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## Islam and the Realization of Human Rights in the Muslim World: A Reflection on Two Essential Approaches and Two Divergent Perspectives

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# Islam and the Realization of Human Rights in the Muslim World: A Reflection on Two Essential Approaches and Two Divergent Perspectives\*

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## Abstract

This article argues that while Islam may not be the sole factor for ensuring the realization of human rights in Muslim States, it is certainly a significant factor that can be constructively employed as a vehicle for improving the poor human rights situation in predominantly Muslim States that recognise Islam as State religion or apply Islamic law or Islamic principles as part of State law. It addresses the question of how best to realize that in light of the two essential approaches (the 'socio-cultural approach' and the 'politico-legal approach') for promoting and protecting human rights generally, and the two divergent perspectives (the 'adversarial perspective' and the 'harmonistic perspective') to the discourse on Islam and human rights. The article then advances the view that the harmonistic perspective would be most helpful for employing Islam as a vehicle for the realization of human rights in the Muslim world within the context of the socio-cultural and politico-legal approaches for promoting and protecting human rights generally. Relevant academic and policy oriented examples, especially in relation to promoting women's rights in the Muslim world, are cited to substantiate this position.

**KEYWORDS:** Islam, human rights

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## I. Islam and human rights in the Muslim world

The discourse about the relationship between Islam and human rights in the Muslim world has been diverse and ongoing for sometime.<sup>1</sup> The discourse is not only theoretically relevant to the universalization of human rights generally, but also specifically relevant to the practical realization of human rights in the Muslim world. This is due to the evident role that Islam has generally played and continues to play in the social, cultural, political and legal affairs of many predominantly Muslim States and societies. Although some commentators do argue that Islam is, essentially, neither the solution nor the problem *per se* to political and social problems in the Muslim world,<sup>2</sup> a careful purview of current social, cultural, political and legal developments in Muslim states such as Saudi Arabia, Iran, Iraq, Egypt, Morocco, Sudan, Nigeria, Pakistan, Indonesia, Malaysia, Palestine, and even secular Turkey<sup>3</sup>, among others, reveals different degrees of Islamic influence in both the private and public spheres of those States, which directly or indirectly affects human rights issues. For example, Bielefeldt has observed that ‘traditional sha’ria [sic] norms continue to mark family structures all over the Islamic world’ and that ‘the sha’ria [sic] criminal law is [still] applied ... in a few Islamic countries today’.<sup>4</sup> Buskens has also noted that:

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<sup>1</sup> There is wide range of literature on this subject. See e.g. A. A. An-Na’im, *Towards an Islamic Reformation: Civil Liberties, Human Rights and International Law*, New York: Syracuse University Press, 1990; M. Monshipouri, *Islamism, Secularism and Human Rights in the Middle East*, Boulder: L. Rienner Publishers, 1998; M. A. Baderin, *International Human Rights and Islamic Law*, Oxford: Oxford University Press, 2003; A. A. Mayer, *Islam and Human Rights: Tradition and Politics*, Boulder: Westview Press, 4<sup>th</sup> Ed, 2006; D. Arzt, ‘The Application of International Human Rights Law in Islamic States’ (1990) 12 *Human Rights Quarterly*, pp.202-230; S. A. Abu-Sahlieh, ‘Human Rights Conflicts between Islam and the West’ (1990) *Third World Legal Studies*, pp. 257-284; A. Sajoo, ‘Islam and Human Rights: Congruence or Dichotomy’ (1990) 4 *Temple International and Comparative Law Journal*, pp. 23-34; B. Tibi, ‘Islamic Law/Shari’a, Human Rights, Universal Morality and International Relations’ (1994) 16 *Human Rights Quarterly*, pp.277-299; F. Halliday, ‘Relativism and Universalism in Human Rights: The Case of the Islamic Middle East’ (1995) XLIII *Political Studies*, pp. 152-167; H. Bielefeldt, ‘Muslim Voices in the Human Rights Debate’ (1995) 17 *Human Rights Quarterly*, pp.587-617; J. Morgan-Foster, ‘A New Perspective on the Universality Debate: Reverse Moderate Relativism in the Islamic Context’ (2003) 10 *ILSA Journal of International and Comparative Law*, No. 35, pp.35-67; A. Chase, ‘The Tail and the Dog: Constructing Islam and Human Rights in Political Context’ in A. Chase and A. Hamzawy (eds.) *Human Rights in the Arab World*, Philadelphia: University of Pennsylvania Press, 2006, pp.21-36.

<sup>2</sup> See e.g. D. Brumberg, ‘Islam is not the Solution (or the Problem)’ (2005-06) 29 *The Washington Quarterly*, No. 1, pp. 97-116. (argues, *inter alia*, in relation to democracy in the Muslim world, that ‘naming Islam as the solution exaggerates the extent to which Islam shapes Muslims’ political identity); A. Chase, ‘Liberal Islam and ‘Islam and Human Rights’: A Sceptics View’ (2006) 1 *Religion and Human Rights*, No.2, pp. 145-163; A. Chase, *supra*, note 1 above, at p. 21 (argues for a contextualized understanding of the relationship between Islam and human rights in the Arab world, and notes that ‘It is political, social, and economic context that explains the status of human rights, for better for worse: ‘Islam is neither responsible for rights violations nor the core basis for advancing rights’).

<sup>3</sup> See e.g. T. W. Smith, ‘Between Allah and Atatürk: Liberal Islam in Turkey’ (2005) 9 *The International Journal of Human Rights*, No. 3, pp. 307-325.

<sup>4</sup> H. Bielefeldt, ‘Muslim Voices in the Human Rights Debate’ (1995) 17 *Human Rights Quarterly*, pp.587-617 at p. 612 (This situation, observed by Bielefeldt in 1995, remains significantly correct today).

‘[i]n most Muslim societies it is impossible to speak about family law except in terms of Islam’<sup>5</sup>, which, on the one hand, denotes the cultural and legal influence of Islam in that regard, but, on the other hand, has significant impact on the application of human rights law, especially in relation to women’s rights, in most Muslim States. Modirzadeh has thus observed the need to take Islamic law seriously and engage with it one way or the other in relation to the promotion and protection of human rights in the Muslim world.<sup>6</sup> This domestic influence of Islam is formally reflected in the constitutions of some Muslim States that declare Islam as the religion of the State<sup>7</sup>, recognise Islamic law as part of State law<sup>8</sup> or provide for the establishment of State courts that apply Islamic law.<sup>9</sup>

Apart from the domestic influence of Islam in individual Muslim States, Muslim States have also adopted regional instruments such as the Arab Charter on Human Rights,<sup>10</sup> the Charter of the Organisation of Islamic Conference (OIC),<sup>11</sup> the OIC Cairo Declaration on Human Rights in Islam<sup>12</sup> and the OIC Covenant on the Rights of the Child in Islam,<sup>13</sup> all of which respectively make references to Islam as a relevant factor in the human rights discourse in the Muslim world. Also at the United Nations (UN) level, the OIC has, for example, made submissions on behalf of Muslim States regarding proposed reforms of the UN Security Council

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<sup>5</sup> L. Buskens, ‘Recent Debates on Family Law Reform in Morocco: Islamic Law as Politics in an Emerging Public Sphere (2003) 10 *Islamic Law and Society*, No.1, pp.70-131 at p. 71.

<sup>6</sup> N. K. Modirzadeh, ‘Taking Islamic Law Seriously: INGOs and the Battle for Muslim Hearts and Minds’ (2006) 19 *Harvard Human Rights Journal*, pp.192-233, at 192 (observes, *inter alia*, that despite the increasing sophistication in the work of human rights organizations in the Muslim world, they ‘remain unsure of how to address questions of Islamic law when it conflicts with international human rights law’ and argues that international non-governmental organizations need to take Islamic law more seriously and engage with it in one way or the other); See also Netherlands Scientific Council for Government Policy (WRR), *Dynamism in Islamic Activism: Reference Points for Democratization and Human Rights*, Amsterdam: Amsterdam University Press, 2006 (notes that ‘Since the 1970s, Islam has become an increasingly important political factor’ particularly in the Muslim world).

<sup>7</sup> See e.g. T. Stahnke and R.C. Blitt, ‘The Religion-State Relationship and the Right to Freedom of Religion or Belief: A Comparative Textual Analysis of the Constitutions of Predominantly Muslim Countries’ (2005) 36 *Georgetown Journal of International Law*, No.4; also available online at the website of the US Commission on International Religious Freedom:

[http://www.uscirf.gov/countries/global/comparative\\_constitutions/03082005/Study0305.pdf](http://www.uscirf.gov/countries/global/comparative_constitutions/03082005/Study0305.pdf)

pp.7-12 [Last accessed: 24/6/07].

<sup>8</sup> *Ibid.*; See also WRR, *supra*, note 6 above, at pp. 232-233.

<sup>9</sup> See e.g. The Constitution of the Federal Republic of Nigeria (1999) Sections 260-264 and Sections 275-279, and The Constitution of the Islamic Republic of Pakistan (1973 as amended) Article 203.

<sup>10</sup> Adopted by the League of Arab States on 15 September 1994, reprinted in (1997) 18 *Human Rights Law Journal*, p. 151. The revised version adopted in May 2004 is reprinted in (2005) 12 *International Human Rights Reports*, p. 893 and is also available online at:

<http://www1.umn.edu/humanrts/instree/loas2005.html> [Last accessed: 24/6/07].

<sup>11</sup> 914, UNTS, p. 111.

<sup>12</sup> Adopted on 5 August 1990. See UN Doc. A/45/5/21797, p. 199.

<sup>13</sup> Adopted by the 32nd Islamic Conference of Foreign Ministers in Sana’a, Yemen in June, 2005. See: <http://www.oic-oci.org/french/conventions/Rights%20of%20the%20Child%20In%20Islam%20F.pdf> [Last accessed: 20/5/07].

stating that ‘any reform proposal, which neglects the adequate representation of the Islamic Ummah in any category of members in an expanded Security Council will not be acceptable to the Islamic countries’,<sup>14</sup> and also with regard to international human rights, the Organisation ‘expressed its determination to vigorously pursue the promotion and protection of human rights and fundamental freedoms and encouraged greater transparency, cooperation, mutual tolerance and respect for religious values and cultural diversity in the field of universal promotion and protection of human rights.’<sup>15</sup> Furthermore, within international human rights forums, questions regarding the relationship and impact of Islam generally, and Islamic law specifically, on the application of human rights law in Muslim States have been raised before the Human Rights Committee under the UN human rights system,<sup>16</sup> before the European Court of Human Rights under the European regional human rights system<sup>17</sup> and before the African Commission on Human and Peoples’ Rights under the African regional human rights system.<sup>18</sup> All these, no doubt, reflect the relevance of Islam to international human rights discourse generally, but particularly its impact and role in relation to Muslim States.

Pragmatically therefore, efforts for the promotion and protection of human rights in the Muslim world must necessarily take the impact and role of Islam into account, be it positively or negatively. Islam generally, and Islamic law specifically, cannot simply be disregarded as irrelevant in any of such endeavours. An-Na’im has observed in that regard that ‘[t]he implementation of international human rights norms in any society requires thoughtful and well-informed engagement with religion (broadly defined) because of its strong influence on human belief systems and behaviour’ and that ‘religious considerations are too important for the majority of people for human rights scholars and advocates to continue to dismiss them simply as irrelevant, insignificant, or problematic.’<sup>19</sup> That candid observation is much more significant in relation to Islam and human rights due to Islam’s significant societal role and influence in the Muslim world generally. In her article examining the human rights reports of international non-governmental organisations (INGOs) in Muslim States, Modirzadeh observed that ‘[h]uman rights discourse and Islamic legal discourse are powerful forces in the

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<sup>14</sup> See UN Doc. A/59/425/S/2004/808 (11 October 2004), para. 56.

<sup>15</sup> *Ibid.*, para. 57.

<sup>16</sup> See e.g. Concluding Observations of the Human Rights Committee on The Sudan, 19 November 1997, CCPR/C/79/Add.85 at para.22; Concluding Observations of the Human Rights Committee on the Islamic Republic of Iran, 3 August 1993, CCPR/C/79/Add/25 at para.13.

<sup>17</sup> See e.g. *Refah Partisi (The Welfare Party) & Others v Turkey*, 2003-II 87; (2003)37 *European Human Rights Reports* 1.

<sup>18</sup> See *Curtis Francis Doebbler v Sudan*, 236/2000 16<sup>th</sup> Annual Activity Report of the African Commission on Human and Peoples’ Rights (2002-3); (2004) 11 *International Human Rights Review*, 252.

<sup>19</sup> A.A. An-Na’im, ‘Islam and Human Rights: Beyond the Universality Debate’ (2000) 94 *ASIL Proceedings*, pp.95-101 at 95.

Muslim world today' but noted 'a long simmering dilemma within the Western-based human rights movement' concerning 'how the human rights movement should deal with Islamic law'<sup>20</sup> and thus proposed 'three possible solutions for INGOs to consider in shaping their work on Islamic law' in relation to human rights in relevant Muslim States.<sup>21</sup> Many other commentators have also suggested different possible solutions to the problem of realising human rights in the Muslim world.

Against the backdrop above, this article presents a pragmatic and constructive argument based on two evident facts. The first fact is that Muslim States are amongst the countries with the poorest human rights records in the world today. It has been observed, in that regard, that there is a 'growing sense in the West that *something must be done* about human rights in the Muslim world'.<sup>22</sup> The second fact is that at least half of the predominantly Muslim States have constitutionally proclaimed Islam as the official State religion, and also 'recognize some constitutional role for Islamic law, principles, or jurisprudence.'<sup>23</sup> Although Blitt and Stahnke have observed that the practical ramifications of both the constitutional declaration of Islam as State religion and the constitutional recognition of Islamic law vary respectively from State to State,<sup>24</sup> there is no doubt that the former theoretically reflects the general religious and moral role of Islam in the respective States, while the latter means that Islamic law (as part of domestic law) can impact on the application of human rights in the respective States. This article, therefore, argues that while Islam may not be the sole factor for ensuring the realization of human rights in Muslim States, it is certainly a significant factor that can be constructively employed as a vehicle for improving the poor human rights situation in, at least, predominantly Muslim States that recognise Islam as State religion or apply Islamic law or Islamic principles as part of State law.

But, what is the best approach to adopt in that regard to achieve the best possible outcome? This question will be addressed in the light of what I consider to be the two essential approaches (the 'socio-cultural approach' and the 'politico-legal approach') for promoting and protecting human rights generally. After analysing those two essential human rights approaches, the article will then examine the two divergent perspectives (the 'adversarial perspective' and the 'harmonistic perspective') to the discourse on Islam and human rights. The article will advance the view that the harmonistic perspective would be most helpful for

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<sup>20</sup> N. K. Modirzadeh, *supra*, note 6 above, at p. 192.

<sup>21</sup> *Ibid*, at p. 231.

<sup>22</sup> *Ibid*, at p. 192 (emphasis in original text).

<sup>23</sup> See Blitt and Stahnke, *supra*, note 7 above, at pp.6-11, which records that 22 of 44 listed predominantly Muslim States have constitutionally declared Islam as the religion of the State and have some constitutional roles for Islamic law.

<sup>24</sup> See e.g. Blitt and Stahnke, *ibid*, at p. 6.

employing Islam as a vehicle for the realization of human rights in the Muslim world within the context of the socio-cultural and politico-legal approaches for promoting and protecting human rights generally. Relevant academic and policy oriented examples, especially in relation to promoting women's rights in the Muslim world, will be cited to support this position. It is important to note that this article does not argue that it is only through Islam or Islamic law that human rights can be realised in the Muslim world, but rather that Islam can, within the context of the socio-cultural and politico-legal approaches to human rights analysed herein, play a significant positive role towards the realization of human rights in the Muslim world instead of the negative role often simplistically attributed to it in that regard.

## **II. The two essential approaches for promoting and protecting human rights.**

For its effective realization generally, human rights, in my view, must be pursued through two essential complementary approaches, which, although not usually made explicit in human rights literature, are implicit in the processes of promoting and protecting human rights universally. They are what I refer to as the 'socio-cultural approach' and the 'politico-legal approach' for promoting and protecting human rights. These two approaches relate to the moral and justificatory attributes and the legal and executive attributes of human rights respectively. The socio-cultural approach is a bottom-to-top approach while the politico-legal approach is a top-to-bottom approach. Both approaches are complementary and must be simultaneously pursued for the robust and effective realization of human rights globally. Owing to the traditional state-centric and positivist nature of international law generally, international human rights discourse and advocacy have often concentrated more on politico-legal imperatives, placing emphasis on human rights obligations of the State, but with relatively less attention paid to socio-cultural imperatives necessary for the promotion and protection of international human rights norms from the grassroots within communities. Yet, as early as 1958, the first chairperson of the UN Commission on Human Rights, Eleanor Roosevelt, had acknowledged as follows:

'Where, after all, do universal human rights begin? In small places, close to home -- so close and so small that they cannot be seen on any map of the world. Yet they *are* the world of the individual person: the neighborhood he [or she] lives in; the school or college he [or she] attends; the factory, farm or office where he [or she] works. Such are the places where every man, woman, and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere. Without concerted

citizen action to uphold them close to home, we shall look in vain for progress in the larger world. Thus we believe that the destiny of human rights is in the hands of all our citizens in all our communities.’<sup>25</sup>

This acknowledges that an effective socio-cultural approach is as essential as the politico-legal approach for the global realization of human rights generally, but more particularly in the developing world of which most Muslim States are part.

The socio-cultural approach to human rights relates to education, information, orientation and empowerment of the populace through the promotion of a local understanding of international human rights norms and principles. Through the socio-cultural approach, positive social change and a cultural link to human rights can be advocated, with which negative cultural relativist arguments used by some States to justify their human rights violations can be challenged by the populace themselves from within the relevant norms of respective societies. It is important to note that the socio-cultural approach to promoting and protecting human rights is different from the traditional concept of cultural relativism in human rights discourse. While the traditional cultural relativist argument is often advanced by States to justify their human rights violations, the socio-cultural approach to promoting and protecting human rights is a positive means for realizing human rights through relevant social and cultural norms that already exist within different societies and communities. The socio-cultural approach to human rights encourages and facilitates the localization of international human rights norms.<sup>26</sup> According to Acharya, ‘localization describes a complex process and outcome by which norm-takers build congruence between transnational norms (including norms previously institutionalized in a region) and local beliefs and practices. In this process, foreign norms, which may not initially cohere with the latter, are incorporated into local norms. The success of norm diffusion strategies and processes depends on the extent to which they provide opportunities for localization.’<sup>27</sup> In that regard, the socio-cultural approach to human rights aims principally at the populace, especially at the grassroots, and

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<sup>25</sup> Eleanor Roosevelt, remarks at the presentation of booklet on human rights, ‘*IN YOUR HANDS: A Guide for Community Action for the Tenth Anniversary of the Universal Declaration of Human Rights*’, to the UN Commission on Human Rights, New York, 27 March 1958. See: <http://www.udhr.org/history/inyour.htm> [Last accessed: 24/6/07].

<sup>26</sup> See e.g. K. De Feyter, ‘Localizing Human Rights’ Discussion Paper, 2006/.02, IOB, University of Antwerp, available at:

[http://www2.warwick.ac.uk/fac/soc/law/events/past/2006/rightsandjustice/participants/papers/de\\_feyter.pdf](http://www2.warwick.ac.uk/fac/soc/law/events/past/2006/rightsandjustice/participants/papers/de_feyter.pdf) [Last accessed, 24/6/07] (the author argues that: ‘International human rights lawyers tend to focus on establishing the universality of human rights rather than on improving the usefulness of human rights in addressing local problems’ and thus he ‘draws attention to the need to make human rights more locally relevant’).

<sup>27</sup> A. Acharya, ‘How Ideas Spread: Whose Norms Matter? Norm Localization and Institutional Change in Asian Regionalism’ (2004) 58 *International Organization*, pp.239-275 at p. 241.



can help in empowering them with the positive understanding of human rights in their own language and within their own social and cultural contexts. It links human rights positively to relevant socio-cultural values of different societies and communities and thus enables a better appreciation of the concept by the local populace, which helps to establish the moral and justificatory attribute of human rights locally. Nelson Mandela is quoted to have once said: 'If you talk to a man [or woman] in a language he [or she] understands, that goes to his [or her] head. If you talk to him [or her] in his [or her] own language, that goes to his [or her] heart'.<sup>28</sup> One could add that if you talk to a man or woman in a language he or she doesn't understand, that actually goes nowhere. Thus, the socio-cultural approach to human rights facilitates bringing human rights to the grassroots populace of every society in their own 'language'<sup>29</sup> so that it goes to their hearts. Where the socio-cultural approach to human rights is effectively pursued, the politico-legal approach to human rights will also become much easier to achieve and be more purposeful.

To be effective, the socio-cultural approach to human rights requires a search within different societies and cultures for relevant accommodating models to help realize international human rights norms. It ensures that the local communities understand human rights as part of their own human heritage and thus push the human rights idea from the bottom to the top, which, where effectively achieved, becomes a powerful politico-legal tool for the populace, the State, and for human rights advocates generally. De Feyter has rightly observed in that regard that '[i]f the experience of local communities is to inspire the further development of human rights, community-based organizations will have to be the starting point.'<sup>30</sup> Thus, local non-governmental organisations (NGOs), civil groups, cultural groups, religious groups, educational institutions and other local associations have important roles to play in the bottom-to-top orientation of the socio-cultural approach to human rights.

This idea of a socio-cultural approach for promoting and protecting human rights is inferable from international human rights instruments such as the *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms* adopted by the United Nations (UN) General Assembly in 1999,<sup>31</sup> which recognises, *inter alia*, 'the right and the responsibility of individuals, groups and associations to promote respect for and foster knowledge of human rights and fundamental freedoms at the national and international

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<sup>28</sup> See [http://www.saidwhat.co.uk/quotes/political/nelson\\_mandela/if\\_you\\_talk\\_to\\_a\\_man\\_9870](http://www.saidwhat.co.uk/quotes/political/nelson_mandela/if_you_talk_to_a_man_9870) [Last accessed: 24/6/07].

<sup>29</sup> 'Language' is used here figuratively and in a broad sense, not just literally to mean 'verbal conversation'.

<sup>30</sup> De Feyter, *supra*, note 26 above, at p.13

<sup>31</sup> General Assembly Resolution 53/144 of 8 March 1999, Annex.

levels'.<sup>32</sup> Its importance has also been emphasised mostly by human rights scholars and advocates from developing States who appreciate the need for such an approach especially in the developing world. For example, De Feyter cites the argument of Makau Mutua in that regard that '[o]nly by locating the basis for the cultural legitimacy of certain human rights and mobilizing social forces on that score can respect for universal standards be forged'.<sup>33</sup> Thus, in seeking to remedy the poor human rights situations in Muslim States, as part of the developing world, the socio-cultural approach to human rights is very relevant in relation to Islam.

On the other hand, the politico-legal approach to human rights is a top-to-bottom approach that relates more to human rights responsibility and accountability on the part of the State and its organs. This approach aims principally at ensuring respect for human rights by the State through relevant political and legal policies and through the establishment of relevant public institutions for the promotion and protection of human rights. As noted earlier, much emphasis has often been placed on the politico-legal approach to human rights, whereby the focus is normally on urging States to fulfil their international, regional or constitutional human rights obligations. State practice, however, shows that developed States are often more responsive to the politico-legal approach than developing States. The guarantee of human rights under this approach depends largely on the positive political will of the government in power, which is often lacking in most States of the developing world including Muslim States. It is, thus, in the context of the politico-legal approach to human rights that States are often lobbied, internally and externally, to ratify relevant human rights treaties and pacifically pressured, where necessary, to fulfil their obligations under such treaties. This top-to-bottom approach to promoting and protecting human rights is acknowledged in many human rights instruments, which provide that States have the primary responsibility to promote, protect and implement human rights and that they must adopt all necessary administrative and legislative measures to ensure the guarantee of relevant human rights within their respective jurisdictions.<sup>34</sup> Thus, it is in the context of the politico-legal approach that the legal and executive attribute of human rights is ensured, and through it victims of human rights violations are able to seek legal redress for such violations personally or through the assistance of human rights NGOs. Being a top-to-bottom approach, factors such as good governance, positive political will, justice, good faith, and judicial independence are very essential for its successful realization.

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<sup>32</sup> *Ibid*, 8<sup>th</sup> Preambular paragraph.

<sup>33</sup> M. Mutua, *Human Rights: A Political and Cultural Critique*, Philadelphia: Philadelphia University Press, 2002, p. 256, cited in De Feyter, *supra*, note 26 above, at p. 6.

<sup>34</sup> See e.g. General Assembly Resolution 53/144 of 8 March 1999, *supra*, note 31 above, Art. 1 and 2.

However, the politico-legal approach to human rights is, primarily, vertically-oriented and may therefore not effectively address horizontal human rights problems such as human rights violations that occur within family relations and in the private sphere, especially violations grounded on the ‘victims’ consent’, whereby victims of human rights violations justify the violations against themselves on grounds of cultural and traditional practices they blindly follow without questioning. It is a fact that where the populace are themselves not informed or aware of their rights, or where they see human rights strictly as a foreign idea, they are often unable to challenge any violation of their human rights by the State or question any of such violations hinged on cultural or religious grounds. Thus, while the politico-legal approach to human rights is very essential for ensuring necessary political and legislative guarantees that facilitate respect for human rights from the top to bottom on the part of the State, a parallel bottom-to-top socio-cultural approach is necessary to ensure a robust and effective system of promoting and protecting human rights in every State.

In relation to the Muslim world, it is submitted that Islam, owing to its general socio-cultural and politico-legal influence in many Muslim States and societies as earlier identified above, can play a significant role in effectively pursuing both the socio-cultural and the politico-legal approaches for promoting and protecting human rights in relevant Muslim States. The relevance of Islam in both regards is reflected in the views of the Netherlands Scientific Council for Government Policy (WRR) in its recently published policy-oriented report on Islamic activism in the Muslim world. The Council observed that ‘[p]rogressive improvements of human rights in many Muslim countries are simply easier to accept if they can be imbedded in the local tradition and culture’,<sup>35</sup> which reflects the need for a socio-cultural approach to human rights on the one hand, and also that ‘[d]espite all the incentives and control mechanisms, they [human rights] can only go beyond the level of rights on paper when they can boast internal legitimacy, in other words, when they are viewed as ‘one’s own law’’,<sup>36</sup> which also reflects the need for a politico-legal approach to human rights on the other hand, both as argued in this article. The Council then pointed out notably that ‘in a number of countries ... this ‘own law’ is based on Sharia’ and thus ‘[p]recisely because international law primarily acquires its force through national law, the EU [European Union] must recognize that the legitimizing power of the Sharia in Muslim countries can be used to realize international human rights.’<sup>37</sup>

However, the success of both the socio-cultural and politico-legal approaches for promoting and protecting human rights in Muslim States depends, substantially, on which of two divergent perspectives is adopted in addressing the

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<sup>35</sup> WRR, *Dynamism in Islamic Activism*, *supra*, note 6 above, at pp. 10-11.

<sup>36</sup> *Ibid.*, pp. 169-170

<sup>37</sup> *Ibid.*, p.170.

relationship between Islam and human rights in the Muslim world as analysed below.

### **III. The two divergent perspectives to the Islam and human rights discourse.**

A perusal of most of the literature on the subject reveals generally that there are two broad divergent perspectives on how the question of Islam and human rights in the Muslim world has been and continues to be addressed. These I refer to as the ‘adversarial perspective’ and the ‘harmonistic perspective’ to Islam and human rights respectively. These two divergent perspectives are reflected in both human rights and Islamist arguments on Islam and human rights respectively. The adversarial perspective is a hostile one, while the harmonistic perspective is a receptive one.

Human rights arguments reflecting the adversarial perspective to Islam and human rights generally presume that Islam is inherently the main cause of all human rights violations in Muslim States and perceives Islam and Islamic law as strictly conservative and fossilized systems that can not be in synergy with international human rights norms and principles at all. An example of this perspective is reflected in the view of a human rights activist that ‘Islamic Sharia law should be opposed by everyone who believes in universal human rights’,<sup>38</sup> and in a general view of the European Court of Human Rights expressed in the case of *Refah Partisi (The Welfare Party) & Others v Turkey* that ‘[i]t is difficult to declare one’s respect for democracy and human rights while at the same time supporting a regime based on sharia’.<sup>39</sup> Similarly, there are adversarial Islamist arguments that perceive the promotion of international human rights as a Western anti-Islamic agenda, which must not be encouraged to flourish in the Muslim world.

The adversarial perspective to Islam and human rights is a confrontational and negative perspective that tends to place a wedge between Islam and human rights. It disregards any possible areas of common ground between the two systems and thus eliminates the possibility of realising human rights within an Islamic dispensation thereby suggesting that Muslims must make a choice between Islam and human rights. This promotes an incompatibility or absolute conflict theory in the Islam and human rights discourse. While there is no doubt that there are some important areas of differences between some human rights principles and some traditional principles of Islam, which needs to be addressed, the confrontational nature of the adversarial perspective is problematic in the

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<sup>38</sup> A. Kamguian, ‘Why Islamic Law should be opposed?’

<http://www.middleeastwomen.org/html/sharia.htm> [Last accessed: 24/6/07].

<sup>39</sup> *supra*, note 17 above. See the Grand Chamber Judgement, 13 February 2003, para.123, at the ECHR website: <http://cmiskp.echr.coe.int/tkp197/portal.asp?sessionId=1013043&skin=hudoc-n&action=request> [Last accessed, 24/6/07].

context of both the socio-cultural or politico-legal approaches for promoting and protecting human rights in the Muslim world. It does not provide room for real dialogue and engagement as it confronts the Islam and human rights question as a sort of competition between value systems, which makes it a very difficult perspective for the realization of human rights in Muslim States through the socio-cultural and politico-legal approaches to human rights earlier analysed above. I have argued against this ‘discordant’ perspective elsewhere by highlighting its general negativity and noted that such a perspective ‘emanates from the traditional divide and stereotype of confrontation between the Occidental and Oriental civilisations, between religion and secularism and more specifically between Islamic orthodoxy and Western liberalism.’<sup>40</sup>

Deplorably however, the poor human rights practices of governments in most Muslim States also nourish the adversarial approach to Islam and human rights, especially when such governments try to justify their human rights violations by reference to Islamic culture or Islamic law. Nevertheless, while it is very vital to challenge the arguments of governments that plead Islam or Islamic law to justify their violations of human rights, it actually tends to help their case to propose that their arguments and deplorable practices confirm that Islam and human rights are inherently divergent and adversarial in nature. In that regard, Entelis has observed, in relation to women’s rights, that ‘[t]he claim that Islamic culture, as influenced by *shari’a* law, cannot accommodate modern human right doctrine is simply a means by which conservative Islamists in Government strive to preserve the patriarchal societies in place’.<sup>41</sup> In my view, it helps the promotion of human rights in the Muslim world better by countering such arguments with relevant evidences showing that neither Islam nor Islamic law supports human rights violations.

Commenting on an adversarial proposition in one article which ‘urges that the United States government should put similar energy [as it ‘used in combating terrorism emerging from militants in the Muslim world’] into combating the treatment of women under *Shari’a*’, Modirzadeh observed, *inter alia*, that while it is true that serious human rights violations occur as a result of some Islamic rules for which solutions need to be found, ‘to suggest that the solution to every violation is merely more “pressure” from the United States government, *seriously undermines the extent to which Islamic law is deeply ingrained in the legal, political, and social frameworks of many Muslim countries.*’<sup>42</sup> Thus, while an adversarial perspective to Islam and human rights might be convenient, for

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<sup>40</sup> M. A. Baderin, ‘Human Rights and Islamic Law: The Myth of Discord’ (2005) *European Human Rights Law Review*, Issue 2, pp.163-183, at p.165.

<sup>41</sup> J. Entelis, ‘International Human Rights: Islam’s Friend or Foe?: Algeria as an Example of the Compatibility of International Human Rights Regarding Women’s Equality and Islamic Law’ (1997) 20 *Fordham International Law Journal*, pp. 1251-1305 at pp.1294-5.

<sup>42</sup> Modirzadeh, *supra*, note 6 above, at p. 212-213. (*emphasis added*).

example, in naming and shaming governments of Muslim States that violate human rights on grounds of Islam or Islamic law, it is relatively less helpful in the context of the socio-cultural and politico-legal approaches for promoting the realization of human rights in Muslim States. The observation of the WRR that '[a] climate of confrontation is hardly conducive to the creation of lasting conditions for ... increasing respect for human rights'<sup>43</sup> is very instructive in that regard.

Conversely, the harmonistic perspective to Islam and human rights is a responsive one that seeks to develop positive ways by which Islamic principles and international human rights norms can be harmonised as far as possible and thereby operate in synergy. Advocates of this perspective perceive Islamic law as a dynamic system that can respond to the dynamics and realities of human existence and thus reconcilable with international human rights norms. In contrast to the adversarial perspective to Islam and human rights, the harmonistic perspective concentrates on realizing the ideals of human rights in Islam rather than perceiving the question of Islam and human rights as a competition of values. The harmonistic perspective to Islam and human rights therefore encourages understanding, constructive engagement and dialogue between Islam and human rights. This perspective emphasises and explores the possibilities offered by alternative juristic views of Islamic law that are both moderate and legitimate on relevant questions of human rights in the Muslim world and thereby promotes a congruence theory in the Islam and human rights discourse. Although the harmonistic perspective promotes dialogue and understanding, this does not mean that areas of differences and conflict are downplayed or shied away from but, rather, that they should be addressed with the aim of finding constructive resolutions to them. Contextually, this perspective is relatively more helpful in relation to the socio-cultural and politico-legal approaches for promoting and protecting human rights in Muslim States earlier analysed above.

Generally, the harmonistic perspective to Islam and human rights is reflected in different ways in the works and practices of many scholars and advocates on the subject,<sup>44</sup> some of which will be referred to in the next section below. The report of the WRR also favours this perspective as a positive perspective that has much more potential for the realisation of human rights in the Muslim world.

Owing to the evident influence of Islam in the Muslim world as identified earlier above, I have consistently argued that approaches which encourage

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<sup>43</sup> WRR, *supra*, note 6 above, at p. 209.

<sup>44</sup> See e.g. N. A. Shah, 'Women's Human Rights in the Koran: An Interpretive Approach' (2006) 28 *Human Rights Quarterly*, pp. 868-903, particularly pp.875-884, where the author discusses some different approaches to this perspective by reference to the works of Mahmood Monshipouri, Bassam Tibi, Abdullahi An-Na'im, and Mashood Baderin, respectively.

harmonisation of Islamic principles and human rights norms have a better chance of facilitating an effective realization of the implementation of international human rights in Muslim States rather than approaches that tend to place a wedge between Islam and human rights or present human rights as an alternative ideology to Islam in Muslim societies.<sup>45</sup> It is in that vein that I reiterate the need to advance the harmonistic perspective to Islam and human rights in conjunction with the socio-cultural and politico-legal approaches to human rights in the Muslim world with relevant substantiations below.

#### **IV. Advancing a harmonistic perspective to Islam and human rights in the Muslim world**

In his conclusion in an article on the interdependence of religion, secularism, and human rights,<sup>46</sup> An-Na'im made an important observation that: 'peoples and individuals need make no choice among religion, secularism, and human rights [and that] [t]he three can work in synergy.' He noted, however, that 'there is a related choice that does need to be made: whether or not to attempt mediating tensions among the three paradigms' and thus urged 'scholars and policymakers to take responsibility for that mediation rather than permit further damage to be done by belief in the incompatibility of religion with secular government and human rights.'<sup>47</sup> In relation to Islam and human rights in the Muslim world, the populace certainly 'need make no choice' between Islam and human rights, as demanded by the adversarial perspective to Islam and human rights, they can have both Islam and human rights working in synergy. Such synergy can be achieved using the harmonistic perspective to Islam and human rights in conjunction with the socio-cultural and politico-legal approaches for promoting and protecting human rights as has been previously argued in this article.

In the context of the socio-cultural approach to human rights, it is apparent that while there is a relatively strong human rights debate developing in the Muslim world today, most of that discourse is taking place high above the grassroots in most Muslim States. There is therefore an important need for the human rights debates in the Muslim world to be brought lower down to the populace at the grassroots in the language they understand. In doing that, the

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<sup>45</sup> See e.g. M.A. Baderin, 'Establishing Areas of Common Ground between Islamic Law and International Human Rights' (2001) 5 *The International Journal of Human Rights*, No. 2, pp. 72-113; 'Identifying Possible Mechanisms Within Islamic Law for the Promotion and Protection of Human Rights in Muslim States' (2004) 22 *Netherlands Quarterly of Human Rights*, No. 3, pp. 329-346; 'Islam and Human Rights: The Myth of Discord' (2005) 2 *European Human Rights Law Review*, pp. 165-185.

<sup>46</sup> A.A. An-Na'im, 'The Interdependence of Religion, Secularism, and Human Rights', (2005) 11 *Common Knowledge*, No.1, pp. 56-80.

<sup>47</sup> *ibid*, at p.80.

socio-cultural approach to human rights must address two main elements, namely, social change and cultural control.

In every society, there is need for some element of social change for the effective realization of human rights, especially in the horizontal interaction of the populace, which is better achieved through positive improvement in social consciousness than through forceful political or legal control. Promoting social change can however be problematic in almost all societies, but particularly in Muslim societies when this is perceived by the populace as being externally motivated. In a recent comment on scholarship for social change in Muslim societies, An-Na'im observed, *inter alia*, that: '[e]xternal interventions, whatever may be its motivation and objectives, is always likely to be regarded with suspicion and scepticism by local communities.'<sup>48</sup> Most advocates of human rights at the local level in Muslim societies would probably have experienced this problem of suspicion and scepticism. For example, at a conference on women's rights in Islam under the auspices of the Planned Parenthood Federation of Nigeria (PPFN) but with international sponsorship, held in 1994 at the University of Ibadan in Nigeria, there were suggestions from almost all the local Muslim participants behind the scene, and from many of them on the conference floor, that the conference had a hidden agenda against Islamic norms and traditions which must be resisted. The local participants perceived the programme as externally driven to undermine Islam. Ten years later, in 2004, there was similar suspicion and scepticism expressed at an international conference at the University of Jos in Nigeria on comparative perspectives of *shari'a* in Nigeria organized by the University of Jos in conjunction with Bayreuth University of Germany and with international sponsorship from Volkswagen Foundation of Germany. It was also reported, similarly, that both behind the scene and on the conference floor there were suggestions from most local Muslim participants that the conference had a hidden externally driven agenda against the application of Islamic law in Nigeria. Similar scenarios of suspicion and scepticism are not uncommon at such meetings in other Muslim States, which needs to be addressed through local confidence building in the international human rights system. An element of this suspicion, is also institutionally reflected in the call of the OIC to its Member Muslim States 'to continue their coordination and cooperation in the area of human rights in the relevant international fora with the view to enhance Islamic solidarity in confronting attempts to use human rights as a means to politically pressurize any of the Member States'.<sup>49</sup>

The socio-cultural approach to human rights would work better in addressing that problem in conjunction with the harmonistic perspective to Islam

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<sup>48</sup> A. A. An-Nai'm, 'Human Rights and Scholarship for Social Change in Islamic Communities' (2005) 2 *Muslim World Journal of Human Rights*, No.1, Article 2, at pp. 1 and 3.

<sup>49</sup> See UN Doc. A/59/425/S/2004/808 (11 October 2004), para.57.



and human rights. In pursuing the social-cultural approach to human rights here, Islam can play a very positive role. On the one hand, local Muslim communities are not generally inimical to social change, but they are often more amenable to social changes that can be justified in Islam, which, one must however acknowledge, is not always a clear-cut matter due to the different possible 'Islamic' views that can exist on any particular issue. In that regard, there is often the problem of how to deal with hard-line Islamist views on relevant human rights issues. It is submitted that, using the socio-cultural approach to human rights, such hard-line views can be engaged by constructively using relevant Islamic sources and arguments, which is more feasible through the harmonistic perspective to Islam and human rights rather than the adversarial perspective. There is relevant evidence within Islamic sources to aid such a congruous socio-cultural human rights discourse to promote human rights in Muslim societies. On the other hand, resistance to social change is usually due to the cultural control of the populace. As culture provides a sense of community for ordinary people they feel protected by it and cling to it for fear of isolation. Apart from being a religion, Islam also theoretically provides a sense of an 'Islamic culture' amongst Muslims. The religious attachment to the 'Islamic culture' gives it stronger control within Muslim societies. However, different negative local traditional cultures have crept into the 'Islamic culture' of different Muslim States and have for long become wrongly perceived as part of the 'Islamic culture' even though in contradiction with Islamic norms and principles. It has been noted that such cultural components have become so deeply rooted in most Muslim societies that 'many Muslims are no longer aware of their non-religious origins.'<sup>50</sup> Most of the grassroots populace in the Muslim world have become subjected to such negative cultural control ignorantly, which adversely affects their enjoyment of some basic human rights.

The issue of women's rights is perhaps the most adverse area of such negative cultural control in the Muslim world, which a socio-cultural approach to human rights in conjunction with the harmonistic perspective to Islam and human rights can help to address in almost all Muslim States. One example of such adverse traditional culture that threatens and continues to violate the fundamental right to life of many Muslim women, but which has been peddled wrongly in different Muslim societies as an 'Islamic culture' is the so called 'honour killing' of women that sadly occurs in some parts of the Muslim world. A bottom-to-top socio-cultural approach to human rights in conjunction with a harmonistic perspective to Islam and human rights with reference to relevant Islamic sources against this inhuman act is an important means of dealing with this problem from the grassroots in Muslim States. Historical evidence indicates that Islamic law has

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<sup>50</sup> A. al-Hibri, 'Islam, Law and Custom: Refining Muslim Women's Rights (1997) 12 *American University Journal of International Law and Policy*, pp.1-44, at p. 5.

actually never been static generally, rather it has been evolutionary and has responded in the past to changes in most Muslim societies but mostly to the advantage of the male gender in most Muslim States. I have stated elsewhere that ‘it is hypocritical if men on the one hand acquire and enjoy many rights and liberties of today’s world, often through constructive and evolutionary interpretations of the *Sharī’ah* but on the other hand consider the rights and liberties of women to be stagnated upon the juristic views of the classical schools of Islamic law.’<sup>51</sup> The enhancement of women’s rights is therefore very important in all Muslim States and can be achieved through the harmonistic perspective to Islam and human rights in the context of both the socio-cultural and politico-legal approaches to human rights as argued in this article.

The relevance of the socio-cultural approach to human rights and the harmonistic perspective to Islam and human rights in relation to women’s rights in Muslim societies is very well reflected in the observation of one researcher on women’s rights in Afghanistan who stated: ‘From my impressions and interviews in Afghanistan, ... [m]any women expressed that while they were keen to have rights, they wanted it within the framework of Islam and not as a cultural imposition from the West.’<sup>52</sup> The author then noted that:

‘Many Afghan women believed that the Qur’an offered women enough rights for them to negotiate their rights, but it was the fundamentalist interpretations that prevented women from claiming those rights and from educating themselves. Given the strategies employed by various women’s organizations in Afghanistan to empower women, it became obvious that their perceptions of culture and religion played a crucial role in their women’s rights strategies’.<sup>53</sup>

Habiba Sorabi, then the Afghanistan Minister for Women’s Affairs,<sup>54</sup> was also quoted as stating in an interview that: ‘Islam is here to stay and women want rights within the Islamic framework; ... Islam gave women rights to education and employment and that her Ministry was working within that framework.’<sup>55</sup>

Similarly, al-Hibri reflects the positive nature of the harmonistic perspective to Islam and human rights in relation to the promotion of women’s rights in Muslim States by first observing that ‘[i]t is important to keep in mind that most Muslim women tend to be highly religious and would not want to act in contradiction to their faith’. She then narrated a personal experience, which corroborates the usefulness of the harmonistic perspective to Islam and human

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<sup>51</sup> M.A. Baderin, *International Human Rights and Islamic Law* (Oxford: Oxford University Press, 2003) p.65.

<sup>52</sup> H. Ahmed-Ghosh, ‘Voices of Afghan Women: Women’s Rights, Human Rights, and Culture’ (2004) 27 *Thomas Jefferson Law Review*, p.27 at 29.

<sup>53</sup> *ibid* at p. 31

<sup>54</sup> Habiba Sorabi is currently the Governor of the Bamyan Province of Afghanistan.

<sup>55</sup> *ibid.* at p. 32.

rights in relation to the socio-cultural approach to promoting human rights in Muslim States, as follows:

‘A couple of years ago, I met some “modern” Muslim women behind closed doors in a certain Muslim country. The object was to have frank discussions about Islam and the rights of women. The women reflected a high degree of conflict and frustration. They wanted to be good Muslims, but they wanted to have their rights as well. When we focused on the issue of greatest concern to them, the Qur’anic view of gender relations, and I provided a non-patriarchal Qur’anic interpretation on the subject, sighs of relief filled the room. The conflict created by patriarchal interpretations for Muslim women who do not have the benefit of a religious education is frightening’.<sup>56</sup>

She then argued that ‘[t]he majority of Muslim women who are attached to their religion will not be liberated through the use of a secular approach imposed’ on them and that the best way ‘is to build a solid Muslim feminist jurisprudential basis which clearly shows that Islam not only does not deprive them of their rights, but in fact demands these rights for them.’<sup>57</sup>

Also, in an article commenting on Fatima Mernissi’s works on women’s rights in the Muslim world, the authors observed that Mernissi’s approach had evolved ‘from advocating secular reconstruction of Muslim societies to a position that resembles Islamic reformism’,<sup>58</sup> which reflects a shift from an adversarial perspective to a harmonistic perspective to Islam and human rights. The authors noted that while Mernissi had argued for a reconstructive approach to Islam in relation to women’s rights in her first book, *Beyond the Veil*, published in 1975, which reflected an adversarial perspective to Islam and human rights, she seemed to argue differently 16 years later for a reformative approach, which reflected a harmonistic perspective to Islam and human rights in her book, *The Veil and the Male Elite*, published later in 1991. This, according to the authors, represented ‘a shift from Mernissi’s earlier works, in which she argued that the establishment of women’s rights in Muslim societies would necessitate going beyond the limits of Islamic discourse. In *The Veil and the Male Elite* Mernissi reveals her preference for a reformist approach to Islam and the sociopolitical establishment.’<sup>59</sup> They concluded that ‘Mernissi’s early reconstructivist approach ... faced the test of relevance’ in the sense that ‘[i]f Muslim feminist theory is separated from its subjects and not able to inspire and motivate Muslim women, then that theory is diminished in relevance and effectiveness’,<sup>60</sup> which essentially corroborates the

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<sup>56</sup> A. al-Hibri, *supra*, note 50 above, at p.3.

<sup>57</sup> *Ibid.*

<sup>58</sup> R. Barlow & S. Akbarzadeh, ‘Women’s Rights in the Muslim World: Reform or Reconstruction?’ (2006) 27 *Third World Quarterly*, No.8, pp. 1481-1494 at, p. 1481

<sup>59</sup> *Ibid.*, at p. 1483.

<sup>60</sup> *Ibid.*, p.1493.

usefulness and relevance of the harmonistic perspective to Islam and human rights in that regard.

It was noted earlier above that the socio-cultural approach to human rights relates to the education, information, orientation and empowerment of the populace through the promotion of a local understanding of international human rights norms and principles, and that local human rights NGOs, religious groups and institutions have an important role to play in that regard. From a harmonistic perspective to Islam and human rights, I have argued elsewhere, regarding human rights education, that there is Islamic evidence to support the promotion of human rights education and awareness in the Muslim world, and that:

‘[a]n Islamic and international human rights curriculum for primary, secondary and tertiary institutions in the Muslim world is very necessary in that regard. This needs to be implemented both in private and public schools. Due to the importance and the role of religion and religious institutions in the Muslim world, human rights education should not be limited to the secular institutions but also extended to the Islamic religious institutions and centres. The provisions of the Qur’an and *Sunnah* that promote the ideals of human rights must be stressed. As there are many Qur’anic provisions that buttress most of the human rights guarantees under international human rights instruments, it is essential that the international human rights provisions be explained and illustrated through the Islamic legal tradition for a religious and cultural appreciation of those rights.’<sup>61</sup>

I have further observed in that regard that ‘[t]he duty of promoting human rights through education is not restricted to States alone, non-governmental organisations (NGOs) and religious bodies also have an important role to play in that regard and should be encouraged by the States to do so’, and consequently suggested that:

‘a decade of human rights education and dissemination be declared by the OIC [Organisation of Islamic Conference] for its Member States, and Muslim States should be encouraged to adopt national plans for human rights education in that regard. Such an approach will be a bold step towards the realisation of the ideal Islamic society in which people are aware of their rights, wherein human rights are duly respected and human beings enjoy the inherent honour (*karāmah*) which their Creator had endowed in them at creation.’<sup>62</sup>

From a harmonistic perspective to Islam and human rights, the establishment of local NGOs to facilitate a social-cultural approach to human rights in Muslim

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<sup>61</sup> M. A. Baderin, ‘Identifying Possible Mechanisms Within Islamic Law for the Promotion and Protection of Human Rights in Muslim States’ (2004)22 *Netherlands Quarterly of Human Rights*, No. 3, pp. 329-346 at p. 337;

<sup>62</sup> *Ibid.*, p.338.

States can also be substantiated in Islam by reference to an earlier practice of Prophet Muhammad in that regard. Islamic historical accounts indicate that Prophet Muhammad had participated in an organisation called *Hilf al-Fudul* (League of Excellence)<sup>63</sup> in Mecca around 590CE as a young man before his call to prophethood.<sup>64</sup> The League undertook the task of intervening and protecting the interest of the oppressed and victims of injustice in any transaction involving the chieftains and the powerful people in Mecca at that time. He is reported to said, about the League, after his prophethood many years later, that it was a League he loved to join and if he were to be ‘invited to have a hand in it even after the advent of Islam, [he] would have undoubtedly joined again’.<sup>65</sup> The *Hilf al-Fudul* League has been described as the first human rights NGO in Islamic history.<sup>66</sup> The socio-cultural promotion of human rights education and awareness, establishment of relevant human rights NGOs and involvement of local groups and religious institutions in that regard can therefore be positively pursued through the harmonistic perspective to Islam and human rights in the Muslim world.

The Muslim Women Lawyers for Human Rights (KARAMAH),<sup>67</sup> is an example of a women’s organisation whose work practically reflects the harmonistic perspective to Islam and human rights, which can be emulated in other relevant areas of human rights for the Muslim world. Information on the organisation’s website indicate that it ‘is committed to research, education, and advocacy work in matters pertaining to Muslim women and human rights in Islam, as well as civil rights and other related rights under the Constitution of the United States.’ The organisation is said to be ‘founded upon the ideal that education, dialogue, and action can counter the dangerous and destructive effects of ignorance, silence, and prejudice’ and it ‘supports Muslim communities in America and abroad in the pursuit of justice.’ Corroborating the importance of the socio-cultural approach to human rights, the organisation has also noted that ‘[w]hen we talk of human rights abuses, we often direct our attention to

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<sup>63</sup> Also translated variously as ‘League of the Virtuous’, League of the Righteous’, ‘Alliance of the Righteous’, ‘Alliance of Excellence’, ‘Pact of Excellence’, Pact of the Virtuous, ‘Pact of the Righteous’.

<sup>64</sup> See e.g. A. S. Najeebabadi, *The History of Islam*, Vol.1, Riyadh: Darussalam International Publishers, 2000, pp. 99-101; and also Ch. Pellat, ‘Hif al-Fudul’, in *Encyclopaedia of Islam*, Vol. III, Edited by B Lewis, et. al, Brill, 1986.

<sup>65</sup> Najeebabadi, *ibid.*, p.101.

<sup>66</sup> See A. Zaoui, ‘Islam and Human Rights’ *Vice-Chancellors Lecture Series, Massey University, Albany Campus*, August 2005.

<http://www.freezaoui.org.nz/system/files/Islam+and+Human+Rights+MasseyUni+Aug2005.pdf> [Last accessed: 24/6/07]; See also entry titled ‘The Pact of the Virtuous (Hilf al-Fudul)’ in UNDP, *Arab Human Development Report 2004: Towards Freedom in the Arab World*, New York: UNDP, 2005, p. 74.

<sup>67</sup> <http://www.karamah.org/home.htm> [Last accessed: 24/6/07].

governments and institutions. We must not forget, however, that the most basic of our rights emerges within our private and our domestic spheres.<sup>68</sup>

Now we turn to the politico-legal approach to human rights, which must also address two main elements, namely, political authority and legal order. Politically, the protection of human rights is about good governance and accountability, which is lacking in most parts of the developing world, including Muslim States. As earlier observed, Islam however has political influence in most parts of the Muslim world. This is evidenced by the use of Islam as a political tool by the political elites in Muslim States. Even in secular Muslim States, political leaders do often unpack and play up their Islamic identity to cajole the Muslim populace to their side when the political terrain gets tough. Being a top-to-bottom approach, this element of the politico-legal approach to human rights can be used to engage governments of Muslim States to adopt welfare policies that ensure the guarantee of the human rights of the populace, as required and encouraged under Islamic political principles. Employing the harmonistic perspective to Islam and human rights, the political authority, at least in those Muslim States that have constitutionally proclaimed Islam as the religion of the State, can be persuaded with relevant evidences from within Islamic sources urging accountability and good governance on the part of those conferred with political authority.

One political question that often creeps into the Islam and human rights discourse, in relation to the politico-legal approach to human rights is the issue of secularism. In relation to international human rights law, the issue of secularism is, apparently, paradoxical. While it is often suggested, from a human rights perspective, that human rights are better guaranteed within a strictly secular political dispensation, there is no specific international human rights obligation upon States to adopt a secular political system. Blitt and Stahnke have observed in that regard that:

‘Under international human rights standards, a state can adopt a particular relationship with the religion of the majority of the population, including establishing a state religion, provided that such a relationship does not result in violations of the civil and political rights of, or discrimination against, adherents of other religions or non-believers.’<sup>69</sup>

Nevertheless, while the issue of secularism may be paradoxical in relation to international human rights law, and while predominantly Muslim States may not be in violation of international human rights rules by constitutionally declaring Islam as State religion, yet Muslim States definitely have an obligation under

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<sup>68</sup> *Ibid.*

<sup>69</sup> See Blitt, and Stahnke, *supra*, note 7 above, p.8. See also Human Rights Committee, General Comment No. 22: The Right to Freedom of Thought, Conscience and Religion (Art. 18), UN Doc. CCPR/C/21/Rev.1/Add.4, July 30, 1993, para. 9.

international human rights law to ensure non-discrimination against adherents of other religions and non-believers within their respective jurisdictions. It is interesting to note that the poor situation regarding respect for minority rights in Muslim States has, rightly so, attracted the interest of many Muslim scholars to propose a re-examination of the traditional Islamic jurisprudence on the issue of minorities (*fiqh aqaliyyāt*) under Islamic law,<sup>70</sup> which the political authorities in most Muslim States need to address as a possible means of positively promoting respect for minority rights in the Muslim world. Berween has argued in that regard, citing relevant Islamic sources, that Muslim States have an obligation to protect minority rights under Islamic law. He observed notably that

‘[i]n an Islamic state, although the Muslim majority rules, it does not have the power to deprive the minorities of their basic rights or to stop them from serving their society like any other citizen. The Muslim majority must obey all Islamic laws. In many ways it is like any other majority in any civilized society, the Muslim majority has the power to act, but it must act legally, fairly, and without violating the rights and liberties of any citizen. Finally, to be legitimate the Muslim majority rule must be reasonable and it must respect and protect the rights of all minorities. That requires protection of all those freedoms that make effective opposition possible. Those freedoms must, at least, include the right to full and equal political participation; freedom of expression; freedom of the press; freedom of beliefs; an independent judiciary; freedom of peaceful assembly and petition; and, freedom of choice.’<sup>71</sup>

The realization of this obligation can be positively enhanced through the harmonistic perspective to Islam and human rights in conjunction with the politico-legal approach to human rights as advanced in this article.

On the other hand, an effective legal order is also a very important element of the politico-legal approach to human rights. Although this element is often seen as remedial and triggered by human rights violations, it can also serve to prevent human rights violations where relevant laws are promulgated and relevant human rights institutions and mechanisms are created by the State and well utilised in that regard. Many Muslim States today have elements of Islamic law incorporated into their domestic laws, thus the relationship between Islamic law and human rights in Muslim States has constituted an important aspect of the Islam and human rights discourse. Similar to the issue of secularism above, States have the sovereign autonomy to adopt a legal system of their choice and international human rights law does not impose any specific legal system on States. The impasse on the role of Islamic law in the drafting of the Iraqi constitution,

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<sup>70</sup> See e.g. A. Ahmad, ‘Extension of Shari’ah in Northern Nigeria: Human Rights Implications for Non-Muslim Minorities’ (2005) 2 *Muslim World Journal of Human Rights*, Issue 1, Article 6.

<sup>71</sup> M. Berween, ‘Non-Muslims in the Islamic State: Majority Rule and Minority Rights’ (2006) 10 *The International Journal of Human Rights*, No. 2, pp. 91-102, at p. 101.

however, demonstrated the general presumption in human rights circles that Islamic law or *shari`a* is inimical to civil liberties and human rights. There is no doubt that some traditional implementations of Islamic law, which when viewed historically may be considered to have been ahead of their time then, are today contradictory to human rights standards. The problem is exactly that Islamic law has mostly been viewed and promoted in its historical context by most commentators and scholars, and also applied mostly as such by many Muslim States. It is important to emphasise in that regard that Islamic law is not, and must not be perceived as static and fossilized but rather as evolutionary. Its evolutionary nature makes it complementary with human rights through the harmonistic perspective advanced in this article. Where Islamic legal scholarship, in response to modern human rights challenges, is re-directed at emphasising the evolutionary nature of Islamic law rather than presenting it in a historical context and as a fossilized legal system stuck in the past, its potential as a vehicle for the realization of human rights will be better enhanced. The methods of Islamic law are quite robust and flexible to facilitate the needed progressive evolution of Islamic law in that regard.<sup>72</sup>

For example, in adopting a new women's rights-friendly Family Code, *The Mudawwana*, based on Islamic law and principles in 2004, Morocco demonstrated the evolutionary nature of Islamic law and the possibility of a harmonistic perspective to Islam and human rights in relation to the politico-legal approach to human rights. Many commentators have observed that the new Moroccan Family Code, compared to the old Code, ensures considerable enhancement of women's rights within the context of Islamic law and principles in Morocco. The preamble of the new Family Code stated that the Moroccan monarch had, during its drafting, 'encouraged the use of *ijtihad* (juridical reasoning) to deduce laws and precepts, while taking into consideration the spirit of our modern era and the imperatives of development, in accordance with the Kingdom's commitment to internationally recognized human rights.'<sup>73</sup> The preamble further observed that the provisions of the new Family Code was

'...drafted in a modern legal jurisprudential style, in conformity with Islam's tolerant rules and exemplary purposes while providing balanced, fair and pragmatic solutions resulting from enlightened open *ijtihad* (juridical reasoning). This code further stipulates that human and citizenship rights are

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<sup>72</sup> See e.g. W. Hallaq, *A History of Islamic Legal Theories*, Cambridge: Cambridge University Press; New Ed., 1999); M. H. Kamali, *Principles of Islamic Jurisprudence*, Cambridge: Islamic Texts Society, 1991; M. A. Baderin, *International Human Rights and Islamic Law*, Oxford: Oxford University Press, 2003, particularly pp.32-47.

<sup>73</sup> 4<sup>th</sup> Preambular Paragraph of the English Translation of the Moroccan Family Code (*Moudawana*) of February 5, 2004 by Global Rights. Available online at: <http://www.hrea.org/moudawana.html> [Last accessed: 24/6/07].



accorded to all Moroccans, women and men equally, in respect of the holy divine religious references.<sup>74</sup>

While the new Moroccan Family Code may be considered in human rights circles as a modest step in relation to the protection of women's rights generally, it nevertheless, demonstrates that with the right political will, governments of Muslim States can positively enhance human rights within their Islamic dispensations through a harmonistic perspective to Islam and human rights in conjunction with the politico-legal approach to human rights generally. In her comments on the new Family Code, Weingartner observed that 'the reformed code more closely aligns with modern views on women's rights and privileges in a democratizing society'.<sup>75</sup> The WRR also referred to the adoption of the new Moroccan Family Code as an example of the harmonistic perspective to Islam and human rights through which 'considerable improvement in women's rights has taken place under the banner of Sharia' in Morocco.<sup>76</sup>

Regarding the establishment of relevant political and legal institutions and mechanisms for ensuring the practical implementation of human rights under the politico-legal approach to human rights, I have argued elsewhere, for example, that the creation of National Human Rights Commissions and establishment of human rights courts in Muslim States can be Islamically justified in line with the harmonistic perspective to Islam and human rights and also emphasised the importance of regional cooperation amongst Muslim States in that regard.<sup>77</sup> The WRR had also noted the importance of cooperation among Muslim States in relation to the politico-legal approach to human rights in conjunction with the harmonistic perspective to Islam and human rights by stating, *inter alia*, that:

'[I]legal implementation is not only the result of internal pressure within Muslim countries and external pressure from multilateral institutions like the UN, but also of mutual discussions and comparison among Muslim countries themselves. It is particularly over such charged issues as gender relations, freedom of religion, and cruel punishments that mutual learning processes can often be more effective than external pressure that can be interpreted as paternalistic, uninformed, or even inimical to 'Islam''.<sup>78</sup>

It is clear from the above analyses and illustrations that the harmonistic perspective to Islam and human rights is a more pragmatic and constructive way

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<sup>74</sup> *ibid.*, 5<sup>th</sup> Preambular Paragraph.

<sup>75</sup> L. A. Weingartner, 'Family Law and Reform in Morocco – The *Mudawana*: Modernist Islam and Women's Rights in the Code of Personal Status' (2005) 82 *University of Detroit Mercy Law Review*, pp.687-713, at p.687.

<sup>76</sup> WRR, *supra*, note 6 above, p. 11.

<sup>77</sup> M. A. Baderin, *supra*, note 61 above, pp.338-346.

<sup>78</sup> WRR, *supra*, note 6 above, p. 172.

to enhance the realization of human rights within the context of the socio-cultural and politico-legal approaches for promoting and protecting human rights generally, which can be adopted by advocates of human rights in Muslim States and further encouraged through both human rights and Islamic legal scholarship.

## **V. Conclusion.**

Apart from mere human rights standard-setting, the need for the promotion and protection of human rights is positively acknowledged under international human rights law and affirmed in many international human rights treaties. Without effective promotion and protection, human rights provisions in treaties and declarations would be mere empty rights on paper. This however requires important systematic approaches and methodologies for its effective realization, which needs to be more seriously addressed in human rights debates and literature. This article has been a modest attempt in that regard. Obviously, the situation in Muslim States is more complex due to many factors, with Islam being one significant factor as analysed in this article. The two essential approaches for promoting and protecting human rights and the two divergent perspectives to the Islam and human rights discourse as analysed herein have endeavoured to provide a pragmatic and constructive take on how best to promote the realization of human rights in Muslim States. The position advanced in the end is informed by the author's view that human rights are best promoted not through the use of force but through positive engagement, moral persuasion, positive political will and due process of law.

However, in advancing the harmonistic perspective to Islam and human rights in conjunction with the socio-cultural and politico-legal approaches to human rights herein, one must acknowledge the general criticism often advanced that such an approach could be slow and indulging, especially in the face of human rights violations that need urgent attention, such as the issue of women's rights and minority rights in most Muslim States. The WRR has observed in that regard that 'Islamic reforms in the direction of international human rights standards often appear to Western eyes either as going too slowly or even as a step backward. However, one should not exclude the possibility that it is precisely these kinds of reforms that have a better chance of taking root than large or Western-imposed steps',<sup>79</sup> and also noted 'the fact that permanent improvements cannot be imposed and sometimes take a long time'.<sup>80</sup>

To re-emphasise the relevance of the harmonistic perspective to Islam and human rights advanced in this article, it is instructive to conclude with another observation by the WRR as follows:

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<sup>79</sup> *Ibid.*, p.151.

<sup>80</sup> *Ibid.*, p. 171.

‘The argument that Islam is principally incompatible with these ideas [democracy and human rights] is simply untrue. This does not necessarily mean, however, that such a policy will achieve great success in the short term. Not only are power relations stubborn, but views do not change overnight. All kinds of developments may be of influence, such as higher education, women participating in the workforce, migration, and media consumption. For this reason, the present limited influence of positive views of democracy and human rights does not mean that their potential influence will be as limited. Changes in individual behaviour as well as changes in the political make-up can increase the need for interpretations of Islam which support democracy and human rights’.<sup>81</sup>

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<sup>81</sup> *Ibid*, p. 56.