Islamic Law and Human Rights

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Kofi Annan, Secretary-General of the United Nations, is reported to have said, “A United Nations that will not stand up for human rights is a United Nations that cannot stand up for itself.”1 The

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statement reflects the conviction with which human rights are advocated today not only by the Secretary-General, but by many people all over the globe, including those in the Muslim world. The statement also proclaims a fundamental truth: the bulk of human rights are here to stay, for the obvious reason that the Universal Declaration of Human Rights (UDHR)\(^2\) and other legal instruments dealing with human rights represent the collective experience of mankind. A bare reading of these documents is an education and an exhilarating experience; the knowledge of centuries is collected in a few pages.\(^3\) Yet, this is not knowledge for its own sake. It is a practical and well designed programme that guides human beings on how they are to order their lives and to acknowledge and give to others the respect that is due to them. Is this human experience different from that of the Muslims? Is Islamic law opposed to these rights? The answer to both these questions is in the negative, at least for the bulk of these rights. All this, and more, each Muslim will acknowledge.

One in every four persons in the world today is a Muslim.\(^4\) A century from now more than half the population of the world is likely to be Muslim.\(^5\) The majority of this population is expected to follow Islamic law with a conviction that it is a universal law meant for all mankind;\(^6\) a law that deals with human rights in its own way even when the rights acknowledged are the same as


\(^3\)Reading these documents and reflecting upon the ideas contained in their articles is an education in itself. The Arabic and the English versions of some of these documents are, therefore, included in this issue. The Arabic versions are highly instructive for those who study Islamic law in Arabic.

\(^4\)This is based on various population estimates and projections. The figures are available at http://www.islamicweb.com/begin/results.htm. The figures for countries are also found at http://www.flash.net/~royal/country.html. The sources for these figures are the CIA Factbook and growth rates are based on UN figures. According to some estimates, the population of Muslims is well over 2 billion today. This would mean that one in every three persons in the world today is a Muslim.

\(^5\)Id.

\(^6\)When we say this, we are talking about Islam as an ideology, a system, and a way of life that has its own norms of justice and fairness that it believes have to be adopted by all before there can be true peace in the world.
those acknowledged by the rest of humanity.\footnote{Rights are associated with rules and principles and the identification of these rules and principles is necessary during interpretation and adjudication. It is, therefore, necessary for the courts and legislatures in Muslim countries to employ the Islamic forms of these rules and principles rather than those from the common law or Roman law.}

There is no escape from this fundamental truth either.

As time passes, it is becoming increasingly clear that Islamic law is no longer a municipal law; it is an international force with the power to shape world events. It is destined to play a positive role in shaping the norms of the future world order. To enable it to do so in a positive and constructive way, Muslims must understand the nature of human rights as they are implemented by the United Nations and as they will be implemented by Muslim states in accordance with Islamic law. In reality, Muslims need to wake up from their slumber and make the principles of their law compete with those of natural law and other systems so that their norms and values also become part of international law. Mere complaining, without the necessary foundational work, about the domination of Western principles is not going to work for long. If Islamic principles are not solving problems, Western principles will.

Non-Muslims, on the other hand, must ignore the propaganda launched against Islamic law and be prepared to acknowledge and accommodate the values of systems other than the Western. In particular, they must have a positive approach towards the principles of Islamic law for these principles belong to one of the major legal systems of the world, supported by one-fourth of the population of the world.\footnote{When treaties are interpreted or courts are required to decide international disputes, reliance is usually placed on general principles of law that are “common to legal systems of the world.” In practice, “common to legal systems” really means the Anglo-American common law system and the Romano-Germanic civil law system, which have much in common as they rely on “natural law.” On occasions, lip service is paid to Islamic law and the “uncivilised world,” and even in such cases the argument is expressed in legal constructs relevant to the two dominating systems. We refer here, for purposes of illustration, to the \textit{Continental Shelf Cases} (Fed. Rep. of Germany v. The Netherlands), 1969 I.C.J. 3 (separate opinion of Judge Ammoun). The learned Judge refers to “equity,” “purest moral values,” “justice, equity and good conscience,” in the English sense, as well as to other phrases. The} The United Nations must do so too if
it is to remain a “United” Nations, as imposing the value system of the Western world alone on the rest of humanity is not going to work for long.\textsuperscript{9}

Islamic law has been subjected to an unrelenting vicious propaganda, due to a few penalties prescribed by this law, by those who do not understand, or wish to understand, the nature of these penalties nor appreciate the way in which they are to be implemented. If this propaganda is ignored for a while, it can be seen that Islamic law can make tremendous contributions to the area of human rights—rights that receive divine protection in this system.\textsuperscript{10}

The main idea is that the implementation of human rights in Muslim countries can become much easier if these rights are explained to the Muslim peoples in terms of Islamic law rather than forcing upon them the terminology and concepts employed by Western jurisprudence. The purpose is not to claim that it is

\begin{quote}
question is: what do these phrases mean, and according to whose judgement? It is well known that in the positivist and Austinian sense, it means “total discretion.” For Muslims, these phrases, if at all they have to be used, must convey the Islamic sense as well. If not, international tribunals and courts are deciding according to their own two systems mentioned above. We totally disagree with the statement that equity is the same thing as \textit{istihsän} in Islamic law. \textit{See id.} The court, we have to say, was misled by someone with a superficial understanding of Islamic law. Our conclusion is that the substantive rules and principles of Islamic law must be identified, acknowledged and employed. The vague term “equity” that stands for unfettered discretion can never be a substitute for these principles.
\end{quote}

\textsuperscript{9}We are constrained to say here that though democracy and democratic values are advocated by the United Nations, it is itself a highly undemocratic institution that is dominated by a few nations that constitute the Security Council. \textit{See, e.g.}, Gary Younge, \textit{The Golden Rulemakers} \textsc{The News Int’l}, Nov. 12, 2002, at 27, col. 1 (arguing that the “structures [of the U.N.] are outmoded, its methods [ ] undemocratic, and its record of restoring, defending or establishing democracy around the world [ ] weak”). To introduce true democracy, some new system will have to emerge in the future, a system that gives the membership of the Security Council to the various regions of the world rather than to individual nations, with the member nations of the regions representing their region on the basis of a system of rotation. This, however, is a question for a separate study.

\textsuperscript{10}This point is acknowledged in the Cairo Declaration on Human Rights in Islam, as we will be pointing out in the discussion to follow. See \textit{infra} notes 58–85 and accompanying text.
“human rights” upheld by the United Nations that are being implemented, but to ensure that these rights (whatever their source) are applied in a uniform and generally acceptable manner so as to benefit human beings whether Muslims or non-Muslims. As long as biased propaganda and unjustified criticism are used to achieve progress in the area of human rights, the results are going to be negligible. Temporary advances will ultimately be washed away through religious reactions of increasing intensity laying waste the effort of decades.

Insisting on compatibility between human rights and Islamic law does not mean, however, that we should attempt to show that every form of human rights is found in Islam. The rights must be elaborated and implemented in terms of traditional Islamic law as expounded by its earlier jurists. This is a task that should be undertaken by modern Muslim scholars. The efforts made by such scholars have been highly disappointing. There is not a single serious study that deals with the analysis of human rights, as advocated by the United Nations, in terms of traditional Islamic law.11

On the contrary, many modern Muslim scholars have focused on the inadequacy of their system. Some have attempted to offer “new paradigms” for purposes of reform. The assumption underlying the ideas of reform is that their own system has become inadequate and outdated. The primary reason for the failure of reform movements in the modern times has been their attempt to distance themselves from the literature of the jurists (fuqahā’). Instead of relying on earlier thought and jurisprudence, they have tried to go back to the very early period of Islam and then, instead of working their way down, tried to implant their own “new” ideas on the shape that modern Muslim society should take.12 Instead of attempting to explain these rights merely state a few verses of the Qur’ān leaving the rest to the imagination of the reader. They leave a void that is filled up by Western ideas and procedures. Studies on human rights, in our view, must focus on the concrete and talk about how rights are made justiciable in the Islamic legal system and enforced. These studies must also talk about the priorities within the various types of rights and how conflicts between competing rights are resolved.

11 Those who do attempt to explain these rights merely state a few verses of the Qur’ān leaving the rest to the imagination of the reader. They leave a void that is filled up by Western ideas and procedures. Studies on human rights, in our view, must focus on the concrete and talk about how rights are made justiciable in the Islamic legal system and enforced. These studies must also talk about the priorities within the various types of rights and how conflicts between competing rights are resolved.

12 Most of these writers were highly qualified and brilliant people with a sincere desire to improve the lot of Muslims. There can be no doubt about this. One can only disagree with their methodology and wish that they had
of using traditional Islamic law as a source of strength, a rich legal heritage, they have considered it a hindrance and obstacle in the way of development and progress. Had they focused on concrete discussions of human rights and tried to see how their own law guarantees such rights, they would have achieved much more than they did with their marvellous “insights.” There is no escape from traditional Islamic law, a law that can be a powerful tool for the creation of a true Islamic society that provides justice and guarantees, protects and implements basic human rights.

In this paper we will first discuss certain basic ideas related to human rights from the Islamic perspective, in particular the conflict and tension, if any, between revelation and reason. The discussion of the nature of human rights in Islam flows naturally from this and will be taken up next. The focus will be on traditional Islamic law followed by the position taken by international bodies like the Organisation of Islamic Conference (OIC). The two concentrated their energies on more concrete and productive projects. Today, after the unfortunate incident of September 11, 2001, there is a renewed effort by some Muslims themselves to show that it is Islamic law in its traditional form that stands in the way of progress and in fact leads people to commit violent acts. See, e.g., Khalid bin Sayeed, What Should US Muslims Do?, DAWN, September 30, 2002, at 7, col. 3 (Arguing that traditional Islam "as a social system cannot cope with modern challenges." The article also notes that people in the West now believe that "traditional" Islam [as if there were some other Islam] gives rise to violence and terrorism). For a whole century this approach has not worked, and it is not going to work now.

This conflict has existed, and still exists, in all religions. The ongoing debates can be examined even on the Internet. The conflict was witnessed very early in Islam in almost every field: theology, philosophy and law. It began with the positions taken by the Mu'tazilah, who upheld the role, and binding nature, of reason. They did achieve some success. In fact, the Caliph Ma'mūn al-Rahšīd publicly took their side. The Ash'arīs, who opposed the Mu'tazilah, prevailed in the end. Many philosophers had tried to reconcile the two propositions and to justify revelation on the basis of reason. Among them are al-Kindī, al-Fārābī and Ibn Sīnā (Avicenna). For an overview of the conflict, see A. J. Arberry, Revelation and Reason in Islam (1956); N. J. Coulson, Conflicts and Tensions in Islamic Jurisprudence (1969) (Based on his lectures at the University of Chicago); S. M. Afnan, Avicenna (1958). Our purpose here is not to go into the details of this issue. We merely wish to point out the difficulty Muslim societies and individuals face when they are asked to choose between a principle of natural law based on reason and another conflict principle emerging from revelation. Our focus is, therefore, narrow and confined to the issue within Islamic law.
main approaches to human rights represented by Jeremy Bentham and John Locke will be discussed briefly and the Islamic position with respect to these two approaches will be stated. After this, we will turn to international law insofar as it promotes human rights through various declarations, treaties or conventions of the United Nations. To do so, we shall rely on the experience of the Muslim world with a single convention; namely, the Convention on the Rights of the Child (CRC). The impact of ratifying such documents on the legal systems that uphold the shari'ah will be assessed in a general way. A distinction between the two systems of rights will be attempted for identifying the vital differences, especially those that affect interpretation. Finally, an attempt will be made to select the best approach to human rights that should be adopted by Muslim countries.

We would like to state, as precisely as possible, the main purpose of this paper, lest it be misinterpreted. What is required is to identify every possible source of doubt, doubts that Muslims entertain about human rights. Once this is done, it will be very easy to level out differences if any or at least to be able to face them squarely. The truth is that it is Muslim countries and societies, more than any other, that need to enforce and respect human rights, rights that are granted to human beings by God Almighty, so that their citizens can live in freedom and dignity that is promised by Islam.

I. Revelation, Reason and Human Rights

Islamic law is based on revelation and a firm belief in such revelation. A religious law, like the religion it is based on, must have some fundamental principles that are not subject to change and alteration. If these basic assumptions are changed, the religion,

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15 We use the word religion here, but the word in Islam is Dīn. With no distinction between church and state in Islam, this term can convey the meanings of system, way of life, order and so on. It is, therefore, misleading to call Islam a religion in the sense Christians use the term for their faith. In Islam the meaning is wider.
and thus the religious law, changes, or it is no longer the same religion. It was, perhaps, the Sophists who first challenged the idea of definitive foundations around 500 B.C. They maintained that nothing is certain or definitive and everything is subject to opinion. Truth is relative and depends on persuasion and rhetoric. They denied that there could be fixed, permanent and definitive assumptions about anything. The acceptance of such a philosophy was meant to challenge the very foundations of religion and demolish them, thus, demolishing religion itself. It is for this reason that the Ḥanafī jurist al-Sarakhsī maintains that there is no point in arguing with the Sophists on the basis of sources and proofs for they deny what is manifest and witnessed in our lives. He says: “This is like those among the Sophists who deny what is manifest and witnessed. Thus, a discussion with them relying upon proofs and (related) legal reasoning is not possible.”

In other words, unbridled reason may not be ready to accept as rational all that religion considers fundamental and definitive.

There appear to be two approaches to human rights today in the West: the approach of the “Universalists” and that of the “Cultural Relativists.” The Universalists believe that truth is one and common for all mankind giving rise to common “universal” principles that form the content of international law. The Cultural Relativists believe that truth is relative to the culture to which one belongs. Thus, there can be no common truth or true principles and, therefore, rights. The Cultural Relativists would also treat different religions as part of different cultures. The Cultural Relativists appear to hold a position that is closer to that of

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16 The Sophists regarded law not as the command of a divine being, but as a purely human invention born of expediency. Justice was stripped of its religious attributes and considered in terms of human psychological traits or social interests. They asserted that every issue or question could have two opinions. In other words, every issue was rendered probable (zannî) and nothing was definitive in a rational sense (qaf’tî). It was the function of rhetoric, they said, to transform the weaker line of argumentation into the stronger one. *All law and justice was, therefore, relative—subject to opinion and circumstances.* See Edgar Bodenheimer, *Jurisprudence: The Philosophy and Methodology of the Law* 3–6 (Rev. ed., 1974).

the Sophists. Islamic law upholds the position taken by the Universalists, maintaining at the same time that the principles based upon the Anglo-European-American concepts, used in international law, are “not the whole truth.” The moment we say this, the Cultural Relativists will say, “This is what we mean when we say that principles are relative.” Nevertheless, Islamic law also maintains that the total body of principles consists of those that are unalterable (qat‘ı) and those that may be alterable (zannī). The truth of some basic principles cannot be denied even by the Cultural Relativists, something that H. L. A. Hart has called the “minimum content of natural law.”¹⁸

Islamic law is a religious law, it is, therefore, quite natural that this law has focused on the concepts of qat‘ı (definitive, unalterable) and zannī (probable). These are concepts of rationality and their discussions run throughout usūl al-fiqh (Islamic legal theory) and ‘ilm al-kalām (the discipline dealing with theological foundations). The impact of these concepts on Islamic jurisprudence can be seen by examining the sources of this law in the light of these concepts. The Qur’ān is deemed a qat‘ı (definitive) source. This means that no Muslim can deny that the Qur’ān is a binding source of law without moving out of the fold of Islam. The same is true for the Sunnah of the Prophet (peace be on him), that is, the sayings, acts, and tacit approvals of the Prophet (peace be on him)—legal precedents in short. The idea, however, is true for the Sunnah as a whole, that is, the Sunnah is a binding source of Islamic law. Individual traditions may be questioned with respect to their authenticity on the basis of defects in transmission for which there is a developed science (‘ilm al-hadīth). This is with respect to the sources in general, that is, as sources on the whole. With respect to individual texts and rules emerging from them, the jurists maintain that any denial of a definitive rule emerging from a text of the Qur’ān or from a continuous (mutawātir) tradition is also not admissible in the system. The gravity of such denial can be gauged from the following comments made by al-Sarakhsi on a statement of Muḥammad al-Shaybānī, who was a disciple of Abū Ḥanifah and is one of the highest authorities on Islamic law.

The position in the other schools is the same if not more strict. Al-Sarakhsi, commenting on al-Shaybani’s words, says:

Hishām has related from Muhammad ibn al-Ḥasan al-Shaybani (God bless him) “that fiqh is of four types: what is in the Qur’ān and what resembles it (by way of continuity tawātūr); what has been laid down by the Sunnah and what resembles it (by way of being well-known (mash’hūr)); what is related from the Companions (by way of consensus (ijmā‘)) and what resembles it (that is consensus of the jurists of each period); what is considered good by Muslims (by way of ijmā‘) and what resembles it (knowledge of the people).” This contains an elaboration that the ijmā‘ of the Companions is at the same level of proof as the Book and the Sunnah with respect to its being definitive so that one who denies it is to be imputed with kufr (unbelief). This is the strongest type of consensus, because among the Companions were those who lived in Madinah as well as the family of the Messenger of Allah (peace be on him). There is no dispute, among those whose opinions matter, that this consensus is binding proof that gives rise to definitive knowledge. Thus, one who denies it is to be imputed with kufr like the imputation in the case of one who denies what is established by the Book and a continuous (mutawātir) tradition.¹⁹

Thus, Muhammad ibn al-Ḥasan al-Shaybani adds the consensus of the Companions of the Prophet (peace be on him) to the two binding sources that are not to be denied.²⁰ He also indicates that

¹⁹ Al-Sarakhsi, supra note 17, at 318:

«ذكر هشام عن محمد رحمه الله: اللفظ أربعة: ما في القرآن وما أشبهه، وما جاء به الفقه وما أشبهه، وما جاء عن الصحابة وما أشبهه، وما رأى المسلمون حسنة وما أشبهه. ففي هذا بيان أن ما أجمع عليه الصحابة في مسألة الثلاث بالكتاب والشريعة في كونه مطوعا به حتى يكفر جاهده، وهكذا أقوى ما يكون من الإجماع، فإن الصحابة أهله المدينة وعترة رسول الله صلى الله عليه وسلم، ولا خلاف بين من يعتقد بقولهم أن هذا الإجماع حقه جمعية للعلم فقطا لبكر جاهده كما يكفر نهيه ما تثبت بالكتاب أو يعبر منقول.»

²⁰ Yes, there may be some disagreement within the schools on this point, but we are not listing these points to debate the issue. Our purpose is to indicate the serious consequences that are attached to the negation of some of these definitive principles.
what is established through the Qur’ān and the continuous Sunnah is equally important. We may add here that a later Mālikī jurist went one step further and stated that all the sources of Islamic law are definitive. He makes this the opening sentence of his book al-Muwāfaqat.21 The apparent meaning of his statement is that even analogy/syllogism, which is the fourth source of Islamic law, is definitive. This is not acceptable to all, and has been rejected by some, in the past, as a source of law. In the Sunnī system, however, those schools that rejected this fourth source as a binding source of law have become extinct.22 In short, it is not possible for a Muslim to deny or go against the definitive principles upheld by the legal system as well as the established meanings arising from the Qur’ān and the Sunnah; he will do so only at his own peril. Can we say the same about human rights?

Natural law and human rights are based on human reason, that is, what collective humanity considers to be reasonable and just. They are treated as “universal principles” meaning thereby that they are, or should be, acceptable to every reasonable man. Like natural law thinking, from which they have emerged, they are used as “standards” for criticising positive law in each country as well as the actions of states. All laws must ultimately conform to these universal principles if they have to be acceptable to the world community. In fact, the advocates of human rights appear to be saying, “We do not care what your laws say; you must uphold human rights.”23

Once the collective reason of humanity considers something universally true it gives it the same sanctity that a religion provides to its higher values. Thus, basic human rights, like the rights

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21 “Uṣūl al-fiqh in [the] religion [of Islam] are definitive; they are not probable.” 1 AL-SHÂTIBI, AL-MUWĀFAQAT Fī UṢūL AL-ShARĪ’AH 1 (1998). This statement has baffled many, but one meaning that emerges from it is that even analogy/syllogism (qiyyās) is definitive, along with consensus, besides the two primary sources.

22 For example, the Zāhīrī school upheld literal methods of interpretation. Those who today indulge in blind taqlīd, try to “pick and choose” opinions from this school as well, but in reality the views of this school are no longer binding on anyone, nor are these views followed in practice.

23 This appears to be the approach of most non-governmental organisations (NGOs) working in the area of human rights with the support of the United Nations.
to “life, liberty and the pursuit of happiness” are deemed unalterable and definitive. In other words, no one can deny them. A state that goes against them is ostracised, and subjected to treatment that comes close to the “imputation of *kufr*.”

It is, perhaps, with this in mind that Kofi Anan has said, “A United Nations that will not stand up for human rights is a United Nations that cannot stand up for itself.”

The two positions described above do not pose a problem for those states that treat religion as a private affair, and make a clear distinction between church and state. In most Western societies, religion is a private affair and is pushed to the back seat even in private matters. The position is quite different in the case of Islam and Islamic law. Islam is not a religion in the Western sense of the term; it is a system, an ideology and a way of life that takes into account every act of the state and the individual. Muslim states that have declared themselves to be secular states, for one reason or the other, cannot escape this issue for it will continue to boomerang with intervals.

In an attempt to resolve this problem, if it is a problem, the question that is often raised is as to what role reason plays in Islamic law? The answer is to be sought at two levels, at least. It is not possible to deal with it at length here, but we may point out these two levels.

The issue at the first level is whether the source for the criticism function, that is, for the “standards” through which laws and state as well as individual actions are to be judged as good or bad, right or wrong, is “reason” or is it the *shari‘ah*. There have been protracted debates within Islamic legal literature about this, that is, whether it is reason that finally decides what is right or wrong, good or evil, or whether it is the *shari‘ah*. The Mu‘tazilah, a group deviating from the mainstream, have maintained that it is necessary that all laws of the *shari‘ah* be based on reason. The majority

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24 This appears to be the position of the Universalists discussed above.


26 This issue is identical to that in natural law where the primary function of natural law is to provide “standards” in the light of which positive law is to be criticised and judged as to its goodness or badness and be made to conform to the principles of natural law. It is also referred to as the “is-ought” debate and is usually discussed under the heading of law and morality.
have, however, maintained that while the laws are acceptable to reason, it is the shari‘ah that is the final judge. In other words, if natural law or human rights based on reason happen to clash with the rules of Islamic law, it is the shari‘ah that will have the final say. In fact, even when there is no clash, it is the shari‘ah and its principles that will be the guide for justifying the existence of any and all kinds of rights.\textsuperscript{27} The assumption underlying this is that reason has its limitations, while human interests are so complex that their reconciliation and preference cannot be left to unbridled human reason that often succumbs to various kinds of pressures and circumstances.\textsuperscript{28} *Sharī‘ah* alone is the faithful

\textsuperscript{27}By this we mean that in applying the principles and rules behind a right, a court (or a legislator for that matter) will refer to the general principles of Islamic law and not those of the Anglo-American common law or Romano-Germanic civil law. It is in this context that one finds it difficult to agree with the Council of Islamic Ideology of Pakistan when it claims that “a large number of federal and provincial laws were not contrary to any *Nasū*.\textsuperscript{29} The point is that no one expects the texts of the Qur‘ān and the *Sunnah* to have mentioned terrorism or hijacking or complex banking transactions and the like in terms that we use for these acts today. How are these acts to be judged in the light of the shari‘ah? Obviously, by referring to the general principles emerging from the texts and discussed in *fiqh* literature. This is true even if we claim that a few controversial principles of interpretation will not be used. The task of examining the existing laws can, therefore, never be over until the Council of Islamic Ideology or the higher Courts of Pakistan have elaborated and justified each and every section and article of the Pakistan Code in the light of the Islamic principles. God knows best.

\textsuperscript{28}The assumption underlying natural law is that human reason (collective) can independently arrive at the truth. There is some truth in this statement, and it is also an assumption of Islamic law that “what the people consider good is deemed good.” See Al-Sarakhsī, *supra* note 19 and accompanying text. This, however, can apply to some primary principles that are acceptable to all. Nevertheless, life is so complex that even collective human reason has made many mistakes. History is replete with examples. Bodenheimer says: “Reason is the (limited) ability of the human intellect to comprehend and cope with reality. The reasonable man is capable of discerning general principles and of grasping certain essential relations of things. . . . Since the relations of men and things are often complex, ambiguous, and subject to appraisal from different points of view, it is by no means possible for human reason, in the majority of cases, to discover one and only one final and correct answer to a problematic situation presented by human social life. . . . It was
and reliable guide. Many people in Muslim countries who wish to evade this issue, when they are solving legal problems, are heard to say that there is nothing expressly mentioned in the Qur‘ān and the Sunnah on such and such issue, therefore, we will decide in this way (according to our own reason). That is not how the system works. To deal with situations that are not expressly mentioned, the sharī‘ah still controls decisions through its purposes (maqāsid), the spirit of its laws and fundamental general principles (qawā’id). In fact, it is these purposes that provide guidance on all kinds of rights, and fundamental human rights in particular. These purposes are quite similar to higher values that are observed in Western societies, yet there is a vital difference that holds the key to understanding the issue. Higher values in Western societies are based on human goals and reason, while the purposes of the sharī‘ah have been determined by God Almighty.  

The ends of the sharī‘ah as determined by God Almighty are the guide for all matters that are not expressly stated in the Qur‘ān and the Sunnah. Some writers translate the word ijtiham (interpretation and legal reasoning on the basis of the sources of Islamic law) as “independent reasoning,” perhaps implying thereby that the jurists used to have recourse to their own independent reason for settling issues, that is, independent of the hold of the sharī‘ah and its sources. This translation is incorrect and highly misleading; independent reason has a subservient role to play within Islamic law. According to some schools, reason therefore erroneous on the part of some representatives of the classical law-of-nature school to believe that a universally valid and perfect system of law could be devised, in all of its details, by a pure exercise of the human reasoning faculty operating in abstracto.” Bodenheimer, supra note 16, at 358.

29Al-Ghazālī, the well known jurist, therefore, defines the purposes as follows: “As for maslahah, it is essentially an expression for the acquisition of manfa‘ah (benefit) or the repulsion of maḍarrah (injury, harm), but that is not what we mean by it, because acquisition of manfa‘ah and the repulsion of maḍarrah represent human goals, that is, the welfare of humans through the attainment of these goals. What we mean by maslahah, however, is the preservation of the ends of the sharī‘ah.” 1 AL-GHĀZĀLĪ, AL-MUSTAṢFĀ MIN ‘ILM AL-USHūL 286 (1877).

30Somehow the meaning persists in the minds of educated people, especially those who rely on secondary sources (in English) and also those educated in the West. See, e.g., Dr. Muqtedar Khan, Who are Moderate Muslims? DAWN,
can give a ruling on good and bad in the case of ethical norms, but in the case of the law it is the shari’ah that is supreme. Some other schools are not willing to grant reason an authority over the ethical norms either.\(^{31}\)

This is one level of the debate. At another level, the debate centres around the issue whether Islam is a programme of action that is comprehensible to every “common” man or whether it requires a philosopher, a rocket scientist, to unravel its mysteries. Jurists have maintained that the religion of Islam was revealed to an unlettered nation and was easily understood by them. Even the responses to hypothetical questions raised by imaginative individuals were given in terms that required action. The approach,

October 19, 2002, at 30, col. 2 (attempting to determine the meaning of a moderate Muslim and arguing that *ijtihād* is unfettered freedom of thought where the texts are silent—the Author relies on the ideas of some “moderate” Muslims who are emerging by the dozens in the United States). *Ijtihād* is interpretation of the texts and the extension of the norms of the shari’ah from these texts to all activity that is not expressly mentioned in the texts. It covers interpretation even in those cases that are mentioned but their meaning is subject to interpretation.

\(^{31}\)Şadr al-Shārī‘ah, a well known Ḥanafī jurist, says: “The term *shar‘īyyah* (legal according to Islamic law) includes all that would not have been known had the communication from the Lawgiver not been issued. This is irrespective of whether this communication pertained directly to a particular *hukm* or was issued in a manner that the *hukm* was dependent upon it, as in the issues based on analogical deduction. The rules for these too would be legal for had the communication not been issued for the original case, the rule extended for analogy would not have been known either. This stipulation (of the term *shar‘īyyah*), therefore, includes the goodness (*husn*) and badness (*qubh*) of all acts according to those who deny that this can be discovered through reason.

Know that in our view (Ḥanafī) and that of the majority of the Mu’tazilah, the goodness of some acts as well as their badness can be discovered through reason, but in certain acts they cannot be discovered and are dependent upon the communication from the Lawgiver. The first type of acts are not part of *fiqh*; they belong to the domain of ethics. The second type are part of *fiqh* and the definition of *fiqh* remains sound, comprehensive and precise (with the stipulation of the term *shar‘īyyah*) according to this view.

According to al-Ash’ārī and his followers, on the other hand, the goodness and badness of every act is known through the shari’ah (even those of purely moral acts) and all these acts would, therefore, be part of *fiqh* (according to the definition under discussion).” 1 ŞADR AL-SHARĪ‘AH, AL-TAWḍĪH 32–33 (1957).
we may add, is the same as that of the United Nations for human rights. It is action that is important and philosophical debates may continue as long as action is visible. In this context, jurists have looked down upon imaginative interpretations of the verses of the Qur’an, especially when action is missing.

Al-Shaṭibī, for example, begins this debate in the tenth preliminary concept of his book mentioned earlier by saying: “When support is sought from a transmitted evidence and reason, it is on the condition that the transmitted evidence will be given precedence so that it is the one that is followed. Reason will be relegated [to the background] and it is subservient to transmission. Reason will not be permitted a free play during investigation except to the extent of the bounds permitted by the shari‘ah.” He goes on to explain that if reason were given a free hand to determine what is good and bad “[I]t would become permissible to annul the shari‘ah through reason, and this is impossible and void.”

In the fifth preliminary concept, he argues that Islam is a religion of action and is stated in terms that are understood by an ordinary person. It does not require intellectual rationalisation for following the directives. The crux of his argument is that once the meaning of law is determined, it is to be followed and adopted as a law. The adoption of such a law does not require rationalisation as to its goodness or badness. Thus, many of the laws in the area of worship are not attributed any underlying reason or rationality; worship is a matter of ritual obedience. There are those who believe that most other laws are based on ritual obedience and trying to discover an underlying rationality is futile and perhaps contrary to the preferred methodology. Thus, when we say that interest (ribā) charged on loans is prohibited, there are some who try to provide some rational basis for this prohibition, while others maintain that there is no point in looking

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32 Al-Shaṭibī, supra note 21, at 61.
33 Id. (see the discussion of the third issue at 61).
34 Such a justification was attempted in the lengthy judgement on ribā by the Shari‘at Appellate Bench of the Supreme Court of Pakistan, M. Aslam Khaki v. Muhammad Hashim, P.L.D. 2000 S.C. 225.
for rational explanations; it is something prohibited by God and must be abolished.\footnote{It may be mentioned here in passing that there is no dispute about the prohibition of \textit{ribā} in Islamic law. It is something certain and definitive. The debate is about the meaning of \textit{ribā} itself whether it covers bank interest. Those who deem \textit{ribā} to be the same thing as bank interest treat its practice as a sin and a violation of a fundamental prohibition. The Cairo Declaration on Human Rights in Islam \cite{infra note 59, art. 14} upholds this prohibition.}

We can agree with Al-Shaṭībī, and those who uphold a similar opinion, that rationalisation for the individual who has to mould his behaviour in accordance with the dictates of the \textit{shari'ah} is not necessary. He has to focus on the performance of his duties. A simple directive is, therefore, more effective for the individual. We cannot agree, however, when the same ruling is applied to the jurist, the judge or the legislator. Life is complex, and these specialists have to weigh and balance a host of probabilities and often conflicting interests. They also have to assess the consequences and the impact of their decision on those who will be required to act upon and abide by the decision. The case of the prohibition of \textit{ribā} mentioned earlier can serve as an illustration.\footnote{See, supra note 34 and accompanying text.}

The result of the above discussion is that Islamic law provides one standard for judging and criticising existing or proposed laws, while human rights as expressed by the United Nations provide another standard, especially where nations have ratified the declarations and conventions of the United Nations. As far as the fundamental rules of Islamic law are concerned they have to be adopted by Muslims without investigating the goodness or badness of the rules on the basis of human reason. Such goodness or badness has already been determined by God Almighty. When there is a clash between these two standards, it is obvious that the standard imposed by Islamic law will be followed and the conflicting standard laid down by the United Nations will be rejected. This holds true whether or not a Muslim country has signed and ratified a convention of the United Nations and irrespective of what international law has to say regarding reservations to such instruments. Ratification cannot set aside the fundamental rules.
of Islamic law. It may be argued that international relations are based on reciprocity and a Muslim nation can accept conditions when the same conditions are being imposed on the other signatory to a treaty. The argument against this is the same; although reciprocity is an acknowledged principle in Islamic law, no rule of reciprocity can set aside, suspend, or permanently remove a fundamental rule of the shari‘ah.

We may now turn to an examination of the nature of human rights in Islam.

II. THE NATURE OF HUMAN RIGHTS IN ISLAM

A. Human Rights in General

The true nature of human rights is explained in a statement by Mary Robinson: “Human rights are inscribed in the hearts of people; they were there long before lawmakers drafted their first proclamation.”

Discussions about human rights began in the form of “natural rights” in the 18th century. Writers like Hobbes believed that citizens had entered into a contract with the rulers and had handed over all these rights in exchange for peace and security. Locke, on the other hand, said that the only right that had been surrendered to the rulers was the right to secure and preserve “natural rights” that had been retained. God created people free and equal, and in this state of natural equality, he said, no one should harm another person’s life, health, liberty or possessions. These four

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37 We say this on the assumption that international law, whatever its basis, obviously does not want Muslims to give up their way of life or their fundamental norms. Yes, it does want them to create a clear separation between religion (church) and state, but that amounts to demolishing the foundations of Islamic law. Even when the United Nations claims that Islamic law “discriminates”, the argument cannot be accepted. See, infra note 105 and accompanying text.


rights were considered by Locke to be the foundational and God-
given natural rights. Hobbes had maintained that man in a state
of nature is actually in a state of war. He, therefore, surrenders
these rights for the sake of peace and security. Locke disagreeing
with him emphasised that the state of nature is not necessarily a
state of war. A state of war, he maintained, is declared only when
natural rights are violated. The offender violating these rights
deserves to be punished, and even killed. The government we create
is authorised to judge us and to defend our natural rights. The
purpose of laws, he said, “is not to abolish or restrain, but to pre-
serve and enlarge freedom.” A government that violates such
laws and threatens the life, liberty and property of the individual
is to be dissolved.

Locke’s philosophy travelled to the United States. Thomas
Jefferson opened the “Declaration of Independence” with the fol-
lowing words:

We hold these truths to be self-evident, that all men are
created equal, that they are endowed by their Creator
with certain inalienable rights, that among these are life,
liberty, and the pursuit of happiness—that to secure these
rights, governments are instituted among men, deriving
their just powers from the consent of the governed, that
whenever any form of government becomes destructive of
these ends, it is the right of the people to alter or to abolish
it, and to institute new government, laying its foundation
on such principles, and organising its powers in such form,
as to them shall seem most likely to effect their safety and
happiness.

Accordingly, this philosophy has been expounded by United
States Supreme Court time and again. The Court said in Sav-
ing and Loan Association v Topeka:

42 Locke, supra note 40, ch. vi, sec. 57.
43 See, id. ch. iv, sec. 168.
44 American Declaration of Independence para 1 (U.S. 1776).
45 Saving and Loan Association v. Topeka, 20 Wall. 655, at 662–63; 22 L.Ed.
455, at 461 (1875), as quoted in Bodenheimer, supra note 16, at 50.
There are... rights in every free government *beyond the control of the state*. A government which recognised no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism...  

The words “beyond the control of the state” are important and convey that these rights should not be suspended or cannot be suspended by any government. In fact, they cannot be questioned by any law or by any government—they are outside the purview of the law.

The opposite position was taken by thinkers like Jeremy Bentham. Bentham rejected the idea of natural rights and stated that “natural law and natural rights are two kinds of fictions.” Such views paved the way for interference by governments in the area of basic rights. The difference was that Bentham believed that rights are not “natural rights.” All rights are created by the state and, therefore, the state can take them away when there is an actual or perceived emergency. Bentham has been highly influential in Britain for almost one hundred and fifty years and this influence naturally spilled over into its colonies including the areas that are now Pakistan and India. The “benefit” is that some of these colonies still suspend basic rights for the flimsiest of reasons and even imaginary emergencies. Apparently, we have to thank Britain and Bentham for this.

At the international level, the most important example of “natural rights” is the Universal Declaration of Human Rights adopted on December 10, 1948, by the General Assembly of the

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46 *Id.* (emphasis added).


49 For example, a former government in Pakistan (Nawaz Sharif’s) decided to “freeze” foreign currency accounts in the country for some reason. It also suspended all fundamental rights to add flavour to its decision.
United Nations.\textsuperscript{50} It differs from the early ideas about these rights insofar as the Universal Declaration focuses on the status of individuals as humans. The Declaration, thus, terms these rights “human rights.”\textsuperscript{51} The use of this term does not mean that the Universal Declaration does not draw on classic concepts; it does. In other words, the Declaration draws deeply on the “Anglo-European” concept of human rights or the Western concept of rights if you will. The different civilisations of the world uphold many of these rights, but the rights may be couched in different terms.

Another way in which the Declaration differs from the classical form is that the earlier concepts pertained to a few basic rights, while the Declaration lists a number of additional rights.\textsuperscript{52} Thus, along with rights to “life, liberty and the security of person,” human beings also have specific rights against enslavement, torture, arbitrary arrest, and exile, and rights for due process in prosecution, such as the presumption of innocence.\textsuperscript{53} Rights that are sometimes called “liberty rights” include those involving the right to movement, to marry, to have a family, to divorce, to freedom of thought, and to religious practice. Political rights include the right to participate in “genuine elections” and cultural rights to develop one’s personality.\textsuperscript{54} Economic rights include the right to work, to favourable pay, to join trade unions, and to paid holidays.\textsuperscript{55} Then there are welfare rights to social security, to health care, to special assistance for child care, and to free education. All these rights are deemed a “common standard of achievement for all peoples and all nations.”\textsuperscript{56}

\textsuperscript{50}See supra note 2.

\textsuperscript{51}For a clear statement on these differences and the history of these rights see “Rights” in The Internet Encyclopaedia of Philosophy, http://www.utm.edu/research/iep/rights.htm (last visited October 15, 2002).

\textsuperscript{52}Id. See also Locke, supra note 40 and accompanying text.

\textsuperscript{53}See Internet Encyclopaedia of Philosophy, supra note 51.

\textsuperscript{54}Id.

\textsuperscript{55}Id. In reality, the various declarations and conventions of the United Nations continue to add to the integrated system of rights.

\textsuperscript{56}Id.
B. Human Rights in Islam

In Islamic law, the position lies somewhere in the middle, however, the net impact is similar to the position taken by the United Nations or the United States. Rights are granted by the sharī‘ah and no government or power can take them away or suspend them under any circumstances. The rights granted by the sharī‘ah to individuals are protected as the right of God. The implication is that the rights have been granted by God and no human agency has the authority to alter them or suspend them in any way—God Almighty alone has this right. Further, if Islamic law is implemented in its proper form, these rights remain justiciable through the courts irrespective of their being acknowledged by, or recorded in, a constitution or other document. The Preamble of the Cairo Declaration adopted by Organisation of Islamic Conference (OIC) states as follows:

Believing that fundamental rights and universal freedoms in Islam are an integral part of the Islamic religion and that no one as a matter of principle has the right to suspend them in whole or in part or violate or ignore them in as much as they are binding divine commandments, which are contained in the Revealed Books of God and were sent through the last of His Prophets to complete the preceding divine messages thereby making their observance an act of worship and their neglect or violation an abominable sin, and accordingly every person is individually responsible—and the Ummah collectively responsible—for their safeguard.

57 That is, as compared to the advocates of “natural law” like John Locke and those, like Bentham, who believe that rights are granted by the state.

58 See generally 4 AL-SHĀTI’BĪ, supra note 21.

59 Cairo Declaration on Human Rights in Islam, Nineteenth Islamic Conference of Foreign Ministers (Cairo, 14 Muharram, 1411 A.H./5 August, 1990 A.D.), pmbl.

60 Id. (emphasis added). Here, it is not stated whether these rights are “self-executing” and automatically justiciable through the courts in a Muslim country. We would say that this paragraph implies that the rights are justiciable irrespective of their acknowledgement by a constitution or other document.
These statements may imply that human rights and liberties are clothed in norms that are enforceable through courts of law irrespective of their being acknowledged by constitutions or laws. Yet, these are norms that have been acknowledged in general terms. Are such norms supra-constitutional and enforceable directly? A more practical approach has been expressed in the *Advisory Opinion on the Meaning of Laws* by the Inter-American Court of Human Rights in 1986. The Court maintained that: "[O]ne cannot interpret the word ‘laws’ . . . as a synonym for just any legal norm, since that would be tantamount to admitting that fundamental rights can be restricted at the sole discretion of governmental authorities with no other formal limitation than that such restrictions be set out in provisions of a general nature."\(^{61}\)

The solution according to the Court is that:

In order to guarantee human rights, it is therefore essential that state actions affecting basic rights not be left to the discretion of the government but, rather, that they be surrounded by a set of guarantees designed to ensure that the inviolable attributes of the individual not be impaired. Perhaps the most important of these guarantees is that restrictions to basic rights only be established by a law passed by the Legislature in accordance with the Constitution. Such a procedure not only clothes these acts with the assent of the people through its representatives, but also allows minority groups to express their disagreement, propose different initiatives, participate in the shaping of the political will, or influence public opinion so as to prevent the majority from acting arbitrarily. Although it is true that this procedure does not always prevent a law passed by the Legislature from being in violation of human rights—a possibility that underlines the need for some system of subsequent control—there can be no doubt that it is an important obstacle to the arbitrary exercise of power.\(^{62}\)

The Court draws attention to the fact that basic rights and freedoms are usually restricted in the name of “general welfare” and “public order”. To identify the method for such restriction, the Court, relying on its earlier decision, emphasises “that ‘public order’ or ‘general welfare’ may under no circumstances be invoked as a means of denying a right guaranteed by the Convention or to impair or deprive it of its true content.”

We fully agree with these words of wisdom. In the Islamic world the term *maslahah* is narrowly translated as public interest by some and is often invoked by modern scholars to justify a restriction of basic rights and freedoms granted by God Almighty. The correct way, in addition to what the learned Court has stated, would be to restrict a basic right only in case such a restriction or interest is directly stated or acknowledged by the *shari‘ah* in the

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64“Within the framework of the Convention, it is possible to understand the concept of general welfare as referring to the conditions of social life that allow members of society to reach the highest level of personal development and the optimum achievement of democratic values. In that sense, it is possible to conceive of the organisation of society in a manner that strengthens the functioning of democratic institutions and preserves and promotes the full realization of the rights of the individual... The Court must recognise, nevertheless, the difficulty inherent in the attempt of defining with precision the concepts of ‘public order’ and ‘general welfare.’ It also recognises that both concepts can be used as much as to affirm the rights of the individual against the exercise of governmental power as to justify the limitations on the exercise of those rights in the name of collective interests. In this respect, the Court wishes to emphasise that ‘public order’ or ‘general welfare’ may under no circumstances be invoked as a means of denying a right guaranteed by the Convention or to impair or deprive it of its true content (See art. 29 (a) of the Convention). Those concepts, when they are invoked as a ground for limiting human rights, must be subjected to an interpretation that is strictly limited to the ‘just demands’ of ‘a democratic society,’ which takes account of the need to balance the competing interests involved and the need to preserve the object and purpose of the Convention.” *Id.*

65It is a grave mistake to identify *maslahah* with “public interest” or “utility.” It cannot be denied that there are similarities, but there are vital differences that change the whole nature of the doctrine of *maslahah* in Islamic law.
texts of the Qur’ān and the Sunnah. No interest or case of “general welfare”, determined by the state or some other authority, should be deemed sufficient to restrict a basic right.

C. The Cairo Declaration on Human Rights in Islam

General statements about the importance of human rights in Islam is one thing and the identification of these rights in Islamic legal literature and subsequent translation into laws of Muslim states quite another. Exerting pressure on Muslim states, by organisations like the OIC, to enforce these rights is obviously a far cry and almost non-existent.

The first significant step at the international level, however, came in the shape of what is called the “Cairo Declaration” that was issued by the Nineteenth Islamic Conference of Foreign Ministers (Cairo, 14 Muharram, 1411A.H./5 August, 1990 A.D.). The Declaration consists of a preamble and twenty-five articles. The Declaration acknowledges the universal efforts for human rights by saying, “Wishing to contribute to the efforts of mankind to assert human rights, to protect man from exploitation and persecution, and to affirm his freedom and right to a dignified life in accordance with the Islamic Shari‘ah.”

The document is a mixture of liberties, economic and social rights. For example, Article 14 states: “Everyone shall have the right to legitimate gains without monopolisation, deceit or harm to oneself or to others. Usury (ribā) is absolutely prohibited.”

The Cairo Declaration is found on a few websites dealing with human rights in general and as an appendix to a book placed on the ISESCO site. We could not find it on the OIC sites. Consequently, little is known in the Islamic world about this document. The only document that openly acknowledges the Declaration and supports it, in the context of the rights of the child, is the Report of the Kingdom of Saudi Arabia submitted to the Committee on

66See supra note 59.
67The full text may be seen in the documents section of this issue.
68Id.
69Id. art. 14.
the Rights of the Child.\footnote{Committee on the Rights of the Child, Consideration of Reports Submitted by States Parties Under Article 44 of the Convention: Initial report of Saudi Arabia due in 1998, CRC/C/61/Add.2, 29 Mar. 2000.} The following statements are recorded in paragraph 14 and 121 of this report:

14. To reaffirm its deep-rooted faith in human rights and dignity as prescribed in Islam, the Kingdom of Saudi Arabia ratified the Declaration of Human Rights in Islam, known as the Cairo Declaration, adopted by the Organisation of the Islamic Conference on 4 August 1990.\footnote{Id. at para 14.}

121. Under article 7 (b) of the Cairo Declaration of Human Rights in Islam, “parents or legal guardians have the right to choose the form of upbringing they want for their children in a manner consistent with their interests and their future in the light of moral values and the regulations of Islamic law.”\footnote{Id. at para 121.}

The Arab states, however, decided to have their own charter and the Council of the League of Arab States, Arab Charter on Human Rights, September 15, 1994 came into being.\footnote{Council of the League of Arab States, Arab Charter on Human Rights, Sep. 15, 1994, reprinted in 18 HUM. RTS. L.J. 151 (1997).} This Charter acknowledges the Cairo Declaration along with other declarations in the following words:

Reaffirming the principles of the Charter of the United Nations and the Universal Declaration of Human Rights, as well as the provisions of the United Nations International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights and the Cairo Declaration on Human Rights in Islam.\footnote{Id. pmbl.}

Despite our efforts, we could not establish as to how many Muslim states have signed the Cairo Declaration and what progress has been made on its provisions. The only document we could discover on the Internet was a resolution that is in the
nature of a lamentation seven years after the Cairo Declaration was adopted.\footnote{The Eighth Session of the Islamic Summit Conference (Session of Confidence, Dialogue and Participation) held in Tehran, Islamic Republic of Iran, from 9 - 11 Sha‘aban 1418H (9–11 Dec. 1997).} We are constrained to reproduce some paragraphs from this resolution here:

Recalling also Resolutions No. 37/20-P, No. 40/21-P, No. 39/22-P, No.40/23-P and 41/24-P of the successive Sessions of the Islamic Conference of Foreign Ministers as well as Resolution No. 39/7-P (IS) of the Seventh Islamic Summit underlining the importance of following up the Cairo Declaration on Human Rights in Islam . . . .

Recognising the necessity and urgency of translating the follow up of the Cairo Declaration, as called for by the above-mentioned resolutions, into concrete and practical measures after a lapse of 7 years of its adoption . . . .\footnote{Id. (emphasis added).}

Exploring ways and means of promotion and protection of human rights through, \textit{inter alia}, formulation and codification of Islamic norms and values into a set of universally recognised Islamic instruments on human rights\footnote{Id. (emphasis added).} . . . .

Taking note . . . [of] the small number of participants in the said meeting, as well as the slow pace of activities and lack of concrete achievements of the Governmental Expert Group in fulfilling its mandate;\footnote{Id. (emphasis added).}

Recognises the importance . . . to start the formulation and codification of the Islamic norms and values into a universally recognised Islamic instrument on human rights.

Another five years have passed since this resolution was adopted. Yet, we could not discover anything on the Internet, or anywhere else for that matter, pertaining to the proposed Fifth meeting of the Governmental Expert Group during 1998. There is no news about the “formulation and codification of the Islamic norms and values into a universally recognised Islamic instrument on human rights”\footnote{Id.} nor is there any hint about the “seminars and
workshops.” A symposium on human rights in Islam was held by the Muslim World League in Rome, Italy, at the headquarters of the Cultural Islamic Centre of Italy, and is a true example of the vague general statements that we refer to. What is needed is that the laws of Muslim states be “surrounded by a set of guarantees designed to ensure that the inviolable attributes of the individual [are] not [ ] impaired.” Unless the subjects of Muslim states start feeling that the rights granted to them by the Shari‘ah are available to them and are protected and enforced by their courts, documents on human rights are going to share the fate of the Cairo Declaration.

The Cairo Declaration is indeed an important document. It may be counted among other important documents on the subject. Thus, there are many regional instruments on human rights besides the Universal Declaration of Human Rights. These are:

1. American Declaration on the Rights of Man (1948)
2. The European Convention on Human Rights (drafted 1950 and enforced on September 3, 1950)
3. The European Social Charter (drafted in 1961 and enforced since 1965)

In reality, and as compared to these documents, the Cairo Declaration is not a regional document. It represents one-fourth of humanity. This large group of people have every right to adopt,

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81 *Id.*

82 This resulted in what is being called the Declaration of Rome on Human Rights in Islam. The text is available at the ISESCO website *supra* note 70.

83 *See supra* note 61 and accompanying text.
promote and enforce human rights in their own way and in accordance with their own faith. It is, therefore, suggested that the OIC should make efforts for developing and refining a convention on human rights in Islam, a convention that is binding on Muslim states.84

A convention on human rights on Islam can only be developed when Muslim scholarship moves from the “vague and general” to the tangible and concrete, and from the possible to the actual and enforced. Human rights in Islam will become meaningful when the rights granted by God are also recognised and enforced through the courts of law. One way of doing this is to analyse each and every article and clause of the United Nations instruments on human rights. It is with this purpose in mind that this issue carries some of the important instruments in English as well as Arabic. Further, a problem that needs to be seriously addressed is that while each Muslim state is eager to sign and ratify UN instruments, there is a total lack of interest in documents issued by the OIC. The OIC must make arrangements to publish all these documents in the local languages of the Muslim states.

We may now turn to international law and see how the sharī‘ah is viewed through the eyes of international conventions. One UN instrument that has received universal acceptance is the Convention on the Rights of the Child (CRC),85 and it is through this Convention that we will examine the next issue.

III. The Sharī‘ah and International Law

We have so far examined the problems faced by a religious law like Islamic law when it comes to justifying ideas that may clash with revelation on which this law is based. Islamic law, we said, cannot accept ideas that may attack its fundamental principles, especially those that are deemed to be definitive. In case of such a conflict, the offending concepts contained in UN conventions will have to be rejected. We have also tried to compare the approach of the United Nations, and even that of the United States, towards

84 This is what the resolution referred to above is saying. See supra note 76 and accompanying text.
85 Convention, supra note 14.
human rights with the approach of Islamic law towards the same rights particularly in the context of the Cairo Declaration on human rights in Islam. We may now see how the two approaches come face to face with each other in case of the UN Convention on the Rights of the Child (CRC).

The Convention on the Rights of the Child has been hailed as a “visionary document.” It is considered the first legally binding international instrument to incorporate the full range of human rights—civil and political rights as well as economic, social and cultural rights—for safeguarding the welfare of the child. It is supported by two Optional Protocols, on the involvement of children in armed conflict and on the sale of children, child prostitution and child pornography. The Convention is also supported by three types of rules concerning child justice. These are the UN Guidelines for the Administration of Juvenile Delinquency (the Riyadh Guidelines), the UN Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules), and the UN Rules for the Protection of Juveniles Deprived of their Liberty.

The Convention was adopted by the General Assembly of the United Nations by its resolution 44/25 of 20 November 1989. Prior to this, a declaration on the rights of the child was adopted by the League of Nations in 1924 and then another declaration

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87 Id.
was adopted by the United Nations in 1959.\textsuperscript{93} The two Optional Protocols, on the involvement of children in armed conflict and on the sale of children, child prostitution and child pornography, entered into force, respectively on 12 February and 18 January 2002.\textsuperscript{94} The Convention has been ratified by all the countries of the world, except the United States and Somalia.\textsuperscript{95} In the case of Somalia, the reason is obvious: it does not have an effective government. In the case of the United States, the reasons are detailed and cannot be recorded here.\textsuperscript{96}

The CRC has been ratified by a record number of countries, and it has been ratified by all the Muslim countries (except Somalia, as noted). A majority of the Muslim countries, however, have ratified the Convention with some kind of reservation, with many saying that the Convention would be interpreted in the light of the \textit{shari‘ah}. Several countries have objected to this reservation. We have summarised below, in the following section, the nature of these reservations for some of the Muslim countries. This is followed by a description of some of the objections to these reservations. The main idea is to show where Islamic law fits in with respect to such conventions and what kind of reaction it invokes.

A. \textit{Ratification of the CRC by Muslim Countries and Reservations}

We will first list the reserving countries and follow this up by objections raised by some Western State parties to the Convention.

\textit{(1) Reservations.}—Reservations by the countries listed below\textsuperscript{97} pertain mostly to the following issues:

\footnotesize
\begin{itemize}
\item \textsuperscript{94}CRC-Guide, supra note 1.
\item \textsuperscript{96}See article on \textit{Islamic Law and the CRC} by this writer in this issue for the details.
\item \textsuperscript{97}The data that follows, that is, with respect to reservations and objections by States has been excerpted from a \textit{Status Sheet, supra} note 95. An
1. The articles of the Convention will be interpreted in the light of the injunctions of the shari‘ah and Islamic values. Only a few countries made such a comprehensive reservation. One of the countries that did make such a reservation was Pakistan, however, the reservation was withdrawn by Pakistan in 1997. We have not been able to verify whether or not this was done after consulting the Council of Islamic Ideology. Saudi Arabia, Iran and a few other countries did not withdraw such reservations.

2. The provisions of the Convention pertaining to adoption are against the shari‘ah. This reservation was made mostly by Arab states.

3. The provisions concerning the changing of religion is against the shari‘ah for a Muslim. Some Muslim states have avoided this issue.

4. The right to provide education in accordance with Islamic values belongs to parents.

5. The Convention will be interpreted in the light of the Constitution of the State party and its internal laws. This reservation has been made mostly by those Muslim countries that are declared secular states or those that have large non-Muslim minorities.

(a) Countries making a reservation that the provisions of the Convention will be interpreted in the light of the shari‘ah.—The countries that made a general reservation were Afghanistan.

attempt has been made to reproduce the objections as found in this document. No further citations have, therefore, been provided with respect to the reservations and objections.

98 The Government of the Republic of Afghanistan reserves the right to express, upon ratifying the Convention, reservations on all provisions of the Convention that are incompatible with the laws of Islamic Shari‘a and the local legislation in effect.” Id.
Brunei Darussalam,\textsuperscript{99} Djibouti,\textsuperscript{100} Iran,\textsuperscript{101} Kuwait,\textsuperscript{102} and Mauritania.\textsuperscript{103}

Pakistan\textsuperscript{104} made a general reservation initially, but withdrew it later. The statement recorded in UN documents is: “Subsequently, on 23 July 1997, the Government of Pakistan informed the Secretary-General that it had decided to withdraw its reservation made upon signature and confirmed upon ratification.” This was done under considerable pressure from the Committee on the Rights of the Child at the time of examination of Pakistan’s first report. One of the learned members had the following to say about a general reservation:

13. Mr. KOLOSOV said it was a principle of international treaty law that no reservation could be accepted if it undermined the purpose of the treaty concerned. A reservation of the sort made by Pakistan did, however, undermine one purpose of the Convention on the Rights of the Child, which was to uphold the principle of non-discrimination.

\textsuperscript{99} “[The Government of Brunei Darussalam] expresses its reservations on the provisions of the said Convention which may be contrary to the Constitution of Brunei Darussalam and to the beliefs and principles of Islam, the State religion, and without prejudice to the generality of the said reservations, in particular expresses its reservation on articles 14, 20 and 21 of the Convention.” \textit{Id.}

\textsuperscript{100} “[The Government of Djibouti] shall not consider itself bound by any provisions or articles that are incompatible with its religion and its traditional values.” \textit{Id.}

\textsuperscript{101} “The Islamic Republic of Iran is making reservation to the articles and provisions which may be contrary to the Islamic Shariah, and preserves the right to make such particular declaration, upon its ratification.” Reservation upon ratification: “The Government of the Islamic Republic of Iran reserves the right not to apply any provisions or articles of the Convention that are incompatible with Islamic Laws and the international legislation in effect.” \textit{Id.}

\textsuperscript{102} “[Kuwait expresses] reservations on all provisions of the Convention that are incompatible with the laws of Islamic Shari’a and the local statutes in effect.” (restricted to Articles 7 & 21 upon ratification). \textit{Id.}

\textsuperscript{103} “In signing this important Convention, the Islamic Republic of Mauritania is making reservations to articles or provisions which may be contrary to the beliefs and values of Islam, the religion of the Mauritania People and State.” \textit{Id.}

\textsuperscript{104} “Provisions of the Convention shall be interpreted in the light of the principles of Islamic laws and values.” \textit{Id.}
He hoped, therefore, that the representative of Pakistan would be able to signify to his authorities that the reservation was unacceptable and that the matter required urgent attention.\footnote{Committee on the Rights of the Child, Sixth session, Summary Record of the 132nd Meeting (Held at the Palais des Nations, Geneva, on Tuesday, 5 April 1994, at 3 p.m.), GENERAL CRC/C/SR.132, 12 April 1994, para 9. Available at http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/Pakistan2.htm.}

In its first report submitted to the Committee on the Rights of the Child, Pakistan had already reduced the impact of this reservation to adoption.\footnote{Paragraph 31 of Pakistan’s first report states: “31. Pakistan ratified the Convention on 12 November 1990, with a general reservation that its provisions shall be interpreted in the light of principles of Islamic laws and values. Practically no provision of the Convention comes into direct conflict with any of the major precepts of Islam, barring the matter of adoption for which an appropriate provision has already been made in the Convention. Pakistan has, therefore, committed itself to achieving the rights of the child—rather of the ‘whole child’ and of ‘all children’ in the development perspective.” Committee on the Rights of the Child, Consideration of Reports Submitted by States Parties Under Article 44 of the Convention, Initial Reports of States Parties due in 1993 (Addendum): Pakistan, CRC/C/3/Add.13 28 May 1993.}

The other countries making the general reservation on the basis of the provisions of the *shari‘ah* are: Qatar,\footnote{“[The State of Qatar] enter(s) a general reservation by the State of Qatar concerning provisions incompatible with Islamic Law.” Id.} Saudi Arabia\footnote{“[The Government of Saudi Arabia enters] reservations with respect to all such articles as are in conflict with the provisions of Islamic law.” Id.} and Syria.\footnote{“The Syrian Arab Republic has reservations on the Convention’s provisions which are not in conformity with the Syrian Arab legislations and with the Islamic Shariah’s principles, in particular the content of article (14) related to the Right of the Child to the freedom of religion, and articles 2 and 21 concerning the adoption.” Id.}

(b) **Countries making a reservation with respect to particular articles of the Convention that may be against the provisions of Islamic law, like freedom to choose one’s religion and adoption.** — Algeria made a comprehensive reservation that can be split into two parts. The first part dealt with Islamic provisions,\footnote{The provisions of paragraphs 1 and 2 of article 14 shall be interpreted by the Algerian Government in compliance with the basic foundations of the}
the general part referred to the provisions of its laws, like the Penal Code and other laws.

Bangladesh referred to Article 14, para 1 of the Convention (freedom of thought, conscience and religion) and then stated that Article 21 (adoption) would be subject to the national laws of the country.\textsuperscript{112} The reservation by Bosnia and Herzegovina referred to the separation of the child from its parents. Maldives referred to the provisions of the \textit{shari’ah} in a general way at the time of signature, but then restricted this to Articles 14 and 21 of the Convention at the time of ratification.\textsuperscript{113} Likewise, Egypt referred to the \textit{shari’ah} in a general way, but narrowed it down to adoption alone.\textsuperscript{114}

\begin{flushleft}
\textsuperscript{112}\textsuperscript{a}[The Government of Bangladesh] ratifies the Convention with a reservation to article 14, paragraph 1. Also article 21 would apply subject to the existing laws and practices in Bangladesh.” \textit{Id.}
\end{flushleft}

\begin{flushleft}
\textsuperscript{113}\textsuperscript{a}(1) Since the Islamic Shariah is one of the fundamental sources of Maldivian Law and since Islamic Shariah does not include the system of adoption among the ways and means for the protection and care of children contained in Shariah, the Government of the Republic of Maldives expresses its reservation with respect to all the clauses and provisions relating to adoption in the said Convention on the Rights of the Child. (2) The Government of the Republic of Maldives expresses its reservation to paragraph 1 of article 14 of the said Convention on the Rights of the Child, since the Constitution and the Laws of the Republic of Maldives stipulate that all Maldivians should be Muslims.” \textit{Id.}
\end{flushleft}

\begin{flushleft}
\textsuperscript{114}\textsuperscript{a}“Since The Islamic Shariah is one of the fundamental sources of legislation in Egyptian positive law and because the Shariah, in enjoining the provision of every means of protection and care for children by numerous ways and means, does not include among those ways and means the system of adoption existing in certain other bodies of positive law. . . .” \textit{Id.}
\end{flushleft}
The reservations made by Iraq, Jordan and Morocco were almost identical referring to freedom of choice of religion as well as adoption, while the reservation of Oman went into a little more detail, especially with respect to nationality. The reservation by the United Arab Emirates was similar to that of Oman although it referred to mass media as well.

(c) Countries making a reservation that the provisions of the Convention will be interpreted in the light of the constitution of the country and its domestic laws. Under this heading come two countries from the Far East, namely, Indonesia and Malaysia.

115 “The Government of Iraq has seen fit to accept [the Convention] ... subject to a reservation in respect to article 14, paragraph 1, concerning the child’s freedom of religion, as allowing a child to change his or her religion runs counter to the provisions of the Islamic Shariah.” Id.

116 “The Hashemite Kingdom of Jordan expresses its reservation and does not consider itself bound by articles 14, 20 and 21 of the Convention, which grant the child the right to freedom of choice of religion and concern the question of adoption, since they are at variance with the precepts of the tolerant Islamic Shariah.”

117 “The Kingdom of Morocco, whose Constitution guarantees to all the freedom to pursue his religious affairs, makes a reservation to the provisions of article 14, which accords children freedom of religion, in view of the fact that Islam is the State religion.” Id.

118 A reservation is entered to all the provisions of the Convention that do not accord with Islamic law or the legislation in force in the Sultanate and, in particular, to the provisions relating to adoption set forth in its article 21.” Id.

119 “Article 14: The United Arab Emirates shall be bound by the tenor of this article to the extent that it does not conflict with the principles and provisions of Islamic law. ... Article 21: Since, given its commitment to the principles of Islamic law, the United Arab Emirates does not permit the system of adoption, it has reservations with respect to this article and does not deem it necessary to be bound by its provisions.” Id.

120 “With reference to the provisions of articles 1, 14, 16, 17, 21, 22 and 29 of this Convention, the Government of the Republic of Indonesia declares that it will apply these articles in conformity with its Constitution.” Id.

121 “The Government of Malaysia accepts the provisions of the Convention on the Rights of the Child but expresses reservations with respect to article 1, 2, 7, 13, 14, 15, [...], 28, [paragraph 1 (a)], 37, [...]. of the Convention and declares that the said provisions shall be applicable only if they are in
The other two countries are at the other end of the Muslim world, close to Europe: Tunisia\textsuperscript{122} and Turkey.\textsuperscript{123}

(2) Objections to the Reservations by Western State Parties.—The document of the United Nations from which these objections have been excerpted states that: “Unless otherwise indicated, the objections were made upon ratification, acceptance, accession or succession.” The objections raised by state parties related mostly to the following points:

1. The reservation must not go against the objectives and purposes of the Convention.
2. The constitution or the internal laws of a state cannot be made an excuse to evade the obligations created for the State party through the ratification of the Convention.
3. The reservation is vague and needs to be made more specific.
   This objection was levelled against the reservation by Malaysia in particular, because the State party had claimed interpretation of the Convention in the light of its internal laws.

In most cases, the objecting state party did not consider the objection to have affected the formation of the treaty between the objecting State party and the country that had made the reservation. In a few cases, however, the objecting State party did not consider relations under the treaty to have been established. It may be mentioned here that these objections were raised despite the following statement in the preamble of the CRC:

conformity with the Constitution, national laws and national policies of the Government of Malaysia. . . .” \textit{Id.}

\textsuperscript{122} “The Government of the Republic of Tunisia enters a reservation with regard to the provisions of article 2 of the convention, which may not impede implementation of the provisions of its national legislation concerning personal status, particularly in relation to marriage and inheritance rights. . . .” \textit{Id.}

\textsuperscript{123} “The Republic of Turkey reserves the right to interpret and apply the provisions of articles 17, 29 and 30 of the United Nations Convention on the Rights of the Child according to the letter and the spirit of the Constitution of the Republic of Turkey and those of the Treaty of Lausanne of 24 July 1923.” \textit{Id.}
Taking due account of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child.\textsuperscript{124}

This may lead one to conclude that the shari'ah does not come under the meaning of “traditions and cultural values.”

It is not possible for us to record all the objections raised by various countries. The objections along with the names of the countries are summarised below in the form of a table\textsuperscript{125} and is followed by a few representative objections to give the reader a general idea of their nature and tenor.

<table>
<thead>
<tr>
<th>State Objecting</th>
<th>Reserving State</th>
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<tbody>
<tr>
<td>Austria</td>
<td>Malaysia, Brunei Darussalam, Saudi Arabia, United Arab Emirates</td>
</tr>
<tr>
<td>Denmark</td>
<td>Brunei Darussalam, Saudi Arabia</td>
</tr>
<tr>
<td>Finland</td>
<td>Indonesia, Pakistan, Qatar, Syrian Arab Republic, Iran, Malaysia, Oman</td>
</tr>
<tr>
<td>Germany</td>
<td>Tunisia, Qatar, Syrian Arab Republic, Iran, Brunei Darussalam, Saudi Arabia, Malaysia, Oman</td>
</tr>
<tr>
<td>Ireland</td>
<td>Bangladesh, Djibouti, Indonesia, Jordan, Kuwait, Pakistan, Tunisia, Iran, Saudi Arabia, Malaysia</td>
</tr>
<tr>
<td>Italy</td>
<td>Syrian Arab Republic, Qatar, Brunei Darussalam, United Arab Emirates</td>
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<tr>
<td>Netherlands</td>
<td>Djibouti, Indonesia, Iran, Pakistan, Syrian Arab Republic, Qatar, Turkey, Malaysia, Brunei Darussalam, Saudi Arabia, Oman, United Arab Emirates</td>
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<tr>
<td>Norway</td>
<td>Djibouti, Indonesia, Iran, Pakistan, Syrian Arab Republic, Qatar, Malaysia, Brunei Darussalam, Saudi Arabia, Oman</td>
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<tr>
<td>Portugal</td>
<td>Bangladesh, Djibouti, Indonesia, Kuwait, Pakistan, Turkey, Iran, Qatar, Malaysia, Brunei Darussalam</td>
</tr>
<tr>
<td>Slovakia</td>
<td>Qatar</td>
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</tbody>
</table>

\textsuperscript{124}See Convention, supra note 14, pmbl.

\textsuperscript{125}The table has been constructed from the data available in the Status Sheet, supra note 95.
Sweden

| Indonesia, Pakistan, Jordan, Syrian Arab Republic, Iran, Malaysia, Saudi Arabia, Oman |

The objection by Austria (applicable to all countries listed for Austria) was stated as follows:

18 June 1996—with regard to the reservations made by Malaysia upon accession

“Under article 19 of the Vienna Convention on the Law of Treaties which is reflected in article 51 of the [Convention] a reservation, in order to be admissible under international law, has to be compatible with the object and purpose of the treaty concerned. A reservation is incompatible with the object and purpose of a treaty if it intends to derogate provisions the implementation of which is essential to fulfilling its object and purpose.

The Government of Austria has examined the reservation made by Malaysia to the [Convention]. Given the general character of these reservations a final assessment as to its admissibility under international law cannot be made without further clarification.

Until the scope of the legal effects of this reservation is sufficiently specified by Malaysia, the Republic of Austria considers these reservations as not affecting any provision, the implementation of which is essential to fulfilling the object and purpose of the [Convention].

Austria, however, objects to the admissibility of the reservations in question if the application of this reservation negatively affects the compliance of Malaysia . . . with its obligations under the [Convention] essential for the fulfilment of its object and purpose.

Austria could not consider the reservation made by Malaysia . . . as admissible under the regime of article 51 of the [Convention] and article 19 of the Vienna Convention on the Law of Treaties unless Malaysia, . . . by providing additional information or through subsequent practice to ensure[s] that the reservations are compatible with the
provisions essential for the implementation of the object and purpose of the [Convention].”

The objection by Denmark (applicable to all countries listed for Denmark) was stated as follows:

10 February 1997—With regard to the reservation made by Brunei Darussalam upon accession

“The Government of Denmark finds that the general reservation with reference to the Constitution of Brunei Darussalam and to the beliefs and principles of Islamic law is of unlimited scope and undefined character. Consequently, the Government of Denmark considers the said reservation as being incompatible with the object and purposes of the Convention and accordingly inadmissible and without effect under international law. Furthermore, it is a general principle of international law that national law may not be invoked as justification for failure to perform treaty obligations.

The Convention remains in force in its entirety between Brunei Darussalam and Denmark.

It is the opinion of the Government of Denmark, that no time limit applies to objections against reservations, which are inadmissible under international law.

The Government of Denmark recommends the Government of Brunei Darussalam to reconsider its reservation to the Convention on the Rights of the Child.”

The objection by Ireland with respect to Iran was as follows:

5 September 1995—With regard to the reservation made by Iran (Islamic Republic) upon ratification

“The reservation poses difficulties for the States parties to the Convention in identifying the provisions of the Convention which the Islamic Government of Iran does not intend to apply and, consequently, makes it difficult for State Parties to the Convention to determine the extent of their treaty relations with the reserving State.

126 Id.
127 Id.
The Government of Ireland hereby formally makes objection to the reservation by the Islamic Republic of Iran.”

The objection of Italy with respect to Qatar in the context of a general reservation of compatibility with Islamic law was as follows:

14 June 1996—With regard to the reservations made by Qatar upon ratification:

“The Government of the Italian Republic considers that such a reservation, which seeks to limit the responsibilities of Qatar under the Convention by invoking general principles of national law, may raise doubts as to the commitment of Qatar to the object and purpose of the Convention and, moreover, contributes to undermining the basis of international treaty law. It is [in the] common interest of States that treaties to which they have chosen to become Parties should be respected, as to the objects and the purpose, by all Parties. The Government of the Italian Republic therefore objects to this reservation. This objection does not constitute an obstacle to the entry into force of the Convention between the Government of the Italian Republic and the State of Qatar.”

The objection by Netherlands to the reservations made by Djibouti, Indonesia, Iran (Islamic Republic of), Pakistan and the Syrian Arab Republic states as under:

“The Government of the Kingdom of the Netherlands considers that such reservations, which seek to limit the responsibilities of the reserving State under the Convention by invoking general principles of national law, may raise doubts as to the commitment of these States to the object and purpose of the Convention and moreover, contribute to undermining the basis of international treaty law. It is in the common interest of States that treaties to which they have chosen to become parties should be respected, as to object and purpose, by all parties. The

128 Id.
129 Id. The same objection was later directed at Brunei Darussalam and United Arab Emirates. Id.
Government of the Kingdom of the Netherlands therefore objects to these reservations.
This objection does not constitute an obstacle to the entry into force of the Convention between the Kingdom of the Netherlands and the aforementioned States.”\textsuperscript{130}

B. Understanding the International Law on Reservations

States usually do make reservations to a treaty. In the case of the CRC, there were reservations by several states on various points. According to Article 2(1)(d) the Vienna Convention on the Law of Treaties, 1969:

“Reservation” means a unilateral statement, however phrased or named, made by a state, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that state.”\textsuperscript{131}

The detailed rules for reservations were settled in the Genocide Case,\textsuperscript{132} and these are now reflected in Article 19(c) of the Vienna Convention, which states as follows:

\textsuperscript{130}Id.
\textsuperscript{131}Vienna Convention on the Law of Treaties, 1969, art. 2(1)(d).

1 [T]he state which has made and maintained a reservation which has been objected to by one or more of the parties to the Convention but not by others, can be regarded as being a party to the Convention if the reservation is compatible with the object and purpose of the Convention; otherwise, that state cannot be regarded as being party to the Convention.

2 [T]hat if a party to the Convention objects to a reservation which it considers to be incompatible with the object and purpose of the
A state may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless: (a) the reservation is prohibited by the treaty; (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or (c) in cases not falling under subparagraphs (a) or (b), the reservation is incompatible with the object and purpose of the treaty.¹³³

Thus, as long as the reservation is “compatible with the object and purpose of the treaty” it does not work to defeat the treaty. A reserving state is not bound by a treaty until its reservation is “acknowledged” and “accepted” by at least one other state.¹³⁴ If this is done, the treaty is in effect between the reserving state party and the party acknowledging and accepting the reservation. This, however, is subject to the reservation.

The question facing us is whether state parties making reservations to treaties to the effect that they will interpret the treaty in the light of the *shari’ah* are violating the “object and purpose of the treaty.” In other words, is the *shari’ah* incompatible with the objects and purposes of treaties and, therefore, with international law? If we review the reservations and the objections to those reservations in the previous two sections of this paper, we notice that this is exactly what the states objecting to the reservations are implying. In most cases, the objections mention incompatibility with the objects and purposes of the treaty, and in some cases the words “undermining the basis of international treaty law” and “undermining the basis of international human rights treaties” have been used. Even where the reservation is not general and pertains to specific articles, the same objections are raised. This is the impression we gather from the objections

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¹³⁴ *Id.*, art. 20(4).
and we sincerely hope that someone will be able to interpret such statements otherwise.

Most United Nations conventions require States parties to make new laws that are compatible with and promote the objectives of the conventions or to amend the existing laws to remove conflicts if any. Where a change in the law, or the making of the law, is required, Islamic law has to be invoked for Muslim countries. The age-old conflict between revelation and reason, described in some detail above, stares us in the face. Here we would like to recall that Islam is not to be treated as a mere “religion” for it is a way of life, a system, especially a legal order. Without going into the details of the Convention on the Rights of the Child, or any other convention for that matter, we see that the objections recorded above amount to a blanket rejection of the norms of the shari‘ah. This is not, and can never be, acceptable to the Muslims of the world.

It is, therefore, suggested that international law must take the norms of the shari‘ah into consideration and make room for them, because they are the legal norms of one-fourth of humanity. Till such time that international law does that, it is imperative that all conventions be ratified after they have been presented to the public, for their views, and to their elected representatives for approval; treaties should not be ratified through executive action whatever the procedural difficulties involved. The last point needs a little more explanation for which we turn to the next section.

IV. Domestic Laws on the Ratification of United Nations Conventions

Multilateral treaties are drafted through a process of negotiation. It is not clear whether Muslim states participating in these stages ever raise the issue about the norms of the shari‘ah. Article 9 of the Vienna Convention states as follows:

1. The adoption of the text of a treaty takes place by the consent of all the states participating in its drawing as provided in paragraph (2).
2. The adoption of a treaty at an international conference takes place by a vote of two-thirds of all states present and
voting, unless by the same majority they shall decide to apply a different rule.\textsuperscript{135}

To be bound by a treaty, states must give their consent. Consent is given by means of signature,\textsuperscript{136} ratification, or accession. Signature is required when the authorised state negotiator signs the treaty. Ratification requires formal adoption by the state’s head of government, which is sometimes with the consultation of the legislature. As the approval of the legislature sometimes becomes cumbersome, treaties employ terms like “approval” and “acceptance” rather than “ratification” to facilitate the process. Accession differs from signature and ratification insofar as it entails an expression to be bound by the treaty and is made by a state that did not participate in the negotiation and drafting of the treaty. This is permitted for multilateral treaties.

In many countries, constitutions require that ratification be undertaken with the “advice and consent” of the legislature. United States is one example. In such cases, the treaty automatically becomes law, though this is not necessary. In other countries, treaties are ratified through an executive act and laws are made later. Treaties have to be registered under the UN Charter. To ensure that treaties would not be made secretly, a provision was added to the Charter requiring all members to register their treaties with the UN.\textsuperscript{137} The treaty does not become law automatically. One thing is to be noted here that where a state that has ratified the treaty does not alter its laws to conform to the treaty, it invokes criticism. This criticism is often built into multilateral treaties or conventions through reporting and other procedures.

\textsuperscript{135}Id. art. 9.
\textsuperscript{136}Id. art. 12(1).
\textsuperscript{137}U. N. Charter art. 102: “(1) Every treaty and every international agreement entered into by any member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it. (2) No party to any such treaty or international agreement which has not been registered in accordance with the provisions of paragraph 1 of this Article may invoke that treaty or agreement before any organ of the United Nations.”
There are different theories about the coexistence of international law with municipal law.\textsuperscript{138} The oldest, perhaps worn out, theory is that of Dualism, which regards the two law systems as separate. The other view, upheld by Hans Kelsen and Hersch Lauterpacht, is called Monism, which views municipal law as a subset of international law. A third theory is that of Monism-Naturalism, which considers municipal law to be subservient to international law and international law subservient to natural law (think again about reason and revelation here). This theory was upheld by Georges Scelle and also Joseph G. Starke. The fourth theory is that of Coordinationism, which maintains that municipal courts are generally obliged to make municipal law conform to the requirements of international law. This theory has been advanced by Gerald Fitzmaurice and Charles Rousseau. As far as one can observe the activity of the United Nations and its agencies, in collaboration with the non-governmental agencies, it is this last theory that is being vigorously pursued these days. We are here concerned with what Pakistan does.

In \textit{Ms. Sheila Zia and others v. W.A.P.D.A.},\textsuperscript{139} the Supreme Court of Pakistan observed:

> An international agreement between the nations if signed by any country is always subject to ratifications, but it can be enforced as a law only when legislation is made by the country through its Legislature. Without framing a law in terms of the international agreement the covenants of such agreement cannot be implemented as a law nor do they bind down any party.\textsuperscript{140}

In a recent case, \textit{SGS Societe Generale v. Pakistan},\textsuperscript{141} the Lahore High Court recalled this view and observed that in Pakistan “dualism” is still the accepted norm. The learned Court discussed Dualism and Monism, but not the other two theories. The Court pointed out that the treaty in question was ratified by the Ministry of Foreign Affairs, Government of Pakistan on April 4, 138

\textsuperscript{138}A variety of theories are mentioned by writers. \textit{See, e.g.,} Ivan A. Shearer, \textit{Starke’s International Law} 63–67 (11th ed. 1995).


\textsuperscript{140}Id. at 710.

\textsuperscript{141}SGS Societe Generale v. Pakistan, C.L.D. 2002 Lah. 790.
1994. This shows that in Pakistan treaties are ratified by executive action. The Court indicated that the possible source for this was Lord Atkin’s observation in *Attorney-General for Canada v. Attorney-General for Ontario*,\(^{142}\) as follows:

Within the British Empire, there is a well established rule that the making of a Treaty is an executive Act, while the performance of obligations, if they entail alteration of the existing domestic law, requires legislative action. The stipulations of a Treaty do not, by virtue of Treaty alone, have the force of law, if the Government of the day decides to incur the “obligations of a Treaty” which involves alteration of law they have to run the risk of obtaining the assent of Parliament to the necessary statute or statutes.\(^{143}\)

The advocates of the theory called Coordinationism would agree with Lord Atkin insofar as international law cannot force itself upon municipal law or override it, but they point to something that carries a deeper message. Thus, Gerald Fitzmaurice says:

Formally, therefore, international law and domestic law can never come into conflict. What may occur is something strictly different, namely a conflict of obligations, or an inability for the state *on the domestic plane* to act in the manner required by international law. The supremacy of international law in the international field does not in these circumstances entail that a judge in the municipal courts of the state must override the local and apply international law. Whether he does or can do this depends on the local law itself, and on what legislative or administrative steps can be or are taken to deal with the matter. The supremacy of international law in the international field simply means that if nothing can be or is done, the state will, on the international plane, have committed a breach of its international law obligations, for which it will


\(^{143}\) *Id.*
be internationally responsible, and in respect of which it cannot plead the condition of its domestic law by way of absolution. International law does not therefore in any way purport to govern the content of national law in the national field—nor does it need to. It simply says—and this is all it needs to say—that certain things are not valid according to international law, and that if a state in the application of its domestic law acts contrary to international law in these respects, it will commit a breach of its international obligations.\footnote{144}{Gerald Fitzmaurice, *The General Principles of International Law Considered from the Standpoint of the Rule of Law* 92 Recueil des Cours de l’Académie de Droit International 70 (1957).}

The message is loud and clear. The signing and ratification of international conventions is no simple matter. You simply cannot delay action on them or refuse to shoulder your international obligations created by the conventions. The plea of domestic law cannot work for long.\footnote{145}{In the context of SGS Societe Generale v. Pakistan, C.L.D. 2002 Lah. 790, mentioned above, see Rafaqat Ali, *ICSID Asks Government not to Pursue Case Against SGS* Dawn, Nov. 11, 2002, at 12, col. 6 (“The ICSID Tribunal said that the Supreme Court judgement is final as a matter of the law of Pakistan. ‘As a matter of international law, it does not in any way bind this Tribunal.’”).}

We would, therefore, suggest that all international conventions must be placed before the elected representatives of the people prior to ratification, even if some shortcut is designed to avoid delay. Approval by the legislature should not mean that the convention ratified in this way becomes law automatically. If the legislature does not exist for some reason, during a certain period, there must be some mechanism for soliciting the views of the public, to determine whether or not the new norms are likely to clash with the *shari’ah*. In Pakistan, for example, each convention or other instrument should be sent to the Council of Islamic Ideology. The Council should make its report public for soliciting the views of the citizens, especially those of the Pakistan Bar Council. A final report may then be sent to the government for taking appropriate action.
The truth appears to be—despite the position we take with respect to Dualism, Monism, Monism-Naturalism and Coordinationism—that the world is heading towards some kind of Monism. International law will not rest until it has asserted its supremacy. This can be judged from the massive campaign led by the United Nations with the help of NGOs to persuade, if not force, nation states to alter their laws and systems, bringing them in line with the declarations, conventions and protocols of the United Nations. The fears of those individuals, in the United States and elsewhere, who maintain that the United Nations is working towards the undoing of state sovereignty are not entirely misplaced. It should also be realized that if international law represented by the United Nations is a legal system, it has to work in this direction and assert itself, just as the US Federation did with the federating states after the Declaration of Independence or as the European Community is doing with respect to its member nations. This is exactly what the Cultural Relativists say when they maintain that the “Universalist” posture of the United Nations is likely to lead to the destruction of different cultures and legal systems. Whatever the shape of things to come, Islamic law being the legal system of one-fourth or more of humanity is bound to assert itself and carve out a major role for itself.

V. Distinction Between the Islamic and Western Systems of Rights

We have approached the problem of human rights in Islam from various perspectives. A big void will be left in the discussion if we do not indicate the vital differences or distinctions between the approach of human rights in the Western systems and the Islamic legal system. In the description of the reservations by Muslim countries, made with respect to the CRC, we have seen that only a few specific and minor issues have been raised, like adoption. When we examine a declaration of rights, like the Cairo Declaration on Human Rights in Islam, or even attempts by Muslim scholars to elaborate the various types of rights in Islam, we find that there is almost no difference between the two positions.

See supra note 59.
addition to this, the core areas of the two systems, something that has been called the “minimum content of natural law” by H. L. A. Hart, are almost identical. Where lies the problem then? What is all the discussion about?

The differences are understood when we notice that individual rights mean very little in themselves, unless they are related to other competing rights and interests. The system of rights is an integrated whole. The rights support each other and clash with each other often requiring delicate balancing by the lawmaker and judge. In other words, it is all a question of reconciliation, preference and priorities that a legal system has determined for itself. The priorities within the two systems we are considering are quite different. This can be grasped by examining the jurisprudential interests or the value-system within the Western legal systems and the purposes of Islamic law called the *maqāṣid al-sharī'ah*. In the Islamic legal system there are five purposes that the system seeks to secure: preservation of the religious system (*dīn*), preservation of life, preservation of the family unit and its values, preservation of the intellect and the preservation of wealth. The priority assigned to these purposes exists in the order these have been stated. Thus, a child’s right to information, which falls under the preservation of his intellect, is limited by the interests that are superior to it; namely, family, life and religious system. Likewise, freedom of expression, again represented by intellect, will be restrained if it attempts to demolish an interest that is superior to it. In another work, we suggested that these interests are different from those upheld in the West, and those in the West may be in the reverse order. Whether or not this is proved to be true, the two systems are different, and the distinction lies in the priorities followed within the two systems. We have been using the term “Western legal system,” but we include the system represented by the UN as part of this system, or as representing it, unless the norms of other systems are acknowledged in concrete terms.

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VI. Conclusion

We began this paper by saying that human rights based on the collective thinking and experience of mankind are a gift of the modern times and present unique opportunities. Due to their inner strength these rights are here to stay. We also pointed out that it is Muslim countries, more than any other country or region, that are in need of implementing human rights for the welfare and well-being of their populations. The Convention on the Rights of the Child is one such instrument that needs maximum support.

As these rights are expressed in Western terms and terminology, ordinary Muslims may find it difficult to relate to them. To solve this problem, if these rights were explained to the citizens of these countries in the language of their own heritage and way of life, the chances of their rapid implementation will increase. We find, however, that whenever an attempt is made to expound these rights in Islamic terms the result is a vague and general discussion that does not offer anything concrete with which the individual can associate himself. This is witnessed at the international level as well where ambitious claims are made, but there is very little action on the part of Muslim countries. The Cairo Declaration on Human Rights in Islam exists on paper alone. There appears to be no action within the Islamic world to convert the aims and objectives of this document into concrete work, proposals or binding conventions. Later statements about issuing binding conventions or codifying the content of Islamic norms have not materialised.

The amending of existing laws in Muslim countries, or the introduction of totally new laws, in conformity with the various conventions, may give the false impression that progress is being made. There is a growing feeling that most of these changes are being imposed upon the Muslims to serve a “Western agenda.” This may give rise to resistance or to reactions that can undo such assumed progress. There is a dire need to acknowledge Islamic norms at the international level, norms that are fundamental to the Islamic system. This recognition must be reflected in the instruments of the United Nations as well as the “principles” employed by the ICJ and other institutions to interpret these instruments. The right of Muslim countries to implement these instruments in their own way must be acknowledged. In fact, it
should be assumed that each instrument ratified by a Muslim country will be interpreted in terms of the Islamic shari’ah. Once this is acknowledged, the Islamic form of various rights will start emerging in a clear and concrete form, thus, leading to true and more permanent progress.

Within the Muslim countries, each instrument must be presented to the masses for discussion from the Islamic perspective before it is actually ratified. For Pakistan, we have suggested that the Council of Islamic Ideology should play a more effective role by analysing these instruments and presenting its findings to the people for discussion prior to actual ratification. At the international level, the OIC needs to adopt a more positive approach to the implementation of human rights as they are understood in Islam. In doing so, the texts of the Qur’ān and the Sunnah, the general principles of Islamic law as expounded by the jurists, and the purposes of Islamic law, with their inherent priorities, must be assigned the maximum importance.