

# ISLAMIC STATES AND THE UNITED NATIONS CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN: ARE THE *SHARI'A* AND THE CONVENTION COMPATIBLE?

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## INTRODUCTION

Of all the international treaties pertaining to the protection of women's rights, the Convention on the Elimination of All Forms of Discrimination against Women (Women's Convention)<sup>1</sup> is the most comprehensive.<sup>2</sup> The Women's Convention is a brand apart from

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1. G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/34/46 (1979), reprinted at app. II [hereinafter Women's Convention].

2. See Anna Jenefsky, *Permissibility of Egypt's Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women*, 15 MD. J. INT'L L. & TRADE 199, 202 (1991) (stating that Women's Convention, which draws on several international agreements on women's rights, is culmination of efforts by U.N. Commission on Status of Women, established in 1946); see also Anne F. Bayefsky, *The Principle of Equality or Non-Discrimination in International Law*, 11 HUM. RTS. L.J. 1, 20 n.100 (1990) (listing 19 international treaties relating to women and sexual discrimination). See generally NATALIE KAUFMAN HEVENER, *INTERNATIONAL LAW AND THE STATUS OF WOMEN* (1983) (providing text of 22 international agreements and treaties pertaining to women). The agreements and treaties in Hevener's book include the: U.N. Charter; Convention Concerning the Employment of Women on Underground Work in Mines of All Kinds; Universal Declaration of Human Rights; Convention Concerning Night Work of Women Employed in Industry; Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others; International Convention for the Suppression of the Traffic in Women and Children; Convention Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value; Convention on the Political Rights of Women; Convention Concerning Maternity Protection; Convention on the Nationality of Married Women; Convention Concerning Discrimination in Respect of Employment and Occupation; Convention Against Discrimination in Education; Convention on Consent to Marriage, Minimum Age for Marriage, and Registration of Marriages; International Covenants on Human Rights: Covenant on Civil and Political Rights; and International Covenants on Human Rights: Covenant on Economic, Social and Cultural Rights.

A comparison of the Women's Convention with the above listed treaties shows that the Women's Convention includes many of the treaties' provisions. See Women's Convention, *supra* note 1, arts. 1-16, at 194-96. The Women's Convention was adopted in 1979 and became effective in September 1981. HEVENER, *supra*, at 215. Its stated goal is sexual equality. *Id.* In pursuit of that goal, the Convention covers virtually all spheres of life: political, social, economic, educational, legal, and cultural. See generally Women's Convention, *supra* note 1, arts.

other treaties because it seeks to regulate not only state, but also private, nongovernmental action.<sup>3</sup> More specifically, the Women's Convention seeks to influence cultural values that may prescribe the traditional roles of men and women in marriage, family relations,<sup>4</sup> and other situations that are fertile ground for sexual stereotypes.<sup>5</sup> It is precisely this state duty to counter discrimination in private life that renders the Women's Convention a dynamic, as well as controversial, instrument of human rights.<sup>6</sup>

As of February 1994, at least 12 of the 132 States Parties to the Women's Convention, or countries ratifying the Women's Convention, were countries with a majority Muslim population.<sup>7</sup> These countries were: Bangladesh, Egypt, Indonesia, Iraq, Jordan, the Libyan Arab Jamahiriya, Mali, Morocco, Tajikistan, Tunisia, Turkey, and Yemen.<sup>8</sup> Of these countries, all but Mali and Tajikistan registered reservations to the Convention's provisions.<sup>9</sup> Perceived conflicts between various provisions of the Women's Convention and the Islamic *Shari'a*,<sup>10</sup> or

1-16, at 194-96.

3. Donna J. Sullivan, *Gender Equality and Religious Freedom: Toward a Framework for Conflict Resolution*, 24 N.Y.U. J. INT'L L. & POL. 795, 799 (1992) (noting that Women's Convention seeks to eradicate discrimination in social and cultural life, as well as in state action).

4. See Women's Convention, *supra* note 1, art. 16, at 196 (stating that States Parties should take all steps to eliminate discrimination against women in matters relating to marriage and family relations, including right to freely choose spouses, divorce, and own, acquire, manage, administer, enjoy, and dispose of property).

5. Women's Convention, *supra* note 1, art. 5(a), at 195 (requiring that signatories take measures to modify social and cultural patterns of conduct in order to eliminate practices steeped in idea that one sex is superior or inferior, or that men and women may be classified in stereotyped ways).

6. Sullivan, *supra* note 3, at 799 n.10 (emphasizing that Women's Convention requires that governments of States Parties eliminate private discrimination and noting particularly Articles 2, 5, and 16 which address customary practices and private matters such as marriage and family relations).

7. *Report of the Committee on the Elimination of Discrimination against Women*, U.N. GAOR, 49th Sess., Supp. No. 38, Annex I, at 154-57, U.N. Doc. A/49/38 (1994) [hereinafter *CEDAW Report*] (listing countries that ratified or acceded to Women's Convention as of February 4, 1994 as States Parties).

8. *Id.*

9. *Id.* Many non-Islamic countries have also registered reservations to the Women's Convention. See *id.* (listing, for example, Argentina, Australia, Austria, Belgium, Brazil, China, Cuba, Cyprus, El Salvador, England, Ethiopia, France, Germany, India, Ireland, Israel, Italy, Jamaica, Luxembourg, Maldives, Malta, Mauritius, Mexico, Netherlands, New Zealand, Poland, Republic of Korea, Romania, Spain, Thailand, Venezuela, and Vietnam as countries making declarations and reservations); see also Rebecca J. Cook, *Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women*, 30 VA. J. INT'L L. 643, 644 (1990) (noting that, as of February 1990, 23 States Parties made 88 substantive reservations, making Women's Convention among most heavily reserved international human rights conventions).

10. See ALL APPROPRIATE MEASURES: UNITED STATES CONFORMANCE WITH THE REQUIREMENTS OF THE UNITED NATIONS CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN, Mar. 1993, at 10, 130-33 (Report prepared by Morrison & Foerster on behalf of B'nai B'rith Women) (on file with *The American University Law Review*) [hereinafter ALL APPROPRIATE MEASURES] (documenting declarations and reservations of States Parties). Bangladesh, Egypt, and Libya took reservation to Article 2 of the Convention. *Id.* at

Islamic law,<sup>11</sup> was the common denominator of many of the Islamic countries' reservations.<sup>12</sup>

Arguments exist on both sides for the relative leverage of religious rights and women's rights.<sup>13</sup> This Comment does not make a case for one over the other, but, rather, examines the necessity for the reservations in light of Islamic law and experience, and advocates pursuing the Convention's goals from a culturally specific perspective. Parts I and II of this Comment provide relevant background on the Women's Convention and certain family law aspects of the *Shari'a*. Part III examines the experiences of select Muslim-majority states with regard to Islamic law and reform as applied therein, giving particular attention to family law provisions that disproportionately affect women. Part IV discusses the cultural biases inherent in the Women's Convention. Finally, Part V makes recommendations on facilitating a balance between the goals of the Women's Convention and religious practices.

10. Bangladesh, Egypt, Iraq, Morocco, and Tunisia also reserved the right to accede to Article 16 of the Convention, which governs family relations. *Id.* at 130-33. Bangladesh, Egypt, and Iraq based their reservations to Article 16 on the Islamic *Shari'a*, *id.*, as did Morocco, see *Convention on the Elimination of All Forms of Discrimination against Women: Report of the Secretary-General*, U.N. GAOR, 48th Sess., Provisional Agenda Item 112, at 9, U.N. Doc. A/48/354 (1993) [hereinafter *Report of the Secretary-General*] (documenting reservations of Kingdom of Morocco to Article 16 based on Islamic *Shari'a*), while Tunisia based its reservation on its Personal Status Code, which is informed, in large part, by Islamic considerations. See *infra* Part III.B (describing Tunisian Code of Personal Status as reforming Islamic law by appealing to Qur'anic reasoning).

11. See KEITH HODKINSON, *MUSLIM FAMILY LAW: A SOURCEBOOK* 1 (1984) (defining *Shari'a* as "divine law . . . [or] religious code of conduct of which law in the western sense occupies but a small part"). The *Shari'a* differs from Western codes of law because it is all-encompassing, making "little distinction between moral, ethical and (in a Western sense) legal questions." *Id.* *Shari'a* prescriptions cover religious matters, such as rituals, praying, and fasting, as well as areas such as wills and contracts, regarded as secular in the West. See *id.* It is vital to understand that, unlike Western legal codes, which are framed in terms of rights, *Shari'a* principles are expressed in the form of duties. See *id.*

12. See *supra* note 10 and accompanying text (attributing reservations of Bangladesh, Egypt, and Libya to Article 2 of Women's Convention and those of Bangladesh, Egypt, Iraq, Morocco, and Tunisia to Articles 16 of Convention to Islamic law).

13. See, e.g., Bayefsky, *supra* note 2, at 20-23 (arguing that race, sex, and religion are internationally "suspect" categories); Belinda Clark, *The Vienna Convention Reservations Regime and the Convention on Discrimination Against Women*, 85 AM. J. INT'L L. 281, 317 (1991) (maintaining that religious systems have strict views on personal rights and have derogating effect when used as bases for reserving right to accede to provisions of treaty); Sullivan, *supra* note 3, at 816-23 (discussing unresolved nature of conflicts between protected rights and advocating balancing approach for conflict resolution between gender rights and freedom to practice religion). Compare with reservations made to the Women's Convention based on the Islamic *Shari'a*. See ALL APPROPRIATE MEASURES, *supra* note 10, at 10, 130-33 (detailing religiously based reservations of various countries to Articles 2 and 16 of Women's Convention); *Report of the Secretary-General*, *supra* note 10, at 8 (explaining that Morocco's accession to Article 2 of Women's Convention is circumscribed by Islamic *Shari'a*, which "strives . . . to strike a balance between the spouses in order to preserve the coherence of family life").

## I. BACKGROUND ON THE WOMEN'S CONVENTION

The Women's Convention, which was adopted by the United Nations General Assembly in 1979,<sup>14</sup> has been described as "[b]y far the most important of the conventions on the status of women,"<sup>15</sup> and "the most concise and useful document adopted during the Decade [for Women]."<sup>16</sup> It became effective in 1981,<sup>17</sup> following its ratification by twenty countries, the minimum required by Article 27 of the Convention.<sup>18</sup>

A United Nations convention is a document that embodies commonly held principles and is offered to governments for action.<sup>19</sup> Governments may support a convention in two ways: by signing the convention and thereby agreeing not to contravene its provisions or, more affirmatively, by ratifying or acceding to the convention and taking specific measures to achieve its provisions.<sup>20</sup> A convention becomes an international treaty between or among those countries ratifying it.<sup>21</sup> Thus, the Women's Convention serves as an international treaty for those countries that have ratified it.

### A. *Standard of Adherence to the Women's Convention*

The standard of adherence to international treaties is announced in The Vienna Convention on the Law of Treaties,<sup>22</sup> which is generally accepted as the authoritative doctrine on treaty interpretation.<sup>23</sup> The Vienna Convention states the rule of *pacta sunt servanda*, making all treaties binding and requiring that parties to any treaty

14. ARVONNE S. FRASER, *THE U.N. DECADE FOR WOMEN: DOCUMENTS AND DIALOGUE* 123 (1987).

15. HILKKA PIETILA & JEANNE VICKERS, *MAKING WOMEN MATTER: THE ROLE OF THE UNITED NATIONS* 123 (1990). See generally HENEVER, *supra* note 2 (reproducing numerous human rights instruments on status of women).

16. FRASER, *supra* note 14, at 123.

17. PIETILA & VICKERS, *supra* note 15, at 123.

18. Women's Convention, *supra* note 1, art. 27, at 197.

19. FRASER, *supra* note 14, at 123 (defining convention as "a document containing certain agreed upon principles which is then submitted to governments for action").

20. FRASER, *supra* note 14, at 123 (setting out ways in which countries may support conventions).

21. FRASER, *supra* note 14, at 123 (explaining that U.N. convention takes effect as treaty among countries ratifying or acceding to it).

22. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

23. See SHABTAI ROSENNE, *BREACH OF TREATY* 4 (1984) (referring to Vienna Convention as key instrument codifying law of treaties); Cook, *supra* note 9, at 645 (noting that Vienna Convention reflects prevailing norms of treaty interpretation and is recognized as such "beyond its ratifying membership").

perform in good faith.<sup>24</sup> Accordingly, States Parties to the Women's Convention are bound to carry out its provisions in good faith.

### B. Formulation of Reservations

The Vienna Convention does, however, provide for the formulation of reservations.<sup>25</sup> The Vienna Convention defines a reservation as "a unilateral statement, however phrased or named, made by a State, when signing [or] ratifying . . . a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State."<sup>26</sup> Under Article 19(a) and (b) of the Vienna Convention, a country can make reservations to a treaty at the time of signing or ratifying it so long as the treaty does not prohibit formulation of reservations or limit types of reservations that may be made.<sup>27</sup> Mere compliance with these two subsections, however, does not automatically render a reservation valid. Article 19(c) of the Vienna Convention prohibits reservations incompatible with a treaty's object and purpose.<sup>28</sup>

The Women's Convention does not further restrict or limit the types of reservations that signing or ratifying States may enter.<sup>29</sup> In fact, it specifically provides for reservations entered against one of its procedural articles on dispute resolution.<sup>30</sup> Thus, the Women's Convention permits reservations consistent with its "object and purpose."<sup>31</sup>

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24. Vienna Convention, *supra* note 22, art. 26, 1155 U.N.T.S. at 339.

25. See Vienna Convention, *supra* note 22, arts. 19-23, 1155 U.N.T.S. at 336-38. Article 19 outlines standards for formulating reservations. *Id.* art. 19, at 336. Article 20 describes procedures for acceptance of and objection to reservations. *Id.* art. 20, at 337. Article 21 explains legal effects of reservations and objections to reservations. *Id.* art. 21, at 337. Article 22 gives protocol for withdrawing reservations and objections to reservations. *Id.* art. 22, at 338. Finally, Article 23 states other procedures for reservations. *Id.* art. 23, at 338.

26. Vienna Convention, *supra* note 22, art. 2(1)(d), 1155 U.N.T.S. at 333.

27. Vienna Convention, *supra* note 22, art. 19(a)-(b), 1155 U.N.T.S. at 336-37.

28. Vienna Convention, *supra* note 22, art. 19(c), 1155 U.N.T.S. at 337.

29. See Women's Convention, *supra* note 1, art. 28, at 197 (setting out procedures governing reservations). While the Women's Convention does not specifically state that reservations are permissible, this fact is implied in Article 28(2), which prohibits reservations incompatible with the Convention's object and purpose. *Id.* art. 28(2), at 197. Thus, the Vienna Convention's "object and purpose" clause has been incorporated into the Women's Convention. See Vienna Convention, *supra* note 22, art. 19(c), 1155 U.N.T.S. at 337 (stating that reservation incompatible with object and purpose of treaty may not be entered); Women's Convention, *supra* note 1, art. 28(2), at 197 (adopting language similar to Vienna Convention's art. 28(2)).

30. Women's Convention, *supra* note 1, art. 29(2), at 198 (allowing reservations to Article 29(1), which governs dispute resolution procedures).

31. Women's Convention, *supra* note 1, art. 28(2), at 197; see also *supra* note 29 and accompanying text (noting Women's Convention's adoption of Vienna Convention's "object and purpose" test for determining permissibility of reservations).

In terms of sheer number of reservations, the Women's Convention has faced an extraordinary amount of opposition.<sup>32</sup> Many of the reservations are substantive.<sup>33</sup> Further, the Convention has been subject to considerable political debate over its alleged cultural and religious hegemonistic character.<sup>34</sup>

### C. *Articles of the Women's Convention*

Part I of the Women's Convention, consisting of Articles 1-6, defines discrimination against women and outlines the general obligations that parties to the Convention are required to undertake. Article I defines discrimination against women as:

any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.<sup>35</sup>

The Women's Convention expands on the concepts of "human rights and fundamental freedoms"<sup>36</sup> in subsequent Articles.<sup>37</sup>

Article 2 dictates how States Parties are to enforce the Women's Convention domestically.<sup>38</sup> Included in this Article is the requirement that States Parties "adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all

32. See Clark, *supra* note 13, at 283 (concluding that Women's Convention has been subject to relatively large number of reservations); Cook, *supra* note 9, at 644 (stating that Women's Convention is among most heavily reserved of international human rights conventions). Clark notes that, while 22% of States Parties to the Women's Convention entered reservations, only 3.1% of States Parties to the International Convention on the Elimination of All Forms of Racial Discrimination did the same. Clark, *supra* note 13, at 283. She points out, however, that a few other international human rights instruments, most notably, the Covenant on Economic, Social and Cultural Rights, and the Covenant on Civil and Political Rights, have also been subject to a high number of reservations. *Id.*

33. See Clark, *supra* note 13, at 282 (stating that, as of December 1989, 41 of 100 States Parties had entered substantive reservations); Cook, *supra* note 9, at 643-44 (noting large number of substantive reservations to Women's Convention). Clark states that "[o]f the UN human rights treaties, [the Women's Convention] has attracted the greatest number of reservations with the potential to modify or exclude most, if not all, of the terms of the treaty." Clark, *supra* note 13, at 317.

34. See Clark, *supra* note 13, at 284, 287 (discussing Islamic and non-Western States' assertions of Western cultural imperialism and religious insensitivity to religiously and culturally based reservations entered by some States Parties, particularly those following *Shari'a*).

35. Women's Convention, *supra* note 1, art. 1, at 194.

36. Women's Convention, *supra* note 1, art. 1, at 194.

37. See generally Women's Convention, *supra* note 1, arts. 2-16, at 194-96.

38. See Women's Convention, *supra* note 1, art. 2, at 194-95; see also Jencensky, *supra* note 2, at 205 (noting that Article 2 prescribes broad range of measures to be undertaken by States Parties in order to carry out provisions of Women's Convention).

discrimination against women."<sup>39</sup> In another subsection, Article 2 requires that "all appropriate measures, including legislation"<sup>40</sup> be taken in order to "modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women."<sup>41</sup> Article 2 also requires the abolition of all domestic penal laws discriminating against women.<sup>42</sup>

Articles 3-5 provide general stipulations on the nature of States Parties' obligations, such as using affirmative action to achieve *de facto* equality between the sexes<sup>43</sup> and taking steps to protect maternity.<sup>44</sup> Article 5(a) requires States Parties to take measures to correct social and cultural practices and other customary beliefs that work to the detriment of women.<sup>45</sup> Article 5(b) impresses upon States Parties the importance of men and women sharing equally in child rearing.<sup>46</sup>

Subsequent parts of the Women's Convention are more specific in their prescriptions to States Parties. Part II, consisting of Articles 7-9, deals primarily with discrimination against women in the public realm,<sup>47</sup> particularly with respect to voting rights,<sup>48</sup> running for office,<sup>49</sup> representing their governments,<sup>50</sup> and determining their own<sup>51</sup> and their children's nationality.<sup>52</sup>

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39. Women's Convention, *supra* note 1, art. 2(b), at 195.

40. Women's Convention, *supra* note 1, art. 2(f), at 195.

41. Women's Convention, *supra* note 1, art. 2(f), at 195.

42. Women's Convention, *supra* note 1, art. 2(g), at 195.

43. Women's Convention, *supra* note 1, art. 4(1), at 195 (stating that Women's Convention will not treat affirmative action as discriminatory).

44. Women's Convention, *supra* note 1, art. 4(2), at 195 (stating that Women's Convention allows for special measures aimed at protecting maternity and that such measures will not be labeled as discriminatory).

45. Women's Convention, *supra* note 1, art. 5(a), at 195 (calling for elimination of practices based on idea of male superiority or stereotypical gender roles).

46. Women's Convention, *supra* note 1, art. 5(b), at 195 (recognizing common responsibility of men and women in child rearing and development).

47. See generally Women's Convention, *supra* note 1, arts. 7-9, at 195 (enunciating responsibilities of States Parties with respect to ensuring women equal rights in political and public life).

48. Women's Convention, *supra* note 1, art. 7(a), at 195 (giving women right to vote in all elections and public referenda).

49. Women's Convention, *supra* note 1, art. 7(a)-(b), at 195 (establishing women's right to hold all public offices).

50. Women's Convention, *supra* note 1, art. 8, at 195 (giving men and women equal opportunity to represent their governments internationally as individuals and members of international organizations).

51. Women's Convention, *supra* note 1, art. 9, at 195 (granting women right to acquire, change, or retain their nationalities independent of their husbands' nationalities).

52. Women's Convention, *supra* note 1, art. 9, at 195 (granting women equal status with husbands in determining their children's nationalities).



Part III of the Convention, consisting of Articles 10-14, seeks to eradicate sexual discrimination in the educational<sup>53</sup> and employment<sup>54</sup> contexts, and calls for adequate health care for women.<sup>55</sup> In addition, this Part addresses the special needs of rural women.<sup>56</sup> Article 10 of the Convention calls for States Parties to take appropriate measures to ensure that women and men have equal academic<sup>57</sup> and extracurricular opportunities,<sup>58</sup> free of sexual stereotyping, at all levels of education. The Article considers coeducation as a means of eliminating sexual stereotyping in educational settings.<sup>59</sup>

Part IV of the Convention, consisting of Articles 15 and 16, deals with the rights of women under the law<sup>60</sup> and within the family.<sup>61</sup> Article 15 requires that women be given status equal with men under the law<sup>62</sup> and equal legal capacity in civil matters, such as the administration of property or court proceedings.<sup>63</sup> The Article enjoins States Parties from giving legal effect to contracts and other instruments that restrict the legal capacity of women.<sup>64</sup> Finally, Article 15 requires that women have rights equal to men when choosing their residences and domiciles.<sup>65</sup>

53. Women's Convention, *supra* note 1, art. 10, at 195 (giving women equal access to educational opportunities, including gender-neutral career and vocational guidance, scholarships and grants, and continuing education programs).

54. Women's Convention, *supra* note 1, art. 11, at 195 (stating that women should have right to, among other things, employment in any profession, equal pay and benefits, social security, safe working conditions, and freedom from sanctions or dismissal for pregnancy, maternity leave, or marital status).

55. Women's Convention, *supra* note 1, art. 12, at 196 (requiring States Parties to ensure that women have same access to general medical care as men, and make special efforts to ensure women's access to obstetric, gynecological, and other gender-related medical care).

56. Women's Convention, *supra* note 1, art. 14, at 196 (requiring generally that States Parties ensure that women participate in and benefit from rural development, and requiring, in particular, assistance of States Parties in helping rural women to obtain formal and informal training and education, access agricultural credit and loans, and procure adequate housing).

57. See *supra* note 53 (listing academic rights Article 10 provides for women).

58. Women's Convention, *supra* note 1, art. 10(g), at 195 (requiring equal opportunities for women to actively participate in sports and physical education).

59. See Women's Convention, *supra* note 1, art. 10(c), at 195 (listing coeducation, textbook and curricular revisions, and new teaching methods as methods of eliminating sexual stereotyping in educational institutions).

60. Women's Convention, *supra* note 1, art. 15, at 196 (stating that States Parties shall treat women and men equally under law by giving women legal capacity equal to that of men in civil and contractual matters, prohibiting contracts that restrict women's legal capacity, and allowing women to administer property, choose residence and domicile, and move at will).

61. Women's Convention, *supra* note 1, art. 16, at 196 (securing equal rights for women in marriage and family matters, including rights to enter into marriage freely, work outside household, and participate in family planning).

62. Women's Convention, *supra* note 1, art. 15(1), at 196.

63. Women's Convention, *supra* note 1, art. 15(2), at 196.

64. Women's Convention, *supra* note 1, art. 15(3), at 196.

65. Women's Convention, *supra* note 1, art. 15(4), at 196.

Article 16 requires States Parties to eliminate discrimination against women "in all matters relating to marriage and family relations."<sup>66</sup> It requires, among other things, that men and women should be equally free to choose a spouse and enter into marriage,<sup>67</sup> have equal rights during marriage and divorce,<sup>68</sup> have equal rights vis-à-vis their children,<sup>69</sup> and equal rights to acquire, own, enjoy, and dispose of property.<sup>70</sup> Finally, the Article nullifies child marriages, requires that States Parties set a minimum age for marriage, and mandates official registration of marriages.<sup>71</sup>

Part V of the Convention, consisting of Articles 17-22, deals with international monitoring of States Parties' adherence to the Women's Convention.<sup>72</sup> Article 17 establishes a Committee on the Elimination of Discrimination against Women (CEDAW) consisting of a diverse group of twenty-three experts in the field of global women's rights.<sup>73</sup> This Committee oversees the progress of States Parties in achieving compliance with the Convention<sup>74</sup> by reviewing periodic country reports submitted by States Parties on measures taken to effectuate the Convention.<sup>75</sup> States Parties nominate<sup>76</sup> and elect<sup>77</sup> committee members, who rotate every four years.<sup>78</sup> Articles 19 through 22 cover the Committee's *modus operandi* and other technical matters.<sup>79</sup>

66. Women's Convention, *supra* note 1, art. 16, at 196. Article 16, like Article 2, has faced a number of reservations based on religious grounds and is considered controversial with respect to practicability under Islamic *Shari'a* regimes. See Cook, *supra* note 9, at 687-88, 702-03 (documenting reservations of Islamic countries to Articles 2 and 16); *supra* notes 10, 12 and accompanying text (discussing several countries' reservations to Article 16 based upon Islamic considerations).

67. Women's Convention, *supra* note 1, art. 16(1)(a)-(b), at 196 (giving women right to choose own spouse and disallowing marriage without woman's "free and full consent").

68. Women's Convention, *supra* note 1, art. 16(1)(c), at 196.

69. Women's Convention, *supra* note 1, art. 16(1)(d)-(f), at 196 (giving women full parental rights and responsibilities, regardless of marital status, including right to decide number and spacing of children, and to act as children's guardian, trustee, or ward).

70. Women's Convention, *supra* note 1, art. 16(1)(h), at 196.

71. Women's Convention, *supra* note 1, art. 16(2), at 196 (requiring States Parties to take "all necessary action, including legislation" to meet these goals).

72. See generally Women's Convention, *supra* note 1, arts. 17-22, at 196-97 (providing for establishment of "Committee on the Elimination of Discrimination against Women" (CEDAW) to oversee implementation of Women's Convention).

73. Women's Convention, *supra* note 1, art. 17, at 196-97.

74. Women's Convention, *supra* note 1, art. 17, at 196-97.

75. Women's Convention, *supra* note 1, arts. 18, 20, at 197 (describing procedures for oversight committee).

76. Women's Convention, *supra* note 1, art. 17(2)-(3), at 196-97 (outlining procedure by which each State Party may nominate one person from among its own nationals).

77. Women's Convention, *supra* note 1, art. 17(2)-(4), (6), at 196-97 (outlining procedures for secret ballot elections).

78. Women's Convention, *supra* note 1, art. 17(5), at 197.

79. See generally Women's Convention, *supra* note 1, arts. 19-22, at 197 (establishing rules governing Committee's meeting and activities).

The Committee's power, as outlined in Article 21, lies in its freedom to make suggestions and recommendations to the United Nations General Assembly.<sup>80</sup>

The final part of the Convention, Part VI, consists of Articles 23-30.<sup>81</sup> Article 23 allows States Parties to substitute domestic or international laws that are more conducive to gender equality for measures offered by the Convention that are less effective.<sup>82</sup> Article 26 states that written requests to revise the Convention may be sent to the Secretary-General of the United Nations at any time.<sup>83</sup> Proposed revisions are then taken up by the General Assembly.<sup>84</sup> Article 28 addresses reservations.<sup>85</sup> It states, along the lines of the Vienna Convention,<sup>86</sup> that reservations that are inconsistent with the object and purpose of the Convention are impermissible.<sup>87</sup> It also states that reservations may be withdrawn at any time, subject to notification to the Secretary-General.<sup>88</sup>

#### *D. Reservations Entered to the Convention on the Basis of Islamic Law*

Among the Islamic countries registering reservations to articles of the Women's Convention are Egypt, Tunisia, and Morocco.<sup>89</sup> All three countries have registered reservations to Article 16 of the Convention that are essentially based on the Islamic *Shari'a*.<sup>90</sup> With

80. See Women's Convention, *supra* note 1, art. 21, at 197 (permitting Committee to make suggestions and recommendations to U.N. General Assembly based upon Committee's activities and States Parties' suggestions and reports).

81. Women's Convention, *supra* note 1, arts. 23-30, at 197-98.

82. See Women's Convention, *supra* note 1, art. 23, at 197 (stating that Women's Convention shall not override legislation, international treaties, conventions, or agreements that are more conducive to achievement of gender equality).

83. Women's Convention, *supra* note 1, art. 26(1), at 197.

84. Women's Convention, *supra* note 1, art. 26(2), at 197 (stating that General Assembly shall decide steps, if any, to take upon State Party request for Women's Convention revision).

85. See generally Women's Convention, *supra* note 1, art. 28, at 197 (prescribing procedures for accepting, circulating, and withdrawing reservations).

86. See *supra* text accompanying note 28 (noting that Vienna Convention stipulates that reservations may not contravene object and purpose of treaties).

87. Women's Convention, *supra* note 1, art. 28(2), at 197.

88. Women's Convention, *supra* note 1, art. 28(3), at 197 (stating that reservations and subsequent withdrawals addressed to U.N. Secretary General are effective upon receipt).

89. See CEDAW Report, *supra* note 7, at 154-57 (listing Egypt, Tunisia, and Morocco among States Parties to Women's Convention declaring reservations as of February 4, 1994).

90. See *supra* note 10 (discussing reservations of various countries, including Egypt, Tunisia, and Morocco, to Articles 2 and 16 of Women's Convention); see also Clark, *supra* note 13, at 299-301 (mentioning Egypt's reservation to Article 2 and Tunisia's reservations regarding "aspects of matrimonial property and family law," as outlined in Article 16, and stating that both have uncertain scope); Cook, *supra* note 9, at 687-88, 696-97 (outlining reservations of Egypt and Tunisia, among others, to Article 2, and Egypt to Article 16). See generally Jenešky, *supra* note 2, at 205-06 (discussing Egypt's reservations to Articles 2 and 16 of Women's Convention and assessing permissibility of each).

regard to Article 2, both Egypt and Morocco have reserved the right to accede or have declared an intention not to do anything to abrogate the Islamic *Shari'a*.<sup>91</sup> Tunisia filed a "general declaration" stating that it will not adopt measures that conflict with Chapter I of the Tunisian Constitution, which declares Islam the official religion of Tunisia.<sup>92</sup>

The text of the Egyptian reservation to Article 16 states, in part, that provisions of Article 16 that mandate equal rights for women in the realms of marriage and family relations<sup>93</sup>

be without prejudice to the Islamic Sharia provisions whereby women are accorded rights equivalent to those of their spouses so as to ensure a just balance between them. This is out of respect for the sanctity deriving from firm religious beliefs which govern marital relations in Egypt and which may not be called in question and in view of the fact that one of the most important bases of these relations is an equivalency of rights and duties so as to ensure complementarity which guarantees true equality between the spouses and not quasi-equality that renders the marriage a burden on the wife. This is because the provisions of the Islamic Sharia lay down that the husband shall pay bridal money to the wife and maintain her fully out of his own funds and shall also make a payment to her upon divorce, whereas the wife retains full rights over her property and is not obliged to spend anything on her keep. The Sharia therefore restricts the wife's rights to divorce by

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While little has been written on Morocco's reservations to Articles 2 and 16, it is important to point out that Morocco's accession to the Women's Convention was made relatively recently, on June 21, 1993. See *CEDAW Report*, *supra* note 7, at 155; *Report of the Secretary-General*, *supra* note 10, at 8-9 (containing text of Morocco's reservations to Articles 2 and 16 and noting that Article 2 reservation is termed "declaration"). Morocco states that the provisions of Article 2 must "not conflict with the provisions of the Islamic *Shariah*." *Id.* at 8. This reservation also notes that "certain of the provisions contained in the Moroccan Code of Personal Status according women rights that differ from the rights conferred on men may not be infringed upon or abrogated because they derive primarily from the Islamic *Shariah*." *Id.* The same document contains Morocco's reservation to Article 16, which states that:

Equality [of the kind requiring equality of men and women in matters of entry into and dissolution of marriage] is considered incompatible with the Islamic *Shariah*, which guarantees to each of the spouses the rights and responsibilities within a framework of equilibrium and complementarity in order to preserve the sacred bond of matrimony. . . . For these reasons, the Islamic *Shariah* confers [] the right of divorce on a woman only by decision of a *Shariah* judge.

*Id.* at 9.

91. See ALL APPROPRIATE MEASURES, *supra* note 10, at 10 (reproducing Egypt's reservation to Article 2, which states that Egypt will comply with Article only if compliance does not violate Islamic *Shari'a*); *Report of the Secretary-General*, *supra* note 10, at 8 (outlining Morocco's declaration that its commitment to Article 2 is circumscribed by *Shari'a*).

92. Cook, *supra* note 9, at 687.

93. Women's Convention, *supra* note 1, art. 16, at 196.

making it contingent on a judge's ruling, whereas no such restriction is laid down in the case of the husband.<sup>94</sup>

This reservation is similar to Morocco's reservation, which also emphasizes the concept of complementarity of the spouses and discusses a wife's right to own and dispose of her own property, and receive payment upon marriage and divorce from her husband.<sup>95</sup> Tunisia's reservation to Article 16(c), (d), (f), (g), and (h) is based on the Tunisian domestic law without much elaboration.<sup>96</sup> The Egyptian and Moroccan reservations are innovative in terms of marshaling a "separate but equal" argument and portraying the Islamic concept of women's equality in terms of complementary rights.<sup>97</sup> Framing women's and men's roles as different but "of equal value may be claimed to satisfy the Women's Convention."<sup>98</sup> Thus, the case can be made that a reservation, such as Egypt's, "according women rights equivalent to the rights of their spouses so as to ensure a just balance between them," may be compatible with a literalist interpretation of Article 16 of the Women's Convention.<sup>99</sup> It is, however, questionable whether Article 23, which allows States Parties to use domestic laws that are more conducive to achieving gender equality,<sup>100</sup> permits the "equivalency" approach relied upon by Egypt and Morocco<sup>101</sup> in light of the "object and purpose" test set out in both the Women's<sup>102</sup> and Vienna Conventions.<sup>103</sup> The "object and purpose" argument can be utilized considering that "[a] fundamental object and purpose of the Women's Convention is that states parties eliminate [gender-specific] family laws"<sup>104</sup> that may be equitably

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94. Cook, *supra* note 9, at 704 (citing U.N. Doc. CEDAW/SP/13/Rev. 1, at 11 (1989)).

95. *Report of the Secretary-General*, *supra* note 10, at 8.

96. ALL APPROPRIATE MEASURES, *supra* note 10, at 133 (asserting merely that certain provisions of Article 16 "must not conflict with [the equivalent] provisions of the Personal Status Code").

97. Cook, *supra* note 9, at 704 (stating that marital relations in Egypt are governed by Islamic religious beliefs, which may not be questioned, and arguing that equal but distinct responsibilities given husband and wife in Islam make adherence to Article 16 unfeasible).

98. Cook, *supra* note 9, at 704.

99. Cook, *supra* note 9, at 704 (citations omitted).

100. See Women's Convention, *supra* note 1, art. 23, at 197 (stating that Convention shall not affect legislation, international conventions, treaties, or agreements more conducive to achieving gender equality).

101. See *supra* notes 94-99 and accompanying text (explaining that Egypt and Morocco subscribe to complementarity of male and female roles approach, which is, according to them, rationale underlying *Shari'a's* concept of rights of men and women).

102. Women's Convention, *supra* note 1, art. 28(2), at 197.

103. Vienna Convention, *supra* note 22, art. 19(c), 1155 U.N.T.S. at 337.

104. Cook, *supra* note 9, at 705-06.

valued in theory but inequitably regarded in practice, thereby compromising women's status.<sup>105</sup>

Commentators have considered reservations to Article 2 to breach the object and purpose test of the Vienna Convention.<sup>106</sup> Reservations based on domestic provisions contravene the generally accepted norm that domestic law cannot be used as a justification to refuse compliance with international treaty provisions.<sup>107</sup>

Both the Committee on the Elimination of Discrimination against Women and the recently issued Vienna Declaration on Human Rights<sup>108</sup> state that the object of achieving full compliance with human rights instruments is undermined by the existence of reservations and that, to the extent possible, such reservations should be withdrawn, or at the very least, narrowly formulated.<sup>109</sup> Insofar as any of the registered reservations are based on the *Shari'a*, it must be emphasized that expressions of religious faith are protected by international human rights law.<sup>110</sup> The authenticity of religious expressions is not at issue in international instruments protecting freedom of religion, and, authentic or not, practices believed to be

105. Cook, *supra* note 9, at 704-05. But see Bayefsky, *supra* note 2, at 34 (maintaining that equality does not always mean equal treatment, nor are differences in treatment always tantamount to discrimination).

106. See, e.g., Clark, *supra* note 13, at 299 (stating that "very object and purpose [of the Women's Convention] is set out in Article 2" and arguing that if reservation to Article 2 is put into practice, discrimination against women would inevitably result, thereby contravening object and purpose of Women's Convention); Cook, *supra* note 9, at 689 (stating that Article 2 sets out goals of Women's Convention and delineates means by which Convention's provisions are to be carried out and therefore facilitates its object and purpose); Jenefsky, *supra* note 2, at 211 (maintaining that Article 2 is central to carrying out object and purpose of Women's Convention and quoting commentator as saying that reservation to Article 2 "obstructs and compromises compliance with the object and purpose of the Convention") (citations omitted).

107. Vienna Convention, *supra* note 22, art. 27, 1155 U.N.T.S. at 339 (prohibiting States Parties from invoking their internal law as justification for failure to honor treaty provisions).

108. U.N. Doc. A/Conf.157/24 (Part I) (1993), 20-446, reprinted in 32 I.L.M. 1661 (1993) [hereinafter Vienna Declaration].

109. See CEDAW Report, *supra* note 7, at 12-13 (referring to "problem of reservations" and recommending that States Parties formulate reservations narrowly with objective of eventually withdrawing them); Vienna Declaration, *supra* note 108, at 32, 21 I.L.M. part II, (A)(5) (articulating general principle that States Parties should limit extent of reservations lodged to human rights treaties and formulate any reservations narrowly, respecting object and purpose of treaty, with view toward withdrawing them). The Vienna Declaration also specifically addresses the Women's Convention and urges the application of its general principles on reservations to the Women's Convention. *Id.* at 37, 21 I.L.M. part II, (B)(3)(39).

110. See International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 18, 999 U.N.T.S. 178, 178 [hereinafter Political Covenant] (guaranteeing freedom to manifest religion or belief in worship, observance, practice, and teaching); Declaration on the Elimination of All Forms of Religious Intolerance and of Discrimination Based on Religion or Belief, G.A. Res. 36/55, U.N. GAOR, 36th Sess., Supp. No. 51, at 171, U.N. Doc. A/36/51 (1981) [hereinafter Declaration on Religious Intolerance] (stating that religious beliefs should be respected as fundamental element of life).

expressions of religion are protected.<sup>111</sup> It is a recognized principle, however, that freedom of religion is circumscribed by restrictions that are "prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others."<sup>112</sup> Religion may not be used as a justification for the derogation of rights that are universally recognized and upheld.<sup>113</sup> Further, as noted earlier, the Vienna Convention provides that domestic law cannot be invoked to escape compliance with provisions of a treaty.<sup>114</sup> Moreover, "traditional outlooks or local prejudice will not count as reasonable justification for differential treatment."<sup>115</sup> Thus, freedom of religion, while guaranteed,<sup>116</sup> is not an absolute defense to the derogation of certain other rights.<sup>117</sup> Despite such international standards governing freedom of religion vis-à-vis other rights, provisions of religious systems may themselves be utilized to bridge apparent gaps between religious practice and other protected rights. Thus, religious dictates need not be framed in terms antagonistic to other human rights and may lend support to instruments of human rights. For example, the experiences of some countries entering *Shari'a*-based reservations reveal that the reservations may be unnecessary according to the *Shari'a* itself, or that the reservations could be formulated more narrowly,<sup>118</sup> in compliance with the

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111. Sullivan, *supra* note 3, at 813 (maintaining that whether practice is considered aberrant or authoritative is irrelevant to applicability of religious freedom so long as such practices are not representative of "spurious or fraudulent claims"). Professor Sullivan notes in her article that, while the question of authenticity of a particular religious practice is not considered by human rights instruments protecting freedom of religion, revealing a practice's authenticity "does . . . have both strategic and substantive importance for those seeking to reform religious law or practice or to promote alternative interpretations" in that inauthentic and undesirable practices may be exposed as such so that they may be reformed. *Id.*

112. Political Covenant, *supra* note 110, art. 18(3), 999 U.N.T.S. at 178; *see* Declaration on Religious Intolerance, *supra* note 110, at 171 (utilizing similar language).

113. *See* Sullivan, *supra* note 3, at 811 (describing religiously permitted practices such as slavery, apartheid, untouchability, and withholding medical treatment from children that are nonetheless condemned internationally).

114. Vienna Convention, *supra* note 22, art. 27, 1155 U.N.T.S. at 339 (banning parties from invoking their internal law as justification for failure to perform treaty obligations); *see* Sullivan, *supra* note 3, at 807 (asserting that while "states may implement religious law in domestic law, they may not invoke religious law embodied in national legal systems to excuse breaches of their international human rights obligations"); *supra* note 107 and accompanying text.

115. Bayefsky, *supra* note 2, at 34 (articulating internationally recognized standards of nondiscrimination).

116. *See* Political Covenant, *supra* note 110, 999 U.N.T.S. at 178; Declaration on Religious Intolerance, *supra* note 110, at 171.

117. *See supra* notes 112-14 and accompanying text (maintaining that freedom of religion is not absolute, as in case where such right may be suspended in order to protect greater good or where States Parties attempt to bypass compliance with international treaties by pointing to religiously imbued provisions of domestic law).

118. *See infra* Part V (demonstrating that reservations expressed by countries such as Tunisia and Iraq to Article 16 are overbroad).

international recommendation to formulate reservations as narrowly as possible, and still remain consistent with the *Shari'a*.<sup>119</sup> The following section illustrates the dynamic nature of the *Shari'a* and highlights the fact that Qur'anic sources of *Shari'a* were instrumental in according women a measure of rights where previously they had none.

## II. BACKGROUND ON THE *SHARI'A*

The *Shari'a* is not a singular law, but rather is derived from many sources.<sup>120</sup> Different and often conflicting laws make up the totality of what is collectively known as the *Shari'a*.<sup>121</sup> A major feature of the *Shari'a* is that it draws no distinction between the religious and the secular, between legal, ethical, and moral questions, or between the public and private aspects of a Muslim's life.<sup>122</sup> This last subfeature particularly is central to understanding the differences between law in the Western sense and law in the Islamic sense.<sup>123</sup> The *Shari'a* thus regulates matters ranging from prayer and dietary regulations to wills and contracts.<sup>124</sup> The *Shari'a* is considered to be a divine law, the authority of which depends on the revealed word of Allah, or God.<sup>125</sup> Since its revelation and compilation, the *Shari'a* has been expounded and interpreted by Islamic jurists.<sup>126</sup> As divine law, the *Shari'a* is considered to be a set of duties by which all Muslims must live and conduct themselves.<sup>127</sup>

119. See *supra* note 109 and accompanying text (discussing recommendations made by CEDAW and Vienna Declaration to limit reservations).

120. See JOHN L. ESPOSITO, WOMEN IN MUSLIM FAMILY LAW 3-10 (1982) (identifying and elaborating on four main sources of Islamic law: the Qur'an, Sunna (or Prophetic example), *qiyas* (analogical reasoning), and *ijma* (community consensus)).

121. See *id.* at 35 (documenting differences in divorce law among four major schools of Islam, namely, Maliki, Shafi'i, Hanbali, and Hanafi). Various Islamic laws also differ in terms of maintenance to be paid to a divorced wife, see *id.* at 27, views on equality within marriage, see *id.* at 128, certain inheritance rights, see *id.* at 69, and sources of consensus (or *ijma*), see *id.* at 128, among other differences.

122. HODKINSON, *supra* note 11, at 1.

123. HODKINSON, *supra* note 11, at 1 (contrasting *Shari'a* and Western legal systems and noting that private and public matters were separated under Roman law). See *infra* Part II.C (discussing and differentiating between private and public law aspects of *Shari'a*). The all-inclusive nature of the *Shari'a* explains why it may conflict with the Women's Convention, which is also all-inclusive in terms of the areas it seeks to regulate. See *supra* notes 2-6 and accompanying text (characterizing Women's Convention as seeking to change discriminatory practices in social, cultural, and familial realms as well as in public realm).

124. HODKINSON, *supra* note 11, at 1.

125. HODKINSON, *supra* note 11, at 2 (noting that force of *Shari'a* law is regulated by its divine nature rather than by sanctions that may be imposed).

126. HODKINSON, *supra* note 11, at 1.

127. See HODKINSON, *supra* note 11, at 1 (terming *Shari'a* to be "path of the believer, the way which Allah wishes man to pass").



### A. Sources of the *Shari'a*

There are four main sources of *Shari'a*.<sup>128</sup> These are the Qur'an, Sunna, *qiyas*, and *ijma*.<sup>129</sup> The Qur'an is the primary source of *Shari'a*, and is considered, as God's revelation, "the central fact of the Islamic religious experience."<sup>130</sup> The precepts of *Shari'a* are garnered first from the Qur'an, second from the traditions of the Prophet (Sunna), and finally "from the 'reliable' and 'guided' action of the individual persons and the community who have lived in accordance with that revelation and tradition."<sup>131</sup> While *qiyas* (reasoning by analogy) and *ijma* (consensus) are not expressly sanctioned sources of law, they came about as a result of *ijtihad*, or interpretation, which was considered to be an authentic way to derive the *Shari'a*.<sup>132</sup>

#### 1. The Qur'an as a source of *Shari'a*

The Qur'an, the sacred book of the Muslims, is the compilation of revelations made by Allah (God) to Prophet Muhammad from approximately A.D. 610 to A.D. 632, the time of the Prophet's death.<sup>133</sup> The Qur'an is the basis of the "Islamic code of conduct both towards Allah and to one's fellow man."<sup>134</sup> It is comprised of chapters, known as *suras*, which are subdivided into verses.<sup>135</sup> The Qur'an issues prescriptions on all realms of life, making "no distinction between matters which the Christian would categorize as religious, moral, social and legal."<sup>136</sup> While the Qur'an is the primary source of Islamic law, it cannot be equated with a code of law as such.<sup>137</sup> Of the 6219 verses of the Qur'an, 500-600 verses contain a legal element, but only roughly 80 verses may be classified as legal injunctions in the narrow sense of the term.<sup>138</sup> The legal matter, in

128. See ESPOSITO, *supra* note 120, at 3-12.

129. ESPOSITO, *supra* note 120, at 3-12.

130. ESPOSITO, *supra* note 120, at 3.

131. ABDULLAHI AHMED AN-NA'IM, TOWARD AN ISLAMIC REFORMATION 19 (1990).

132. See *id.* at 12, 19 (noting, however, that *ijtihad* was legitimate mechanism for deriving *Shari'a* only in second and third centuries of Islam, or between A.D. 722 and A.D. 822).

133. See *id.* at 12-13 (tracing life of Prophet Muhammad and revelation of holy law contained in Qur'an to him by Allah); ESPOSITO, *supra* note 120, at 3-5 (providing history of Qur'an and noting features of its content); HODKINSON, *supra* note 11, at 3 (describing Qur'an and its genesis).

134. HODKINSON, *supra* note 11, at 3.

135. HODKINSON, *supra* note 11, at 3.

136. HODKINSON, *supra* note 11, at 3.

137. See Noel Coulson, *A History of Islamic Law*, in 2 ISLAMIC SURVEYS 17 (1964).

138. See AN-NA'IM, *supra* note 131, at 20; see also ESPOSITO, *supra* note 120, at 3 (stating that Qur'an contains only 80 verses concerning legal injunctions). The exact number of legal

the Western sense of the word, most expressly regulated in the Qur'an is the law of succession.<sup>139</sup> In this context, one should keep in mind that a primary function of the Qur'an was to effectively reform or replace, to the ultimate betterment of society, the customary law governing pre-Islamic tribes in Arabia.<sup>140</sup> To this end, the Qur'an was very effective. For example, in the law of marriage, the Qur'an limited previously unrestrained polygamous practices by forbidding a man to marry more than one wife unless he could treat his wives equally and impartially:

Marry women of your choice, two, three or four. But if ye fear that ye shall not be able to deal justly [with them] then only one<sup>141</sup>

While this verse is often interpreted as "sanctioning" polygamy, a lesser-cited verse lends a different perspective:

Ye are never able to be fair and just as between women, even if that were your ardent desire<sup>142</sup>

Hence, in a radical departure from the customs of pre-Islamic Arabia, Qur'anic scripture seems not only to limit polygamy, but also to suggest that the criteria imposed by the Qur'an for the practice of polygamy are virtually impossible to meet.<sup>143</sup> Thus, at the very least, the Qur'an seems to discourage customary pre-Islamic polygamy.

Succession is also an example of the reforms engendered by the Qur'an.<sup>144</sup> In tribal customary law, succession was based solely on inheritance through male descent.<sup>145</sup> But the Qur'an changed this practice:

prescriptions in the Qur'an, however, is disputed. At least one scholar, for example, maintains that as many as 200 verses may constitute edicts of law. See HODKINSON, *supra* note 11, at 3 ("There are no more than 200 verses concerned with what we would term 'law' in the western sense.").

139. HODKINSON, *supra* note 11, at 3 (stating that law of succession is only area of law receiving detailed treatment in Qur'an).

140. HODKINSON, *supra* note 11, at 8 (explaining that while *Sunni* Muslims believe that *Shari'a* reformed existing customary tribal laws, *Shi'a* Muslims believe that *Shari'a* effectively invalidated all that came before it, and was foundation of brand new system of law). There are many differences between *Sunni* Islam and *Shi'a* Islam. Among these differences are the sources of *Shari'a* themselves. The assumptions made by this Article rest largely on the study of *Sunni* belief, which is dominant in the Islamic world. See *id.* at 7, 8 (stating that as many as 90% of all Muslims are *Sunni*). There are different schools within *Sunni* Islam. For a detailed discussion of these schools, and their significance, see *infra* Part II.B.

141. ESPOSITO, *supra* note 120, at 4 (citing *The Qur'an* IV:3).

142. ESPOSITO, *supra* note 120, at 4 (citing *The Qur'an* IV:129).

143. See *supra* notes 141-42 and accompanying text (discussing Qur'anic verses that allow polygamy only if husbands can treat each wife equally, but then state that no husband can treat multiple wives equally).

144. See ESPOSITO, *supra* note 120, at 5 (stating that inheritance is example of Qur'anic reform of existing practices in that women were accorded inheritance rights where they had none in pre-Islamic Arabia).

145. ESPOSITO, *supra* note 120, at 5.

[The Qur'an introduced] the golden rule of inheritance, the primacy of distribution of certain fixed shares to several categories of Quranically designated heirs comprised mainly of the nearest female relatives excluded under the agnatic system [inheritance through male descent]. After these *Quranic* claims have been satisfied, the residue of the estate is awarded to the nearest male (agnate) relatives.<sup>146</sup>

While the Qur'an introduced progressive changes to the existing tribal framework in place at the time of the divine revelations, there were verses of the Qur'an that were seemingly irreconcilable and inconsistent with each other.<sup>147</sup> In order to achieve consistency in Qur'anic guidelines, a mechanism called *naskh* developed, which renders certain verses null and void through a process of repeal.<sup>148</sup> *Naskh*, primarily a *Sunni* practice,<sup>149</sup> is principally responsible for the general content of *Shari'a* as it is presently known and practiced by various communities.<sup>150</sup>

## 2. *The Sunna as a source of Shari'a*

The Sunna is the record of the life experiences and the deeds of the Prophet Muhammad<sup>151</sup> as maintained in the *hadith*.<sup>152</sup> The different versions of the *hadith* were not compiled until approximately the ninth century, when it was discovered that *hadith* works differed,<sup>153</sup> and that many of the *hadith* collections were fabricated.<sup>154</sup>

146. ESPOSITO, *supra* note 120, at 5.

147. See HODKINSON, *supra* note 11, at 3 (stating that verses that contradict each other have "defeated the attempts at reconciliation of even the most ingenious jurists, who have had to fall back on attempts to discover which verse abrogates which").

148. See AN-NA'IM, *supra* note 131, at 21 (discussing possibility of applying *naskh* in modern day to achieve legal reforms). Professor An-Na'im argues that *naskh*, unlike *ijtihad*, was never definitively inactivated as a mechanism for reforming the *Shari'a*; the process of *naskh* remains open as a principle of interpretation, so that where there are conflicting prescriptions of *Shari'a*, guidance should be obtained from both the Qur'an and the Sunna, *see infra* Part II.A.2, as well as by legal jurists in order to arrive at the most Islamically favorable outcome. Professor An-Na'im likens this process to determining legislative intent. AN-NA'IM, *supra* note 131, at 57-60. A shortcoming of this proposal is subjectivity of the jurists who may favor repressive interpretations.

149. *Sunni* refers to the branch of Islam to which the vast majority (over 90%) of Muslims belong. ESPOSITO, *supra* note 120, at 135 n.2; *supra* note 140 (noting major difference between *Sunni* and *Shi'a* Islam, with latter being second largest branch of Islam).

150. See AN-NA'IM, *supra* note 131, at 21 (describing acceptance of *naskh* by various *Sunni* jurists and schools of thought as foundation of modern principles of *Shari'a*).

151. NOEL J. COULSON, *CONFLICTS AND TENSIONS IN ISLAMIC JURISPRUDENCE* 4 (1969).

152. ESPOSITO, *supra* note 120, at 6 (defining *hadith* as collected record in compendia of Prophet Muhammad's words and deeds).

153. ESPOSITO, *supra* note 120, at 6. The different versions of the *hadith* have been attributed to discord over the significance of various incidents in Prophet Muhammad's life, which led to varying interpretations, and, ultimately, regional Sunna. *Id.* at 115.

154. See ESPOSITO, *supra* note 120, at 6 (stating that recognition of *hadith* fabrications during ninth century led to effort to find more authentic *hadith*); *see also* AN-NA'IM, *supra* note 131, at

The process of arriving at an authentic *hadith* involved examining the narrators who propagated a particular version and scrutinizing the subject matter of a particular version in order to determine whether or not it was in conflict with the Qur'an.<sup>155</sup> By the latter part of the ninth century, the major collections of *hadith* that withstood the tests of authenticity had been identified.<sup>156</sup> Questions surrounding the authenticity of these collections, however, persist.<sup>157</sup>

### 3. *Qiyas and Ijma as sources of Shari'a*

Because the source of *qiyas* is human interpretation, it is considered to be a subordinate source of law.<sup>158</sup> In addition, because *qiyas* involves human interpretation, it is closely related to the concept of *ijtihad* (interpretation).<sup>159</sup> *Qiyas* may be effectively marshaled when the reason for or cause of a situation requiring legal adjudication resembles one for which a definitive *Shari'a* pronouncement has already been made.<sup>160</sup> Thus, *qiyas* involves analogical reasoning. An example of *qiyas* at work is the analogy drawn between the Qur'anic penalty for theft and the "theft" of a bride's virginity.<sup>161</sup> The sum for a minimum dower or *mahr*, the minimum amount to which a bride is entitled from her husband at the time of marriage,<sup>162</sup> was fixed according to a scaled version of the penalty for theft.<sup>163</sup> Specifically, minimum dowers in Kufa and Medina, two cities central

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22 (quoting S.G. Vesey-Fitzgerald, *Nature and Sources of the Shari'a*, in *LAW IN THE MIDDLE EAST* 93 (Majid Khadduri & Herbert Liebesny eds., 1955)) (discussing phenomenon of fabrication and need for authentication). The problem of fabrication is largely attributable to the lack of first-hand knowledge of the practice of the Prophet and his companions. Speculation, therefore, inevitably played a part in the compilations of the *hadith* as they were passed on through time. See AN-NA'IM, *supra* note 131, at 22-23. The authentication process was itself flawed because it depended on the unverifiable criterion of the "reliability" of sources of the *hadith*. See *id.*

155. See ESPOSITO, *supra* note 120, at 6.

156. ESPOSITO, *supra* note 120, at 6. Of the numerous collections of the *hadith* that emerged in the ninth century, only six are considered "genuine." *Id.* at 7; see also AN-NA'IM, *supra* note 131, at 22-23.

157. AN-NA'IM, *supra* note 131, at 23 (suggesting that some fabrication may still exist among six "authentic" Sunna compilations and among discarded or poorly ranked Sunna compilations); see also ESPOSITO, *supra* note 120, at 7, at 112-13 (discussing attacks on *hadith* collections and acknowledging existence of "forgeries" and inauthentic *hadith*).

158. HODKINSON, *supra* note 11, at 5.

159. ESPOSITO, *supra* note 120, at 7 (defining *ijtihad* as personal or independent juristic reasoning or interpretation).

160. See AN-NA'IM, *supra* note 131, at 25 (noting that *qiyas* has been resisted precisely because it is product of human reasoning rather than divine revelation and suggesting that *qiyas* should be limited to cases where none of other sources is applicable); ESPOSITO, *supra* note 120, at 7 (describing *qiyas* as extension of ruling in one situation to another situation that is similar in reason or cause).

161. ESPOSITO, *supra* note 120, at 7.

162. See ESPOSITO, *supra* note 120, at 7.

163. See ESPOSITO, *supra* note 120, at 7.

to the development of Islamic civilization, were fixed at the threshold values that stolen goods had to be worth before authorities would amputate a thief's hand.<sup>164</sup> It is important to note here that, while the analogy between a woman's virginity and "stolen goods" may be, at best, offensive, it is a man-made analogy, and is not directly derived from the Qur'an.<sup>165</sup> This is but one instance where a sexual stereotype is attributable to human judgment rather than to religious prescription.<sup>166</sup>

While human judgment may have interpreted the Qur'an to the ultimate detriment of women in some respects, the principle of *qiyas* facilitates the application of Islam to new problems and situations without actually purporting to interpret divine revelation.<sup>167</sup> This is an important point because, while the gates of *ijtihad* may have been effectively closed after the ninth century A.D., *qiyas* provided a window of opportunity whereby new principles could be developed with the support of preexisting *Shari'a* as a legitimating force.<sup>168</sup>

The final main source of *Shari'a*, *ijma*, is defined as the consensus of qualified legal scholars of a given generation.<sup>169</sup> *Ijma* is considered infallible, as the Prophet was once deemed to have said, "[M]y community will never agree on an error."<sup>170</sup> While the Qur'an and Sunna are generally thought to be preeminent over *ijma*, it is also widely contended that only those interpretations of the Qur'an and Sunna that have passed the test of *ijma* are authoritative.<sup>171</sup> A problem with the *ijma* principle is the difficulty of its logistical implementation: "How to secure or prove the agreement of scholars who were scattered far and wide throughout the Islamic empire?"<sup>172</sup> The problem of achieving agreement, or even proving that agreement

164. ESPOSITO, *supra* note 120, at 7.

165. See generally ESPOSITO, *supra* note 120, at 7 (noting that, by its nature, *qiyas* applies where no definitive pronouncement on given issue exists).

166. See generally ESPOSITO, *supra* note 120, at 7 (noting that application of *qiyas* principle occurs when no pronouncement exists on given issue, hence, by implication, suggesting that *mahr* example involved *qiyas* and therefore human judgment).

167. See AN-NA'IM, *supra* note 131, at 24-25.

168. See AN-NA'IM, *supra* note 131, at 25 (pointing out that *qiyas* served useful function in allowing for development of *Shari'a* without having to exercise *ijtihad*, which was impermissible after ninth century A.D.).

169. HODKINSON, *supra* note 11, at 4.

170. HODKINSON, *supra* note 11, at 4.

171. See AN-NA'IM, *supra* note 131, at 23 (stating that *ijma* is powerful influence over development of *Shari'a* because it determines interpretation and application of Qur'an and Sunna); see also HODKINSON, *supra* note 11, at 4 (maintaining that *ijma* is most important source of *Shari'a* because it infuses interpretations of Qur'an and Sunna with authority).

172. HODKINSON, *supra* note 11, at 4-5.

has been reached, is one with which Muslim scholars continue to grapple.<sup>173</sup>

### B. *Schools of Islamic Law*

The various schools of Islamic law came about in response to disillusionment in the Islamic world during the mid-seventh to mid-eighth centuries.<sup>174</sup> During this period, known as the *Umayyad*, *qadis*, or judges, were entrusted with interpreting the law.<sup>175</sup> A belief that the *qadis* were failing in their duty to "incorporate and implement the spirit of Quranic reforms" resulted in growing discontent.<sup>176</sup> Various schools of law sprang up in major cities throughout the Islamic world and *Imams* (religious leaders) associated themselves with these schools.<sup>177</sup> The different schools of Islamic law were subsequently named after the *Imams* who founded them.<sup>178</sup> The four major surviving schools are the Shafi'i, Hanafi, Maliki, and Hanbali.<sup>179</sup>

The differences between these schools are at times significant with respect to the rights accorded to women.<sup>180</sup> For example, the Hanbali school recognizes a woman's right to determine certain nonessential but enforceable provisions of her marriage contract, while the Hanafi school does not.<sup>181</sup> The schools also differ in their treatment of divorce by judicial process.<sup>182</sup> Under Hanafi law, women have very narrow grounds for instigating court-mandated

173. HODKINSON, *supra* note 11, at 4-5.

174. See ESPOSITO, *supra* note 120, at 2 (documenting history of various schools of Islamic law).

175. See ESPOSITO, *supra* note 120, at 2 (describing chronology of juristic decisionmaking and its guardians).

176. ESPOSITO, *supra* note 120, at 2.

177. See ESPOSITO, *supra* note 120, at 2 (describing origin of schools of law during eighth century and eventual emergence of great *Imams*).

178. See ESPOSITO, *supra* note 120, at 2 (identifying *Imams* as Muhammad al-Shafi'i, Abu Hanifa, Malik ibn Anas, and Ahmad ibn Hanbal).

179. AN-NA'IM, *supra* note 131, at 18 (describing founding of schools and mentioning that school founded by Awaz'i did not survive). The schools originated in four main centers: Mecca, Medina, Kufa, and Baghdad. ESPOSITO, *supra* note 120, at 2. The followers of these schools associated themselves with one of the four great *Imams* of the time. See *supra* note 178 (identifying *Imams*). These developments occurred primarily in the eighth and ninth centuries. ESPOSITO, *supra* note 120, at 2-3. For a discussion of the differences between the four schools, see *infra* notes 180-84 and accompanying text; *infra* Part III.

180. See generally ESPOSITO, *supra* note 120, at 20-48 (discussing main features of classical Muslim family law, with some attention to differences between various schools of law).

181. ESPOSITO, *supra* note 120, at 23 (noting that Hanbali school allows women to regulate or prohibit polygamy in her marriage contract).

182. See generally ESPOSITO, *supra* note 120, at 34-35 (discussing grounds for divorce available to women under different schools).

dissolution of a marriage.<sup>183</sup> By contrast, under the Maliki school, a wife may file for a court-ordered divorce under relatively broader grounds.<sup>184</sup> Islam underscores the importance of the differences among various schools of law by giving Muslims the right to switch schools.<sup>185</sup> A [*Sunni*] Muslim may, "even for the sake of convenience where one school's legal regime proves more favourable to his purposes than another's,"<sup>186</sup> adopt a different school.<sup>187</sup>

### C. *The Distinction Between Public and Private Shari'a*

The *Shari'a* is a code of law regulating both public and private life.<sup>188</sup> The areas of law included in the public domain are constitutional order, criminal law, and international and human rights law.<sup>189</sup> Private *Shari'a* includes laws governing religious practice and personal life.<sup>190</sup> The distinction between these two spheres is not always clear, and some overlap exists.<sup>191</sup> The Women's Convention seeks to impact both extra-governmental, private conduct as well as public law in signatory states and hence is unconcerned with any distinction between the two spheres.<sup>192</sup> Many Islamic nations, by contrast, are very much aware of the public/private distinction, adopting secular Western norms in the realm of public law, but

183. See ESPOSITO, *supra* note 120, at 34-35 (setting out circumstances under which courts may grant divorce under Hanafi law). Esposito explains that:

a court may dissolve a marriage only if: (1) the marriage is irregular; (2) a person who has the option to dissolve the marriage exercises it; (3) the parties are prohibited from marriage by fosterage; (4) the marriage was contracted by non-Muslims who subsequently adopt Islam (or vice versa); (5) a husband is unable to consummate the marriage; or (6) he is missing.

*Id.* at 35.

184. See ESPOSITO, *supra* note 120, at 35 (stating that, under Maliki law, wife may divorce her husband if he (1) is cruel; (2) refuses or is unable to maintain her; (3) deserts her; or (4) has serious disease or ailment that would endanger her were their marriage to continue). The Maliki school thus allows for cruelty in a marriage as a grounds for divorce. By contrast, the Hanafi school's grounds for divorce are largely procedural, with the exception of a husband being missing or unable to consummate the marriage. *Id.*

185. See HODKINSON, *supra* note 11, at 7 (asserting that Muslims may change schools at any time in light of mutual tolerance exhibited by each).

186. HODKINSON, *supra* note 11, at 7.

187. See HODKINSON, *supra* note 11, at 7 (noting that changing schools is accepted practice). But see ESPOSITO, *supra* note 120, at 95-96 (stating that tradition is not to combine teachings, but to follow one school).

188. See AN-NA'IM, *supra* note 131, at 1.

189. AN-NA'IM, *supra* note 131, at 1.

190. AN-NA'IM, *supra* note 131, at 1.

191. See AN-NA'IM, *supra* note 131, at 1 (noting that some private matters, such as inheritance and family law, have constitutional ramifications).

192. Women's Convention, *supra* note 1, art. 16, at 197 (seeking to regulate marriage and family relations in signatory states). See generally Women's Convention, *supra* note 1, art. 2, at 194-95 (mandating that States Parties must undertake to abolish customary practices that discriminate against women, as well as public and institutional discrimination against women).

continuing to follow the *Shari'a* in matters of personal status or private law.<sup>193</sup> While private law reform has occurred, the real value of these reforms is contested, oftentimes serving as mere "paper tigers."<sup>194</sup> Thus, the *Shari'a*, as it governs personal status and family law, has traditionally proven to be more difficult to reform and, where the *Shari'a* diverges from the Women's Convention, reconciling the two may be difficult.<sup>195</sup>

Secularization of public laws is an obvious solution to the problem of reforming public law aspects of the *Shari'a* that are contrary to accepted norms. It has been contended, however, that the concept of secularism is unworkable in the context of Islamic religious practice.<sup>196</sup> Nevertheless, "[Muslims] are sensitive to tensions between inherited wisdom and the realities of the modern world,"<sup>197</sup> and this awareness is reflected in the "concessions [made] to the demands of constitutionalism and the rule of law in national and international relations."<sup>198</sup> For example, *Shari'a* recognizes "the aggressive use of force to propagate Islam and does not recognize the equal sovereignty of non-Muslim states. These aspects of *Shari'a* repudiate the basis of modern international law."<sup>199</sup> Another example of the *Shari'a's* inconsistency with widely accepted human rights norms<sup>200</sup> is the acceptability of slavery under a literalist interpretation of the *Shari'a*.<sup>201</sup> The majority of Muslims condemn such aspects of the *Shari'a*, which have been rejected in the laws of

193. See MINOU REEVES, *FEMALE WARRIORS OF ALLAH* 29 (1989) (explaining that, in many Islamic countries, law is amalgamation of religious and secular concepts); see also FATIMA MERNISSI, *BEYOND THE VEIL* 22 (1987) (distinguishing subject matter not governed by *Shari'a*, such as penal law, taxation, constitutional law, and law of war, from subject matter over which *Shari'a* retained control, such as religious duties, marriage, divorce and maintenance, and inheritance). But cf. REEVES, *supra* (noting that some Islamic nations, such as Turkey, chose to completely eliminate religious law from their legal system).

194. Compare REEVES, *supra* note 193, at 29 (attesting to concessions made in *Shari'a* by Islamic states to appease feminists) with ELIZ SANASARIAN, *THE WOMEN'S RIGHTS MOVEMENT IN IRAN* 100 (1982) (calling attempts at *Shari'a* reform in Iran compromises and mockeries).

195. But cf. REEVES, *supra* note 193, at 29 (maintaining that emerging feminist movements have forced Islamic countries to move slowly away from traditional system, where Western principles governed public law and *Shari'a* governed private law). Compare with SANASARIAN, *supra* note 194, at 97 (stating that Iran's personal status law reforms merely refined existing *Shari'a*) and MERNISSI, *supra* note 193, at 22 (stating that religious laws remain uncontested).

196. See Abdullahi Ahmed An-Na'im, *Islamic Law, International Relations, and Human Rights: Challenge and Response*, 20 CORNELL INT'L L.J. 317, 319 (1987) (stating that, traditionally, Muslims find secular reforms to their religious laws unacceptable).

197. An-Na'im, *supra* note 196, at 319.

198. An-Na'im, *supra* note 196, at 319.

199. AN-NA'IM, *supra* note 131, at 9.

200. See AN-NA'IM, *supra* note 131, at 9 (stating that *Shari'a* violates some of most fundamental human rights standards).

201. See AN-NA'IM, *supra* note 131, at 9 (stating that slavery may be reestablished under *Shari'a* if certain conditions are met).



Islamic states.<sup>202</sup> Thus, where aspects of the *Shari'a's* public law are repugnant to international norms, the latter have been adopted.<sup>203</sup> Important exceptions to the adoption of international norms in the public context do exist, however. In Pakistan, for example, there has been a recent reversion to Islamic evidentiary requirements that disproportionately work to the detriment of women.<sup>204</sup> Nevertheless, with few exceptions, public law in Islamic countries is largely consistent with international consensus.<sup>205</sup> This point is underscored by the lack of *Shari'a*-based reservations registered against Articles 7 and 8 of the Women's Convention, which deal with the equality of women in public life and women's right to adequate representation.<sup>206</sup> Traditional *Shari'a*, by contrast, limits women's ability to participate in public life.<sup>207</sup>

Private law reform has proven to be a totally different matter, however. The general condemnation of some practices sanctioned by the *Shari'a* that run against the grain of human rights norms in the public sphere has not been matched in the private sphere.<sup>208</sup> One obvious explanation for this dichotomy between the public and private spheres is that "the reform of personal status codes appears to many men not as an advantage but as a loss of rights and powers . . . deep psychological biases and fears mesh with religion and tradition and with the total organization of society to form a barrier . . ."<sup>209</sup>

Iran's history of personal law reform exemplifies the continued deference accorded to practices that are oppressive to women<sup>210</sup> and reflects the experiences of other Islamic states.<sup>211</sup> Though Iran has

202. See AN-NA'IM, *supra* note 131, at 9.

203. Cf. AN-NA'IM, *supra* note 131, at 9 (discussing consensus of Muslim nations with international community that slavery is reprehensible).

204. See An-Na'im, *supra* note 196, at 328 (discussing violations of human rights as result of re-introduction of public *Shari'a* in Pakistan); *infra* Part III.D (setting out Pakistani evidentiary requirements and punishments harking back to literalist *Shari'a*).

205. See Nikki Keddie & Lois Beck, *Introduction to WOMEN IN THE MUSLIM WORLD* 1, 27-28 (Lois Beck & Nikki Keddie eds., 1978) (noting ease with which public Islamic law has been reconciled with international practice, particularly when compared with embedded nature of traditional family law).

206. ALL APPROPRIATE MEASURES, *supra* note 10, at 40-48 (providing text of Articles along with list of reserving States Parties and their reasons for reserving).

207. An-Na'im, *supra* note 196, at 330-31 (describing effects of public *Shari'a* on women, including bar on women holding executive or judicial positions).

208. See Keddie & Beck, *supra* note 205, at 27 (noting that personal law aspect of *Shari'a* has been tenaciously held onto in most Islamic countries).

209. Keddie & Beck, *supra* note 205, at 28.

210. See SANASARIAN, *supra* note 194, at 93-101 (documenting history and efficacy of legal reforms pertaining to women in Iran).

211. Cf. Jeneffsky, *supra* note 2, at 219 (summarizing Egypt's current personal status law and attendant problems, such as inability of woman to personally show she has been harmed by her husband's second marriage as grounds for seeking divorce); see also *supra* notes 89-102 and accompanying text (discussing reservations to Women's Convention registered by Egypt, Tunisia,

not acceded to the Women's Convention, it is a potential States Party given its membership within the U.N.<sup>212</sup> While Iran was largely regarded as liberated under the Shah's reign, some scholars maintain that *Shari'a* "remained untouched in laws concerning women, especially in the areas of morality, marriage, divorce and basic family relations,"<sup>213</sup> in spite of apparent personal law reforms.<sup>214</sup> With the passage of the Family Protection Act in 1967,<sup>215</sup> Iran took steps to restrict polygamy by requiring court permission when a man sought to marry a second wife, and mandating that the failure to obtain such permission is a penal offense.<sup>216</sup> Iran's polygamy reform was in effect drawn from the Qur'anic verse requiring equal treatment of wives.<sup>217</sup> Iran also sought to regulate divorce under the Family Protection Act.<sup>218</sup> Prior to the Act, Iran allowed unilateral divorce by a husband if two witnesses were present at the time that he pronounced the Qur'anic divorce formula (*talaq*).<sup>219</sup> Further, in contrast to a husband's unilateral and untrammelled right to divorce under Iranian law, a wife could divorce only in the event of her husband's impotence, insanity, inability to provide for her, ill-treatment of her, or contagious disease.<sup>220</sup> With the advent of the Family Protection Act, Iran allowed divorce, for both parties, only with

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and Morocco).

212. B'nai B'rith Women, List of States Parties (as of January 25, 1994), at 2 (May 1994) (listing United Nations Member States that have not yet ratified Women's Convention) (on file with *The American University Law Review*).

213. SANASARIAN, *supra* note 194, at 94.

214. See SANASARIAN, *supra* note 194, at 94-97 (referring to Family Protection Acts of 1967 and 1975 and noting that while Acts sought to reform marriage, divorce, and general family relations, reforms were often superficial).

215. See SANASARIAN, *supra* note 194, at 94.

216. See SANASARIAN, *supra* note 194, at 94 (citing to 1967 Family Protection Act, art. 14 (repealed 1975)).

217. See SANASARIAN, *supra* note 194, at 94 (indicating that 1967 Family Protection Act adopted provision from Qur'an that requires man who doubts ability to treat wives equally to refrain from remarrying); see also *supra* notes 141-42 and accompanying text (quoting text of Qur'anic verse mentioned in 1967 Act).

218. See SANASARIAN, *supra* note 194, at 95 (noting that Act required court permission for divorce and expanded divorce rights for both spouses in cases of imprisonment, addiction, abandonment, or court conviction of either spouse or remarriage of husband without wife's consent).

219. See SANASARIAN, *supra* note 194, at 95 (stating that although Iranian law required presence of two witnesses, requirement was rarely enforced). For a comprehensive overview of divorce in Islamic law, see ESPOSITO, *supra* note 120, at 28-39 (listing and describing various forms of divorce in Islam and their consequences). One of the customary forms of divorce practiced by Muslims, known as *talaq*, enables a husband to unilaterally divorce his wife with the utterance of one of several expressions three times. See *id.* at 30-31 (discussing *talaq* procedure). The wife is not a part of this procedure and, in effect, has no particular right to be present or to even be informed that she has been divorced. *Id.* at 31.

220. See SANASARIAN, *supra* note 194, at 95 (citing CIVIL CODE OF IRAN, arts. 1121, 1122, 1129, 1130, 1133, 1134).

a court's permission.<sup>221</sup> In theory, Iran's reforms looked promising. In practice, however, the reforms were ineffective because of the continued adherence to customary practices and legal loopholes in the wording of the law, which further entrenched men's superior position in Iran's legal and social hierarchy.<sup>222</sup>

Problems of implementation are difficult to overcome, particularly when more than one interpretation of a legal provision is possible. This is exemplified in the instance of the expanded divorce rights granted under the Family Protection Act of 1967, which granted divorce rights when a husband remarries without the consent of his original wife.<sup>223</sup> It is possible to interpret this law as enabling *either* the husband or original wife to obtain a divorce based on the wife's refusal to consent.<sup>224</sup> A reformatory approach would recognize only a wife's right to obtain a divorce following her unwillingness to consent to her husband's second marriage. The goal of expanding women's rights is compromised by providing husbands with additional grounds for divorcing their wives, in addition to their already untrammelled rights to divorce. What follows a wife's refusal to consent to her husband's second marriage depends on the enlightenment of the judiciary in enforcing the laws to her advantage, or on whether a woman is informed of her rights and enterprising enough to exercise them.<sup>225</sup> Thus, reform of the personal law system

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221. See SANASARIAN, *supra* note 194, at 95 (noting that court could not issue divorce unless convinced reconciliation was impossible).

222. See SANASARIAN, *supra* note 194, at 97 (finding that reforms are often "skin deep" or ineffective due to women's lack of knowledge of their rights and restrictive interpretation of reforms by judiciary) (quoting J.N.D. Anderson, *Modern Trends in Islam: Legal Reform and Modernisation in the Middle East*, 20 INT'L & COMP. L.Q. 1, 21 (1971)). For example, under the polygamy reform, a court would contact the first wife of a man petitioning to contract a second marriage "when possible" in order to determine whether a man is capable of supporting more than one wife. *Id.* at 94. This provision effectively left the participation of the first wife in this process to the court's discretion. Additionally, implementation problems resulted because financially and socially dependent women could be forced to agree to a polygamous union. *Id.* at 95. The 1967 Family Protection Act added several other conditions under which a divorce could be obtained, such as imprisonment of a spouse, addiction, abandonment, and remarriage of a husband without his wife's consent, which, while increasing a wife's opportunities to divorce her husband in theory, was inconsistently applied in practice so that women did not see equal divorce rights. *Id.* at 97. For example, the right to divorce based on remarriage of a husband contracting a second marriage without his first wife's permission applied to *both* husband and wife. See *id.* (stating that although reforms increased number of grounds available to women seeking divorces, these new grounds were also available to men).

223. See SANASARIAN, *supra* note 194, at 97 (indicating that implementation and enforcement of new divorce reforms was weak and inconsistent).

224. See SANASARIAN, *supra* note 194, at 95 (noting that Article 11 of Family Protection Act, which provides for expanded divorce rights, addresses itself to both men and women).

225. See SANASARIAN, *supra* note 194, at 97 (indicating that reforms are meaningless unless women are aware of and exercise rights and judiciary interprets rights broadly) (quoting Anderson, *supra* note 222, at 21).

requires the formulation of airtight laws that are not subject to manipulation by a potentially biased judiciary.

#### D. *Conclusions on the Shari'a*

From the foregoing discussion, several general conclusions may be drawn. First, Islam and, by extension, the *Shari'a*, were revolutionary phenomenon in pre-Islamic Arabia that reformed the status quo and, thus, benefitted society as a whole and women in particular.<sup>226</sup> Second, the various schools of *Shari'a*, with their different legal prescriptions, have prevented formation of an altogether uniform *Shari'a*.<sup>227</sup> Third, the previous point is underscored by the very nature of the sources of *Shari'a*. The *Shari'a* consists not just of the Qur'an, but also of any of six compilations of the deeds and actions of the Prophet Muhammad, comprising the *hadith* of the Sunna.<sup>228</sup> Further, elements of subjectivity are a factor when considering the nature of *ijma* (consensus) and *qiyas* (reasoning by analogy).<sup>229</sup> It is reasoned that *ijma* (note that *ijma* cannot be taken back, as it was considered permanently binding once pronounced)<sup>230</sup> is a most important source of law, because it is only through *ijma* that interpretations of the Qur'an and Sunna are legitimated and given authoritative force.<sup>231</sup> The principle of *qiyas* at work was illustrated by the analogy drawn between a bridal dower and the penalty for theft.<sup>232</sup> Such analogies are man-made interpretations of divine law.<sup>233</sup> Moreover, while a strictly Islamic society does not allow for secular law reform,<sup>234</sup> it has been shown that, in many Islamic countries, the laws already in force reflect a combination of the religious and the secular, and that even within the religious, reform has been attempted.<sup>235</sup> Problems with loopholes in reform language, restrictive

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226. See ESPOSITO, *supra* note 120, at 14-15 (documenting condition of women in pre-Islamic Arabia and noting that Islam brought profound social changes and elevated women's status).

227. See *supra* notes 174-87 and accompanying text (discussing various schools of Islamic law).

228. See *supra* notes 133-57 and accompanying text (discussing both Qur'an and Sunna as sources of *Shari'a*).

229. See *supra* notes 158-73 and accompanying text (addressing *qiyas* and *ijma* as sources of *Shari'a*).

230. See ESPOSITO, *supra* note 120, at 122 (explaining that while *ijma* was initially dynamic process that allowed for adapting law as times changed, it eventually became rigid and inflexible).

231. See HODKINSON, *supra* note 11, at 4 (noting that only interpretations of Qur'an and Sunna sanctioned by *ijma* are authoritative and definitive).

232. See *supra* text accompanying notes 161-66.

233. See *supra* text accompanying note 165.

234. See HODKINSON, *supra* note 11, at 5 (stating that, because *Shari'a* is divinely obtained law, "human legislation" is not provided for).

235. See *supra* notes 193-221 and accompanying text (discussing adoption of secular Western principles in public law and attempts to reform religious law).

interpretation by the judiciary, and infrequent use of reforms by women all impede effective utilization of the reforms.<sup>235</sup>

### III. THE PRACTICE AND REFORM OF *SHARI'A* IN SELECT STATES

The effect of the *Shari'a* on women's lives becomes clear when it is studied in the context of its practice in various states. Some examples, most notably from Iran, have already been mentioned.<sup>237</sup> This section focuses on the history and application of *Shari'a*-based personal laws and their reform in four countries, namely Morocco, Tunisia, Egypt, and Pakistan. Of these countries, Morocco, Tunisia, and Egypt have acceded to the Women's Convention,<sup>238</sup> albeit with substantial reservations.<sup>239</sup> Pakistan is a potential States Party given its membership within the U.N.<sup>240</sup> The focus on these four countries will illustrate several points, among them, the interaction and interrelationship of legislative laws and the school of law that the majority populations in these countries traditionally subscribe to; the creative application of traditional Islamic reform mechanisms to achieve results desired by those in power; the importance of activism at the grassroots level in precipitating change; the inadequacy of laws that provide loopholes through which reformatory effects may be avoided; and the politicization of Islam and the practice of cloaking regressive laws in "Islamic" terms to achieve political purposes.

#### A. Morocco

As a traditionally Maliki country, Morocco emphasizes those aspects of *Shari'a* specific to the Maliki school, but also departs from characteristically Maliki teachings where necessary in order to achieve reforms.<sup>241</sup> As previously discussed, the Maliki school allows women

236. See *supra* notes 222-25 and accompanying text (discussing problems of implementation, interpretation, and enforcement of reforms).

237. See *supra* notes 210-22 and accompanying text (discussing difficulties of implementing private law reform in Islam with result that *Shari'a* remained largely untouched, and illustrating this principle with Iran's history of personal law reform).

238. CEDAW Report, *supra* note 7, at 154-57 (providing list of States Parties to Women's Convention).

239. CEDAW Report, *supra* note 7, at 154-56 (identifying Morocco, Tunisia, and Egypt among States Parties declaring reservations to Women's Convention); Report of the Secretary-General, *supra* note 10, at 8-10 (providing text of Morocco's declaration on and reservations to Articles 2, 9, 15, 16, and 29); ALL APPROPRIATE MEASURES, *supra* note 10, at 54, 122, 133 (providing text of Tunisia's reservations to Articles 9, 15, and 16 of Women's Convention); *id.* at 10, 52, 131 (providing text of Egypt's reservations to Articles 2, 9, and 16 of Women's Convention).

240. See B'nai B'rith Women, *supra* note 212, at 2 (listing U.N. Member States who are potential States Parties, including Pakistan).

241. See Vanessa Maher, *Women and Social Change in Morocco*, in WOMEN IN THE MUSLIM WORLD, *supra* note 205, at 100, 101 (indicating Moroccan society was integrated by common adherence to Maliki Islam and its particular body of tradition); see also, MERNISSI, *supra* note 193,

to acquire judicially decreed divorces under relatively more liberal circumstances than Hanafi women.<sup>242</sup> In other aspects, however, Maliki law is more conservative. Maliki women, for example, may have their marriages arranged without their consent and against their will, even as adults, unless they have been married previously.<sup>243</sup> In order to counteract this provision of the Maliki school, Morocco has enacted several safeguards that do not directly contravene the provision. For example, Morocco passed a minimum age for marriage of fifteen years.<sup>244</sup> This means that a young Moroccan woman cannot be contracted in marriage against her will until she is fifteen years old. Another provision of Moroccan law provides that, while a marriage guardian may still fix a woman's marriage on her behalf, as mandated by the Maliki school, "no adult woman may be contracted in marriage without her consent unless the court accepts the guardian's application to marry her on the grounds that he is concerned about her moral welfare."<sup>245</sup> This "moral welfare" provision illustrates that, while the possibility that a woman is given in marriage against her will is substantially curtailed, loopholes in the law exist in that there is substantial room for discretion in determining what constitutes "concern about moral welfare."<sup>246</sup>

In the area of polygamy, while Morocco has not restricted the practice directly, family law reforms enacted in 1958 created a provision allowing a woman to stipulate in her marriage contract that she has the right to divorce her husband should he subsequently remarry.<sup>247</sup> This practice was borrowed from the Hanbali school of law, which recognizes the validity of such contractual stipulations, as long as they do not negate the essential aspects of the marriage itself.<sup>248</sup>

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at 181 n.38 (identifying regions in which various schools of *Sunni Shari'a* predominate).

242. *Supra* note 184 and accompanying text.

243. See Noel Coulson & Doreen Hichcliffe, *Women and Law Reform in Contemporary Islam*, in *WOMEN IN THE MUSLIM WORLD*, *supra* note 205, at 37, 39 (noting that Maliki countries did not traditionally require consent of both spouses to contract them in marriage and pointing out that Morocco still requires women to be represented by guardian in contracting marriage).

244. See *id.* at 41 (stating that minimum age for marriage in Tunisia and Morocco is 15).

245. *Id.*

246. See *id.*

247. See ESPOSITO, *supra* note 120, at 93 (noting that Morocco and Jordan enacted provisions allowing wife to retain right, in marriage contract, to divorce husband for taking second wife, and distinguishing this feature of Hanbali law from Hanafi law).

248. See ESPOSITO, *supra* note 120, at 93 (explaining that Hanbali school allows inclusion of such stipulations in marriage contract); see also Coulson & Hichcliffe, *supra* note 243, at 40-41 (citing Qur'anic verse, which is basis for Hanbali provision, and noting that Hanbali view has been at forefront of reform in many Muslim countries).

While Maliki law, which predominates in North African nations such as Morocco,<sup>249</sup> is conservative in according women marriage rights, it served as the basis for law reforms in the area of divorce, primarily because it provides the most liberal framework for granting a woman a judicially decreed divorce.<sup>250</sup> Accordingly, Morocco further restricted a husband's unfettered right to divorce by requiring court permission in order to obtain a divorce.<sup>251</sup>

Morocco has also reformed the Qur'anic punishment for a wife's continued "disobedience" toward her husband. The Qur'an allows a husband to beat his wife as a "last resort" if she fails to obey him.<sup>252</sup> The Moroccan Code du Statut Personnel of 1958 (Code of Personal Status) allows a battered wife to bring suit against her abusive husband.<sup>253</sup> This expansion in legal remedies available to women is counteracted, however, by the condition requiring physical evidence of mistreatment and the further stipulation that such mistreatment must be "demonstrably unbearable."<sup>254</sup> Further, it lies within a judge's discretion whether or not the mistreatment meets the standard.<sup>255</sup> Thus, while Moroccan law expanded women's rights in some respects, it either left in place or created impediments to the full realization of increased rights for women.

Developments in Morocco's legal history illustrate the positive aspects of borrowing from different schools of Islamic law.<sup>256</sup> However, problems of implementing new and liberalized laws, such as awareness among women of their rights, and judicial subjectivity in the interpretation of new laws, are realities that may impede the effectiveness of legal reforms.<sup>257</sup> In addition, loopholes built into

249. See MERNISSI, *supra* note 193, at 181 n.38 (referring to Maliki school as "Malekite" school, which dominates in North Africa).

250. See Coulson & Hichcliffe, *supra* note 243, at 41 (distinguishing Maliki law, which is more liberal in terms of securing women's right to divorce in that it grants women divorce rights where they are treated cruelly by their husbands or deserted, from Hanafi law, which denies women right to divorce, and stating that Maliki law has provided basis for divorce law reform).

251. See ESPOSITO, *supra* note 120, at 93 (noting that, with reforms of 1958, husband's unilateral right of divorce under traditional Islamic law became subject to court jurisdiction). The 1958 legal reforms in Morocco are manifested in the *Code du Statut Personnel*, which fixes minimum ages for marriage and restricts a husband's unilateral right to divorce (*talaq*). Coulson & Hichcliffe, *supra* note 243, at 50.

252. See MERNISSI, *supra* note 193, at 111, 188 n.7 (referring to *sura* 4, verse 34 of Qur'an, which states that beating is permissible to enforce obedience only if all other measures fail).

253. See MERNISSI, *supra* note 193, at 111, 188 n.9 (discussing progressive effect of Article 56 of 1958 on women's legal rights).

254. MERNISSI, *supra* note 193, at 111.

255. See MERNISSI, *supra* note 193, at 111.

256. See *supra* notes 185-87 and accompanying text (discussing right to switch Islamic schools).

257. See SANASARIAN, *supra* note 194, at 97 (citing Anderson's critique of legal reforms as "skin deep" and ill-suited to realities of village women, with attendant problem of ensuring

reforms may also defeat advances in the legal relief afforded women, as demonstrated by the requirement of physical evidence in wife-beating cases.<sup>258</sup>

Despite such shortcomings, the need for Moroccan reservations entered to Article 16 of the Women's Convention are not entirely apparent.<sup>259</sup> The substantial reforms undertaken by Morocco indicate that *Shari'a* can be applied in a flexible manner. Moreover, in formulating its reservations, it does not appear that the Moroccan Government has drawn a distinction between what is permitted and what is prescribed under the *Shari'a*. For example, it would be difficult to argue that measures such as wife-beating and polygamy are required under the *Shari'a*.<sup>260</sup> Accordingly, the Moroccan reservations may be more narrowly drawn.<sup>261</sup>

### B. Tunisia

The experience of Tunisia, another North African Islamic nation, provides an example of a different route to reform. Tunisia enacted major reforms to existing *Shari'a* with the passing of the Code of Personal Status in 1956.<sup>262</sup> The Code abolished polygamy, required that divorces be pronounced by a court of law, gave women the same rights to divorce as men, and established minimum ages for marriage.<sup>263</sup> Tunisia justified these radical reforms with Qur'anic reasoning:

The government argued that (1) polygamy, like slavery, was an institution whose past purpose was no longer acceptable to most people; and (2) the ideal of the *Quran* was monogamy. Here [a reformist position] was espoused, namely, that the *Qur'anic*

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judicial compliance with spirit of legal reforms) (quoting Anderson, *supra* note 222, at 21).

258. See MERNISSI, *supra* note 193, at 111 (discussing requirement of physical evidence in wife-beating cases). For another example of self-defeating legal reforms, see *supra* text accompanying note 245 (noting that legislation banning forced marriages provided loophole allowing guardian to contract marriage on woman's behalf where he can demonstrate to court that he is "concerned about her moral welfare").

259. Morocco's reservation to Article 16 of the Women's Convention essentially states that it reserves the right to accede to those provisions of the Article that are incompatible with the Islamic *Shari'a*, and points to provisions "relating to the equality of men and women in respect of rights and responsibilities on entry into and at dissolution of marriage" as examples of provisions running contrary to the *Shari'a*. See *Report of the Secretary-General*, *supra* note 10, at 9; see also Women's Convention, *supra* note 1, art. 16(1)(a)-(c) (giving men and women equal right to marry and divorce).

260. See AMINA WADUD-MUHSIN, *QUR'AN AND WOMAN* 84 (1992) (noting that Qur'an does not directly sanction polygamy).

261. For the complete text of Morocco's reservations to Article 16 of the Women's Convention, see *Report of the Secretary-General*, *supra* note 10, at 9.

262. See Coulson & Hichcliffe, *supra* note 243, at 49-50 (documenting Tunisia's reforms within chronological table of legal reforms throughout Muslim world).

263. Coulson & Hichcliffe, *supra* note 243, at 49-50.



permission to take up to four wives (IV:3) was seriously qualified by verse 129: 'Ye are never able to be fair and just between women even if that were your ardent desire' (IV:129). Thus, while polygamy was permitted, the *Quranic* ideal is monogamy.<sup>264</sup>

This method of trying to fashion reform from Qur'anic principles without purporting to reinterpret the Qur'an, in tandem with then-President Bourguiba's moral authority as a historical figure of the independence movement, contributed to the popular support and societal legitimacy enjoyed by these reforms.<sup>265</sup> Not all sectors of Tunisian society agreed with the changes, however. Surprisingly, the judiciary was at the vanguard of a movement of conservatives and others with a vested interest in the traditional system opposing the reforms.<sup>266</sup> Nevertheless, Bourguiba's government was able to co-opt dissident judges into either accepting the new laws or transferring to other posts.<sup>267</sup>

Another major reason for the success of the reforms was the parallel mobilization of socialist forces at the grassroots level.<sup>268</sup> The socialist party put into force numerous programs to facilitate the transition.<sup>269</sup> Specifically, it undertook to educate the general population about the need for change, created the National Union of Tunisian Women, and included women on its electoral slates. Thus, women were enfranchised socially, economically, and politically due in significant part to the efforts of extra-governmental actors.<sup>270</sup>

The momentum of these reforms, however, was lost over time, primarily due to Bourguiba's illness and ensuing power struggles.<sup>271</sup> Eventually, by the late 1960s, a traditionalist mentality began to overtake the country and the momentum of the prior legal and social

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264. ESPOSITO, *supra* note 120, at 92-93.

265. See REEVES, *supra* note 193, at 71 (explaining that success of reforms is largely attributable to general respect for Bourguiba as well as his "concern to avoid rupture with the authentic background of Tunisian society," namely, Islam).

266. See Mark A. Tessler, *Women's Emancipation in Tunisia*, in *WOMEN IN THE MUSLIM WORLD*, *supra* note 205, at 141, 142 (explaining that justices from both religious and civil courts were opposed to Code and sometimes refused to implement it); see also REEVES, *supra* note 193, at 71 (explaining that judges opposed to reforms, such as judges of religious courts who had vested interest in continuation of traditional system, were unable to mobilize broad support).

267. See Tessler, *supra* note 266, at 142. It is reported that Bourguiba has personally intervened in court when he felt that a woman was not being accorded her due rights. Bourguiba appealed to jurists to be "civilized." *Id.*

268. See Tessler, *supra* note 266, at 143 (discussing role of Neo-Destour Party in efforts to resocialize population to accept changes).

269. Tessler, *supra* note 266, at 143.

270. See generally Tessler, *supra* note 266, at 143 (discussing activities of National Union of Tunisian Women including meetings held to discuss health, child care, birth control, and professional problems faced by women).

271. See Tessler, *supra* note 266, at 144-46.

reforms was never regained.<sup>272</sup> As a result of decreasing governmental emphasis on law reform and equal status for women, such goals lost support with the Tunisian polity.<sup>273</sup> While unofficial efforts at reform continued,<sup>274</sup> they required governmental support in order to win wide-scale societal approval.<sup>275</sup>

While the momentum of the reforms may have slowed, the gains made in the wake of Tunisian independence as a result of dynamic legal reforms remain apparent.<sup>276</sup> The success of the Tunisian reforms seems to rest on several factors. As mentioned earlier, important ingredients contributing to the success of the reforms included the legitimacy of Bourguiba's leadership, combined with unofficial grassroots reform movements working in tandem with the official machinery.<sup>277</sup> An additional factor was the appeal of reforms imbued with Islamic legitimacy.<sup>278</sup> In outlawing traditional mainstays of the *Shari'a* as it is practiced, such as polygamy and *talaq* (a husband's unilateral power to divorce his wife through the pronouncement of a repudiation formula<sup>279</sup>) the reforms were "innovative reinterpretation[s]" of religious laws.<sup>280</sup> Bourguiba characterized the Tunisian legal reforms as accomplishing as much as is possible "in terms of reform of personal law, while still remaining a Muslim state."<sup>281</sup> Tunisia is an illustration of progressive changes

272. See Tessler, *supra* note 266, at 147 (quoting respected Tunisian sociologist and stating that revolutionary momentum of post-independence Tunisia was lost).

273. See Tessler, *supra* note 266, at 151 (noting that support for women's rights showed marked decline between 1967 and 1973).

274. See Tessler, *supra* note 266, at 151 (remarking that unofficial reform efforts were not only unsuccessful absent government support, they contributed to decline in popular support for reforms).

275. See Tessler, *supra* note 266, at 151 (describing government effort necessary to promote popular support); *supra* notes 272-73 and accompanying text (discussing how decrease in governmental priority for equal rights for women decreased societal approval of reforms).

276. See Tessler, *supra* note 266, at 154 (asserting that Tunisia remains one of most advanced Arab nations in terms of women's rights and that, in spite of deterioration of legal reforms, it remains far ahead of most Arab counterparts as result of post-independence reform campaign).

277. See *supra* notes 265-70 and accompanying text (stating that government and grass roots support for legal reform were essential).

278. See Elizabeth H. White, *Legal Reform as an Indicator of Women's Status in Muslim Nations, in WOMEN IN THE MUSLIM WORLD*, *supra* note 205, at 52, 58 (contending Tunisia took "unusual" step in comparison with Turkey and Communist Muslim states by abolishing polygamy and *talaq* in context of "Islamic explanation").

279. See Coulson & Hichcliffe, *supra* note 243, at 37.

280. See Sullivan, *supra* note 3, at 852-53 (stating that reinterpreting religious laws is successful method for reform).

281. White, *supra* note 278, at 59 (itemizing Tunisian reforms and respective Islamic justifications). White's essay effectively recaps the Tunisian reforms: The abolition of polygamy was founded on the Qur'anic teaching that men must practice impartiality amongst their wives, which, according to some interpretations, is also Qur'anically impossible. *Id.* Unilateral divorce for men (*talaq*) was also abolished based on Islamic principles that divorce is disfavored and arbitration must be attempted when there is marital discord. *Id.* Thus, the Tunisian reforms

inspired by Islamic traditions rather than Western precedent.<sup>282</sup> Yet, "no other Muslim country has followed the Tunisian example,"<sup>283</sup> opting instead for more limited reforms.<sup>284</sup>

Curiously, Tunisia has entered a reservation with respect to Article 16(c) of the Women's Convention,<sup>285</sup> which requires that women and men enjoy the same rights and responsibilities at marriage and at its dissolution.<sup>286</sup> Tunisia's extensive reform of family law suggests that the Code of Personal Status presents little conflict with Article 16(c) of the Women's Convention.<sup>287</sup> Nevertheless, law norms holding impermissible the preference for domestic law as an explanation for noncompliance with treaty obligations<sup>288</sup> suggest that Tunisia's rationale for reserving the right to accede to provisions of Article 16 is inadequate.<sup>289</sup> Tunisia may alternatively argue, under Article 23 of the Women's Convention, that its legislation is more conducive to achieving equality between men and women than is Article 16,<sup>290</sup> rather than merely stating that certain provisions of Article 16 "must not conflict with [select] provisions of the Personal Status Code."<sup>291</sup> Thus, as they stand, Tunisia's reservations to Article 16 seem impermissibly formulated and substantively unnecessary.

required that all petitions for divorce be arbitrated by a court of law. *Id.* at 58-59.

282. See REEVES, *supra* note 193, at 71-72 (explaining that Bourguiba's reforms were successful, both because they remained consistent with Tunisia's Islamic heritage and because there was "general unwillingness" to break with Islamic traditions, as Turkey and Iran did, during Shah's reign).

283. ESPOSITO, *supra* note 120, at 93.

284. See ESPOSITO, *supra* note 120, at 93 (pointing to more conservative reform paths followed by Syria and Pakistan).

285. ALL APPROPRIATE MEASURES, *supra* note 10, at 133 (providing text of Tunisia's reservation to Article 16, which states that Tunisia does not consider itself bound by Article 16(1)(c), (d), (f), (g), and (h) due, in part, to conflicts that may exist between Code of Personal Status and certain provisions of Article). Tunisia does not specifically state that its reservation is rooted in the Islamic *Shari'a*. ALL APPROPRIATE MEASURES, *supra* note 10, at 13. However, this is one possible reason, although by no means the only one.

286. Women's Convention, *supra* note 1, art. 16(c), at 196.

287. Compare *supra* note 263 and accompanying text (stating that Code abolished polygamy, mandated that courts sanction divorce, gave men and women same rights to divorce, and set minimum age for marriage) with Women's Convention, *supra* note 1, art. 16(c) (stating men and women enjoy same rights and responsibilities at marriage and at its dissolution).

288. See *supra* note 114 and accompanying text (discussing Vienna Convention provision rendering impermissible reservations invoked on grounds of domestic law).

289. See Vienna Convention, *supra* note 22, art. 27, 1155 U.N.T.S. at 339 (setting out that provisions of internal law will not serve as bar to implementing States Parties' treaty obligations).

290. See Women's Convention, *supra* note 1, art. 23(a) (stating that legislation of States Parties more conducive to achieving women's equality shall not be affected by provisions of Women's Convention).

291. ALL APPROPRIATE MEASURES, *supra* note 10, at 133.

### C. Egypt

Egypt's experience with the *Shari'a* exemplifies the dichotomy of retaining both Western-inspired public law and Islamic personal or family law.<sup>292</sup> Egypt was to play a pivotal role in inspiring reformist movements in other parts of the Muslim world—a role that began with the adoption by many Islamic countries of Egyptian scholar Muhammad Qadri Pasha's authoritative code of laws based on the Hanafi school and compiled under the aegis of the Egyptian Government.<sup>293</sup> This code "greatly influence[d] the administration of *Shari'a* in Egypt and other parts of the Middle East by the turn of the century."<sup>294</sup> While the code was never officially enacted, its influence as a reference for *Shari'a* courts was felt in various parts of the Middle East outside of Egypt.<sup>295</sup> When family law reform finally did occur in Egypt in the 1920s, the Egyptian example led other Arab countries toward reform.<sup>296</sup> "Egyptian jurisprudence and legislation was to provide the impetus for modernist legislation throughout the Arab world."<sup>297</sup> Egyptian legal reforms, and the innovative mechanisms used to achieve them, were to be adopted by other Muslim countries seeking to achieve family law reforms within the limits prescribed by Islam. Thus, a discussion of Egypt is central to the study of the *Shari'a* as it is practiced in many countries given the trailblazing role Egypt has played in the development and reform of the *Shari'a*.

Among the earlier Egyptian reformers who had a tremendous impact on the practice and reform of Islamic law was Rifaah Badawi Rafi al-Tahtawi, a renowned scholar of the early nineteenth century. Tahtawi stressed the need to adapt the *Shari'a* to new and changing circumstances.<sup>298</sup> The method that he advocated was *takhayyur*, the principle by which a Muslim could adopt the prevailing interpreta-

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292. See Jenefsky, *supra* note 2, at 216 (describing Egypt's civil and criminal codes as being influenced by European, and particularly French, culture and laws, while family law "remained within the exclusive purview of Islamic law").

293. ESPOSITO, *supra* note 120, at 49-50.

294. Jenefsky, *supra* note 2, at 216; see also ESPOSITO, *supra* note 120, at 49-50 (stating that Pasha's code is authoritative force for interpretation of Islamic law in courts of Egypt and other Muslim countries).

295. See ESPOSITO, *supra* note 120, at 50.

296. See ESPOSITO, *supra* note 120, at 51-52 (maintaining that Egyptian reforms precipitated widespread reformist legislation in other Arab legal systems); Jenefsky, *supra* note 2, at 216 (stating that Egyptian jurisprudential and legislative reform influenced legislation in other Arab countries).

297. ESPOSITO, *supra* note 120, at 52.

298. ESPOSITO, *supra* note 120, at 50.

tions of another *Sunni* school in certain specific circumstances.<sup>299</sup> As evidenced by family law reforms of the early twentieth century, *takhayyur* played a decisive role in facilitating interpretations favoring women.<sup>300</sup> Maliki interpretations, particularly, prevailed over the predominant Hanafi ideology in influencing divorce reform.<sup>301</sup> Thus, *takhayyur* provided a legitimate mechanism for change, not only in Egypt, but in other areas of the Muslim world as well.

Egypt's impact on reforms in other countries may also be illustrated with reference to the teachings of Muhammad Abduh, also known as the "Father of Muslim Modernism."<sup>302</sup> One example of Abduh's influence is illustrated by the fact that he developed the Qur'anic argument that polygamy was contrary to the Qur'an.<sup>303</sup> Abduh reasoned that, according to IV:3 and IV:129 of the Qur'an, "more than one wife was only permissible when equal justice and impartiality were guaranteed."<sup>304</sup> Because such equality is practically impossible to achieve, Abduh reasoned that the Qur'anic ideal was monogamy.<sup>305</sup> The discussion of Tunisia's reforms illustrates that this rationale was adopted by other countries<sup>306</sup> and served as an argument against polygamy that could be adopted by modernist reformers throughout the Muslim world.<sup>307</sup>

Scholars brought to bear significant, innovative changes that became imbued with Islamic legitimacy.<sup>308</sup> For example, the applicability of *takhayyur* was extended to adopt individual opinions of scholars within a particular school as they suited the social objectives the reforms sought to achieve. This is in stark contrast to the traditional mandate that only the dominant opinion of a school

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299. ESPOSITO, *supra* note 120, at 50, 95.

300. See ESPOSITO, *supra* note 120, at 50 (presenting *takhayyur* as principle that influenced family law reform); see also *supra* note 248 and accompanying text (providing example of *takhayyur* in Moroccan context); *infra* notes 316-18 and accompanying text (discussing process of *takhayyur* in achieving divorce reform favorable to women).

301. See ESPOSITO, *supra* note 120, at 53-54 (noting that al-Tahtawi's suggestion of looking outside of one's own school of Islamic law in order to resolve problems provided legal basis for reforms ushered in by Law No. 25 of 1920 and Law No. 25 of 1929).

302. See ESPOSITO, *supra* note 120, at 50 (discussing Abduh's attempts to reconcile Qur'anic principles with modern realities).

303. See ESPOSITO, *supra* note 120, at 50-51 (describing Abduh's argument as Qur'anic ideal being monogamy).

304. ESPOSITO, *supra* note 120, at 51.

305. ESPOSITO, *supra* note 120, at 51.

306. See *supra* text accompanying note 264 (demonstrating theory, as applied in Tunisia, that monogamy, not polygamy, was ideal under Qur'an).

307. ESPOSITO, *supra* note 120, at 50-51.

308. See ESPOSITO, *supra* note 120, at 50 (noting that many scholars had to grapple with how to present social reform within Islamic rationale).

could be adopted through the process of *takhayyur*.<sup>309</sup> Hence *takhayyur* itself evolved and was used to justify reforms.

The effective beginnings of reform concerning women in the twentieth century occurred around 1915 when imperial edicts of the Ottoman Empire declared that Egyptian women had the right to sue for divorce under certain circumstances.<sup>310</sup> Then, in 1917, the first official attempts at codifying Muslim family law in the modern period were undertaken, as evidenced by the Ottoman Law of Family Rights.<sup>311</sup> Prior to this time, the main legal development was the requirement under the Egyptian Code of Organization and Procedure for Shariah Courts that evidence of claims concerning certain family law issues such as marriage and divorce must be provided in the form of written documentation or official certification.<sup>312</sup> Otherwise, prior to the Ottoman reforms, Egyptian women had few divorce rights under the predominant Hanafi school—only a husband's impotence or a fraudulent marriage contracted prior to puberty provided grounds for divorce.<sup>313</sup>

A watershed in Egyptian family law reform occurred when Law No. 25 of 1920 was passed.<sup>314</sup> The enactment of this law, and the second phase of the reform in 1929, resulted in an expansion of

309. See ESPOSITO, *supra* note 120, at 95 (noting that this extension of process of *takhayyur* constituted "clear departure" from traditional understanding, which required adoption of dominant teaching of one of four schools). Esposito refers to the attempts to correct abuse of the divorce formula in Egypt's Law No. 25 of 1929 to illustrate that, where the formal positions of four major *Sunni* schools do not allow for reformatory interpretations, the teachings of a minority view scholar from within one of the schools were adopted in order to lend a legitimizing force to the reforms. See *id.* (illustrating that reformist used minority-view position of Hanbali scholar, Ibn Taymiyah, which states that validity of *talaq* divorce is dependent upon intent to divorce rather than formalistic pronouncement of divorce formula, as means of providing Islamic sanction to reforms). But see AN-NA'IM, *supra* note 131, at 45 (maintaining that *takhayyur* does not necessarily require adopting dominant opinion of given school of Islamic law).

310. See ESPOSITO, *supra* note 120, at 53 (specifying that change in divorce law expanded women's divorce rights beyond grounds of impotence of husband or fraudulent marriage prior to puberty to include cases of desertion and instances where husband carried contagious disease, such as venereal disease or leprosy).

311. See ESPOSITO, *supra* note 120, at 53.

312. See ESPOSITO, *supra* note 120, at 52 (describing written certification requirement as particularly important to curbing phenomenon of child marriages because courts did not certify marriages where bride and groom had not reached ages of 16 and 18 respectively, precluding judicial relief where such marriages transpired). The certification requirement was achieved through the doctrine of *siyassa shari'a*, or the right of a ruler to take administrative steps to ensure the welfare of society under *Shari'a* rule. See *id.* at 52-53. This practice was a permissible way of achieving reform where direct intervention, such as pronouncing child marriages invalid, would have been construed as impermissible *ijihad* (interpretation). See *id.* at 52.

313. See ESPOSITO, *supra* note 120, at 53 (describing women's right to divorce in Hanafi school).

314. See ESPOSITO, *supra* note 120, at 53 (characterizing reforms as establishing "broader grounds for divorce" for women).

divorce rights for women.<sup>315</sup> Under this reform, a woman could petition for divorce under the following circumstances: (1) her husband's failure to provide her with maintenance support, also known as *nafaqah*; (2) her husband's infection with a dangerous/contagious disease; (3) desertion by her husband; and (4) maltreatment by her husband.<sup>316</sup>

These reforms were significant, not only for the substantive changes in the law that they effected, but also for the process through which they were achieved. The Egyptian reforms were cloaked under the veil of the "acceptable" reform mechanism of *takhayyur*.<sup>317</sup> By drawing from the liberal tenets of the Maliki school's divorce law, the Egyptian reforms counteracted the more rigid tenets of the Hanafi school's divorce law that predominated in Egypt.<sup>318</sup>

The process of innovative interpretation of the *Shari'a* to achieve reforms without conflict with perceived Islamic ideals was not confined to the early reform period.<sup>319</sup> Relatively recent developments in family law reform are testament to the recyclability of the various legitimating mechanisms for adapting Islamic law to changing

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315. See ESPOSITO, *supra* note 120, at 56 (stating that cruelty and desertion were added as grounds for divorce, with cruelty as grounds for divorce finding its only support in Maliki school).

316. See ESPOSITO, *supra* note 120, at 53-59 (enumerating expanded divorce rights of women under new legislation, with particular emphasis on broadening women's rights due to husband's failure to provide or pay maintenance). The legal reforms were significant not only for the substantive changes they imparted, but also for the Islamically sanctioned reform mechanisms that gave rise to them. Law No. 25 of 1920 and Law No. 25 of 1929 were particularly innovative in the sense of breaking with Hanafi interpretations and adopting the more egalitarian views of the Maliki school, for example, with regard to the amount of support due a wife. *Id.* at 54. Hanafi law maintained that a husband was responsible only for maintenance presently owed and that he did not incur the debt of past maintenance. See *id.* (stating that only if couple had distinct agreement about maintenance, husband would have to pay past maintenance). Law No. 25 of 1920 amended this practice by stipulating that cumulative debt may be required of a husband (Article 1) and failure to pay would be grounds for a divorce (Article 4). *Id.* Similar provisions were enacted in favor of divorced wives in Article 2 of the Law. See *id.* (stating that divorced husband's maintenance debt owed to ex-wife should be computed from time of divorce). Law No. 25 of 1920 further departed from the Hanafi tradition by decreeing in Articles 4 and 5 that, in cases where husband had failed to pay maintenance, maintenance could consist of any property owned by the husband, not merely those items the woman specifically required. See *id.* (explaining that under classical Hanafi law, maintenance was paid only with property in nature of required maintenance, such as clothing and food). The most significant expansion of the 1920 law with regard to maintenance was a wife's right under Article 4 to divorce her husband due to his incapacity or unwillingness to support her. *Id.* Law No. 25 of 1929 granted a similar expansion of rights. See *id.* at 53-54 (listing grounds available to women for divorce under both Law No. 25 of 1920 and Law No. 25 of 1929). Departure from prevailing Hanafi tradition was again evident with respect to the establishment of cruelty or maltreatment (*darar*) as grounds for a woman to divorce her husband where reconciliation seems unlikely (Article 6). *Id.* at 56.

317. ESPOSITO, *supra* note 120, at 53-54.

318. See ESPOSITO, *supra* note 120, at 54.

319. See *infra* notes 321-25 and accompanying text (discussing interpretation of *Shari'a* consistent with Islamic ideals in issuing Law No. 44 by Presidential decree).

circumstances.<sup>320</sup> In 1979, Anwar Sadat issued Law No. 44 by presidential decree during parliamentary recess, as provided for in the Egyptian Constitution, so that the legislature could not block passage of the law.<sup>321</sup> Known as "Jihan's Law," in honor of Sadat's wife, the provisions of Law No. 44 gave women further protection in the event of a husband's subsequent polygamous marriage by affording a woman the right to a divorce, as provided for in the Maliki and Hanbali traditions, should a husband fail to inform his original wife of a subsequent marriage or should such a marriage harm her in any way.<sup>322</sup> Once again, by invoking Maliki and Hanbali teachings, reforms were attempted under the protection of Islamic sanction.<sup>323</sup>

While Jihan's Law constituted a significant step forward in addressing the status quo disfavoring women, other issues of concern to women were not addressed. Specifically, polygamy remained practicable without judicial approval,<sup>324</sup> and court permission was not required for a man to divorce his wife.<sup>325</sup> Thus, the reforms under Jihan's Law were characterized as "an important, if still inadequate, step forward."<sup>326</sup>

As a result of opposition to the reforms, a decree of the Supreme Court of Egypt struck down Law No. 44 in 1985.<sup>327</sup> The Supreme

320. See Jenefsky, *supra* note 2, at 218 (stating that Law No. 44 used Maliki and Hanbali jurisprudence in giving wife right to divorce if husband does not inform her of subsequent marriage, or if subsequent marriage harms her).

321. See ESPOSITO, *supra* note 120, at 61-62 (discussing provisions of Law No. 44 as well as prior history of legislative opposition to its content); Jenefsky, *supra* note 2, at 218 (documenting general legislative history of Law No. 44).

322. See ESPOSITO, *supra* note 120, at 61 (pointing out that woman's right to be informed in event of repudiation by her husband and requirement of notarized certificate of divorce serve as safeguards against husband's repudiation, claim of repudiation without wife's knowledge, or husband's refusal of maintenance); Jenefsky, *supra* note 2, at 218 (noting in addition that new law required husband to procure notarized certificate of divorce, and also that wife must be informed if husband is planning to divorce her or take second wife).

323. See ESPOSITO, *supra* note 120, at 63 (maintaining that "a return to the Qur'an is evident" in reforms restricting *talaq*, or male right of unilateral repudiation of his wife, and expanding women's divorce, custody, and maintenance rights); *supra* notes 309, 315-18 and accompanying text (discussing use of Hanbali and Maliki teachings to achieve reform).

324. See Jenefsky, *supra* note 2, at 219 (discussing retention by men of right to practice polygamy and attain divorce without court permission, in spite of other reforms).

325. See ESPOSITO, *supra* note 120, at 63 (noting irony of Egypt's lack of legislation on judicial approval for divorce and polygamous marriages given its status as "a leader in family law reform in the Middle East and . . . a country in which women enjoy a relatively advanced status").

326. Margot Badran, *Competing Agenda: Feminists, Islam and the State in Nineteenth- and Twentieth-Century Egypt*, in WOMEN, ISLAM & THE STATE 201, 224 (Deniz Kandiyoti ed., 1991) (noting that, in addition to "inadequa[cy]" of reforms from feminist point of view, dissatisfaction with reforms was palpable among men, due to "unprecedented" manner in which they were passed).

327. See *id.* at 225 (stating that Government canceled Law No. 44); see also Jenefsky, *supra* note 2, at 219 (noting that law was struck down on grounds that it was unconstitutional because power to issue Presidential decrees was "limited to 'emergency' situations" and did not extend to personal status law).



Court's ruling highlights the arbitrary nature of applying Islamic legal justifications to reforms that are deemed "desirable." The very fact that Law No. 44 "invoked Maliki and Hanbali jurisprudence"<sup>323</sup> in some of its tenets illustrates the application of *takhayyur* at work yet again, but the law was struck down on a procedural point.<sup>329</sup> As previously discussed,<sup>330</sup> Islamic law reforms had been enacted under the doctrine of *siyassa shari'a*.<sup>331</sup> This doctrine conferred on a ruler the right "to take administrative steps where necessary to insure a society ruled by the *Shariah*,"<sup>332</sup> a doctrine of which Sadat was not given the benefit because his Law No. 44 was not afforded the justification of *siyassa shari'a*.<sup>333</sup>

The repeal of Law No. 44, in spite of its detractors, resulted in widespread discontent. Women's groups reacted by uniting to call for the Law's reenactment.<sup>334</sup> As a result, a new law, resembling the old Law No. 44, was passed.<sup>335</sup> This new law, Law No. 100, is currently the main legislation that determines the rights of women in the family law context.<sup>336</sup>

The Egyptian experience with *Shari'a* in the family law context reveals that a variety of methods have been used to achieve reform, in particular *siyassa shari'a* (administrative discretion), *takhayyur* (ability to adopt dominant teaching of another school), and *talfiq* (patching together different schools of thought).<sup>337</sup> The inconsis-

328. Jenefsky, *supra* note 2, at 218.

329. See *supra* note 327 and accompanying text (explaining that Presidential decrees were only allowed for emergency situations and not for personal status laws).

330. See *supra* note 312 and accompanying text.

331. See ESPOSITO, *supra* note 120, at 52-53 (explaining use of doctrine to reform child marriage laws).

332. ESPOSITO, *supra* note 120, at 52-53; see also *supra* note 312 and accompanying text (discussing use of *siyassa shari'a* to deter child marriages).

333. See *supra* note 327 and accompanying text (stating that law was struck down for improper use of Presidential decree).

334. See Badran, *supra* note 326, at 225 (relating that women's group's actions led to new law restoring most of rights found in prior law); Jenefsky, *supra* note 2, at 219 (documenting social agitation leading to enactment of similar law).

335. See Badran, *supra* note 326, at 225 (describing new law that restored most, but not all, of women's rights lost when old law was struck down).

336. See Jenefsky, *supra* note 2, at 219 (pointing out that, while new law remained largely similar to old Law No. 44, changes included that judge, rather than wife, determines seriousness of injury inflicted by husband's subsequent polygamous marriage, and stricter penalties in event that provisions of law are contravened).

337. See ESPOSITO, *supra* note 120, at 95 (characterizing *talfiq* as "eclectic process" and "variation of *takhayyur*," which involves "patching together" beliefs of different schools and jurists to result in cohesive singular law); *supra* notes 298-332 and accompanying text (discussing *siyassa shari'a*, *takhayyur*, and *talfiq* as methods of implementing reforms). *Talfiq* has been criticized as a process that encourages deviance from the intentions of the founders of various schools. AN-NA'IM, *supra* note 131, at 33. It should be pointed out, however, that Qur'anic intent is superior. Hence, efforts to discover Qur'anic intent that involve *talfiq* may be legitimate.

tency with which these reforms have been applied<sup>338</sup> suggests the existence of an inconsistent and diluted *Shari'a*. Reservations to the Women's Convention based on the *Shari'a*<sup>339</sup> lose their relevancy in light of Egypt's selective, results-oriented, albeit important, reforms because Egyptian leaders and reformers have been able to legitimate a number of reforms on Islamic bases.<sup>340</sup> Egypt can endeavor to complete its process of reform by following the examples of Tunisia and Morocco in restricting polygamy based on Qur'anic rationale.<sup>341</sup> At the same time, Egypt can attempt to garner support for its adoption of "equivalency" or "complementarity" of rights<sup>342</sup> as a favorable objective as contemplated in its reservation to Article 16.<sup>343</sup>

#### D. Pakistan

One of the most influential leaders of the freedom struggle for Pakistan, a state founded in reaction to the potential for Hindu domination over Muslims in an independent India, was the Islamic modernist M.A. Jinnah.<sup>344</sup> Given that Jinnah's vision guided the founding of the Pakistani State,<sup>345</sup> and there existed diversity of opinion about Islam among new Pakistanis, inevitable confrontations occurred between modernists, tending towards secularism, and traditionalists, desiring a strictly Islamic State.<sup>346</sup> A fertile "battle-

338. See *supra* text accompanying notes 327-33 (noting that Sadat was not given benefit of doctrine of *siyasa shari'a* when court evaluated Jihan's Law).

339. See *supra* text accompanying note 94 (providing text of Egypt's reservation to Article 16 based on *Shari'a* concept of "equivalency" of rights between men and women).

340. See *supra* notes 314-36 and accompanying text (documenting Egyptian family law reforms).

341. See *supra* Parts IIIA-B (discussing legal reforms in Morocco and Tunisia, and emphasizing utilization of Qur'anic reasoning to restrict polygamy).

342. See *supra* text accompanying note 94 (describing *Shari'a* vision of "equivalency of rights and duties" between men and women).

343. See *supra* text accompanying note 94 (providing text of Egypt's reservation to Article 16 of Women's Convention); see also CEDAW Report, *supra* note 7, at 44 (documenting Libyan representative's explanation for disproportionate inheritances accorded to female and male children as based on level of commitment and obligation accompanying inheritance, with those of male children being much higher). CEDAW considered this explanation by the Libyan representative as sufficient to constitute equality. *Id.* Thus, Egypt may be successful in making a similar argument in order to support its "equivalency of rights" approach vis-à-vis Article 16. See *supra* text accompanying note 94.

344. See Ayesha Jalal, *The Convenience of Subservience: Women and the State of Pakistan, in WOMEN, ISLAM & THE STATE*, *supra* note 326, at 77, 83-84 (describing role of Jinnah in reviving Muslim League and inspiring Muslim women to assume activist roles in relation to political participation and self-determination). But see SHAHIDA LATEEF, *MUSLIM WOMEN IN INDIA: POLITICAL AND PRIVATE REALITIES* 70 (1990) (characterizing Jinnah's commitment to *Shari'a* reform with respect to women's rights as mere "lip service").

345. See generally FRANCIS WATSON, *A CONCISE HISTORY OF INDIA* 155 (1974) (describing Jinnah's role in engineering Pakistani state).

346. See Jalal, *supra* note 344, at 86 (inferring that antagonism existed between "religious lobby" and "Pakistan's early managers" due to differing levels of commitment to process of

ground" for this confrontation existed in the arena of women's rights.<sup>347</sup>

The tension between traditionalists and modernists in the political arena still exists in Pakistan.<sup>348</sup> The women's rights issue has been played as the "trump card" in political struggles for power,<sup>349</sup> and it has tipped the delicate balance between the traditional and modernist elements whenever legal reform has been attempted in Pakistani history.<sup>350</sup> With the passage of the Family Laws Ordinance in 1961 under General Ayub Khan's authoritarian regime, the simmering conflict between traditionalists and modernists found a focal point.<sup>351</sup> The Ordinance was the first in Pakistan to challenge the existing status quo of family law.<sup>352</sup> Although "[t]he provisions of the Ordinance were hardly revolutionary,"<sup>353</sup> the Ordinance represented a significant development in terms of the State acting independently of political pressure and considerations.<sup>354</sup> The Ordinance provided for the registration of marriages with local councils, required that a husband seeking to take another wife must first seek the permission of his present wife and maintain her satisfactorily, and required payment of a dower amount at the time of divorce.<sup>355</sup> Prior to this time, the main strides for Pakistani women in the family law context had been achieved during the pre-partition era with the Muslim Marriage Dissolution Act of 1939, which gave women the right

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Islamization). Thus, the conflict between modernists and traditionalists may be framed in terms of their differing views on the role of Islam in the State.

347. See Jalal, *supra* note 344, at 86 (noting that maintenance of "precarious balance between state and society" was achieved by avoiding proactive reforms and by affirmatively granting women rights only where "Islam gave women more rights than the existing social customs").

348. See *infra* notes 357-70, 388-98 and accompanying text (discussing progressive politicians' tendency to stray from Islam and conservatives' practice of adherence to traditional Islamic tenets).

349. See Jalal, *supra* note 344, at 101 (stating that late former president General Zia ul-Huq's Islamization program focused on women in an effort to win him accolades from broad spectrum of society).

350. See *infra* notes 364-67 and accompanying text (stating that failure of Bhutto regime may be attributed to inability to appease both progressives, in favor of according women rights, and conservative groups opposed to reforms).

351. See Jalal, *supra* note 344, at 95 (discussing conservative backlash in response to progressive features of Ordinance).

352. See Jalal, *supra* note 344, at 95 (characterizing enactment of Family Law Ordinance as first and only foray taken by State into "explosive matters [such] as Muslim marriage and divorce laws").

353. See Jalal, *supra* note 344, at 94 (stating that Family Law Ordinance provided Muslim men with method to avert restrictions on polygamy).

354. See Jalal, *supra* note 344, at 95 (dubbing law as State's "assert[ion] of autonomy" against traditional Islamic social order).

355. See Jalal, *supra* note 344, at 94 (maintaining nevertheless that loopholes existed whereby husband could forego obtaining permission from existing wife for subsequent marriage by filing application with local body that would rule on permissibility of husband's petition).

to divorce their husbands and facilitated child custody.<sup>356</sup>

The enactment of the 1961 Ordinance set off a rallying cry among certain traditionalist elements who called for its repeal.<sup>357</sup> Although the law remained on the books, conservative discontent and general disillusionment with the Pakistani loss to India in the liberation campaign of Bangladesh led to political destabilization. After General Yahya Khan's last-ditch attempts at restoring normalcy failed, the Zulfikar Ali Bhutto regime was ushered into power.<sup>358</sup>

Islam continued to serve as a political pressurizing device after the Bhutto regime assumed office.<sup>359</sup> Bhutto was characterized by his "'secular' social and political style"<sup>360</sup> and branded "'unIslamic'"<sup>361</sup> by religious opposition.<sup>362</sup> The possibility of a reactionary backlash was always a factor in the policy decisions of the Bhutto regime.<sup>363</sup> In spite of his attempt to appease the religious lobby and at the same time adopt progressive policies towards women (as was internationally *en vogue* at the time),<sup>364</sup> Bhutto failed to maintain the balance.<sup>365</sup>

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356. See Jalal, *supra* note 344, at 94 (deeming Ordinance "improvement" over Muslim Marriage Dissolution Act of 1939).

357. See Jalal, *supra* note 344, at 95-96 (noting that Pakistani women's movement sought to convince State not to repeal Ordinance while State was under pressure from orthodox elements to repeal).

358. See WOMEN OF PAKISTAN: TWO STEPS FORWARD, ONE STEP BACK? 10-13 (Khawar Mumtaz & Farida Shaheed eds., 1987) [hereinafter WOMEN OF PAKISTAN] (documenting social tensions as result of loss of East Pakistan, now Bangladesh, and resulting discontent arising from Ayub Khan regime's reforms leading eventually to regime's downfall).

359. See ESPOSITO, *supra* note 120, at 100 (suggesting that Bhutto's opposition used Islam to destabilize his regime).

360. Jalal, *supra* note 344, at 97.

361. Jalal, *supra* note 344, at 97.

362. See Jalal, *supra* note 344, at 97 (noting that common conceptions of Bhutto as progressive rendered it politically difficult for him to attempt reforms in area of women's rights for fear of alienating rural-urban migrants, laborers, and other growing classes with conservative tendencies).

363. See Jalal, *supra* note 344, at 97-98 (referring to "paranoias" of leaders that Islamic revivalist elements were weaving union of lower-middle classes and some segments of upper class by attributing country's problems to "the state's lack of Islamic morality").

364. See Jalal, *supra* note 344, at 99 (noting that between 1973 and 1975, "International Women's Year," series of "polite nods" were made to cause of gender equality). In spite of the characterization that his changes were inconsequential, Bhutto accomplished many substantial reforms, such as: administrative reforms enabling women to join the upper echelons of the civil service; drafting of a new Constitution professing commitment to equality among all citizens, prohibiting discrimination on the sole basis of sex, undertaking the commitment to expand participation of women in national life and providing for maternity benefits to working women; the adoption by the National Assembly, which was dominated by Bhutto's followers, of a declaration on women's rights seeking to improve the "social, economic and legal status" of women in commemoration of the Women's Year; and the appointment of a Commission on Women's Rights that presented a report in 1976 bemoaning the lack of progress in implementing the Family Law Ordinance of 1961 and recommending changes and reforms. *Id.* Notwithstanding this apparent progress in the arena of women's rights, the changes have been dismissed as "bottles of ink spilt on women's issues" and "symbolic gestures." *Id.* at 100.

Among the reasons for Bhutto's overthrow was the increased, albeit still meager, participation of women in activities outside the home.<sup>366</sup> Thus Islamic sensibilities were exploited by Bhutto's opposition by appealing to the need to reclaim women's honor by restoring women to the sanctity of the home. Once again Islam was used as a tool to destabilize a regime.<sup>367</sup>

The new military ruler, General Zia ul-Haq, took advantage of Islamic consciousness in the aftermath of Bhutto's reign.<sup>368</sup> General Zia, undertaking a general program of Islamization, focused his efforts primarily on women and ensured that they lived within the bounds of perceived decency.<sup>369</sup> This campaign invoked the popular symbols of *chador* (the veil) and *chardivari* (the four walls of the home).<sup>370</sup>

Zia's reign was also characterized by the selective literalist application of certain provisions of the *Shari'a* in the form of the Hudood Ordinance of 1979<sup>371</sup> and the reform of the Family Laws Ordinance of 1961.<sup>372</sup> Specifically, the Islamic Ideology Council, a governmental advisory board, contended that several provisions of the Family Laws Ordinance, mainly those that improved the status quo of women, were un-Islamic.<sup>373</sup>

365. See Jalal, *supra* note 344, at 100 (suggesting that even unsubstantiated veneer of advances in women's rights served to fuel fire of forces using Islam as political weapon); *supra* note 347 (describing how Jinnah's regime attempted to achieve balance between women's rights and Islam).

366. See Jalal, *supra* note 344, at 100 (describing Islamic sensibility's disdain for women's activities outside home and preference for returning women to "four walls of the home").

367. See ESPOSITO, *supra* note 120, at 100 (discussing re-emergence of Islam in politics, its use by opposition forces in building coalition against Bhutto, and by Bhutto's successor, Zia, in order to legitimate his rule); see also *supra* notes 351-58 and accompanying text (discussing defeat of Ayub Khan regime that passed Family Law Ordinance consisting of reforms improving status of women).

368. See Jalal, *supra* note 344, at 100-01 (characterizing Zia as "wily social tactician" who correctly forecasted that controlling progress of women under guise of following Islamic dictates would win his regime legitimacy).

369. See Jalal, *supra* note 344, at 100 (noting that Zia's platform, which stressed preserving sanctity of home and veil, appealed to sentiments of broad cross-section of Pakistani society).

370. See Jalal, *supra* note 344, at 100-01 (describing Zia's ambition to return Pakistan to "moral purity of early Islam").

371. See Sullivan, *supra* note 3, at 829.

372. See ESPOSITO, *supra* note 120, at 100 (stating that Zia appealed to Islamic ideologies to justify his rule and appointed Islamic Ideology Council for, among other reasons, revision of Family Laws Ordinance); Jalal, *supra* note 344, at 101-02 (noting that Zia's mandates provided for "medieval" punitive measures for various offenses such as death by stoning or 100 lashes for both men and women in cases of adultery and rape).

373. See ESPOSITO, *supra* note 120, at 100 (noting that Ordinance's mandate that notice be served in event of divorce and permission be obtained for husband's proposed second marriage lack Islamic sanction). The case was made by opponents of the reforms that provisions of the Ordinance lacked Islamic sanction; however, this argument assumes that simply because the Qur'an does not specifically approve of a practice, it is un-Islamic. See *id.* at 97 (stating that reforms were based on lack of conflict with primary sources of Islamic law, namely Qur'an and Sunna).

The Hudood Ordinance of 1979 required that evidentiary showings and punishments "for the crimes of rape, adultery and fornication, armed robbery, the use of alcohol and narcotics and false accusations of adultery"<sup>374</sup> follow the Islamic standard.<sup>375</sup> The evidentiary requirements mandated by this standard included, in the case of adultery, confession or the testimony of four Muslim males of good moral standing to implicate the accused parties.<sup>376</sup> This same standard, however, was applied to the case of rape (*zina-bil-jabr*) under the Ordinance, thus "effectively blurr[ing] the distinction between rape and adultery."<sup>377</sup> Without a confession, four Muslim men must also witness and testify to a rape to satisfy the evidentiary requirements of this crime.<sup>378</sup> An insidious effect of this disturbing feature of the new law was the fact that women reporting rape crimes could now be prosecuted under adultery laws if male corroboration or confession was not forthcoming.<sup>379</sup>

The punishment for adultery under the *hudood* laws was stoning to death or 100 lashes.<sup>380</sup> In the absence of the requisite evidence involving four male eyewitness accounts of actual penetration, the *hudood* penalties of lashing or stoning to death are supplanted with *tazir* punishments, established at the discretion of the state,<sup>381</sup> which can consist of flogging, imprisonment, a fine, or a combination of these three.<sup>382</sup>

*Tazir* punishments overwhelmingly affect women, as illustrated by the infamous case of *Safia Bibi v. State*.<sup>383</sup> A blind girl charged her employer with rape but she was convicted of adultery and sentenced to fifteen lashes, three years of imprisonment, and a fine based on

374. Sullivan, *supra* note 3, at 829.

375. See Sullivan, *supra* note 3, at 830 & n.88 (noting that evidentiary requirements and penalties of Ordinance were considered consistent with Islamic jurisprudence).

376. Jalal, *supra* note 344, at 102; see also Sullivan, *supra* note 3, at 830 (pointing out that testimony of women is not recognized for purposes of imposing *hudood* punishment).

377. Jalal, *supra* note 344, at 102.

378. Jalal, *supra* note 344, at 102 (demonstrating lack of distinction in Hudood Ordinance's evidentiary requirements between extramarital sex and rape); see also Sullivan, *supra* note 3, at 829 (noting that relevant provisions were to be found in The Offence of Zina (Enforcement of Hudood) Ordinance of 1979).

379. See Sullivan, *supra* note 3, at 829-30 (discussing possibility that woman alleging rape may be punished as adulterer if her lack of consent is not conclusively established).

380. Jalal, *supra* note 344, at 102 (noting that, under Ordinance, women and men are subject to equal punishment).

381. Evan Gottesman, *The Reemergence of Qisas and Diyat in Pakistan*, 23 COLUM. HUM. RTS. L. REV. 433, 444-45 (1991-92) (noting that *tazir* punishments involve judicial discretion and are not Qur'anic prescriptions).

382. See Sullivan, *supra* note 3, at 830 (stating that victim's testimony may suffice to convict rape suspect for purposes of *tazir* punishment, provided, however, that there is corroborating evidence of medical documentation or if victim's testimony "inspires confidence").

383. 1985 P.L.D. 120 (F.S.C.) (Pak.).

her subsequent pregnancy.<sup>384</sup> As a result of the protest in response to the decision, the Federal Shariat Court was forced to exculpate the girl.<sup>385</sup> In other cases, women lodging rape complaints have actually received *tazir* punishments for supposed adultery.<sup>386</sup>

The examination of Pakistan's experience with Islamic family law and its reform reveals that Islam has served as a "proven bulwark against left-leaning tendencies,"<sup>387</sup> and was often successfully wielded as a political tool to destabilize regimes.<sup>388</sup> Even in present-day Pakistan, political struggles for power are colored by the religion issue, with different sides accusing each other of inauthenticity.<sup>389</sup> With the exception of the Family Laws Ordinance in 1961, promulgated under the Ayub regime,<sup>390</sup> reforms, or the lack thereof, in family law have largely been the measured product of both domestic and international popular tides.<sup>391</sup>

Fragile coalitions are often the reason for the ascendancy of any regime,<sup>392</sup> thus political leaders often have to appease a variety of ideological views.<sup>393</sup> Regimes in power in Pakistan have had to deal with the added factor of maintaining a "precarious balance"<sup>394</sup> between reformism, which would allow Pakistan to claim its rightful

384. See *Safia Bibi v. State*, 1985 P.L.D. 120 (F.S.C.) (Pak.) (detailing charges and holding in case).

385. See *id.*; Jalal, *supra* note 344, at 102 (noting that, while *Safia Bibi* decision was overturned, other rape victims have not been so lucky and have suffered *tazir* punishments for supposed adultery).

386. See Jalal, *supra* note 344, at 102 (discussing cases of two other Muslim women who were sentenced to lashes for reporting rapes); Sullivan, *supra* note 3, at 831 n.95 (stating that appealed rape convictions have resulted in women being convicted of *zina* (extramarital sex) and sentenced to concomitant punishment).

387. Jalal, *supra* note 344, at 98.

388. See *supra* notes 347-51, 357-67 and accompanying text (discussing battle between women's rights proponents and conservative Islamic sects during Jinnah, Ayub Khan, and Bhutto regimes).

389. See Gottesman, *supra* note 381, at 440-41 (documenting politics between Prime Minister Benazir Bhutto and opponent Nawaz Sharif during 1990 elections when Sharif, on many occasions, accused Bhutto of impeding Islamization and Sharif's supporters tagged Bhutto's policies as "offensive to Islam").

390. See *supra* notes 352-56 and accompanying text (stating that Ordinance was first to challenge traditional role of Pakistani women in family law area).

391. See *supra* notes 363-70 and accompanying text (discussing practice of Bhutto's opposition of appealing to conservative portions of society by invoking traditional Islamic notions of women).

392. See Jalal, *supra* note 344, at 98 (reasoning that Zia was able to build consensus among disparate elements of society, such as among lower-middle, middle, and upper classes, by playing Islamic card).

393. See *supra* notes 363-65 and accompanying text (discussing problem of mollifying both progressives and conservatives in area of women's rights).

394. See *supra* note 365 and accompanying text (describing Bhutto regime's failure to maintain balance between women's rights and Islam).

place among the community of nations,<sup>395</sup> and traditionalism, which appealed to large segments of the Pakistani populace.<sup>396</sup> Incumbent leaders and their political opponents alike would often resort to faulty interpretations of religious law<sup>397</sup> for the expedient purposes of achieving social and political legitimacy.<sup>398</sup> This point presents the question of whether such manifestations of religion are protected expressions of religious freedom.<sup>399</sup> It is unlikely that the Hudood Ordinance would be considered among the guaranteed protections, primarily because restrictions on religious law are permissible where women's human rights and fundamental freedoms are being violated.<sup>400</sup> As in the case of slavery, which is religiously permissible but reprehensible in practice,<sup>401</sup> subjecting rape victims to flogging for adultery is likely a situation where peremptory human rights norms govern freedom of religion.<sup>402</sup> Moreover, the authenticity of the evidentiary requirements under the Hudood Ordinance are considered questionable.<sup>403</sup> Finally, many of the judgments obtained under *Shari'a* law are not in fact applications of the *Shari'a* but products of subjective judicial interpretation.<sup>404</sup>

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395. See *supra* note 364 and accompanying text (characterizing as token, rights given to Pakistani women in "International Women's Year").

396. See WOMEN OF PAKISTAN, *supra* note 358, at 14 (discussing widespread opposition from political right to Bhutto regime and demands for greater implementation of Islamic policies).

397. See ESPOSITO, *supra* note 120, at 100-01 (recognizing that interpretation of Islamic law in Pakistan and Egypt has not always been "positively rooted in Islamic values" but was justified by pointing to lack of conflict with Qur'anic prescriptions); see also *supra* notes 376-79 and accompanying text (discussing evidentiary standards for rape and adultery under Hudood Ordinance).

398. See *supra* notes 368-73 and accompanying text (outlining Zia's use of Islam to strengthen his regime).

399. See Sullivan, *supra* note 3, at 813 (noting that "extent to which a . . . particular practice is deemed to have a legitimate foundation in religious law, does not determine whether international guarantees of freedom are applicable"). Sullivan comments that all manifestations of religion, unless "spurious or fraudulent," are protected by international guarantees of religious freedom such as those in the Declaration on Religious Intolerance. *Id.* at 813, 815. It is unlikely that the Hudood Ordinance could be considered fraudulent, given their bases in Islamic law. See *supra* notes 375-78 and accompanying text (noting Islamic justification underlying Hudood Ordinance).

400. Sullivan, *supra* note 3, at 810-11 (maintaining that religious law may be restricted where women's human rights are being violated).

401. Sullivan, *supra* note 3, at 811 (pointing to international consensus on abolition of slavery and other such practices permitted by religious traditions).

402. Sullivan, *supra* note 3, at 818-19 (discussing minimum standards of human rights, such as prohibition on slavery and infliction of physical or mental torture, as circumscribing practice of religion).

403. See WOMEN OF PAKISTAN, *supra* note 358, at 100-01 (maintaining that Qur'anic evidentiary requirements require as witnesses "four believers from amongst you," not four male eyewitnesses).

404. See ESPOSITO, *supra* note 120, at 100 (stating that courts in Pakistan have utilized questionable form of *ijtihad*, or interpretation, in arriving at their judgments).

The impact of judicial interpretation of Islamic law, but with an outcome more favorable to women, may be illustrated even more dramatically with reference to the *Shah Bano* case that



This discussion of Pakistan suggests that religious justification for suppressing women's rights must be critically examined by adherents of the religion themselves. The purpose behind the imposition of *hudood* laws with their disproportionate impact on women is rendered suspect given the history of politicizing Islam in the Pakistani context: "The obvious objective of these measures was to give legitimacy to a

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transpired in India, Pakistan's neighbor. See *Mohammad Ahmed Khan v. Shah Bano Begum*, A.I.R. 1985, S.C. 945, reprinted in *THE SHAH BANO CONTROVERSY* 23, 23 (Asghar Ali Engineer ed., 1987) [hereinafter *SHAH BANO CONTROVERSY*]. In this case, an elderly Muslim woman, Shah Bano Begum, was driven from her marital home by her husband of 43 years. *Id.* Subsequently, Shah Bano filed a court petition for maintenance from her husband, Mohammad Ahmed Khan, who divorced her by unilateral *talaq* months later. *Id.* Khan maintained that under Muslim Personal Law, which Muslims have the option of choosing to follow in India, he had already provided Shah Bano with the requisite maintenance. See *id.*; cf. *LATEEF*, *supra* note 344, at 163 (describing application of Muslim Personal Law in India, which provides Muslim men option of obtaining unilateral divorce). After consistent lower court judgments in favor of the plaintiff wife, Shah Bano, the case was appealed to the Supreme Court of India. See *SHAH BANO CONTROVERSY*, *supra*, at 23. In a scathing judgment criticizing various aspects of Muslim law as it is practiced, the 1985 Supreme Court opinion, written by the Hindu Chief Justice, stated that Muslim law must be interpreted in light of its entirety. *Id.* at 27-28. The Court then purported to interpret the Qur'an to require that a Muslim husband should provide maintenance to a divorced wife. *Id.* at 30. While this interpretation of the Qur'an may have had its supporters as well as detractors among Muslims, the very fact that the Court attempted to interpret the Qur'an offended the sensibilities of a large section of the Muslim community and public outcry resulted. See *LATEEF*, *supra* note 344, at 193-94. In reaction to pressure from the religious lobby, the Rajiv Gandhi government successfully introduced the Muslim Women (Protection of Rights on Divorce) Act of 1986. See Muslim Women (Protection of Rights on Divorce) Bill of 1986, reprinted in *THE SHAH BANO CONTROVERSY*, *supra*, at 85, 85-88; see also Amrita Chhachhi, *Forced Identities: The State, Communalism, Fundamentalism and Women in India*, in *WOMEN, ISLAM & THE STATE*, *supra* note 326, at 144, 146 (noting that Bill was passed by Indian Parliament in 1986, hence becoming Act); Kuldip Nayar, *Separate Personal Laws Do Not Dilute Secularism*, in *THE SHAH BANO CONTROVERSY*, *supra*, at 116, 117 (suggesting that then-Prime Minister Rajiv Gandhi hastily introduced Bill).

The main provision of the Act stated:

[A] divorced woman shall be entitled to . . . a reasonable and fair provision and maintenance to be made and paid to her within the *iddat* period by her former husband.

Muslim Women (Protection of Rights on Divorce) Bill of 1986, *supra*, § 3(1)(a), at 85. Under the Act, the *iddat* period is defined as "three menstrual courses," "three lunar months," or, in the case of pregnant women, "the period between the divorce and the delivery of her child or the termination of her pregnancy, whichever is earlier." *Id.* § 2(b)(i)-(iii), at 85. The Act was viewed as governmental capitulation to conservative Muslim pressure. See *LATEEF*, *supra* note 344, at 194 (stating that Government "yield[ed] to conservative pressure"); Nikhil Chakravarty, *Secularism Segregated in Rajiv's India*, in *THE SHAH BANO CONTROVERSY*, *supra*, at 118, 119 (proposing that Act "puts the divorced Muslim woman in the category of a second-class citizen"). The Act was seen as making a "mockery of protecting women." *LATEEF*, *supra* note 344, at 195.

However, local judicial applications of the Act belied its initial interpretation. For example, in the Kerala state cases of *Ali v. Sufaira*, 1988 (2) K.L.T. 94, *Aliyar v. Pathu*, 1988 (2) K.L.T. 446, and *Ahammed v. Aysha*, 1990 (1) K.L.T. 172, the Act was interpreted so as to separate the word "provision," from the word "maintenance," so that while maintenance was to be provided during the *iddat* period, provision encompassed a divorced woman's needs in the longer term. See Muslim Women (Protection of Rights on Divorce) Bill of 1986, *supra*, at 85; see also *Ali v. Sufaira*, 1988 (2) K.L.T. 94, 94; *Aliyar v. Pathu*, 1988 (2) K.L.T. 446, 447; *Ahammed v. Aysha*, 1990 (1) K.L.T. 172, 175. Thus, court interpretations of seemingly oppressive personal laws have effected reforms in the condition of Muslim women in India. See *Ali v. Sufaira*, 1988 (2) K.L.T. 94, 94; *Aliyar v. Pathu*, 1988 (2) K.L.T. 446, 447; *Ahammed v. Aysha*, 1990 (1) K.L.T. 172, 175.

government . . . .<sup>405</sup> Equally questionable are *tazir* punishments that are established at the discretion of the state.<sup>406</sup> Pakistan's experience thus represents the counterpoint to that of a nation like Tunisia, where traditional Islamic teachings were adopted to achieve socially progressive ends.<sup>407</sup> By contrast, in Pakistan, Islam has been manipulated to result in socially regressive legislation for politically expedient purposes.<sup>408</sup>

### E. Conclusion of Selected States Section

This summary of *Shari'a* as practiced in family law contexts of Muslims in various countries brings to light several important points. First, a number of reform methodologies are available to update *Shari'a* law.<sup>409</sup> In many cases, however, the reform techniques are applied in inconsistent or Islamically unsanctioned ways.<sup>410</sup> Drawing upon Qur'anic language to effectuate change is another effective reform methodology, as exemplified by Tunisia's attempt to abolish long-accepted practices such as polygamy and *talaq*.<sup>411</sup> According to some schools of thought, however, such reforms may be of questionable legitimacy, given that classical Islamic law does not allow for

405. See WOMEN OF PAKISTAN, *supra* note 358, at 17.

406. See Gottesman, *supra* note 381, at 444-45 (discussing discretionary nature of *tazir* punishments, both in terms of their institution by State and their interpretation by judiciary).

407. See *supra* Part III.B (outlining Tunisian reforms that were achieved within Islamically permissible means).

408. See WOMEN OF PAKISTAN, *supra* note 358, at 17. Pakistani women's advocates have suggested that the emergence of regressive interpretations of Islam has contributed to the lack of progress of the country:

The only version of Islam that has developed and flourished at all is conservative, bigoted and fanatical, and it is from this that the emerging elites attempt to derive their philosophical bearings. In the absence of any serious work towards progressive interpretations of religion, of distinguishing between its spirit and symbols, Pakistan seems to be in the grip of the unenlightened and the closed-minded. And since the political process has been subverted, the masses, whose belief may be Islam, but whose concern is not religion but the real issues of existence, have been by-passed.

*Id.*

409. See, e.g., *supra* notes 241-56, 299-301 and accompanying text (discussing reform methodologies). Abdullahi An-Na'im summarizes these methodologies as *takhayyur* (selection of opinions from a school of Islamic jurisprudence), of which *talfiq* (patching together) is a component; a form of Qur'anic reinterpretation whereby certain Qur'anic requirements were used to nullify or restrict perceived rights (such as polygamy); *syasa shari'ya* (or *siyassa shari'a*), whereby a ruler was given the power to implement rules in order to advance the *Shari'a*; and judicial reform through case law in former British colonies such as India. See AN-NA'IM, *supra* note 131, at 45-46 (proposing that methodologies provide only "temporary and insufficient relief"); see also *supra* note 148 and accompanying text (examining possibility of re-activating *naskh*, or abrogation and repeal of certain Islamic mandates, to achieve reform).

410. See *supra* notes 376-78, 398-99 and accompanying text (discussing manipulation of Islam to support repressive practices).

411. See *supra* notes 141-43 and accompanying text (discussing Qur'an's treatment of polygamy).

human interpretation of the divinely acquired *Shari'a*.<sup>412</sup> Other reform methodologies, such as *siyassa shari'a*, have been selectively marshaled and have not been effectively invoked to justify progressive legal changes.<sup>413</sup>

Second, societal conditions and opinions favoring or opposing progressive reforms have significantly impacted the evolution of Muslim personal law in countries such as Tunisia, Egypt, Pakistan, and India.<sup>414</sup> Riding the crest of popular opinion has also politicized Islam and utilized it as an expedient tool when there were power struggles.<sup>415</sup>

Third, the foregoing discussion suggests that there is a lacuna between what the *Shari'a* says and how it is practiced. The lack of an authoritative code of *Shari'a*, given the various schools and sub-sects within Islam,<sup>416</sup> combined with the adulterated, politicized version of Islamic law in force in various countries today,<sup>417</sup> further frustrates the objective of achieving a nexus between the *Shari'a* and women's progress.

The divinity of the *Shari'a* has been called into question by some.<sup>418</sup> The reason given for this view is that a divinely attained law, so diluted by human interpretation, must have lost its divine character.<sup>419</sup> A question arises as to whether existing systems of *Shari'a* can be sustained, or whether the entire framework needs to be overhauled.<sup>420</sup> Some have advocated a return to original precepts of *Shari'a*, such as *ijtihad* (interpretation),<sup>421</sup> while others have suggested devising a system of laws based on current needs.<sup>422</sup>

412. See *supra* note 234 and accompanying text (noting Islamic prohibition of secular law reform).

413. See *supra* text accompanying notes 332-33 (identifying *siyassa shari'a* as doctrine allowing reform at discretion of ruler).

414. See *supra* notes 268, 272, 277, 327-36, 357-70, 404 and accompanying text (giving examples of effect of popular movements on reforms in various countries).

415. See *supra* notes 359-73, 388-98 and accompanying text (describing politicization of Islam as tool of power to stem reform and destabilize progressive regimes).

416. See *supra* Part II.B (discussing various schools of Islamic law).

417. See *supra* Part III (explaining diversity of application of *Shari'a*).

418. See AN-NA'IM, *supra* note 131, at 185-86 (maintaining that, while *Shari'a* is extracted from divine sources, it is not divine in and of itself).

419. See AN-NA'IM, *supra* note 131, at 185 (proposing that *Shari'a* is not divine "because it is the product of human interpretation of those sources").

420. See AN-NA'IM, *supra* note 131, at 186 (stressing that *Shari'a*, in context of public law, was time-specific construct and that present-day Muslims should customize religious law for contemporary application).

421. See ESPOSITO, *supra* note 120, at 103-05, 116-22 (advocating rejection of *taqlid*, or following past precedent, in favor of *ijtihad*, closure of which has been regarded as "pure fiction" by modernist scholars, and recommending revisitation of processes of *qiyas*, or analogical reasoning, and *ijma*, or consensus).

422. See *supra* note 420 and accompanying text (suggesting contemporization of Islamic laws).

There is, however, no guarantee that a new system of Islamic laws, which in itself would seem difficult to achieve, would be any less subject to political vagaries and misinterpretation than the existing *Shari'a*.<sup>423</sup> Given that present-day *Shari'a* has already been exposed to human interpretations,<sup>424</sup> divinity would not be lost in identifying, exposing, and correcting the inconsistencies and misapplications of it. The process of *naskh*, or repeal of Islamic prescriptions that may conflict with the larger ideals of the Qur'an and the Sunna, has been identified as a potential mechanism for effecting reform in place of *ijtihad*.<sup>425</sup> Ultimately, the evolution of the *Shari'a* over time suggests that it is a living law and not inflexible as opponents of reform have painted it.<sup>426</sup>

#### IV. CULTURAL BIASES WITHIN THE WOMEN'S CONVENTION

Reform of *Shari'a* law represents only half of the equation with respect to compliance with the Women's Convention. The Convention itself must be examined for potential biases that preclude its universal adoption. This section will focus on the Convention itself and determine whether provisions of the Convention are workable and desirable, or self-defeating, within an Islamic context.

The existence of cultural conflict between the Women's Convention and several of its States Parties is illustrated by the nature of the reservations made to the Convention.<sup>427</sup> Article 16, for example, which mandates the elimination of discrimination against women in the area of marriage and family,<sup>428</sup> has been the subject of reservations by Bangladesh, Egypt, Iraq, Tunisia, and Turkey.<sup>429</sup> The reservations have been based, for the most part, on provisions of the

423. See *supra* text accompanying notes 410-15 (discussing subjective interpretation and politicization of *Shari'a*).

424. See *supra* notes 418-19 and accompanying text (noting dilution by human interpretation of divinity of *Shari'a*).

425. See *supra* note 148 and accompanying text (describing process of *naskh* and its utility as possible reform mechanism for achieving reform within Islamically permissible means).

426. See *supra* note 373 and accompanying text (discussing opposition to family law reform in Pakistan based on argument that reforms favoring women lacked Islamic sanction).

427. See ALL APPROPRIATE MEASURES, *supra* note 10, at 10, 121-23, 130-34 (reproducing text of *Shari'a*-based reservations of various Islamic nations to Articles 2, 15, and 16 of Women's Convention, which provide that Articles will be adhered to only so long as they do not conflict with *Shari'a*). Only Egypt provides more insight into the conflicts between the *Shari'a* and Article 16 of the Women's Convention in pointing out the distinction between the Islamic concept of "equitability" in marriage and family relations and the Convention's concept of "equality." ALL APPROPRIATE MEASURES, *supra* note 10, at 131.

428. See Women's Convention, *supra* note 1, art. 16, at 196.

429. See ALL APPROPRIATE MEASURES, *supra* note 10, at 130-34 (setting out text of reservations entered by Bangladesh, Egypt, Iraq, Tunisia, and Turkey).

Islamic *Shari'a*.<sup>430</sup> Sources of negotiating history of the Article reveal no discussion on the implications of the Article for religious practices.<sup>431</sup>

The most recent United Nations Report of the Committee on the Elimination of Discrimination against Women provides commentary on Article 16 and its applicability to States Parties.<sup>432</sup> The commentary condemns arranged marriages involving payment or preferment.<sup>433</sup> This condemnation may be short-sighted in the context of Muslim marriages. The payment of *mahr* (dower), which involves payment or preferment, is a central feature of the marriage contract in Islam<sup>434</sup> and, as a measure "intended to safeguard [a woman's] economic position after marriage,"<sup>435</sup> it may not be considered anathema to the Women's Convention, if correctly practiced.<sup>436</sup> Given that Islamic law requires *mahr* to be offered to a bride and not to her relations, the practice of *mahr* in Islamic marriages "could not be considered a sale."<sup>437</sup>

The commentary of the Commission also presupposes that arranged marriages do not involve choice.<sup>438</sup> While marriages may be customarily arranged in Islam,<sup>439</sup> Muslim law recognizes the legal capacity of post-pubescent males and females to contract their own marriages.<sup>440</sup> Moreover, given that marriage is regarded as a sacred contract under Islam,<sup>441</sup> offer and acceptance of the contracting parties

430. See ALL APPROPRIATE MEASURES, *supra* note 10, at 130-32 (reproducing text of Bangladesh's, Egypt's, and Iraq's reservations to Article 16, with *Shari'a* cited as main reason for reserving right not to accede to Article).

431. See ALL APPROPRIATE MEASURES, *supra* note 10, at 129-30 (purporting to summarize "[t]wo central issues" that arose in negotiations of Article 16, namely, parenting rights of single parents and property rights based on joint or sole ownership status with no mention of religious implications).

432. CEDAW Report, *supra* note 7, ¶¶ 11-50, at 3-10. The Committee was established pursuant to Part V (Articles 17-22) of the Women's Convention for the purpose of overseeing the implementation of its provisions. See Women's Convention, *supra* note 1, arts. 17-22.

433. See CEDAW Report, *supra* note 7, ¶ 16, at 4 (suggesting that arranged marriages involving payment or preferment deny women right to "enter freely into marriage").

434. See ESPOSITO, *supra* note 120, at 24 (stating that *mahr* is indispensable part of marriage formalities).

435. ESPOSITO, *supra* note 120, at 24.

436. See ESPOSITO, *supra* note 120, at 24 (stating that dower is paid to bride herself, not her father, as was case in pre-Islamic Arabia).

437. ESPOSITO, *supra* note 120, at 24.

438. See CEDAW Report, *supra* note 7, ¶ 16, at 4 (inferring that women's right to choose spouse is precluded in arranged marriage process).

439. See LATEEF, *supra* note 344, at 163-69 (acknowledging existence of arranged marriages in Islam); see also Vanessa Maher, *Women and Social Change in Morocco*, in WOMEN IN THE MUSLIM WORLD, *supra* note 205, at 100, 113 (discussing role of women in arranging marriages).

440. See ESPOSITO, *supra* note 120, at 16 (stating that, in Islam, age of puberty is age at which males and females can contract marriages on behalf of themselves or others).

441. See ESPOSITO, *supra* note 120, at 16 (defining marriage as "highly religious sacred covenant").

is a central feature of the marriage process.<sup>442</sup> Upon reaching puberty, with the right to contract marriage came the concomitant power to reject a marriage contract.<sup>443</sup> Moreover, under Hanafi law, full rights to marry were only recognized upon having reached puberty, i.e., when the parties concerned have the right to contract for themselves.<sup>444</sup> Further, the free consent of both parties is essential to the Islamic marriage contract.<sup>445</sup> Thus, while practical realities may bespeak otherwise,<sup>446</sup> countries "allow[ing] a woman's marriage to be arranged for payment or preferment"<sup>447</sup> do not necessarily violate the spirit of the Women's Convention, given the underlying purpose of *mahr* and the consensual nature of marriages that seem "arranged" in Islam.

The Committee commented further that, where "the betrothal of girls or undertakings by family members on their behalf is permitted,"<sup>448</sup> a woman's right to freely choose her partner is contravened.<sup>449</sup> This comment fails to recognize that, at least in the Islamic context, boys and girls are equally subject to such arrangements,<sup>450</sup> thus both partners' rights are equally contravened.<sup>451</sup> Such arrangements, while objectionable, are not gender-specific and are thus not indicative of gender discrimination.<sup>452</sup>

The commentary on Article 16 also assumes that a woman's right to enter freely into marriage is circumscribed where her intended

442. See ESPOSITO, *supra* note 120, at 16 (noting that offer (*ijab*) and acceptance (*qabul*) are essential to marriage).

443. See ESPOSITO, *supra* note 120, at 17 (stating that "option of puberty" involved repudiation by either party upon reaching puberty of marriage contracted in fraud or negligence). The option of puberty, while bestowing rights equally on males and females, cannot be exercised if the contracting was done by the parties' fathers or grandfathers. *Id.* "However, this regulation is not supported by any *Quranic* prescription or *Sunnah* of the Prophet." *Id.*

444. See HODKINSON, *supra* note 11, at 92 (stating that, among other things, under Hanafi law, full capacity to marry was contingent upon having attained puberty).

445. HODKINSON, *supra* note 11, at 91; see also Zarina Bhatti, *Muslim Women in Uttar Pradesh: Social Mobility and Directions of Change*, in *WOMEN IN CONTEMPORARY INDIA AND SOUTH ASIA* 199, 202 (Alfred de Souza ed., 1980) (quoting Qur'an as saying that woman will not be married by force in absence of her consent).

446. See Bhatti, *supra* note 445, at 202 (discussing example of Ashraf Muslims of Uttar Pradesh, India among whom girl's consent is immaterial, and moreover, actual expressed preference is "scandalous").

447. CEDAW Report, *supra* note 7, ¶ 16, at 4.

448. CEDAW Report, *supra* note 7, ¶ 38, at 8.

449. CEDAW Report, *supra* note 7, ¶ 38, at 8.

450. See ESPOSITO, *supra* note 120, at 17 (stating that marriages contracted on behalf of minors by third parties may be repudiated "when *he or she* attains puberty") (emphasis added).

451. See CEDAW Report, *supra* note 7, ¶ 38, at 8.

452. See *supra* note 450 and accompanying text.

partner is a consanguine.<sup>453</sup> The reality among many Muslims, however, is that certain blood relatives may marry.<sup>454</sup> The Report fails to articulate a reason for a restriction on cousin-marriages, which is an accepted practice in many segments of non-Western society.<sup>455</sup>

With respect to property ownership, the commentary on Article 16(1)(h) of the Convention labels as discriminatory "any law or custom that grants men a right to a greater share of property . . . on the death of a relative."<sup>456</sup> When the representative of the Government of the Libyan Arab Jamahiriya, for example, explained the Islamic justification for a reduced share of inheritance for female children, namely that "women acquire[] that part of the inheritance without commitments, whereas men had to take over all the concomitant obligations,"<sup>457</sup> members of the Committee "felt that there was no need to enter a reservation, because, with that interpretation, women were treated equally with men."<sup>458</sup> Thus, according to the Committee itself, "a greater share of property"<sup>459</sup> for men is not in all cases tantamount to inequality. The Women's Convention's language, however, does not take this factor into account.<sup>460</sup>

While the Committee on the Women's Convention appears to have a somewhat informed view on the *Shari'a*, it does not adequately recognize the reform and adaptability of *Shari'a* principles over time. While the *Shari'a* is characterized as a static, 1500-year-old code,<sup>461</sup> the reality is that it is a living, amended, and adaptable law.<sup>462</sup> More importantly, the Committee's views are not adequately reflected in the

453. See CEDAW Report, *supra* note 7, ¶ 16, at 4 (stating that woman's right to choose partner should be "[s]ubject to reasonable restrictions based, for example, on a woman's youth or consanguinity with her partner") (emphasis added).

454. See CEDAW Report, *supra* note 7, ¶ 170, at 44 (mentioning that marriages between close relatives other than man and his mother, sister, niece, or aunt are permitted in Libya); Michael M.J. Fischer, *On Changing the Concept and Position of Persian Women*, in WOMEN IN THE MUSLIM WORLD, *supra* note 205, at 189, 197 (discussing preference for parallel cousin marriages in certain regions of Middle East).

455. See LATEEF, *supra* note 344, at 165 (discussing women's inheritance rights in marriages arranged between cousins); Andrea Menefee Singh, *The Study of Women in South Asia: Some Current Methodological and Research Issues*, in WOMEN IN CONTEMPORARY INDIA AND SOUTH ASIA, *supra* note 445, at 61, 83 (referring to acceptance of cousin-marriages).

456. CEDAW Report, *supra* note 7, ¶ 28, at 6.

457. CEDAW Report, *supra* note 7, ¶ 174, at 44.

458. CEDAW Report, *supra* note 7, ¶ 174, at 44.

459. CEDAW Report, *supra* note 7, ¶ 28, at 6.

460. See Women's Convention, *supra* note 1, art. 16(h), at 196 (mandating same property rights for both spouses).

461. See CEDAW Report, *supra* note 7, ¶ 132, at 39 (suggesting that *Shari'a* has remained static and recommending *ijtihad* in order to update *Shari'a*).

462. See *supra* Part III (discussing diversity of application of *Shari'a*); see also *supra* note 148 and accompanying text (pointing out adaptability of reform mechanism of *nash* to modern context).

language of the treaty,<sup>463</sup> as illustrated by the example of proportional property inheritance.<sup>464</sup>

Another area in which the Convention's provisions are culturally insensitive is its espousal of coeducation.<sup>465</sup> This objective does not take into account the possibility that compulsory coeducation could have an undesirable effect on the goal of women's equality by motivating some parents, especially in milieus where strict *purdah* (separation of the sexes and veiling of women) is observed,<sup>466</sup> to pull their daughters out of school to enforce gender separation.<sup>467</sup> The coeducation recommendation illustrates that neglecting the varying cultural and religious circumstances of women may be a self-defeating feature of the Convention.

Criticism of the Women's Convention has been aimed at the cultural hegemony of Western ideals embodied within the Convention. The Islamic concept of "equitability," which emphasizes the complementary but equally important roles of men and women, rather than "equality" in the objective sense, is an example of the differing concepts of parity in different societies.<sup>468</sup> Egypt artfully utilizes Article 23 of the Convention, which allows for States Parties to apply their own legislative measures when "more conducive to the

463. See *supra* text accompanying notes 456-60 (noting failure of Convention language to acknowledge Committee's standard for equality of inheritance rights).

464. See *supra* text accompanying note 457 (outlining Islamic interpretation of equality of inheritance rights which depends on obligations accompanying inheritance).

465. See Women's Convention, *supra* note 1, art. 10(c), at 195.

466. See Ursula M. Sharma, *Purdah and Public Space*, in WOMEN IN CONTEMPORARY INDIA AND SOUTH ASIA, *supra* note 445, at 213, 213-14 (defining *purdah* as "those rules which govern the behavior of married women towards male affines and neighbours . . . ; those norms which define the separation of the sexes . . . ; [and/or] those norms which govern women's mobility, and even visibility, outside the home"). It is important to note that, while *purdah* can be regarded as exclusionary, it is regarded by some as empowering. See *id.* at 215; see also Deniz Kandiyoti, *Introduction to WOMEN, ISLAM, & THE STATE*, *supra* note 326, at 1, 18 (suggesting that veiled woman in public space may be "formidable"); Keddie & Beck, *supra* note 205, at 9 (noting that veiling suggested economic empowerment and nationalistic reaction against imposition of colonial customs).

467. See Sullivan, *supra* note 3, at 815 & n.48 (stating that it is internationally recognized prerogative of parents to have their children educated in conformance with their own religious convictions).

468. See North American Muslim Women's Retreat and Dialogue on the Document: "The International Convention on the Elimination of All Forms of Discrimination Against Women," Looking at Human Rights, Document I, at 2 (draft 1994) (on file with *The American University Law Review*) [hereinafter Looking at Human Rights] (maintaining that Women's Convention reflects Western and Christian principles of "equality" without regard for Islamic counterpart of "equitability" and ultimately recommending that United States not ratify Convention); see also ALL APPROPRIATE MEASURES, *supra* note 10, at 131 (duplicating text of Egypt's reservation, which stresses concept of equalitability in marriage, or complementary rights of women and men, to Article 16 of Women's Convention); Jenefsky, *supra* note 2, at 227 (illustrating distinction drawn by Egypt between Islamic and Western concepts of equality); *supra* text accompanying note 94 (providing partial text of Egyptian reservation to Article 16).



achievement of equality between men and women."<sup>469</sup> The Egyptian reservation to Article 16 draws upon the principles of Article 23 by maintaining that, in marital relations, "equivalency of rights and duties so as to ensure complementarity . . . guarantees true equality"<sup>470</sup> according to Islamic religious beliefs.<sup>471</sup> The distinction between "equality," as mandated in the Women's Convention,<sup>472</sup> and "equivalency" or "equitability," as defined by proponents of the Islamic standard,<sup>473</sup> is underscored by the contention that the Women's Convention defines women's rights in terms of men and does not regard the complementarity of roles between men and women as a facet of equality.<sup>474</sup>

Given the foregoing discussion, it is arguable that a certain amount of cultural relativity is appropriate in enforcement of the Women's Convention.<sup>475</sup> While some language in the Convention may potentially defeat the purpose of women's equality if unmodified and enforced,<sup>476</sup> other provisions simply fail to consider the diversity of culture-specific or culturally favored definitions of equality, and the practicability or even desirability of implementation.<sup>477</sup>

A more workable, albeit less ambitious, instrument of change would take into consideration the day-to-day realities of women who need change the most. For example, in Uttar Pradesh, India, Ashraf Muslim females are culturally forbidden from expressing a preference

469. Women's Convention, *supra* note 1, art. 23, at 197; *see also* Jenefsky, *supra* note 2, at 227 (promoting Article 23 as provision allowing States Parties to apply their own laws if appropriate to cause of women's equality).

470. ALL APPROPRIATE MEASURES, *supra* note 10, at 131.

471. *See* ALL APPROPRIATE MEASURES, *supra* note 10, at 131 (noting that "quasi-equality" is in reality burden on wives); Jenefsky, *supra* note 2, at 227-28 (recognizing Egypt's indirect invocation of Article 23 to reserve right to accede to Article 16); *supra* text accompanying note 94 (suggesting that Islamic *Shari'a* is arbiter of equitability).

472. Women's Convention, *supra* note 1, art. 23.

473. ALL APPROPRIATE MEASURES, *supra* note 10, at 131 (providing text of Egypt's reservation to Article 16 and asserting that reservation is based on Islamic standard of complementarity between women and men); Looking at Human Rights, *supra* note 468, at 2 (advocating Islamic ideal of equitability that envisions complementary roles of women and men over Women's Convention's ideal of equality, which is defined by male standard).

474. *See* Looking at Human Rights, *supra* note 468, at 2 (declaring that Women's Convention does not recognize rights and responsibilities of women that differ from those of men).

475. *See supra* notes 427-74 (discussing difficulty of enforcing language of Women's Convention on societies where imbedded cultural norms render provisions of Women's Convention unworkable or regressive).

476. *See supra* notes 465-67 and accompanying text (discussing possible negative repercussions of enforcing mandatory coeducation).

477. *See supra* notes 468-74 and accompanying text (noting that "equality" in application may not be more desirable than "equitability" and that this distinction is not acknowledged by Women's Convention, thereby rendering Convention unresponsive to cultural diversity).

for a bridegroom.<sup>478</sup> In such a society, freedom to choose a partner, which is a goal of the Women's Convention,<sup>479</sup> may be a less realistic goal than basic consent to the marriage,<sup>480</sup> a principle advocated by the *Shari'a*, and hence more likely familiar, or at least practical. In this way, the objectives of the Convention need to be customized to the everyday realities of those to whom they will apply.<sup>481</sup> While such charges may be incremental, they also prevent the hardship of social and cultural rejection that women may face in certain settings if the Women's Convention is fully complied with.

## V. RECOMMENDATIONS

The spirit of the *Shari'a*, at the time of its original enforcement, was revolutionary in terms of the rights granted to women.<sup>482</sup> Over time, however, some of the revolutionary spirit of the *Shari'a* has been adulterated due to human misinterpretation and misuse.<sup>483</sup> This misuse has resulted in unacceptable conditions.<sup>484</sup>

Just as provisions of the Women's Convention should be reformulated to adequately address the reality of diverse groups of women,<sup>485</sup> reservations to the Women's Convention should be narrowly tailored to reflect specific conflicts between religious prescription and the Women's Convention.<sup>486</sup> To this end, countries must be prepared to examine the authenticity of those religious practices that allegedly permit unequal treatment of women and the consistency of such practices with other reforms undertaken by the State. A similar

478. See Bhatti, *supra* note 445, at 202 (discussing example of Ashraf Muslims in Uttar Pradesh, India, where girl's consent is immaterial, and moreover, actual expressed preference "scandalous").

479. See CEDAW Report, *supra* note 7, ¶ 16, at 4 ("A woman's right to choose a spouse and enter freely into marriage is central to her life . . . dignity . . . and equality as a human being.").

480. See HODKINSON, *supra* note 11, at 91 (stating that freely given consent is essential to marriage contract in Islam).

481. See *supra* notes 434-80 and accompanying text (outlining cultural practices in Islamic countries that are unnecessarily affected by overbroad provisions of Women's Convention).

482. See ESPOSITO, *supra* note 120, at 13 (stating that Qur'anic reforms "served to raise the status of women" during period after revelation of Islam in seventh century A.D.).

483. See ESPOSITO, *supra* note 120, at 17 (noting that Islamic practice of disallowing challenges to marriages contracted by fathers or grandfathers is not supported in Qur'an); *supra* notes 368-86 and accompanying text (discussing politicization of Islam and misapplication of traditional *hudood* and *tazir* punishments).

484. See Looking at Human Rights, *supra* note 468, at 2 (acknowledging "the deplorable human rights conditions in the 'Muslim' countries," characterizing them as "un-Islamic" and calling for "solutions and corrective measures that are compatible with Qur'anic directives and in harmony with the Islamic worldview"). Criticism leveled at human rights abuses in Islamic societies has attributed such violations to departure from Islamic values. See *id.*

485. See *supra* Part IV (discussing cultural biases within Women's Convention).

486. Vienna Declaration, *supra* note 108, 21 I.L.M. at 1673 (advocating that reservations be formulated "as precisely and narrowly as possible" taking into account object and purpose of treaty).

suggestion was adopted and tabled by the Committee on the Elimination of Discrimination against Women in the face of opposition by several countries.<sup>487</sup>

A superficial comparison of the provisions of Article 16 with the *Shari'a* as it is professed and practiced, suggests that certain countries have formulated overbroad reservations. The first part of Article 16 requires that women and men have the same right to freely enter into a consensual marital union.<sup>488</sup> This right exists in theory, but has been tampered with in practice.<sup>489</sup> While authenticity of religious practices is not considered in affording protection to manifestations of religious belief,<sup>490</sup> "[t]he question of authenticity does, of course, have both strategic and substantive importance for those seeking to reform religious law or practice alternative interpretations."<sup>491</sup>

Inconsistency in reforms and selective marshaling of traditional practices and revolutionary interpretations has resulted in an incoherent body of *Shari'a* in several countries.<sup>492</sup> A more uniform code of law can be achieved, it seems, through a process like that initially undertaken in Bourguiba's Tunisia, where Qur'anic reasoning provided a mechanism for reform through indigenous self-regulation.<sup>493</sup> This process, combined with sorting those provisions that are merely tolerated by the Qur'an<sup>494</sup> from those actually prescribed,<sup>495</sup> might serve to phase out practices, such as polygamy and

487. Clark, *supra* note 13, at 287-88 (discussing CEDAW's suggestion that U.N. undertake study on women living under Islamic law regimes with view toward discovering effect of such laws on status of women in family and marital life and further study principle of *ijtihad* within Islam). CEDAW's suggestion resulted in accusations that it was culturally and religiously imperialist. *Id.* at 288. These accusations silenced the initiative. *Id.*

488. Women's Convention, *supra* note 1, art. 16(1)(a)-(b), at 196.

489. See ESPOSITO, *supra* note 120, at 17 (noting that, while fathers and grandfathers of both male and female minors have exclusive right to contract permanent, inalienable marriages on behalf of their offspring, this right "is not supported by any *Quranic* prescription or *Sunnah* of the Prophet"); *supra* notes 439-45 and accompanying text (discussing right of both females and males to contract their own marriages, but not without exceptions).

490. Sullivan, *supra* note 3, at 813 (stating that international guarantees of religious freedom apply whether particular religious practice is authoritative or aberrant).

491. Sullivan, *supra* note 3, at 813.

492. See *supra* Part III (analyzing application of *Shari'a* and its reform in Morocco, Tunisia, Egypt, and Pakistan).

493. See *supra* notes 280-82 and accompanying text (noting that while Tunisia utilized innovative interpretations of Islamic law to reform laws, reforms were nevertheless achieved primarily through indigenous, Islamic means). The process of *nashh* as a means of facilitating reform has been discussed, see *supra* note 148.

494. See ESPOSITO, *supra* note 120, at 110-11 (arguing that Qur'anic ideal is monogamy and characterizing husband's limitation to four wives as attempt at reforming previously unrestricted polygamous practices). Thus, polygamy is merely a tolerated practice rather than a prescription. See *id.*

495. The *Qur'an* IV:11, IV:12 (prescribing inheritance portions).

nonconsensual marriages,<sup>496</sup> which violate provisions of Article 16.<sup>497</sup> Consistency with the Qur'an ensures, for example, that States Parties' reservations to Article 16(1)(a)-(b)<sup>498</sup> would be unfounded.<sup>499</sup>

Similarly, other features of Islamic law that are expressly governed by Qur'anic prescription, such as inheritance,<sup>500</sup> may be revised in accordance with Qur'anic commentary, which suggests that the two-to-one ratio accorded to men and women, respectively, may have been imposed as a result of oversimplified interpretation of Qur'anic intent by Islamic jurists.<sup>501</sup> Thus, Qur'anic directives on inheritance have served as the basis for several unnecessary reservations to Article 16 of the Women's Convention.<sup>502</sup>

In matters of divorce, where several options are permissible under Islamic law, adopting the teaching of the school of law most favorable to women is a workable solution.<sup>503</sup> Adopting the Maliki school's framework for granting judicially decreed divorces to women would be one possible measure that States Parties could take in order to begin achieving compliance with Article 16(c) of the Women's

496. ESPOSITO, *supra* note 120, at 17 (noting that although fathers and grandfathers contract their children in marriage, without affording children opportunity to consent or repudiate marriage, this is not Qur'anically sanctioned right).

497. Women's Convention, *supra* note 1, art. 16 (a)-(c), at 196 (requiring that women and men have equal rights to enter into marriage, freely choose marriage partner, exercise rights and responsibilities during marriage, and dissolve marriage).

498. Women's Convention, *supra* note 1, art. 16(1)(a)-(b), at 196 (requiring that men and women shall have same right to freely choose spouse and enter into consensual marriage).

499. See *supra* notes 438-52 and accompanying text (making argument that, under pure Islamic law, unadulterated by customary practice, males and females had equal rights to enter into consensual marriages).

500. See WADUD-MUHSIN, *supra* note 260, at 87 (enumerating two-to-one ratio of inheritance accorded to men and women, respectively, under Islamic law and articulating that distribution of inheritance requires equity, which is to be measured by actual benefit accruing to recipient after obligations, such as family support, are met); *supra* note 495 and accompanying text (citing to verse of Holy Qur'an governing inheritance after obligations, such as family, are met).

501. See WADUD-MUHSIN, *supra* note 260, at 87 (suggesting that Qur'anic discussions point to several possibilities for dividing property and that Qur'anic verse prescribes that property must be divided according to actual benefit accruing to heir after taking into consideration heir's financial obligations, irrespective of whether heir is male or female). Wadud-Muhsin's point suggests that whoever must bear the responsibility of supporting the family should receive the higher proportion of inheritance according to the Qur'an, whether that individual is a man or a woman. See *id.*

502. See CEDAW Report, *supra* note 7, ¶ 174, at 144 (providing for permissibility of Libyan laws on inheritance); Clark, *supra* note 13, at 300 (characterizing Iraq's property laws as more favorable to women than Women's Convention and questioning incompatibility of Iraq's law with Article 16); *supra* note 501 and accompanying text (noting that Qur'anic intent underlying inheritance laws may have been nondiscriminatory but has been interpreted by Islamic jurists as favoring men).

503. See *supra* notes 247-48 and accompanying text (illustrating Morocco's adoption of Hanbali tradition to restrict polygamy); see also *supra* notes 250, 301, 318 and accompanying text (documenting rationale for adopting Maliki ideology to implement more progressive divorce reforms beneficial to women).

Convention, which provides that women and men should have "[t]he same rights and responsibilities during marriage and at its dissolution."<sup>504</sup>

In short, because the Qur'an is considered to be the primary regulator of the conduct and behavior of Muslims,<sup>505</sup> every effort should be made by those Islamic countries seeking to maintain the integrity of religious law to consider Qur'anic guidance consistent with its original revolutionary character before imbuing customary practices with religious significance. Where the Qur'an diverges from international obligations, the centrality of the Qur'anic prescription, as well as the importance of the treaty provision to the overall object and purpose of the treaty, should be relatively weighted.<sup>506</sup>

Just as States Parties can take measures to achieve compliance with the Women's Convention while maintaining the Islamic character of their laws, so too can the Women's Convention maintain flexibility where its provisions appear unworkable or undesirable. The Women's Convention must reflect the diversity of those it represents by providing for the culturally defined adaptation of it.<sup>507</sup> The examples of the coeducation recommendation<sup>508</sup> and the requirement of freedom to choose a marriage partner<sup>509</sup> have been discussed in this regard. States Parties must be accorded a certain amount of discretion in determining the practicality of implementing particular provisions in their respective countries. Such determinations must, however, be reached in conjunction with local women's advocates familiar with the problems and needs of women at all levels in the country in question. It is important to note, however, that local tradition should not be used as an excuse for failure to attempt compliance.<sup>510</sup> States Parties should therefore attempt to devise contextually specific alternatives to those provisions of the Convention that are culturally anathema. States Parties may also be more constructive in participating in the process of making the Women's

504. Women's Convention, *supra* note 1, art. 16(c), at 196.

505. See Looking at Human Rights, *supra* note 468, at 2 (calling for implementation of Qur'anic directives in Muslim countries); *supra* text accompanying note 130 (describing primacy of Qur'an).

506. See Sullivan, *supra* note 3, at 821-22.

507. See *supra* Part IV (advocating cultural relativity in implementation of Women's Convention provisions).

508. See *supra* notes 465-67 and accompanying text (maintaining that coeducation recommendation in Article 10(c) of Women's Convention embodied is ill-suited to objective of gender equality in certain contexts).

509. See *supra* notes 439-45 and accompanying text (showing that consent is essential feature of Islamic concept of marriage).

510. See Bayefsky, *supra* note 2, at 34 (maintaining that traditional outlooks should not be used as justification for inequity).

Convention more responsive to pluralistic concerns by requesting that certain Articles be revised to reflect these concerns as provided for in Article 26, rather than merely registering reservations.<sup>511</sup>

Where States Parties, such as Tunisia, have entered reservations based on provisions of domestic law,<sup>512</sup> such reservations should be withdrawn, based on international norms.<sup>513</sup> If necessary, reservations should be reformulated in narrow terms consistent with the recommendations outlined. In the Islamic context, this involves separating issues involving Qur'anic prescription, such as matters of inheritance,<sup>514</sup> from mere tolerance of certain practices, such as polygamy.<sup>515</sup>

Domestic activists have a very important role in achieving compliance with the Women's Convention. First, they must generate awareness of the Women's Convention.<sup>516</sup> Second, they must discourage States Parties from using religious prescription as an excuse for failing to accede to provisions of the Women's Convention where such practices are religiously not required.<sup>517</sup> Finally, because social agitation campaigns have had a profound impact on the development of Islamic law in various countries,<sup>518</sup> women's rights advocates and supporters must be prepared to be active in their demand for women's progress, whether this activism takes the form of mobilizing support for the Women's Convention, exercising the vote, and urging others to do so, or running for office. There is strong evidence of the responsiveness of regimes to public opinion.<sup>519</sup> Domestic support can thus play a major part in paving the

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511. See Women's Convention, *supra* note 1, art. 26, at 197 (providing that States Party may request revision of Convention in writing and submit this request to U.N. Secretary-General who will take matter up with General Assembly); see also *supra* notes 83-84 and accompanying text (outlining process of requesting revision of Women's Convention).

512. See *supra* note 96 and accompanying text (explaining that Tunisian reservations to Article 16 are based on Tunisia's Personal Status Code).

513. See Vienna Declaration, *supra* note 108, 21 I.L.M. at 1673 (asserting that States Parties should not be allowed to choose own laws in favor of international norms without justifiable reasons).

514. *The Qur'an* 4:11, 4:12 (providing that inheritance shall be proportional to duties of beneficiary).

515. See ESPOSITO, *supra* note 120, at 110-11 (suggesting that polygamy is not favored by Qur'an but merely permitted).

516. Shakuntala, *CEDAW: Only A Convention?*, EXPRESS INDIA (Washington, D.C.), Sept. 23, 1994, at 2 ("The sad fact" is that few people even know Convention exists).

517. One example of a practice in conflict with the Women's Convention, but not required by Qur'anic prescription, is the practice of polygamy. See ESPOSITO, *supra* note 120, at 110-11 (noting that some scholars consider Qur'an to advocate ideal of monogamy).

518. See *supra* Parts III.C-D (observing impact of public and international opinion on development of law in Egypt and Pakistan).

519. See *supra* Parts III.C-D (discussing instances in several countries where public opinion has affected government's position).

way for the fullest possible implementation of the Women's Convention.

### CONCLUSION

The Islamic *Shari'a* is not anathema to those provisions of the Women's Convention that have been challenged by certain reserving countries. Islamic countries entering overbroad substantive reservations to provisions of the Women's Convention on the grounds of religion only serve to perpetuate the stereotype that Islam institutionally subjugates women. Islam's revolutionary effect on the status of women subsequent to its revelation attests to its original progressive nature.<sup>520</sup> This quality has been overshadowed by corrupt application of Islamic principles and incorrect interpretation of Islamic precepts for political expediency and social entrenchment.

In order to minimize the conflict articulated by various countries between provisions of the Women's Convention and the personal law aspects of the Islamic *Shari'a*, Qur'anic guidance may provide one means of separating authentically religious dictates from practices that are merely tolerated. While reserving countries should take steps to effectuate greater compliance, the Women's Convention itself should be divested of any culturally insensitive or unworkable language. Ultimately, its aim and purpose should be to afford women choices and not to force women into lifestyles that they consider disagreeable.

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520. See ESPOSITO, *supra* note 120, at 13 (noting that where Qur'anic reforms were actually incorporated, status of women was raised from existing conditions in pre-Islamic time period).

## APPENDIX I

## GLOSSARY OF COMMONLY USED ISLAMIC TERMS

<i>hadith</i>	record of the Sunna or traditions and life example of the Prophet Muhammad
Hanafi	school of law founded by Islamic leader Abu Hanifa in eighth century A.D., one feature of which is its conservative divorce provisions
Hanbali	school of law founded by Islamic leader Ahmad ibn Hanbal in eighth century A.D., one feature of which permits women to determine select provisions of their marriage contracts, thereby enabling them to stipulate consequences should their husbands enter into polygamous unions
<i>hudood</i>	Qur'anic penalties
<i>ijma</i>	consensus of religious leaders
<i>ijtihad</i>	interpretation of the Qur'an and the Sunna that was effectively inactivated as a method for deriving Islamic guidance in tenth century A.D.
<i>Imam</i>	Muslim spiritual leader
Maliki	school of law founded by Islamic leader Malik ibn Anas in eighth century A.D. and known for its relatively progressive divorce provisions
<i>naskh</i>	process of repeal or abrogation of those Qur'an and Sunna verses that are in conflict with other verses
<i>qadi</i>	judge



<i>qiyas</i>	process of analogical reasoning that allowed Qur'anic guidance related to one situation to be applied to another situation for which Qur'anic guidance does not exist
Qur'an	primary material source of the word of God as revealed to the Prophet and most revered source of Islamic guidance
Shafi'i	school of law founded by Islamic leader Muhammad al-Shafi'i during the late eighth and early ninth centuries A.D.
<i>Shari'a</i>	Islamic law as drawn from the Qur'an, the Sunna, <i>qiyas</i> , and <i>ijma</i>
<i>Shi'a</i>	minority branch of Islam that split from majority <i>Sunni</i> branch beginning in A.D. 632 after dispute over leadership of Islamic community
<i>siyassa shari'a</i>	administrative discretion of ruler to adopt measures that promote the <i>Shari'a</i>
Sunna	life example and traditions of Prophet Muhammad
<i>Sunni</i>	majority branch of Islam to which about 90% of Muslims adhere
<i>sura</i>	chapter of the Qur'an
<i>takhayur</i>	process by which a Muslim could adopt the rule of a different school of law
<i>talfiq</i>	patching together provisions of different schools of law to result in composite law
<i>tazir</i>	punishments enforced at the discretion of rulers and their agents to reform and discipline citizens in accordance with the <i>Shari'a</i>

*Ummayyad*

period from A.D. 661 - A.D. 750 during which judges were accused of inadequately enforcing and implementing the spirit of the Qur'an as a result of which arose the different schools of law (Hanafi, Hanbali, Maliki, and Shafi'i)

## APPENDIX II

### CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN

#### **The States Parties to the present Convention,**

*Noting* that the Charter of the United Nations reaffirms faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women,

*Noting* that the Universal Declaration of Human Rights affirms the principle of the inadmissibility of discrimination and proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, including distinction based on sex,

*Noting* that the States Parties to the International Covenants on Human Rights have the obligation to ensure the equal right of men and women to enjoy all economic, social, cultural, civil and political rights,

*Considering* the international conventions concluded under the auspices of the United Nations and the specialized agencies promoting equality of rights of men and women,

*Noting also* the resolutions, declarations and recommendations adopted by the United Nations and the specialized agencies promoting equality of rights of men and women,

*Concerned*, however, that despite these various instruments extensive discrimination against women continues to exist,

*Recalling* that discrimination against women violates the principles of equality of rights and respect for human dignity, is an obstacle to the participation of women, on equal terms with men, in the political, social, economic and cultural life of their countries, hampers the growth of the prosperity of society and the family and makes more difficult the full development of the potentialities of women in the service of their countries and of humanity,

*Concerned* that in situations of poverty women have the least access

to food, health, education, training and opportunities for employment and other needs,

*Convinced* that the establishment of the new international economic order based on equity and justice will contribute significantly towards the promotion of equality between men and women,

*Emphasizing* that the eradication of apartheid, of all forms of racism, racial discrimination, colonialism, neo-colonialism, aggression, foreign occupation and domination and interference in the internal affairs of States is essential to the full enjoyment of the rights of men and women,

*Affirming* that the strengthening of international peace and security, relaxation of international tension, mutual cooperation among all States irrespective of their social and economic systems, general and complete disarmament, and in particular nuclear disarmament under strict and effective international control, the affirmation of the principles of justice, equality and mutual benefit in relations among countries and the realization of the right of peoples under alien and colonial domination and foreign occupation to self-determination and independence, as well as respect for national sovereignty and territorial integrity, will promote social progress and development and as a consequence will contribute to the attainment of full equality between men and women,

*Convinced* that the full and complete development of a country, the welfare of the world and the cause of peace require the maximum participation of women on equal terms with men in all fields,

*Bearing in mind* the great contribution of women to the welfare of the family and to the development of society, so far not fully recognized, the social significance of maternity and the role of both parents in the family and in the upbringing of children, and aware that the role of women in procreation should not be a basis for discrimination but that the upbringing of children requires a sharing of responsibility between men and women and society as a whole,

*Aware* that a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women,

*Determined* to implement the principles set forth in the Declaration on the Elimination of Discrimination against Women and, for that purpose, to adopt the measures required for the elimination of such discrimination in all its forms and manifestations,

*Have agreed* on the following:

## PART I

### Article 1

For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

### Article 2

States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

(a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;

(b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;

(c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;

(d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;

(e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;

(f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;

(g) To repeal all national penal provisions which constitute discrimination against women.

### Article 3

States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advance-

ment of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

#### **Article 4**

1. Adoption by States Parties of temporary special measures aimed at accelerating *de facto* equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.

2. Adoption by States Parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory.

#### **Article 5**

States Parties shall take all appropriate measures:

(a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;

(b) To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.

#### **Article 6**

States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.

### **PART II**

#### **Article 7**

States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right:

(a) To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies;

(b) To participate in the formulation of government policy and the implementation thereof and to hold public office and

perform all public functions at all levels of government;

(c) To participate in non-governmental organizations and associations concerned with the public and political life of the country.

#### Article 8

States Parties shall take all appropriate measures to ensure to women, on equal terms with men and without any discrimination, the opportunity to represent their Governments at the international level and to participate in the work of international organizations.

#### Article 9

1. States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.

2. States Parties shall grant women equal rights with men with respect to the nationality of their children.

### PART III

#### Article 10

States Parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women:

(a) The same conditions for career and vocational guidance, for access to studies and for the achievement of diplomas in educational establishments of all categories in rural as well as in urban areas; this equality shall be ensured in pre-school, general, technical, professional and higher technical education, as well as in all types of vocational training;

(b) Access to the same curricula, the same examinations, teaching staff with qualifications of the same standard and school premises and equipment of the same quality;

(c) The elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education by encouraging coeducation and other types of education which will help to achieve this aim and, in particular, by the revision of textbooks and school programmes and the adaptation of teaching methods;

(d) The same opportunities to benefit from scholarships and

other study grants;

(e) The same opportunities for access to programmes of continuing education, including adult and functional literacy programmes, particularly those aimed at reducing, at the earliest possible time, any gap in education existing between men and women;

(f) The reduction of female student drop-out rates and the organization of programmes for girls and women who have left school prematurely;

(g) The same opportunities to participate actively in sports and physical education;

(h) Access to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning.

## Article 11

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:

(a) The right to work as an inalienable right of all human beings;

(b) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;

(c) The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training;

(d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work;

(e) The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave;

(f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.

2. In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures:

(a) To prohibit, subject to the imposition of sanctions,



dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status;

(b) To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances;

(c) To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities;

(d) To provide special protection to women during pregnancy in types of work proved to be harmful to them.

3. Protective legislation relating to matters covered in this article shall be reviewed periodically in the light of scientific and technological knowledge and shall be revised, repealed or extended as necessary.

#### **Article 12**

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.

2. Notwithstanding the provisions of paragraph 1 of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.

#### **Article 13**

1. States Parties shall take all appropriate measures to eliminate discrimination against women in other areas of economic and social life in order to ensure, on a basis of equality of men and women, the same rights, in particular:

(a) The right to family benefits;

(b) The right to bank loans, mortgages and other forms of financial credit;

(c) The right to participate in recreational activities, sports and all aspects of cultural life.

#### **Article 14**

1. States Parties shall take into account the particular problems faced by rural women and the significant roles which rural women play in the economic survival of their families, including their work in the non-monetized sectors of the economy, and shall take all appropriate measures to ensure the application of the provisions of

this Convention to women in rural areas.

2. States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right:

(a) To participate in the elaboration and implementation of development planning at all levels;

(b) To have access to adequate health care facilities, including information, counselling and services in family planning;

(c) To benefit directly from social security programmes;

(d) To obtain all types of training and education, formal and non-formal, including that relating to functional literacy, as well as, *inter alia*, the benefit of all community and extension services, in order to increase their technical proficiency;

(e) To organize self-help groups and cooperatives in order to obtain equal access to economic opportunities through employment or self-employment;

(f) To participate in all community activities;

(g) To have access to agricultural credit and loans, marketing facilities, appropriate technology and equal treatment in land and agrarian reform as well as in land resettlement schemes;

(h) To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.

## PART IV

### Article 15

1. States Parties shall accord to women equality with men before the law.

2. States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals.

3. States Parties agree that all contracts and all other private instruments of any kind with a legal effect which is directed at restricting the legal capacity of women shall be deemed null and void.

4. States Parties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the

freedom to choose their residence and domicile.

#### **Article 16**

1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

- (a) The same right to enter into marriage;
- (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;
- (c) The same rights and responsibilities during marriage and at its dissolution;
- (d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;
- (e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;
- (f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;
- (g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;
- (h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

2. The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.

### **PART V**

#### **Article 17**

1. For the purpose of considering the progress made in the implementation of the present Convention, there shall be established a Committee on the Elimination of Discrimination against Women (hereinafter referred to as the Committee) consisting, at the time of entry into force of the Convention, of eighteen and, after ratification of or accession to the Convention by the thirty-fifth

State Party, of twenty-three experts of high moral standing and competence in the field covered by the Convention. The experts shall be elected by States Parties from among their nationals and shall serve in their personal capacity, consideration being given to equitable geographical distribution and to the representation of the different forms of civilization as well as the principle legal systems.

2. The members of the Committee shall be elected by secret ballot from a list of persons nominated by States Parties. Each State Party may nominate one person from among its own nationals.

3. The initial election shall be held six months after the date of the entry into force of the present Convention. At least three months before the date of each election the Secretary-General of the United Nations shall address a letter to the States Parties inviting them to submit their nominations within two months. The Secretary-General shall prepare a list in alphabetical order of all persons thus nominated, indicating the States Parties which have nominated them, and shall submit it to the States Parties.

4. Elections of the members of the Committee shall be held at a meeting of States Parties convened by the Secretary-General at United Nations Headquarters. At that meeting, for which two thirds of the States Parties shall constitute a quorum, the persons elected to the Committee shall be those nominees who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

5. The members of the Committee shall be elected for a term of four years. However, the terms of nine of the members elected at the first election shall expire at the end of two years; immediately after the first election the names of these nine members shall be chosen by lot by the Chairman of the Committee.

6. The election of the five additional members of the Committee shall be held in accordance with the provisions of paragraphs 2, 3, and 4 of this article, following the thirty-fifth ratification or accession. The terms of two of the additional members elected on this occasion shall expire at the end of two years, the names of these two members having been chosen by lot by the Chairman of the Committee.

7. For the filling of casual vacancies, the State Party whose expert has ceased to function as a member of the Committee shall appoint another expert from among its nationals, subject to the approval of the Committee.

8. The members of the Committee shall, with the approval of the

General Assembly, receive emoluments from United Nations resources on such terms and conditions as the Assembly may decide, having regard to the importance of the Committee's responsibilities.

9. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Convention.

#### **Article 18**

1. States Parties undertake to submit to the Secretary-General of the United Nations, for consideration by the Committee, a report on the legislative, judicial, administrative or other measures which they have adopted to give effect to the provisions of the present Convention and on the progress made in this respect:

(a) Within a year after the entry into force for the State concerned; and

(b) Thereafter at least every four years and further whenever the Committee so requests.

2. Reports may indicate factors and difficulties affecting the degree of fulfillment of obligations under the present Convention.

#### **Article 19**

1. The Committee shall adopt its own rules of procedure.

2. The Committee shall elect its officers for a term of two years.

#### **Article 20**

1. The Committee shall normally meet for a period of not more than two weeks annually in order to consider the reports submitted in accordance with article 18 of the present Convention.

2. The meetings of the Committee shall normally be held at United Nations Headquarters or at any other convenient place as determined by the Committee.

#### **Article 21**

1. The Committee shall, through the Economic and Social Council, report annually to the General Assembly of the United Nations on its activities and may make suggestions and general recommendations based on the examination of reports and information received from the States Parties. Such suggestions and general recommendations shall be included in the report of the Committee together with comments, if any, from States Parties.

2. The Secretary-General shall transmit the reports of the Committee to the Commission on the Status of Women for its information.

#### **Article 22**

The specialized agencies shall be entitled to be represented at the consideration of the implementation of such provisions of the

present Convention as fall within the scope of their activities. The Committee may invite the specialized agencies to submit reports on the implementation of the Convention in areas falling within the scope of their activities.

## **PART VI**

### **Article 23**

Nothing in this Convention shall affect any provisions that are more conducive to the achievement of equality between men and women which may be contained:

- (a) In the legislation of a State Party; or
- (b) In any other international convention, treaty or agreement in force for that State.

### **Article 24**

States Parties undertake to adopt all necessary measures at the national level aimed at achieving the full realization of the rights recognized in the present Convention.

### **Article 25**

1. The present Convention shall be open for signature by all States.
2. The Secretary-General of the United Nations is designated as the depositary of the present Convention.
3. The present Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.
4. The present Convention shall be open to accession by all States. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

### **Article 26**

1. A request for the revision of the present Convention may be made at any time by any State Party by means of a notification in writing addressed to the Secretary General of the United Nations.
2. The General Assembly of the United Nations shall decide upon the steps, if any, to be taken in respect of such a request.

### **Article 27**

1. The present Convention shall enter into force on the thirtieth day after the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.
2. For each State ratifying the present Convention or acceding to it after the deposit of the twentieth instrument of ratification or

accession, the Convention shall enter into force on the thirtieth day after the date of the deposit of its own instrument of ratification or accession.

#### **Article 28**

1. The Secretary-General of the United Nations shall receive and circulate to all States the text of reservations made by States at the time of ratification or accession.
2. A reservation incompatible with the object and purpose of the present Convention shall not be permitted.
3. Reservations may be withdrawn at any time by notification to this effect addressed to the Secretary-General of the United Nations, who shall then inform all States thereof. Such notification shall take effect on the date on which it is received.

#### **Article 29**

1. Any dispute between two or more States Parties concerning the interpretation or application of the present Convention which is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.
2. Each State Party may at the time of signature or ratification of this Convention or accession thereto declare that it does not consider itself bound by paragraph 1 of this article. The other States Parties shall not be bound by that paragraph with respect to any State Party which has made such a reservation.
3. Any State Party which has made a reservation in accordance with paragraph 2 of this article may at any time withdraw that reservation by notification to the Secretary-General of the United Nations.

#### **Article 30**

The present Convention, the Arabic, Chinese, English, French, Russian and Spanish texts of which are equally authentic, shall be deposited with the Secretary-General of the United Nations.

