviant" Muslim groups, such as Ahmadiyah, al-Wahidiyah and Islam Jemaah (IJ). They have also prevailed upon local authorities in some districts to shut unregistered churches and arrest religious figures whom they accuse of heresy. Furthermore, they have intimidated liberal Islamic groups by threatening to attack their premises or by reporting liberal thinkers to the police for alleged blasphemy. While these tend to be isolated cases, they nonetheless have led to considerable consternation among non-Muslims and unorthodox Muslim groups who are seen as vulnerable to Islamist attacks. The government of Susilo Bambang Yudhoyono has been hesitant in responding to such activism.

Islamist groups and human rights

The Indonesian Islamist discourse on human rights is, with a few notable exceptions, parochial in nature. Despite the fact that many local Islamist groups are well-connected to ideological counterparts in the Middle East, little of the international Islamist debate on human rights has penetrated into Indonesian writings. This is particularly true of the intellectual discourse. There is scant reference to the long struggle of Islamic nations to challenge existing Western and UN conventions on human rights, such as those mounted by Saudi Arabia, Kuwait and Iran to the UDHR and ICCPR over the past 50 years. Seldom, also, is there any mention, let alone detailed discussion, of Islamic initiatives like the 1981 Universal Islamic Declaration of Human Rights (UIDHR) or the 1990 CDHRI. For example, leading PPP and PBB politicians who were at the forefront of efforts to insert a shari'a clause into the constitution in 2001-2002, readily conceded that they did not know about the CDHRI and had read little on this international debate. One PPP figure stated: 'This is about the Indonesian Muslim community, not Muslims elsewhere. We are already very clear about what we want and what the Muslim community wants.' Given that Indonesian Islamist groups have borrowed heavily from other aspects of international Islamist discourse, why have they tended towards insularity on this issue? To answer this, some analysis is needed of the preoccupations of local Islamists.

Several factors have dominated the thinking of Indonesian Islamists on human rights. First, many Islamists believe that the rights of Indonesian Muslims have been grievously and systematically abused, either by non-Muslims or Muslim rulers who do the bidding of 'infidels'. While well aware of human rights abuses against Muslims in other countries, their preoccupation is with redressing abuses and protecting rights in Indonesia. Second, there is a widespread suspicion that 'Western' human rights agendas

conflict with and deliberately undermine Islamic teachings, and therefore should be regarded with caution. Third, Islamists are convinced that 'the West' does not apply its human rights principles consistently, often overlooking or downplaying abuses of Muslim rights, while exaggerating the threat to non-Muslim rights. Last of all, Indonesian Islamists tend to have scriptural rather than intellectual approach to human rights issues. While it is common for Islamists to focus on a literal interpretation of the Quràn and Prophetic tradition in determining a legal stance, what is missing from the Indonesian discourse is a self-consciously intellectual engagement with the broader philosophical or social issues related to human rights, as can be found in many Middle Eastern and South Asian nations. Remarkably few Indonesian Islamists write at length or in a deeply reflective way about human rights, preferring instead to catalogue abuses of Muslim rights and to repeat a small number of arguments to support their interpretation of human rights.

There is a large and growing Islamist literature on the abuse of Indonesian Muslim human rights. Two of many possible examples, Al-Chaidar's *Bencana Kaum Muslimin di Indonesia, 1980–2000* (The Distress of the Muslim Community in Indonesia, 1980–2000) and Hartono Ahmad Jaiz's *Di Bawah Bayang-Bayang Soekarno-Soeharto: Tragedi Politik Islam Indonesia dari Orde Lama hingga Orde Baru* (Under the Shadow of Soekarno and Soeharto: The Tragedy of Indonesian Political Islam from the Old Order to the New Order), set out in detail the indignities and brutality inflicted on the Islamic community since the 1960s. Pride of place is given to state violence towards the Islamic community. There is detailed documentation of events such as the Tanjung Priok massacre in 1984, in which probably more than 200 Muslims were gunned down by security forces in Jakarta, and the Talangsari incident in Lampung in 1989, in which over 100 Muslim villagers were killed by the Army. The authors also catalogue incidents where Islamist activists have been detained or jailed, often using fabricated evidence or harsh social order laws. In addition to this, they highlight what they see as the severe consequences of economic and political marginalization of Muslims by successive Indonesian governments (Al-Chaidar 2000; Hartono 1999).

In addition to this, Islamists are convinced of more subtle and insidious attacks upon the Muslim community by its foes. The most widely mentioned of these attacks is that of "Christianization." This can take a variety of forms, including:

- direct missionary activity;
- the provision of welfare and relief services by Christian groups with the purpose of conversion;

- the opening of new churches in Muslim neighborhoods;
- the defense of mixed religious marriages and promotion of interfaith dialogue; and
- the advocacy of liberal or pluralistic interpretations of the Qur`an and Sunnah.

All of these are seen as part of a concerted attempt by Christians, both domestic and foreign, to weaken Islam either by encouraging impiety or apostasy. Often, parallels are drawn with the plight of Muslims elsewhere in the Islamic world, but it is the local manifestations which cause the greatest sense of grievance among Indonesian Islamists (Adian Husaini 2006; Hartono Ahmad Jaiz 2004 & 2005).

Some idea of Islamist attitudes towards universalist human rights principles can be gained from the following quotations. Invariably, these principles are equated with Western agendas. For example, Hizbut Tahrir in Indonesia, in a preface to a book unfavourably comparing Western to Islamic human rights thinking, commented that:

> Western imperialist nations play a major role in globalizing various views and understandings which structure human rights ideas. In many countries, Western imperialists try to force the values and views of their lives through occupation, hegemony and material disruption (economy) in various aspects of life… Within Muslim communities, Western understandings of human rights predominate along with the elimination of Islamic understanding… It can be said that Western thinking and ideology has now become the fundamental reference for developing the social principles which govern individual rights throughout the world. The implication of this is the uprooting of Islamic civilization from existence, which for more than one thousand years had been practiced by the Muslim community.' (Mufti and al-Wakil, 2005: 1–2).

The prominent Islamist writer and former PBB parliamentarian, Abdul Qadir Jaelani, has written at some length about the reasons why Western human rights concepts were incompatible with Islam:

> It needs to be noted that understandings of human rights according Islam are significantly different from Western understandings of human rights. The basis of the Western outlook can be called 'anthropocentric' in nature, with the understanding that the humankind is viewed as the measure of all things. By contrast, the basis of the Islamic outlook is 'theocentric' in character (centred on God) (*sic*).

> Here, what is Absolute is the most important, while humans are only present on this planet to serve the Great Creator and Most Powerful. Islam gives greater emphasis to obligation rather than rights. Rights derive from obligations that have already been carried out. Because an individual undertakes their obligations [to God], they consequently obtain their rights.' (Jaelani, 1994: 101–3).

Hartono Ahmad Jaiz, a prolific Islamist author affiliated it DDII, goes further and asserts that: 'International Human Rights and democracy … are rules which oppose Islam. Because in essence, all rules made by mankind which do not refer to the commands of God, may peace and blessings be upon Him, will be contrary God's law.' (Hartono Ahmad Jaiz 2004: 317)

It is also notable that, despite this criticism of Western human rights frameworks, many Islamist authors are ambivalent regarding the usefulness of such universal rights codes in addressing abuses suffered by Muslims. Numerous Islamists refer to ways in which the abuses of Muslim rights in Indonesia breach the provisions of international covenants and declarations including the UDHR and ICCPR. To some extent, this ambivalence derives from a perception of Western double-standards in upholding human rights, particularly when Muslims are the victims. One Islamist scholar wryly noted that:

> It is often acknowledged that it was the Western world which gave birth [to human rights]. However, in hundreds of years of history, Europeans have colonized and stripped away the wealth of other peoples, especially in the Muslim world, as well as trampling on the human rights of the faith communities under their power. And yet, forcefully and proudly, they still claim to be upholders of human rights.' (Topo Santoso, 2001: 90).

The centrality of literalism to the human rights thinking of Islamists also warrants further elaboration. Many Indonesian Islamists believe that for Muslims to live piously, the Qur`an must be implemented to the letter, especially those sections prescribing moral behavior and criminal punishments. For them, it is obligatory for Muslims to implement shari`a in a thorough way. Not only is shari`a superior to other forms of law because it is based on the final revelation of God, but also it is capable of protecting the rights and interests of all people, whether Muslim or not.

While there is an assertion of the superiority and enduring relevance of shari`a to contemporary Indonesia, few Islamists examine in detail the

historical problems related to its implementation, either in Indonesia or else-where. For example, the "Padri" movement sparked a brutal civil war and the Darul Islam movement of the 1950s and 1960s also encountered strong resistance from Muslims who objected to its attempted imposition of an Islamic state and implementation of shari`a. Few Islamists have seriously taken up the challenge issued by several leading liberal scholars to adduce evidence supporting the claim that enactment of shari`a makes a community more pious, prosperous and law-abiding (see for eg, Assyaukanie in Fealy and Hooker 2006: 240–1). These liberal scholars have pointed out that corruption within the Indonesian Islamic community has not diminished despite Islamization and also evidence from countries which have capital and corporal punishment suggests that this has little long-term deterrent effect on crime rates. Some scholars have also pointed to the poor record of corruption and overzealousness on the part of the "shari`a police."

The shallowness of the Islamist case for shari`a implementation and Islamic-based human rights protocols is attributable to several elements. For the most part, Islamists regard the superiority of shari`a to be self-evident and the assertion of this superiority to be a marker of their own faith. This is a discourse marked by long descriptions of "what is wrong" and impas-sioned claims that Islamic law is the sole and encompassing solution, rather than rigorous argumentation about shari`a's merits and detailed discussion of the specific content of any proposed Islamic law code. One example of Islamists not addressing the "devil in the detail" is the debate within PBB over the *hijab* issue. The party's former chairman, Yusril Ihza Mahendra, opposed obligatory head covering for women (his wife did not wear the *hijab*) claiming women should have the right to choose for themselves, but a majority of the party board strongly favored mandatory *hijab* for all Muslim women. The party eventually dropped discussion of this issue rather than risk damaging divisions.

The possible exception to Islamist party failure to fully discuss human rights has been the PKS, which has a number of intellectuals who have provided a detailed rationale for comprehensive shari`a implementation and an Islam-based human rights program. Much of this discourse, however, remains within the party's internal fora, as the party leadership seeks to avoid electoral setbacks by appearing too doctrinally Islamist.

Differences between Islamist and universalist human rights codes

There are five main areas of Islamist objection to universalist notions of human rights, as embodied in documents such as the UDHR and ICCPR.

These are: (1) the right to change religion; (2) the right to inter-religious marriages (particularly a Muslim woman marrying a non-Muslim man); (3) the right to proselytize among religious communities; (4) freedom to practice a religion or belief; and (5) gender equality. All of these have been strongly influenced by the historical perceptions of Islamists and the belief that Islam is under attack from its foes.

The Christianization issue has had a powerful impact on Islamist demands that apostates face strong sanctions, including the death penalty, and that proselytization and inter-marriage be restricted. In Islamist writings on this, it is common for much more space to be given to the long history of attempted conversion of Muslims by Christians than to the scriptural or jurisprudential prescriptions within Islam. Similarly, discussions of the right to freedom of religion or belief usually draws Islamist elaborations on the dangers posed by "deviant sects" such as Ahmadiyah, and quasi-Islamic beliefs such as the Javanist "Kepercayaan." Islamic groups succeeded in the 1970s in having Kepercayaan classed as a "belief," not a religion, and thus excluded from the purview of the Department of Religious Affairs. But they would like greater restriction on such activities. There have also been attempts for several decades to have Ahmadiyah banned in Indonesia. Most Islamists favor maintenance of Indonesia's current tight limits on "non-approved" religions – at present only six religions are officially acknowledged, despite a constitutional guarantee of freedom of religion.

The role of women in public life and the broader issue of gender equality has assumed particular importance for Islamists. As numerous scholars have noted, women are often regarded by Islamists as the first front in efforts to Islamize society. Certainly in Indonesia, the most common shari`a-ization issue for Islamists is the regulation of women's dress standards and social freedoms. Coupled with this is a strong underlying belief that Western advocacy of equal women's rights is part of the effort to destroy Muslim morality and social coherence. Many Islamists emphatically reject notions of gender mainstreaming and the permissibility of women ascending to high public office. This debate reached its peak in 1999 when Islamist groups joined together in declaring that Islamic law did not permit the appointment of a female president. The declaration was clearly aimed at Megawati Sukarnoputri, who was then the frontrunner in the presidential race (Platzdasch 2000). The campaign appeared to have little effect on voters as Megawati's PDIP emerged as by far the largest party in the election, though Megawati did not become president until 2001.

Conclusion

The Islamist campaign for an Islam-based human rights regime in Indonesia has not won a wide following, though there are a number of regions in the country where these views enjoy considerable support. Much of the Islamist discourse is shaped both by perceptions of victimization and marginalization at the hands of non-Muslims as well as by a conviction that a literal interpretation of shari`a provides the "total solution" to the problems of the Indonesian Islamic community. The intellectual thinness of this discourse is indicative of the heavily symbolic nature of the issue.

To date, the implementation of shari`a has not impacted extensively on human rights in Indonesia. Most areas of Indonesia have no specific shari`a-based regulations and Muslims in those regions are only subject to the national laws. In a number of provinces and districts, however, local shari`a regulations are limiting the rights of women and to a lesser extent non-Muslims. It is interesting to note that Islamist parties attempts in 2006 to introduce sweeping shari`a-based 'morality' laws under the guise of an anti-pornography bill met with defeat after widespread protests forced parliament to remove the controversial clauses. This development suggests that Islamists will continue to have difficulties gaining sufficient political support to enable the passing of more far-reaching shari`a-derived laws. Moreover, there is no bid by Islamist parties to have Indonesia disavow its ratification of UN human rights covenants and adopt an Islamic-based code.

Notes

1 There are notable exceptions to this, including Liddle (1996), Hefner (1997), van Bruinessen (2002), and Hassan (2006).
2 Formally, Hizbut Tahrir describes itself as a party ("hizb") but it does not contest elections and rejects democracy as contrary to Islamic principles. Thus, for the purposes of this chapter, it is placed in the "activist" rather than "political" category.

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