

THE NEW "PUBLIC"

The Globalization of Public Participation

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The New "Public": The Globalization of Public Participation

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RIGHTING PUBLIC WRONGS AND ENFORCING PRIVATE RIGHTS: PUBLIC INVOLVEMENT IN ISLAMIC LAW

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Public involvement is a tradition that is fundamentally rooted in the law and practice of Islam. It is important to understand the concept of public involvement under Islamic law if current efforts at entrenching the concept in Muslim countries are to resonate with the people. In Muslim countries, it is traditional Islamic law that directly or indirectly infuses legitimacy into what emerges as law, and as such determines people's compliance with it on the ground. Examining the Islamic law dimension of public involvement is more important than simply finding traditional sources or functional equivalents to form a foreign-fashioned principle unknown to Islam. Public involvement leads to more effective decisionmaking by improving the information that is available and by building public support and credibility. Public involvement also improves effective management of natural resources and protection of the environment. Moreover, examination of the Islamic law and practice of public involvement promises to enrich the discourse and contribute to the convergence of efforts in different societies around the world.

This chapter examines the Islamic law insight on improving sustainable development through public involvement. It pays particular attention to examining ways to improve natural resources management and environmental protection in Muslim communities and how Islamic ideas enrich the global discourse on public involvement.

Section I identifies norms, mechanisms, and practices under which the public has participated in governance in Muslim communities. Specifically, it evaluates principles, such as consultation, mutual oath of allegiance between the ruler and the people, venues and

avenues for making information available, and the availability of access to justice. Section II explores the wide range of natural resources for which Islamic law guarantees a voice to Muslim communities in their management. Section III considers the contemporary relevance of Islamic law in promoting public access to information, participation, and justice, as well as insight that may be gained from experiences in other secular countries in developing and implementing specific mechanisms to ensure public involvement. Section IV underscores the need to empower or, more appropriately, re-empower communities in modern Muslim countries as envisaged under traditional Islamic legal norms.

I. AN OVERVIEW OF ISLAMIC LAW ON PUBLIC INVOLVEMENT

Before delving into issues of public involvement, it is necessary to examine briefly the continuing role of Islamic law in Muslim countries. Despite the fact that most Muslim countries have adopted some form of constitutional government with national laws embodied in statutes and ordinances and despite the fact that most of these laws reflect imprints of colonial law, Islamic law still serves in varying degrees as one of the bona fide sources of norms and legitimacy.

The fundamental basis of the Islamic law tradition is that the will of God is the source of law, and no human being may demand obedience or compliance from another human except in accordance with the command of God. Islamic legal theory asserts that what is absolutely beautiful and moral and what is absolutely ugly can only be determined for certain by God.¹ Therefore, divine law shows humankind the right path (Shari'ah) to be traveled in order to achieve salvation.² The Qur'an

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¹ JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW 1 (1991).

² NOEL J. COULSON, A HISTORY OF ISLAMIC LAW 85 (1995) (noting that "Law, therefore, does not grow out of, and is not moulded by, society as is the case with Western systems. Human thought, unaided, cannot discern the true values and standards of conduct ... In the Islamic concept, law precedes and moulds society; to its eternally valid dictates the structure of State and Society must, ideally, conform.").

is supposed to regulate the whole of a Muslim's life, and Muslims privately or publicly strive to ensure that their behaviors conform to the injunctions of the Qur'an, which carries an individual mandate that is not just corporal or secular, but also immortal, spiritual, and ethical. To Muslims, the Shari'ah is not just a legal system with a religious basis, but it also has a significant component of salvation. The principal objective of Islamic law is the approval of God, thus, seeking harmony between the temporal and the spiritual.

The Islamic law tradition is woven around a hierarchy of sources, and the level of authority and universality of a norm often depends on its position within that hierarchy. The Qur'an is the highest in the hierarchy, and its authority is binding.³ Each text of the Qur'an contains levels of meaning, which only learning and devotion can reveal.⁴ Thus, the Sunnah—or tradition of the Prophet Muhammad (peace be upon him)—offers valuable assistance in clarifying and illustrating those meanings and applying them in practice. Both the Qur'an and the Sunnah constitute primary sources of Islamic law. The secondary sources involve the techniques for discerning and discovering the law embedded in the primary sources. The secondary sources are comprised of *ijma'* (consensus) and *ijtihad* (juristic reasoning). Various modes of exercising *ijtihad* include *qiyas* (analogy), *'istislah* (public interest), and *'urf* (local custom). Taken together, this methodology produces identifiable positive Islamic law. This chapter analyzes issues of public involvement under Islamic law by examining these primary and secondary sources.

Although the premise of community participation in traditional Islam is widespread, this premise is not included in the modern nation-state system, which is structured on defined national borders with extensive powers within those borders and with the sole authority to represent all communities within those borders. This structure has caused tremendous erosion of the power of the community in a number of important situations. Therefore, a reconstructed discourse in Islam is needed to reposition public involvement in governance, taking into consideration the internal and external dimensions of state operations.

In Islam, the underlying consideration for public involvement, particularly the requirements of transparency and accountability, is to reduce the burden of governance on the rulers, who are deemed to be trustees for

the people.⁵ By involving the public, those in authority share this burden with the people and will be obliged to maintain the unity that is required of a community.⁶ Apart from mandating public involvement in government generally, Islamic law becomes even more specific in involving the public in matters of natural resources.

The public is the centerpiece of all natural endowments, and communal sharing of all benefits accruing from utilization of those resources is the norm.⁷ Communal sharing of benefits ensures that the interest of the society as a whole will be a significant factor in any decision regarding exploitation and conservation of those resources. An expression of that interest is found in *hima*, Islam's concept of a protected area. A *hima* may be established for various communal purposes. Centuries of practice of *hima* has culminated in the rule that providing for the needs of the poor constitutes a community interest for which a *hima* may be declared, but no *hima* may be established solely for the benefit of the rich.⁸

As concrete norms of international law on public involvement emerge, it is envisaged that Islamic law, which still needs to reclaim and refine its own scheme for public involvement, can provide an avenue for sup-

⁵ MUSLIM IBN AL-HAJJAJ, 12 SAHIH MUSLIM BI SHARH AL-NAWAWI 179 (Yahya S. al-Nawawi, 1990) (quoting the Prophet Muhammad, upon whom be peace, as saying: "Beware! Every one of you is a Shepherd and every one is answerable with regard to his flock. The Caliph is a shepherd over the people and shall be questioned about his subjects (as how he conducted their affairs)."). In advice to Yakubu, the first Emir of Bauchi, Sultan Bello of the Sokoto Caliphate in Northern Nigeria maintained that "[t]he most important condition for a governor is that he should appoint for the care of state affairs such persons who are purposeful, truthful and honest." A. Yahya Aliyu, *A Note on Wilayat al-Mazalim: The Institution of Public Complaints in Islam and the Draft Constitution*, in CONSTITUTIONALISM IN ISLAMIC LAW 1, 7 (A. Rahman I. Doi ed., 1977) (quoting Sultan Muhammad Bello). Also writing in the 19th Century about governance in Northern Nigeria, one of the architects of the Sokoto Caliphate, Abdullahi ibn Fodio, emphasized that the ruler or emir should seek information about the caliber of potential public officers and that the authorities should "count their wealth before appointment." *Id.* at 6.

⁶ Roy Mottahedeh, *Constitution and the Political Process in the Islamic Middle East of the 9th, 10th, and 11th Centuries*, in ISLAM AND PUBLIC LAW 19, 24 (Chibli Mallat ed., 1993).

⁷ See *infra* secs. II.A, B.

⁸ UTHMAN IBN FUDI, BAYAN WUJUB AL-HURA ALA AL-IBAD, 70 (F. H. El Misri trans., 1978).

³ CHRISTOPHER G. WEERAMANTRY, ISLAMIC JURISPRUDENCE: AN INTERNATIONAL PERSPECTIVE 85 (1988).

⁴ *Id.* at 34.

porting and strengthening those international norms.⁹ Many areas of congruence are discussed under the norms of internal law and Islamic law, albeit under a different conceptual framework and terminology. The benefits of public participation in a nation-state are numerous. For example, it has been noted that the nation-state system has failed to take account of long-term interests of transboundary ecosystems to which the lives of local communities (particularly those living along national borders) are intricately connected. Public participation is needed to build public awareness of issues, to give the public opportunity to express its concerns, and to enable authorities to take due account of such concerns.¹⁰

There are layers of public involvement under Islam, which are, in order of preference: active, partial, and passive. These classifications are derived from the statement of the Prophet Muhammad: “Whosoever of you sees an evil action let him change it with his hand; and if he is not able to do so, then with his tongue; and if he is not able to do so, then with his heart and that is the weakest of faith.”¹¹ Therefore, participation by the public in order to put things right—that is, to maintain good governance—is an obligation on all Muslims.¹²

The most commendable participation is active participation, which is signified by the hand and is the ultimate instrument of change. In fact, active participation is required for the legitimacy of an emergent political leader and is expressed in terms of *mubaya’ah*, or lending a hand (discussed in section I.A, below).¹³ The second level of participation is to seek an intermediary

in the involvement by urging others to lend their hands. In certain situations, active participation may be impossible as where change may be effected only by designated people in authority. In that circumstance, people need to participate by voicing their concerns to shape a desired outcome.¹⁴ The third and disfavored level of participation is participation confined only to the heart. It is disfavored because it is the weakest of all responses that can bring about a positive change.

These levels are still relevant both to the manner in which the government guarantees a process of participation, as well as the manner in which people respond.¹⁵ The current trend toward guaranteeing public involvement in nation-states is to provide avenues in decisionmaking processes, as well as public access to information and to justice. Together, these avenues constitute practical mechanisms for implementing the higher, more preferred levels of involvement under Islamic law.

A. LENDING A HAND: PUBLIC PARTICIPATION IN GOVERNANCE

The primary avenue in Islamic law for the public to actively participate in governance is through *shura*, or consultation. In accordance with the principle of *shura*, when interests of members of the public are to be affected, the public must be consulted and their opinions weighed.¹⁶ Historically, consultation was never structured formally between levels of government or between the government and the people,¹⁷ although it was widely practiced in various forms. Early Muslim rulers followed the injunction of consultation as they deemed fit without devising a firm structure or process for that purpose. Accordingly, the early practice of *shura* is so amorphous that it may in a modern setting serve as the executive council of a government, the legislature, or indeed a people’s forum, where government weighs responses of the public on certain policies.

In various decisions that impacted the public, the Prophet Muhammad seldom made a decision or took an action without engaging those who would be affected. As a result, the opinion of people with special knowledge in any given issue carried weight but was not al-

⁹ Public involvement in regional and international instruments is being shaped by Principle 10 of the Rio Declaration on Environment and Development, done at Rio de Janeiro, June 14, 1992, 31 I.L.M. 874 (1992), which states:

Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

The instrument for implementing the Rio Declaration, Agenda 21, provides for public involvement in developing, implementing, and enforcing environmental laws and policies by guaranteeing transparency, participation, and accountability in environmental management. U.N. Doc. A/CONF.151/4 (1992). See especially *id.* chs. 12, 18, 19, 27, 36, 37, 40.

¹⁰ For an articulation of benefits of public participation in environmental matters, see Carl Bruch, *Charting New Waters: Public Involvement in the Management of International Watercourses*, 31 ENVTL. L. REP. 11389, 11390-91 (2001).

¹¹ AL-HAJJAJ, *supra* note 5, vol. 2, at 19.

¹² See *infra* notes 36-38 and accompanying text.

¹³ See *infra* notes 21-22 and accompanying text.

¹⁴ Commenting on the prophetic tradition on change, Judge Iyad said that it establishes the basis of seeking change, and that a person seeking change should use whatever means available to him in deeds or words. AL-HAJJAJ, *supra* note 5, vol. 2, at 19.

¹⁵ For instance, when a public officer of treasury was asked to render his account and was found to have abused his office by keeping part of the money as a gift, the Prophet took it upon himself to take action directly in condemning the abuse. He told the officer publicly: “You should have remained in the house of your father and your mother, until your gift came to you if you spoke the truth.” *Id.* at 183-84.

¹⁶ Qur’an 3:159 (“[A]nd consult them in affairs.”).

¹⁷ Mottahedeh, *supra* note 6, at 21.

ways decisive. Abu Huraira, one of the great companions of the Prophet, noted that: "I have never seen anyone who consults with his companions more than the Prophet, upon whom be peace."¹⁸ To underscore the importance of consultation, the Qur'an contains an entire chapter on consultation—the 42nd chapter. It offers consultation even for nonreligious matters as an exemplary attribute to which Muslims should endeavor to imbibe. They are urged to emulate those "who [conduct] their affairs by mutual consultation."¹⁹ A more direct injunction establishing widespread consultation with the public as a standard norm is contained in the verse: "and consult them in affairs."²⁰

Shura is an important mechanism through which public participation is guaranteed. The law imposes a duty upon every person who engages in directing the affairs of the people, from the highest to the lowest levels, to engage in consultation with the people who may be impacted by a proposed decision. Indeed, the authority of a ruler to govern in Islam was secured through *mubaya'ah*, or a double oath of allegiance binding the public to comply with orders and the ruler to guarantee public participation. As Professor An-na'im observed, "[t]his contract [*mubaya'ah*] imposed a duty of obedience on the subjects and an obligation on the imam to rule in accordance with justice and the dictates of Shari'a, including a duty to consult his subjects."²¹ This double allegiance entitles a citizen to withdraw his allegiance to a ruler when the ruler does not fulfill his own portion of the obligation.²²

The obligation to consult is not dependent on the type of decision so long as the putative decision will have a direct impact on the subjects. The rationale for participation in consultation, it seems then, is to maintain the required unity of a community and to reduce the possibility of friction that may result from a non-

representative decisionmaking process. Closely related to the latter point is a fundamental recognition that people must have an opportunity to have a voice in decisions that could affect them; even if they do not make the ultimate decision, they must be consulted.

The Prophet Muhammad and his companions consulted with the public on a wide array of issues, from military expeditions to purely religious matters. There were occasions when the peoples' voices trumped that of the Prophet, even on religious matters, as for example, on the issue of determining the mode of calling Muslims for prayers and writing down of the Qur'an.²³ The practice of the Prophet was to listen to the voices of the people, both high and low, before a decision was made and to discourage any arguments on the matter once the decision was made.

The only noted modes of consultation, as practiced during the early period of Islam, are *ammah* (involving the general public) or *khasah* (involving a select group of high-ranking leaders). It is not easy to classify which issues were deliberated by which process. Many issues available on consultation with select groups seem to be more common,²⁴ but the *ammah* consultation was also favored. For instance, "[Caliph] Umar used to call people to the mosque...and then he would present to them various issues upon which he wanted them to deliberate."²⁵ On one occasion, Caliph Umar consulted with the public regarding whether he should personally go to Iraq or send an emissary when one of his officials, Abu 'Ubaid, was assassinated there.²⁶ He also chose the *ammah* consultation for determining whether to continue or turn back from a trip to Syria when he was informed the region was beset with plague.²⁷ Many commentators have noted that policy execution during the period of Caliph Umar was smooth because of his optimal utilization of the *shura* scheme in which the general public at large had opportunity to participate.²⁸ Thus, the early practice of Muslim leaders does not indicate a permanent adoption of one mode of consultation over the other.²⁹

However, practices of Muslim leaders in both government and civil organizations since the 8th century have tended to limit the principle of consultation to scholars, experts, community leaders, or ad hoc or per-

¹⁸ MUHAMMAD HUSAYN HAYKAL, 2 UMAR AL-FARUK 277 (1964).

¹⁹ Qur'an 42:38.

²⁰ Qur'an 3:159.

²¹ ABDULLAH AHMED AN-NA'IM, TOWARD AN ISLAMIC REFORMATION: CIVIL LIBERTIES, HUMAN RIGHTS, AND INTERNATIONAL LAW 37 (1996).

²² Islam demands obedience to the ruler so long as he is upright. AL-HAJJAJ, *supra* note 5, at 191. A particular incident sheds more light on this obligation. Once, in the 7th century, there was a consignment of garments from Yemen, and Caliph Umar decided to distribute them among all, with each person, including the Caliph, receiving one piece. Shortly thereafter, Umar was sighted on the pulpit with two pieces of the garments as he sought to enlist the people to participate in an emerging war. One person rose and said he would neither pay attention nor obey the Caliph until he explained to the people how he came about two pieces of garments. Then the son of the Caliph rose and said that he gave his own share to his father, because of the father's height and because one piece would not be sufficient for his need. Then the man said: "Now I will pay attention and obey your orders." HAYKAL, *supra* note 18, at 215.

²³ HAYKAL, *supra* note 18, at 277.

²⁴ Mottahedeh, *supra* note 6, at 23.

²⁵ *Id.* at 209.

²⁶ *Id.*

²⁷ *Id.*

²⁸ HAYKAL, *supra* note 18, at 292 (quoting from HUIJAT ALLAH AL-BALIGAH) (noting that "Umar consulted with the people ... such that most of his decisions and decrees were followed from the east to the west of the territory").

²⁹ *Id.* at 209-10, 292.

manent bodies usually referred to as a “shura committee or council.”³⁰ The reason for permanently excluding the general public seems to be due more to difficulties in assembling the general public because of the rapid rise in the Muslim population rather than to a legal or policy restriction on public entitlement—the Qur’an never did suggest such a limitation on public involvement. Despite the size of the Muslim population, where technology has made it possible for the entire public to participate without assembly, either through use of mass communication components and mass media or through representative participation, nothing should operate to permanently deny the public this opportunity to participate. Although the general mode of consultation later diminished in Muslim communities, this does not affect the sanctity of this entitlement as envisaged by the Qur’an and exemplified by early practice.

Shura is not the only principle upon which public participation may be grounded under Islamic law. *Ijma’*, or consensus of opinion is the third of four major sources from which the principles of Islamic law are derived.³¹ On any matter for which there is consensus of opinion of the people, or of scholars according to other views, such opinion becomes a rule of law binding on all.³² To underscore the force of *ijma’*, it has been observed that “only those men and writings are regarded as authoritative whom the consensus of the community has acknowledged as such, not in synods or councils, but through a nearly subconscious voice of the people which in its universality was regarded as not being subject to error.”³³

People’s way of life, or *urf*, is another avenue through which the public may direct the course of laws under Islam. Customs or traditions of a particular community, within certain limits, provide subsidiary norms in

the Maliki and Hanafi schools.³⁴ As a subsidiary source of law, people’s customs can be particularly relevant in any discussion involving the public managing resources upon which their lives depend. Indeed, local customary practice has been identified in shaping the distinctive-ness and character of different Muslim cities.³⁵

Avenues for public participation are not limited to issues of direct governance as the previous discussion might suggest. People have opportunities to participate outside of formal government authority by contributing to the public good. *Amr bi al-maruf wa nahy ‘an al-munkar*, or advancing good and hindering evil, is a broad principle of public policy under Islamic law. Members of the general public, individually and jointly, are required to participate under this principle.³⁶ The norm of *amr bi maruf* is not a moral suasion but a duty imposed on a community. This duty which may also be satisfied if it is carried out by an individual rather than the community as a whole. However, members of a community are jointly accountable if at any given time there is not an individual or a group that fulfills this obligation.

Whereas *shura* is a consultative mechanism that is relevant prior to the taking of an action, *amr bi al-maruf* always involves a response action directed against averting things that are injurious to the public. For instance, where there is an order from an emir advancing a public good, such as affirmatively outlawing any killing of tigers (an order which is clearly justified under Islamic law)³⁷ every Muslim is expected to not only carry out the order personally but also to discourage others from committing the act. The public is required to find a way of stopping all illegal killing of tigers, either by requiring an intending culprit to desist or by notifying the relevant authority in order to take action.

In practice, Muslim countries have traditionally implemented this public policy through the establishment of *hisbah* institutions to ensure that public health and environmental norms are followed, and that projects are developed and executed in accordance with formulated principles. *Hisbah* is a watch-dog administrative institution that ensures compliance with public interest regulations. However, the existence of a government *hisbah* institution does not preclude private citizens from engaging in similar activities to achieve compliance with public laws.³⁸

³⁰ In Muslim countries, as well as non-Muslim countries in which Muslims may live in a distinct community, there is always a *shura* council or committee, with differing roles and membership criteria. Almost all mosques and Muslim student associations in the United States have a *shura* committee. In political settings, such a committee could be the higher legislative chamber as in Egypt, or lower than the Council of Ministers as in Saudi Arabia. In Saudi Arabia, members of the Shura Council are chosen by the King, and the Council discusses economic and social developments as well as treaties. See Consultative Council Establishment Act, arts. 3,15 (1992), available at www.shura.gov.sa/EnglishSite/Elaw1/law1.htm (last visited June 18, 2002). In contrast to Saudi Arabia, the members of Bahrain’s Shura Council are elected. See Neil MacFarquhar, *In Bahrain, Women Run, Women Vote, Women Lose*, N.Y. TIMES, May 22, 2002, at A3.

³¹ There are four major sources from which rules of Islamic law are derived: the Qur’an, the Prophetic traditions, *ijma’* or consensus of opinion, and analogous deduction. See *supra* notes 3-4 and accompanying text.

³² FAZLUR RAHMAN, ISLAM 60-1 (1979); see also Qur’an 4:115.

³³ HERBERT LIEBESNY, THE LAW OF THE NEAR AND MIDDLE EAST 17 (1975) (translating and quoting Ignaz Goldziher).

³⁴ ASAF A. A. FYZEE, OUTLINES OF MUHAMMADAN LAW 22 (1999).

³⁵ Besim S. Hakim, *The Role of Urf in shaping the Traditional Islamic City*, in ISLAM AND PUBLIC LAW, *supra* note 6, at 141-55.

³⁶ Qur’an 3:104 (“Let there arise out of you a group of people inviting to all that is good, enjoining what is good and forbidding what is bad.”).

³⁷ Ali Ahmad & Carl Bruch, *Maintaining Mizan: Protecting Biodiversity in Muslim Communities*, 32 ENVTL. L. REP. 10020, 10030 (2002).

³⁸ Indeed, Al-Ghazzali in his authoritative treatise preferred private citizens forming what would look like modern nongovernmental organizations. ABU HAMID AL-GHAZZALI, 14 IHYA’ ‘ULUM AL-DIN 343 (1957).

B. ACCESS TO INFORMATION

As part of the process of enlightenment—a primary goal of Islam—people need information. Accordingly, under Islamic law, access to information is central to building the knowledge of Muslim citizens, and concealing information is highly discouraged.³⁹ In many instances, Muslims are discouraged from engaging in an act or making a decision without having full and reliable information. Acting with ignorance or lack of full and reliable information is abhorred.⁴⁰ One is enjoined to seek information and knowledge about a given subject before engaging in it:

O ye who believe! If a wicked person comes to you with any news, ascertain the truth, lest ye harm people unwittingly, and afterwards become full of repentance for what ye have done.⁴¹

Jurists are tasked with institutionalizing the ethics of informed decisionmaking into a legal framework that sets forth the rights and obligations of parties with respect to information in social or commercial transactions. With respect to contracts, for instance, the law stipulates that transactions must be devoid of uncertainty and speculation (*gharar*), and parties must have complete information about all aspects of the contract, otherwise it is unenforceable.⁴² More broadly, the government is obligated to provide access to the information that it possesses which will benefit members of the

³⁹ Disseminating information was referred to as knowledge: "When you were propagating with your tongues, and uttering with your mouth that whereof you had no knowledge, you counted it a little thing, while with Allah it was very great." Qur'an 24:15. Knowledge could be religious information: "Verily, those who believe not in the Hereafter, name the angels with female names. But they have no knowledge thereof. They follow but a guess, and verily, guess is no substitution for the truth." Qur'an 53:27-28. But religious knowledge cannot be concealed: "O Apostle! proclaim the (message) which hath been sent to thee from thy Lord." Qur'an 5:67. Knowledge could be any other form of information as well: "And follow not that of which you have no knowledge." Qur'an 17:36. But the difference between religious and nonreligious information in the modern world disappears when one considers not the information in itself, but the endless uses to which it may be put. For instance, information about the quality or fishable status of a local stream (public health and environmental information) may be used to determine whether the natural condition of the stream has been altered significantly as to limit its use for ritual washing (religious information).

⁴⁰ Qur'an 6:140 ("Indeed lost are they who have killed their children, foolishly, without knowledge."); *id.* 17:36 ("And commit not an action upon that of which you have no knowledge.").

⁴¹ *Id.* 49:6.

⁴² NABIL A. SALEH, UNLAWFUL GAIN AND LEGITIMATE PROFIT IN ISLAMIC LAW 49 (1986) (observing that complete and present information about all aspects of the subject matter of a contract is central to the validity of a contract under Islam).

public and to assist them in reaching better judgment devoid of speculation or ignorance. The public needs to make an informed judgment before embarking on activities, whether of righting public wrongs or enforcing private rights. This obligation to provide public access to information derives from the prohibition on concealing beneficial information. Unless the government provides access to information, the positive duty of ascertaining and verifying the truth before acting upon information will be defeated. Although the need to ascertain the truth is obligatory, it is hard to see how such a determination can be achieved without imposing an obligation on local and national governments to obtain certain information for use by the public.

The quest for information is not confined to a particular political boundary, and Muslims have been encouraged to seek information from as far as China; nor is it confined to subject-matter, as it may involve issues such as genealogy.⁴³

The flipside of the mandate to seek knowledge and information is that one in possession of such information is not to withhold or conceal it: "He who is asked something, he knows it and conceals it, it will have a bridle of fire put on him on the Day of Resurrection."⁴⁴ From this authority, it is clear that the public should have access to the information that government authorities or other individuals possess. The penalty for non-disclosure—an eternal bridle of fire—is dire. Moreover, this provision focuses on the obligations of the person possessing information and not on the person who requests it. Thus, any member of the public, regardless of his status or religious beliefs, may seek information from a government official, who is then compelled to release the information under penalty of immortal pain.⁴⁵ At the same time, the government does not appear to have an obligation under Islamic law to provide information without being asked, except when it relates directly to religious enlightenment.

⁴³ Abu Musa reported that the Prophet Muhammad was asked such things which he disapproved and when they persisted on asking him he felt enraged and then said to the people: "Ask me what you wish to ask." Thereupon a person said: "Who is my father?" He said: "Your father is Hudhafa." Then another person stood up and said: "Allah's Messenger, who is my father?" He said: "Your father is Salim, the freed slave of Shaiba." When Umar saw the signs of anger upon the face of Allah's Apostle (may peace be upon him), he said: "Allah's Messenger, we ask repentance from Allah." AL-HAJJAJ, *supra* note 5, ch. 4, sec. 5829.

⁴⁴ SULAYMAN ABU DAWUD, *Kitab al-Ilm*, in SUNAN ABI DAWUD, sec. 3650; see also Qur'an 3:187 ("And remember Allah took a covenant from the People of the Book, to make it known and clear to mankind, and not to hide it.").

⁴⁵ The eighteenth chapter of the Qur'an contains a story about information sought by some Jews. Also, the Prophet Muhammad approved of "relating traditions from the children of Israel." DAWUD, *supra* note 44, sec. 3654.

There is little authority on the issues surrounding disclosure, but a possible exception to the obligation to disclose may exist for the withholding of proprietary information. Information, like water or wildlife, is to be made accessible to all, but where an individual has expended private effort or material wealth on a small part of any of these permissible items, he may exercise a right of ownership on that part.⁴⁶ By similar reasoning, then, intellectual property could be exempted from disclosure. A less evident exception is for privately held information that may be used by other members of the public to achieve pecuniary or other related interests.

A corollary of asserting this right is that the public need not pay for the actual information, although it may be charged the cost of providing access or maintaining the body of information for subsequent users. In fact, the Qur'an in several places discourages any form of commercializing information or enlightenment that is beneficial to the society.⁴⁷ Thus, those with information that is useful to the public should be forthcoming in providing access to enable the public to discharge its responsibilities. Fees should not prevent meaningful access. Apart from information that is protected for proprietary reasons or that may expose an individual to harm, there appear to be few—if any—circumstances that would permit public authorities to deny access to information under Islamic law.⁴⁸ The practice of early Muslim political leaders was to provide all information about everything pertaining to their service.⁴⁹ In appropriate circumstances, they document such information to ensure transparency.

The history of *diwan* (public record) dates back to the early period of Islamic history. Although there is no certainty about the antecedents that led to its adoption in Islam, it is agreed that it was Caliph Umar who first introduced the practice.⁵⁰ Initially, he saw the need to document the names of all the warriors, including their specific annual salaries, in a dossier. When the state expanded and its income rose rapidly, he expanded the

record to include everyone who derived income from the state, including himself.⁵¹ The record, which contained names, addresses, and differing incomes of public officers, was entered and constantly updated by trusted individuals and kept in a public building. Subsequently, recordkeeping expanded beyond the financial realm and became classified according to subject matter of public concern or according to locality.⁵² This practice, which apparently has been substituted by modern bookkeeping, continued throughout the Muslim world, and the public had full and free access to the complete record in the presence of the recordkeeper, who was there only to ensure its integrity and safety.⁵³ Unfortunately, public access was lost in the modern process.

In addition to ensuring passive access to information by requiring information to be released upon request, Islamic law mandates broad dissemination of specified information. Historically, the mosque environment has been the center for disseminating information about public governance. Information with the highest religious, social, and political significance—such as keeping faith in the Almighty, urging prayer for rain to combat famine, or urging people to uphold public trust in an era of endemic corruption—is sought and conveyed from the pulpit of the mosque. Information that is less religiously significant, such as the manner of addressing neighbors or elders, is made available around the vicinity of the mosque through interactive sessions. In short, the mosque served as the center of information in the long history of Muslims. To this day, mosques remain a useful avenue for sharing information among a significant number of Muslims, although they are somewhat circumscribed by civil political authorities. In addition to mosques, places that attract large number of people (such as the palaces of governments and residences of scholars) provide another means for disseminating information to the broader public in Muslim communities.

C. ACCESS TO JUSTICE

The variety and structure of avenues for filing complaints under Islam are essentially similar to other traditions. The point of departure is that the judicial process, which is the formal dispute resolution mechanism, may be initiated against anybody, including the head of the executive arm. There is no doctrine of sovereign immunity. In fact, numerous cases were reported dur-

⁴⁶ Private property is protected under Islamic law, and one may acquire proprietary interest, ownership, or title, through creative endeavor. Unowned goods, such as timber or wild grasses, may be reduced to ownership by cultivation and possession. MAJALLAH, THE MEJELLE, arts. 2164-69 (C.R. Tyser et al. trans., 1967).

⁴⁷ See, e.g., Qur'an 11:29, 51.

⁴⁸ Sharing of wealth includes sharing information. Information must be made available for the enlightenment of others unless where, in limited circumstances, proprietary interest has attached to the information. Cf. Steven D. Jamar, *The Protection of Intellectual Property Under Islamic Law*, 21 CAP. U. L. REV. 1079, 1093 (1992).

⁴⁹ AL-HAJJAJ, *supra* note 5, at 186 (quoting the Prophet Muhammad as saying: "Whoso from you is appointed by us to a position of authority and he conceals from us a needle or something smaller than that, it would be misappropriation and he will have to produce it on the Day of Judgment.")

⁵⁰ HAYKAL, *supra* note 18, at 228.

⁵¹ *Id.* at 231.

⁵² *Id.*

⁵³ *Id.*

ing the early periods of Islam in which ordinary individuals filed judicial complaints against Caliphs.⁵⁴

Equality before the law means that parties must not be given preferential treatment in any aspect of a proceeding.⁵⁵ The Qur'an requires judges to be fair and impartial even if one of the parties belongs to an enemy nation.⁵⁶ The judicial function is guided by the injunction: "If thou judge, judge in equity between them."⁵⁷ This emphasis on impartiality reflects attempts by early Muslims to avoid the danger of a corrupt judicial system, which was prevalent in previous civilizations.⁵⁸

The traditional judicial system of Islam is not adversarial. It is affordable, simplified, and largely devoid of complex technicalities.⁵⁹ Access to the judicial process is not hindered by the requirement of standing, and any plaintiff may institute a claim as long as he asserts an interest or injury in the subject matter of the proceeding, even if his injury is no greater than that suffered by other members of the public.

The concept of *amr bil maruf*, active pursuit of good governance, is vested in the public and dispenses entirely with the judicial principle of standing that civil and common law systems often impose on litigants pursuing matters of public interest. Activities that affect the public at large implicate *huquq Allah*, or rights of Allah, which rests with every member of the soci-

ety.⁶⁰ While *huquq al-ibad*, or rights of individuals, may be compromised or overlooked by the individuals concerned, norms of public interest and policy (*huquq Allah*) merit the fullest implementation. Accordingly, when there is a wrongdoing or infraction of public policy or directive, the obligation to reverse the wrongdoing falls on the public, and this obligation is not discharged until an individual or public group obtains that redress. As long as a norm relates to a public law or policy, and thus affects the broader public, including natural resources management,⁶¹ an individual need not show any specialized harm to seek redress. Redress may be sought administratively, magisterially, or judicially.

Once a matter affecting the public is involved, the principle of standing is inoperative. Public suits may further be developed along the line of the American procedure of citizens' suits in the enforcement of environmental standards but without the imposed restrictions of the procedures.⁶² Citizens' suits have expanded in some form to many countries. Of the various incarnations, the model with the least procedural restrictions on citizen access is likely to be the most consonant with Islamic law.

The most important nonjudicial mechanism for public complaint is *wilayat al-mazalim*, a bureau for complaint against public officers. The institution of *mazalim* is important in public governance because all public officials are considered to be representatives of the ruler, who is accountable for all their deeds. Caliph Umar said: "If the report reaches me of any public officer who has wronged anybody and I do not redress the wrong, I am deemed to be the wrongdoer."⁶³ *Mazalim* seeks to ensure accountability by public officials. Although nothing restricts the operation of *hisbah* or *mazalim*, in practice *hisbah* has been deployed mainly to address complaints against private citizens while *mazalim* has been especially effective in dealing with public officials. The subject matter of *mazalim* has included executive lawlessness, corruption by public officials, impropriety by officers of *diwan* (or treasury), and

⁵⁴ For instance, when a Jewish citizen of Madina filed a complaint against the person who would be the Fourth Caliph in Islam, Caliph Ali, the judge asked Ali to sit by the side of the complainant to exemplify equality before the law. HAYKAL, *supra* note 18, at 294.

⁵⁵ Impartial treatment of litigants is a cardinal principle, and Caliph Umar specifically mentioned this in letters accompanying appointments of renown judges, such as Abu Musa al-Ash'ari: "Use your own understanding and judgment when disputes are placed before you ... Let all men be equal in your sight, in your court and in your judgment so that the strong may not hope to swerve you into injustice nor is the weak led to despair in your justice." Mohammad Hashim Kamali, *Appellate Review and Judicial Independence in Islamic Law, in ISLAM AND PUBLIC LAW, supra* note 6, at 66.

⁵⁶ Qur'an 5:8 ("Oh ye who believe! Stand out firmly for God, as witnesses to fair dealing, and let not the hatred of others to you make you swerve to wrong and depart from justice. Be just: that is next to piety."). Many cases have been reported in which non-Muslims succeeded against Muslims in judicial proceedings. See ABDUR RAHMAN I. DOI, NON-MUSLIMS UNDER SHARI'AH (ISLAMIC LAW) 36-37, 43-44 (1981).

⁵⁷ Qur'an 5:42. Although judicial doctrine envisages independence of the judiciary and Muslim judges enjoy considerable freedom and independence, the relationship between judiciary and executive sometimes made judicial independence impossible. Kamali, *supra* note 55, at 56.

⁵⁸ The Prophet Muhammad was reported to have stated that previous traditions were corrupted because if a poor person broke the law, he was punished whereas if the powerful did the same thing, he was spared. DOI, *supra* note 56, at 36.

⁵⁹ Early European visitors to pre-colonial northern Nigeria were, in their account, impressed by how the Emir of Bauchi attended to people at a regularly appointed day of the week without intervention of counsel. Aliyu, *supra* note 5, at 9.

⁶⁰ ABUL HASSAN 'ALI IBN AL-MAWARDI, AL-AHKAM AL-SULTANIYYAH WA'L WILAYAT AL-DINIYYAH 273 (1978).

⁶¹ Ali Ahmad, *Islamic Water Law as an Antidote for Maintaining Water Quality*, 2 U. DENV. WATER L. REV. 169, 183 (1999).

⁶² In the United States, most environmental laws guarantee that any person may commence a civil action on his own behalf or behalf of a community against any person, including the government, who is alleged to be violating or to have repeatedly violated the statute. *E.g.*, 42 U.S.C. sec. 7604(a). In practice, depending on the statute involved, strict procedural requirements and substantive limitations have mounted against people who sought to sue on behalf of the community at large. See Eileen Gauna, *Federal Environmental Citizen Provisions: Obstacles and Incentives on the Road to Environmental Justice*, 22 ECOLOGY L.Q. 1, 41 (1995).

⁶³ HAYKAL, *supra* note 18, at 219.

execution of judgment against influential and recalcitrant persons.⁶⁴

The administrator of *mazalim* is given greater power and authority and has wider discretion in granting a remedy than a judge or other administrative officers, such as *hisbah*. For instance, corrupt public officials who have been dismissed, and embezzled funds, where traceable, were returned back to the treasury.⁶⁵

II. ENTRENCHING PUBLIC PARTICIPATION THROUGH COMMUNITY PARTICIPATION IN NATURAL RESOURCES MANAGEMENT

Management of natural resources is one area in which public participation has crystallized in Islam. Members of the public participate through their community, whose size is largely determined by adjoining regions. In general, natural resources are deemed to belong to the community in whose area the corpus of the resource lies, implying that the benefit (and burden) accruing from the communal administration of such resources are shared by the community. Whether a particular resource is subject to nonexclusive use by members of the community or whether it may be appropriated on the basis of first-come, first-served depends on where it is found: on land, at sea, or buried under the ground. This section explores how the Islamic norms, practices, and institutions of public participation in managing natural resources may constitute possible models for developing and institutionalizing public participation in other aspects of Muslim societies.

A. TERRESTRIAL RESOURCES

The legal treatment of natural resources by jurists holds that all resources not located in the oceans are regarded as terrestrial.⁶⁶ These terrestrial resources include mineral resources as well as nonmineral resources, such as land, rainwater, inland water, air, and wildlife.

1. Mineral Resources

There is an extensive and complex corpus of Islamic legal scholarship regarding the acquisition and use of

mineral resources.⁶⁷ For the purposes of this chapter, it is sufficient to note that the Maliki school of Islamic scholarship holds underground minerals to be common property of a community, and an individual who discovers them cannot establish a proprietary claim on them since they belong to the community as a whole.⁶⁸ The Maliki ruling has been universally adopted in the Muslim world.⁶⁹ It is immaterial whether the minerals are solid or liquid, or whether they are discovered on occupied or virgin land.⁷⁰ According to the Maliki school, since minerals are objects of non-appropriation by individual members of the community that own them, they are subject to communal administration and, most importantly, sharing of the benefits. The ruler or head of the community is considered a trustee, and he automatically becomes the overall trustee for mining, maintenance, and administration of the resources.⁷¹

Traditionally, the imam delegates a person or committee, usually among the local people, to represent him in administering the trust. According to Professor Zubair, in deciding on the mining of a resource and sharing the benefits among the community, the imam or his representative “may use direct labour or give it to a company as a trust *for the benefit of the whole community*.”⁷² With regards to minerals that are not completely buried, such as salt, coal, and tar, the rules that apply are similar to water resources and are discussed under the next heading.

Although public participation in decisionmaking regarding the manner of extraction and benefit sharing of mineral resources is established in Islamic law, it is

⁶⁷ Mineral resources are referred to as *ma'adin*, plural of *ma'dan*, and comprise all minerals that are grounded in the earth by the will of Allah without any act of humankind. This excludes *kanz*, or treasure, i.e., resources that belonged to individuals but became buried under the earth by their own act or due to natural phenomena such as earthquakes. It also excludes resources that strayed from their lawful owners. ABDUL KARIM ZAYDAN, *AL-MADKHAL LI DIRASAH AL-SHARI'AH AL-ISLAMIIYAH* 254 *et seq.* (1981); WALIED M.H. EL-MALIK, *MINERALS INVESTMENT UNDER THE SHARI'A LAW* 55 *et seq.* (1993).

The definition of the Qur'anic term of *ard* or “earth” varied and had an effect on what each school included or excluded in its description of mineral resources. For a concise treatment of the nature of consistency of early jurists in their definition of *ard* and the consequences of such definition on the treatment of mineral resources, see ABDUL-QADIR ZUBAIR, *ISLAMIC LEGAL DOCTRINE AND INTERESTS IN LAND* 44-47, 107-12 (1996).

⁶⁸ ZAYDAN, *supra* note 67, at 254. A. AL-KHAFIF, *AHKAM AL-MU'AMALAT AL-SHAR'IYYAH* 105-106 (1947). The Maliki ruling has been universally adopted. Walied El Malik, *State Ownership of Minerals Under Islamic Law*, 14 *J. ENERGY NAT. RESOURCES & ENVTL. L.* 310, 315 (1996).

⁶⁹ For the rulings of other schools, see ZUBAIR, *supra* note 67, at 107-12.

⁷⁰ EL-MALIK, *supra* note 67, at 55.

⁷¹ ZAYDAN, *supra* note 67, at 255.

⁷² ZUBAIR, *supra* note 67, at 106 (emphasis added).

⁶⁴ AL-MAWARDI, *supra* note 60, at 80-3.

⁶⁵ HAYKAL, *supra* note 18, at 223.

⁶⁶ HASSAN S. KHALILIEH, *ISLAMIC MARITIME LAW: AN INTRODUCTION* 133 (1998) (“A general survey of historical accounts, jurisprudential queries, Geniza documents, and commercial treaties concluded between Muslim and non-Muslim governments proves that Islamic law distinguished among (a) the high seas beyond the reach of any caliph or provincial governor, (b) maritime belts and zones outside these waters in which the governor had certain rights, and (c) inland waters (rivers and harbors) which fall directly under the supervision of the state.”).

seldom put to full practice with respect to certain resources that have assumed extreme economic importance. In all other cases, though, the public is largely involved in all aspects of managing or extracting natural resources, with some minor local variations. The fact that Islamic law stipulates public involvement as a threshold mechanism for managing most aspects of natural resources provides an opportunity to develop and apply public participation to enhance transparency and ensure accountability more broadly in modern Muslim communities.

2. Fresh Water Resources

Similar to underground resources, water is to be managed by the community. Unlike those resources, however, where the imam may be the administering representative of the community, direct communal administration applies to water resources. In its natural state, water—however acquired—cannot be the subject of private proprietorship.⁷³ Due to the public nature of water, the proprietor of a property upon which water runs or lies will be liable if he pollutes it or exhausts its source to the detriment of others.⁷⁴

The purpose of the law is to ensure that water is made available to the whole of the community. Since there is little proprietary right attached to water resources, the ruler cannot convey or license any use to anybody in such a way that would exclude the community. Also, since everybody has access to water, water may not be monetized and sold.⁷⁵ Although a person may acquire or own the land on which water is located, jurists have unanimously ruled that acquiring water rights confers a right of priority use, but not exclusive use.⁷⁶ The primary norms for managing water nevertheless ensure that the community not only benefits from the water resources but is also responsible for the routine administration of the water.

Even in modern Muslim nations, the law has regulated water use to maintain the traditional communal care and administration, leaving certain areas of water

policy for the central government.⁷⁷ Jurists have addressed in great detail the priority of water use in various circumstances, such as for drinking, domestic use, agricultural use for those nearest to and farthest from the river, and for industrial use, but no one can refuse surplus water.⁷⁸

When water is involved, the term “community” is defined broadly to even include animals. For example, jurists have ruled that animals have a right of quenching thirst (*haqq al-shirb*) against a proprietor of water body.⁷⁹ The broadened communal administration of water resources is clear from the Prophet’s declaration that: “People are equal partners in three things: water, fire, and pasture.”⁸⁰

As mentioned earlier, the water regime applies to minerals that are not completely buried in the ground, indicating that there is also a nonexclusive right of use and direct communal management. The Prophet Muhammad said that this class of minerals “is like a lake; whoever comes to it takes out of it.”⁸¹

The water regime applies also to fire and pasture. The purpose of the law is to ensure that where these resources are available naturally without the input of humans: access to them cannot be denied. Closely related to pasture is another community-oriented mechanism of *hima*, or protected area, discussed above. The condition for validity of a *hima* is that it must meet the needs of the community that establishes it, and “[e]ach community is to determine the number and size of its *hima*, given the purposes sought to be achieved.”⁸²

3. Other Natural Resources

Slightly different rules apply to other remaining terrestrial resources, such as inland wildlife, biodiversity resources, and *mawat* or virgin land (that is, land that has never been developed). These are all considered *amwal al-mubahat*, or common property that belongs

⁷³ DANTE A. CAPONERA, PRINCIPLES OF WATER LAW AND ADMINISTRATION: NATIONAL AND INTERNATIONAL 71-72 (1992). “Legally, inland waters, i.e., rivers and ports, were recognized as being under state jurisdiction; they were considered property of the state.” KHALILIEH, *supra* note 66, at 141.

⁷⁴ Ahmad, *supra* note 61, at 180.

⁷⁵ CAPONERA, PRINCIPLES OF WATER LAW, *supra* note 73, at 73.

⁷⁶ ISMA’IL AL-AMIR, 3 SUBUL AL-SALAM SHARH BULUG AL-MARAM 166 (1998); CAPONERA, PRINCIPLES OF WATER LAW, *supra* note 73, at 73; MAJALLAH, *supra* note 46, art. 1263.

⁷⁷ CAPONERA, PRINCIPLES OF WATER LAW, *supra* note 73, at 75 (noting that “It appears that in Moslem countries modern codifications of water law aim at institutionalizing, in one form or another, the concept of community of interest in water resources which constitutes the traditional basis of Moslem customary water laws.”).

⁷⁸ DANTE A. CAPONERA, WATER LAWS IN MOSLEM COUNTRIES 38 *et seq.* (1973).

⁷⁹ Qur’an 54:28 (“And tell them that the water is to be divided between them [the wealthy, the poor, and the animals]: each one’s right to drink being brought forward (by suitable turns).”). The principle of *haqq al-shirb* extends the legal category of water rights to animals. See generally B.A. MASRI, ISLAMIC CONCERN FOR ANIMALS (1987); James Wescoat, Jr., *The “Right of Thirst” for Animals in Islamic Law: A Comparative Approach*, 13 ENV’T & PLAN. DIG.: SOC’Y & SPACE 637 (1995).

⁸⁰ AL-AMIR, *supra* note 76, at 165.

⁸¹ AL-MAWARDI, *supra* note 60, at 197.

⁸² Ahmad & Bruch, *supra* note 37, at 10028.

to no one,⁸³ and exclusive ownership may be attained on the basis of first-come, first-served.⁸⁴ “He who develops a virgin land,” the Prophet Muhammad said, “owns it.”⁸⁵ The ruler also has a joint right with the community to make a grant of land (*iqta*) to any other person. Wildlife also belongs to the community as a whole, with the individual having a right only over the fruit of his labor. While this concept could facilitate over-hunting, the legal limitations on the types of wildlife that can be hunted and the mode of killing that can be used, could work to limit this tendency.⁸⁶

B. MARINE RESOURCES

Early Muslim jurists viewed the oceans as beyond the reach of the state and of any particular community.⁸⁷ Consequently, they asserted that these resources belonged to nobody, and that nobody had a proprietary right in them. Thus, the minerals and everything in the ocean are considered to belong to the person whose efforts yield the discovery or catch.⁸⁸ Like the *res nullius* under the Roman law, ocean resources are subject to acquisition by anybody who is able to acquire them.⁸⁹

Public participation has the potential to bring about meaningful changes and creative ways to manage marine resources. Undertaking education and outreach programs in a community can sometimes make a difference, particularly where local knowledge is applied. For example, the Misali Ethics Project was undertaken in a fishing community with an overwhelming Muslim population in Tanzania. The Misali area is renowned for its coral and sea turtles, and the community used various unsustainable methods, including dynamiting, to increase its catch. After conducting a series of workshops using Islamic sources and resource persons, the unsustainable fishing practices of the communities

changed, resulting in an increase in their fishing reserves.⁹⁰ It is particularly worth noting that this is occurring despite the fact that in traditional Muslim communities, marine resources are particularly vulnerable to overexploitation. The project was so successful that the World Wildlife Foundation International accepted it as a Gift of Islam, part of its global Sacred Gifts of Nature Program, at an international gathering in Khatmandu, Nepal in November 2000.⁹¹ This was the only gift to emerge from the African continent. The Misali method is being extended gradually in other Muslim communities.⁹²

C. THE PROMISE OF COMMUNITY-BASED RESOURCE MANAGEMENT FOR ADVANCING PUBLIC PARTICIPATION IN MUSLIM SOCIETIES

“Surely the earth is Allah’s.”⁹³ These words of the Qur’an have been the center of community-based resource management in Islam communities. Except for occupied land (where Islamic law entitles the individual to assert exclusive property rights), communities possess a modicum of right in all other natural resources on land for which there are no mineral resources or public water rights. Furthermore, there is a class of resources whose characteristics render them communitarian according to the consensus of jurists. These are water, beneficial fire (e.g., for heating or cooling), and pasture. Where any resource in this class is found in its natural state, even on private property, the right of the individual is exercised subject to the community interest in the resource. Thus, a landowner could not prevent a canal from passing through his property when that was the only way of getting through to water, in which the interest of the community was overriding.⁹⁴ Ultimately, a fundamental tenet of natural resource management in Islamic law is that the community (including the individuals in the community) must have

⁸³ AL-AMIR, *supra* note 76, at 158 (noting that land belongs to a developer where it previously belonged to no one).

⁸⁴ It is only the Hanafi school that makes ownership of virgin land conditional on the permission of the imam or ruler. AL-MAWARDI, *supra* note 60, at 177. On biodiversity resources, see Ahmad & Bruch, *supra* note 37, at 10029-32.

⁸⁵ AL-AMIR, *supra* note 76, at 158. Developing or reviving a virgin land depends on the intended purpose but it is usually by irrigation, planting of trees or uprooting them for some purpose, or erecting of a structure. AL-MAWARDI, *supra* note 60, at 177. In some instances, unless these signs of development are consummated, the land may revert back to the imam who may allocate it to another person.

⁸⁶ However, this legal limitation is largely inapplicable to marine wildlife. Ahmad & Bruch, *supra* note 37, at 10030.

⁸⁷ KHALILIEH, *supra* note 66, at 133.

⁸⁸ YAKUB ABU YUSUF, *KITAB AL-KHARAJ* 70 (1962).

⁸⁹ In Roman law, property was thought to exist in various forms. Objects that belong to nobody (like whales and stray cats) are *res nullius* and are subject to private acquisition. See SUSAN J. BUCK, *THE GLOBAL COMMONS: AN INTRODUCTION* 4 (1998).

⁹⁰ Fazlun Khalid, *Misali Islamic Ethics* (2000) (unpublished Consultant’s Report for Islamic Foundation for Ecology and Environmental Science) (on file with author). The World Bank is funding a similar project in Indonesia. Personal communication, Fazlun Khalid, Director Misali Ethics Project to Ali Ahmad (Nov. 2001).

⁹¹ Janet M. Chernela et al., *Innovative Governance of Fisheries and Ecotourism in Community-Based Protected Areas*, xx PARKS J. xxx (2002 for the coming).

⁹² Multilateral financial agencies are financing projects with a similar methodology to the Misali project in Malaysia. Personal communication, Fazlun Khalid, Director Misali Ethics Project to Ali Ahmad (Nov. 2001).

⁹³ Qur’an 4:131.

⁹⁴ MALIK IBN ANAS, *AL-MUWATTA*, sec. 36.26.33 (Abdel-Magid Turki ed., 1994). The same rule applies in other resources where the water regime applies. Thus, where a person who discovers a salt deposit tries to bar access to the deposit, he is regarded as a trespasser. ZUBAIR, *supra* note 67, at 118.

the opportunity to participate, and it is an even more fundamental requirement that the benefits of the natural resource flow to the community at large.

Although the concept of communal sharing of benefits from natural resources still underlies many institutional arrangements of modern Muslim states, the role of the community in participating in the management has dwindled from that envisaged by traditional Islamic law.⁹⁵ In many of these countries, a local authority, such as the provincial imam or government, holds title to the land in trust for the community, while mineral resources including oil and gas belong to the state to be exploited for the benefit of all citizens.⁹⁶

Since the emergence of the nation-state, the quality and quantity of benefits from natural resource management that return to the community has been affected.⁹⁷ These states have extended their discretion in managing resources to reach into the area of communal benefit sharing, which is not subject to discretion. As noted above, if management of resources is delegable to the imam or a representative of the community, benefit sharing of such management must accrue to the community as a whole and not merely to the representative.

Public participation in natural resource management can serve as a foundation upon which to construct a modern vision for public involvement in Muslim communities, a framework that extends beyond natural resource management. As the next section will show, public involvement could initially take the shape of communal participation, where everyone jointly participates in the decisionmaking process. Communities may collectively participate in the process or appoint some of their members to do so on their behalf. A dissenting individual or minority may nonetheless represent himself. Alternatively, any member that is sufficiently interested may take it upon himself to represent his community—or just himself.

III. RELEVANCE OF SECULAR EXPERIENCES IN ADVANCING ISLAMIC PARTICIPATION NORMS

This chapter has reviewed a range of norms and practices in Islamic law through which public involvement may be advanced in contemporary Muslim communities and nations. These norms apply both generally and to different specific contexts, and they highlight the historical and continuing need for public in-

volvement. The current challenge is to combine, within a consistent framework of public involvement, the scattered provisions under which requirements for public access to information, participation, and justice have been articulated. Since community participation in natural resources, especially nonmineral resources, has deep textual roots within Islamic law and is vaguely practiced to some extent in Muslim communities to this day, it provides a practical context in which to frame and develop modern Islamic norms and practices of public involvement.

In developing a modern Islamic framework for public involvement, modern principles that have emerged domestically or in multilateral agreements around the world also can provide guidance for internalization and operationalization of those principles in Muslim countries.⁹⁸ Approaches adopted by various states that institutionalize the collection of information on environmental conditions, make the information publicly avail-

⁹⁸ Pursuant to Principle 10 of Rio Declaration, *supra* note 9, regional instruments have emerged seeking to implement the principle. Notable among them is the UN/ECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, adopted at Aarhus, Denmark on June 25, 1998, entered into force Oct. 30, 2001, ECE/CEP/43 [hereinafter Aarhus Convention]. Although regional in scope (comprising Europe, the independent states of the former Soviet Union, Canada, and the United States), the importance of the Aarhus Convention is global. The Aarhus Convention links human rights, the environment, and government accountability in a democratic context. By acknowledging that humans owe an obligation to future generations, it establishes that sustainable development can be achieved only through the involvement of all stakeholders. It is forging a new process for public participation in the negotiation and implementation of international agreements. Particularly, it grants the public rights and imposes on public authorities obligations regarding access to information, public participation, and access to justice. For a review of the Aarhus Convention, see Svitlana Kravchenko, *Promoting Public Participation in Europe and Central Asia*, in this volume; Carl E. Bruch & Roman Czebiniak, *Globalizing Environmental Governance: Making the Leap from Regional Initiatives on Transparency, Participation, and Accountability in Environmental Matters*, 32 ENVTL. L. REP. 10428, 10431-36 (2002).

Although not as binding on the parties as the Aarhus Convention, other notable regional instruments that seek to involve the public include the Inter-American Strategy for the Promotion of Public Participation in Decision-Making for Sustainable Development (2000) (an initiative of the Organization of American States); the Draft ASEM Document on Towards Good Practices for Public Involvement in Environmental Policies (an Asia-Europe initiative); and the Protocol on Shared Watercourse Systems in the Southern Africa Development Community (SADC) Region (1995, entered into force Sept. 1998) (between Southern African countries). See Jorge Caillaux, Manuel Ruiz, and Isabel Lapena, *Environmental Public Participation in the Americas*, in this volume; Mikael Hildén and Eeva Furman, *Towards Good Practices for Public Participation in the Asia-Europe Meeting Process*, in this volume; Collins Odote and Maurice O. Makoloo, *African Initiatives for Public Participation in Environmental Governance*, in this volume.

⁹⁵ CAPONERA, *PRINCIPLES OF WATER LAW*, *supra* note 73, at 75.

⁹⁶ EL-MALIK, *supra* note 67, at 315-17.

⁹⁷ This fact is evident from the centralized nature of the authority to allocate, appropriate, and manage natural resources. It is now the central government that has virtually everything to do with all aspects of mineral resources.

able, promote public participation, and ensure access to justice that can strengthen emerging Islamic mechanisms.

The current practice of Muslim states supports this analysis. Modern legal schemes governing natural resources in most Muslim countries are rooted in communal objectives, albeit with differing interpretations of the term “community.”⁹⁹ For water and resources that are clustered with it, review has shown that “in Moslem countries modern codifications of water law aim at institutionalizing, in one form or another, the concept of community of interest in water resources which constitutes the traditional basis of Moslem customary water law.”¹⁰⁰ Furthermore, in Mali, which has an overwhelming Muslim population, the forestry laws assign responsibilities for forest management to local governments.¹⁰¹

Similarly, a provincial law, the Land Tenure Law of Muslim northern Nigeria, which placed land administration in the hands of local government, was substantially extended to the whole country under a national law with state governors now holding lands in trust for their subjects and, to a lesser degree, devolving some of the significant decisions to local governments.¹⁰² Similar situations have been reported in other Muslim communities of Senegal and Niger, where local chiefs preside over village councils characterized by local structures of participation, which include youth associations, professional groups, Islamic associations, and imams.¹⁰³ Although these arrangements may have been structured by the various governments as a means of managing rural communities, the arrangements would not have succeeded without the prevailing notion of communal participation. Current efforts at further empowering the community and encouraging public involvement must therefore build on this initiative as well.

Even with mineral resources, which have assumed national and international economic significance, Muslim countries have maintained legal regimes with some communal basis, at least with respect to communal par-

ticipation in benefits. For example, the ruling of the Maliki school, which governs the management of oil and natural gas in all countries, provides that oil belongs to the community or, in effect, the state, and that the net benefit should be enjoyed by all.¹⁰⁴ Despite upholding the inviolability of private property, the view of Islamic law regarding minerals was restated in the wake of nationalization of industry in Africa and the Middle East: “Under Islamic law, particularly in the Maliki School, mines and underground resources are the property of the Sultan (the State).”¹⁰⁵ Thus, a corporation that has concession on an oil field cannot claim exclusive ownership of the community property under Islamic law, although it is entitled to compensation for its losses due to nationalization.

The re-empowerment of Muslim communities and citizens may take many forms. For example, the Saudi National Commission for Wildlife Conservation and Development provides one model for making information available at the national level. The Commission’s information center is mandated to gather relevant information and establish an information bank accessible to the public. The center is empowered to stipulate its rules of publication and to provide access to the available information.¹⁰⁶ In the United Arab Emirates, the Environmental Research and Wildlife Development Agency has a mandate “to develop techniques to collect information about the natural constituents of the environment and wildlife” and “to provide the public and private sector with information related” thereto.¹⁰⁷ The agency is also charged with cooperating and exchanging information with local, regional, and international organizations.¹⁰⁸

Islamic law could be helpful in furthering public involvement in Muslim countries because the law is not an impediment and does not need to be negotiated. Comparative analysis of Islamic law and principles that are emerging under international efforts are compatible and could be mutually enforcing. Therefore, the ultimate guarantee of public involvement seems to rest on political, rather than legal, mediation. The most effi-

⁹⁹ See generally FARHAT J. ZIADEH, PROPERTY LAW IN THE ARAB WORLD: REAL RIGHTS IN EGYPT, IRAQ, JORDAN, LEBANON, LIBYA, SYRIA, SAUDI ARABIA, AND THE GULF STATES 26 *et seq.* (1979).

¹⁰⁰ CAPONERA, PRINCIPLES OF WATER LAW, *supra* note 73, at 75.

¹⁰¹ Jesse C. Ribot, *Representation and Accountability in Decentralized Sahelian Forestry: Legal Instruments of Political-Administrative Control*, 12 GEO. INT’L ENVTL. L. REV. 447, 474 (2000). “Indeed, Mali has given local populations greater decisionmaking powers over local natural resources than has any other Sahelian country.” *Id.* at 475.

¹⁰² 1978 Land Use Act (Nigeria) Cap. 202 L. Fed. Nig. sec. 1 (1990) (“Subject to the provisions of this Act, all land comprised in the territory of each State in the Federation are hereby vested in the Governor of that State and such land shall be held in trust and administered for the use and common benefit of all Nigerians in accordance with the provisions of this Act.”). The law also recognizes the power of local governments to make grant of lands that are not in urban areas. *Id.* sec. 6.

¹⁰³ Ribot, *supra* note 101, at 463.

¹⁰⁴ EL-MALIK, *supra* note 67, at 310, 315. Current practice has shown that minerals such as oil and gas have acquired national and international economic importance beyond what nation-states can concede to local communities. In effect, Muslim countries might have widened the meaning of “community,” at least with regard to oil and gas, to include a nation as a whole.

¹⁰⁵ Libyan American Oil Company (LIAMCO) v. Libya, 20 I.L.M. 1, 91 (1981) (Subhi Mahmassani, Arb.).

¹⁰⁶ MUHAMMAD SULAIMAN AL-TARIF, ANZIMAH AL-MUHAFAZAH ALA AL-HAYAH AL-FITRIYYAH WA AL-MAWATIN AL-TAB’IYYAH FI AL-MAMLAKAH AL-ARABIYYAH AL-SA’UDIYYAH 31-32 (1996).

¹⁰⁷ Law Establishing the Environmental Research and Wildlife Development Agency, art. 3, secs. 18, 21, Law No. 4 of 1996, available at www.erwda.gov.ae/englaw.asp (last visited June 17, 2002).

¹⁰⁸ *Id.* art. 8, sec. 9.

¹⁰⁹ Consultative Council Establishment Act, *supra* note 30, at art. 15(b).

cient manner to increase public involvement in Muslim countries is to encourage the people to demand that their political leaders restore traditional Islamic guarantees for public (including community) involvement.

Through a process of articulating Islamic norms and practices of public participation, Muslims can identify common steps and set priorities for achieving practical access to information, participation, and justice in environmental and other matters. For instance, environmental impact assessment or administrative hearings could be mandated under modern Islamic law for new projects that are likely to affect the environment. Moreover, nothing could be more in compliance with the *shura* principle, with respect to modern treaty negotiations, than allowing the public to participate in voicing their concerns on treaties that directly touch upon their interests, as do environmental treaties. Incidentally, the Saudi Shura Council is empowered to "study laws and by-laws, international treaties and agreements, concessions, and make whatever suggestions it deems appropriate."¹⁰⁹ Although treaty negotiations seem remote for most ordinary Muslims who are concerned about local activities that affect their well-being, *shura*, properly practiced, envisions mutuality in consultation at the local as well as international levels. This mutuality presumes initiation or feedback from either the people or the government.

IV. CONCLUSION

Unsuspecting analysts may doubt that the public has any voice under Islamic law, which demands public allegiance to the ruler so long as he implements Qur'anic norms. However, a ruler does not implement those norms, nor can he claim to be a leader, when he scuttles public involvement. This chapter has identified four separate categories of situations under which Islam seeks to give people a voice. The first is in having a voice or, in Islamic terms, a hand in the political governance of the state. As we have seen, the continued legitimacy of political leadership depends on consultation (or *shura*) with the people. The second category is the ability of the people to contribute to legal development through continuous recognition of their customs and way of life. This is done through *urf* and *ijma'*. The third mechanism for public involvement—particularly in ensuring rule of law, accountability, and public access to justice—is through one of the most fundamental public policies

in Islam, *amr bil ma'ruf*, which requires communal engagement in the ordering of good governance in the society. Finally and more specifically, Islam places the community (which sometimes is interpreted narrowly to mean a local populace, or the population of a country, or even more widely to include animals) as the focus of its scheme in managing all natural resources. Under this heading, the community's participation has been greatest in both decisional and beneficial entitlements to nonmineral resources. Access to information is guaranteed by the affirmative duty of disclosure and nonconcealment.

As a practical matter, while Muslim communities still retain some entitlements in the management of natural resources under the nation-state, these are often placed at the discretion of the central government, negating their immediate utility to communities. In most cases, the decisions on most aspects of management and even on the more fundamental issue of sharing benefits are not made by the communities or their representatives. It is therefore necessary to re-empower communities in natural resources matters under the modern nation-state arrangement, as envisaged by Islamic law, to provide guarantees that can effectively ensure qualitative involvement by members of the public.

Experience has demonstrated that one effective way public involvement can be advanced is to ensure transparency of government actions and accountability of government officers to the people. Thus, even if the public is not in a position to act or decide directly on the management of the resources, it will be informed on why and how a decision was made on its behalf. On the one hand, this will empower the community to determine the veracity of a statement and determine if further action is needed (in Islamic terms, by hand, voice, or heart), and on the other hand, it will promote accuracy and prudence by the government about its statements.

As this book highlights, principles are emerging around the world to ensure access to information, public participation in decisionmaking processes, and access to judicial and administrative redress. With a rich tradition of public involvement in governance and management of natural resources, Muslim nations and peoples should be actively engaged in, if not at the forefront of, the dialogue on developing norms, practices, and institutions to promote and ensure public involvement at the local, national, and global levels. Muslim countries cannot otherwise fulfill their obligation to empower the public.