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Egypt's Constitutional Moment: A Comparative Constitutional Analysis Determining How Best to Reconcile the Acknowledgment of Shari' A with the Preservation of Rights for Women and Religious Minorities

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**EGYPT'S CONSTITUTIONAL MOMENT:
A COMPARATIVE CONSTITUTIONAL ANALYSIS DETERMINING HOW BEST TO RECONCILE THE
ACKNOWLEDGMENT OF SHARI'A WITH THE PRESERVATION OF RIGHTS FOR WOMEN AND
RELIGIOUS MINORITIES**

**Jacquelyn Simmons
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Introduction

“I want to study. I am not afraid.”¹ The declaration of 16-year-old Kainat Raiz shows the desire of women in Islamic countries to gain access to education and opportunity.² Raiz was injured in a spray of bullets targeting 16 year-old Malala Yousufzai in Pakistan in October 2012.³ The Taliban targeted Malala because of her objection to the group’s regressive interpretation of Islam that keeps women in the home and bars girls from schools.⁴ Such restrictive implementations of Islam are indicative of a strict constructionist approach, which is also perpetrated by the Salafis in Egypt.⁵ Moreover, in Afghanistan, in July, a man shot his wife with an automatic weapon while over 100 men watched and cheered, because of mere suspicions of adultery.⁶ In Afghanistan, Pakistan and some other states, extremists like the Afghani man are free to carry out “justice” as they see fit because the government looks aside.⁷ As Egypt continues to reform its government and form its constitution, there are grave concerns that Egypt is heading in the direction of this Islamic traditionalism.⁸

Egypt is in the process of reforming its government after the removal of Mubarek in 2011. In Egypt’s constitutional construction, the role of Shari’a, or Islamic law, is central to the discussion. The issues impacted by the incorporation of Islam into Egypt’s constitution are not limited to the rights of women. Those who are non-believers also face restraints on their rights,

¹ Associated Press, *‘We are strong’: Malala’s Wounded Friends Back in Pakistan School*, NBC NEWS (Nov. 22, 2012, 6:01 AM), http://worldnews.nbcnews.com/_news/2012/11/22/15357831-we-are-strong-malalas-wounded-friends-back-in-pakistan-school?lite

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ David D. Kirkpatrick, *A Vague Role for Religion in Egyptian Draft Constitution*, THE NY TIMES (Nov. 9, 2012), <http://www.nytimes.com/2012/11/10/world/middleeast/draft-egyptian-constitution-adopts-a-role-for-religion.html>

⁶ Joel Brinkley, *In Egypt, Morsi’s Silence Speaks Volumes*, CHICAGO TRIBUNE (Jul. 17, 2012), http://articles.chicagotribune.com/2012-07-17/news/sns-201207171300--tms--amvoicesctnav-c20120717-20120717_1_mohammed-morsi-coptic-christians-salafist-party

⁷ *Id.*

⁸ *Id.*

including fear of violence, limited citizenship and taxation. In Egypt specifically, extremists are trying to enforce a Qur'anic commandment that directs Muslims to collect a tax, called the *jizya*, from "non-believers,"⁹ primarily Jews and Christians.¹⁰ In fact, there have been increasing numbers of attacks on Christians in Egypt revolving around extorting *jizya*.¹¹

These threats to basic rights raise significant questions about including Islam into a democratic constitution. Incorporating any religion into the formation of law is problematic because it limits access to the law and legal arguments for any person that does not share the religious belief upon which the law is founded.¹² Moreover, religious foundations are said to "exclude and discriminate" against those who do not share the convictions cited.¹³ To be most effective, a liberal democracy should rely on reasons and arguments that are open and accessible to most citizens.¹⁴ Thus the foundation of a liberal democracy is reliant upon a degree of separation between the church and the state.

However religion plays an important role in identity, both of individuals as well as of people groups. The relationship between religion and government has been a topic of concern for centuries. However, the dynamic between religion and government is of particular concern in a pluralistic democracy where the protection of individual rights is a primary goal. This is true especially in reference to religious minorities, which are most likely to suffer from the lack of

⁹ *Id.*

¹⁰ Also referred to as "People of the Book" in Islam.

¹¹ Brinkley, *supra* note 6.

¹² Khaled Abou El Fadl, *Muslims and Accessible Jurisprudence in Liberal Democracies: A Response to Edward B. Foley's Jurisprudence and Theology*, 66 *FORDHAM L. REV.* 1227, 1228 (1998)

¹³ *Id.*

¹⁴ *Id.*

access.¹⁵ In fact, it is challenging to conceive of an official State religion that, in practice, does not adversely affect religious minorities by discriminating against their members.¹⁶

There have been numerous approaches balancing the relationship between the church and the state, and each has its own challenges and merits. Some nations have chosen to make no accommodation for religion and have created purely secular states, with varying degrees of success in maintaining democratic function. Other states have made accommodation for Christian principles, or have established a form of Christianity as the official state religion. Still others have created Islamic states, intertwining the law of Shari'a into their constitutional construct. To some, the incorporation of Shari'a is not only detrimental to the function of a democracy, but also interferes with the practice of the Islamic faith.¹⁷ However, the acknowledgment of Shari'a is the one thing that disparate factions agree on in Egypt, though to what degree remains a bone of contention.

This paper recognizes that the Egyptian people seek a nation consistent with Shari'a principles and that utilizes Islamic values as a foundation for government. Thus, this paper seeks to determine how best to reconcile the demands of democracy and the preservation of human rights within the context of constitutional accommodation of Islam. Part I will contrast constitutional models for the accommodation of religion, with specific attention paid to the enumeration of civic rights. Additionally, this section will extrapolate upon the effectiveness of each model in preserving the rights of women and religious minorities by using human rights norms to gauge the status of women and religious minorities in each country. Part II will discuss the constitutional moment facing the nation of Egypt and how it can best protect the basic human

¹⁵ United Nations, *'State religions' Risk Alienating Minorities, Warns UN Rights Expert*, UN NEWS CENTRE (Mar. 6 2012), <http://www.un.org/apps/news/story.asp?NewsID=41468&Cr=religion&Cr1=#.UK1ENI6yqi8>

¹⁶ *Id.*

¹⁷ ABDULLAH AHMED AN-NA'IM, *ISLAM AND THE SECULAR STATE: NEGOTIATING THE FUTURE OF SHARIA* 1 (2008).

rights of women and minorities given the accommodation of Shari'a law. This paper proposes that Egypt would be best served by making Islam *a* foundational source of legislation rather than *the* foundational source of legislation, and by explicitly enumerating the rights afforded to women and religious minorities unqualified by application of Shari'a law.

Part I
Constitutional Models for the Accommodation of Religion and their Implications on the Rights of Women and Religious Minorities

I. No Constitutional Accommodation of Religion

Several nations have recognized that incorporating religion is inherently problematic, and so have made no accommodation for religion. China has established a secular nation,¹⁸ however as a socialist “democratic dictatorship,” it does not provide a model for reconciling religion with democratic values. France¹⁹ and Turkey²⁰ have established secular democratic states that enforce a strict separation between church and state. Under French secularism (*laicite*), religion is not to impact the public realm, and the public realm is permitted to disfavor religion in contrast to non-religion.²¹ However, Turkey is unique as a nation with a majority Muslim population that has precluded any interference by “sacred religious feelings in state affairs and politics.”²²

This separation of religious thought from the political sphere lends itself to greater national stability. Secularism prevents dispute concerning the promotion of one religion over another. However, it does not ensure that the rights of women or religious minorities are preserved. Moreover, establishing secularism creates specific challenges for the expression of

¹⁸ Constitution of the People's Republic of China Dec. 4, 1982, art. 1 and 2

¹⁹ Constitution of the Fifth Republic Jul. 23, 2008, art 1 (Fr.) (France is an “indivisible, secular, democratic, and social Republic.”)

²⁰ Constitution of the Republic of Turkey May 10, 2007, art. 1

²¹ Martha Nussbaum, *The Burqa and the New Religious Intolerance*, ABC RELIGION AND ETHICS, (May. 22, 2012), <http://www.abc.net.au/religion/articles/2012/05/22/3507845.htm>

²² Constitution of the Republic of Turkey May 10, 2007, Preamble

any religion. It thereby infringes on the religious rights of all practitioners, minority and majority alike.

France,²³ Turkey²⁴ and China²⁵ have each been compelled to create explicit grants of women's rights. Despite the lack of religious recognition in their constitutions, women's rights have required special attention to ensure protection in varied and diverse cultures. However, these provisions have seen limited success in each of these countries. Turkey sees some of the greatest offenses to women's rights, as violence against women in the home is endemic.²⁶ Moreover, women face particularized violence,²⁷ including honor killings.²⁸ Turkey has begun to address this issue through the implementation of the Family Protection Law.²⁹ However, police and courts regularly fail to protect women, and so a domestic rights deficit remains.³⁰ This failure effectively denies women constitutionally guaranteed equal access and equal protection under the law.³¹ In addition to pervasive violence, Turkish women also face significant disparity in education and economic opportunity.³² Women's rights in China are more expansive than

²³ See Constitution of the Fifth Republic art. 1 § 2 (Fr.) (creating equal access to elective offices for women); *Id.* art. 3 § 3 (granting right to vote); France at the UN, Protection of Women, <http://www.franceonu.org/france-at-the-United-nations/thematic-files/rule-of-law/protection-of-women-638/Protection-of-women#UN-Women> (committing the State to take any necessary measures to eliminate all forms of discrimination against women, in all areas, including political, economic, social, cultural and civil areas).

²⁴ Constitution of the Republic of Turkey May 10, 2007, art. 10 (stating that men and women have equal rights before the law, and creating an affirmative duty for the State to ensure equality in practice).

²⁵ China enacted The Law of the People's Republic of China on the Protection of Rights and Interests of Women, in 1992. It has been ineffectual despite its promise to provide and protect equal rights for women in all aspects of political, social, economic, cultural, and family life. All-China Women's Federation, *Law of the People's Republic of China on the Protection of Rights and Interests of Women* (last visited Nov. 22, 2012) <http://www.women.org.cn/english/english/laws/02.htm>

²⁶ *Turkey: Backward Step for Women's Rights*, HUMAN RIGHTS WATCH (June 10, 2011), <http://www.hrw.org/news/2011/06/09/turkey-backward-step-women-s-rights>

²⁷ *Id.*

²⁸ Elif Shafik, 'Honour Killings': Murder by any Other Name, THE GUARDIAN (Apr. 30, 2012) <http://www.guardian.co.uk/uk/2012/apr/30/honour-killings-spreading-alarming-rate>

²⁹ <http://www.hrw.org/news/2011/06/09/turkey-backward-step-women-s-rights>

³⁰ *Id.*

³¹ See Constitution of the Republic of Turkey May 10, 2007, art. 10.

³² Women compose only 27 percent of Turkey's paid workforce, Moreover, in spite of the Constitutional compulsory education requirement contained in Article 42, 3.7 of the 4.8 million people who are illiterate are women. *Turkey: Backward Step for Women's Rights*, *supra* note 26.

those enumerated in Turkey, however they are largely unenforceable.³³ Thus women in China see less pay, less mobility from the home, and less representation in government than their male counterparts.³⁴ Moreover, China has seen “rights rollbacks” in recent years, to the extent that Chinese women have no status at all.³⁵

France has seen the greatest level of equality with special economic provisions for mothers,³⁶ greater participation in the economic sphere³⁷ and equal representation in the workforce.³⁸ However women remain relegated to lower pay grades³⁹ and have less access to leadership positions.⁴⁰ The commitment to secularism has not guaranteed a culture that supports equality of women and men in any of these countries. France’s constitution provides the strongest enumeration of women’s rights of the three. However, it is the culture of France, reliant upon ideals of gallantry and paternalism,⁴¹ that has ensured women are more valued in the home than in the boardroom or government.

Religious minorities are thought to receive greater protection under a secular state, as there is no religious influence on the government. However, each constitution has approach the

³³ Under the Communist establishment the rights provisions in the Constitution cannot be applied directly by Chinese courts rendering them ineffectual. See Sanzhuan Guo, *Implementation of Human Rights Treaties by Chinese Courts: Problems and Prospects*, 8.1 CHINESE J. INT’L L. 161-179 (2009), <http://chinesejil.oxfordjournals.org/content/8/1/161.full>.

³⁴ *Id.*

³⁵ *Id.*

³⁶ France offers government funded comprehensive family allowances, tax deductibles, free nursery school and even specialized recovery procedures for recent mothers. See Katrin Bennhold, *Where Having it All Doesn’t Mean Having Equality*, NY TIMES (Oct. 11, 2010), http://www.nytimes.com/2010/10/12/world/europe/12iht-fffance.html?pagewanted=all&_r=0.

³⁷ Women make up 82 percent of the workforce in France. *Id.*

³⁸ *Table 5c: Distribution of Laborforce by Status in Employment*, UNITED NATIONS STATISTICS DIVISION (last visited Nov. 20, 2012), <http://unstats.un.org/unsd/demographic/products/socind/>.

³⁹ Women earn, on average, one third less than men. See Ricardo Houseman, Laura Tyson & Saadia Zahidi (2012) *Global Gender Gap Report*, World Economic Forum, http://www3.weforum.org/docs/WEF_GenderGap_Report_2012.pdf

⁴⁰ Roughly two thirds of legislators, senior officials, and managers are men. See *Table 5c: Distribution of Laborforce*, *supra* note 38.

⁴¹ Katrin Bennhold, *supra* note 36.

rights of religious observers differently. France's Declaration of the Rights of Man⁴² provides that no one may be "disquieted on account" of his beliefs, including religious views, so long as their practice does not disrupt public order.⁴³ Turkey's Constitution is more explicit establishing that everyone has the right to the freedom of conscience, religious belief, and conviction.⁴⁴ Moreover, both Turkey⁴⁵ and China⁴⁶ constitutionally proscribe the compulsion of any citizen to believe, or not to believe, in any religion. China extends to citizens protection from discrimination on the basis of belief in any religion, or lack thereof,⁴⁷ creating the most expansive religious freedom provision of the three.

However, both China⁴⁸ and Turkey⁴⁹ place significant limitations on the practice of religion.⁵⁰ Moreover, in neither country is legal status extended to every religion.⁵¹ Additionally, each requires registration of religious groups and imposes government regulation and

⁴² France has made very few specific provisions for rights of citizens in its constitution, but instead has incorporated the Declaration of the Rights of Man of 1789 and has given it constitutional import. The Declaration grants broad, and somewhat vague rights on French citizenry. *See* Constitution of the Fifth Republic Jul. 23, 2008, Preamble. *See also* Declaration of the Rights of Man, 1789 THE AVALON PROJECT (last visited Nov. 22, 2012), http://avalon.law.yale.edu/18th_century/rightsof.asp

⁴³ Declaration of the Rights of Man, 1789, § 10, THE AVALON PROJECT (last visited Nov. 22, 2012), http://avalon.law.yale.edu/18th_century/rightsof.asp

⁴⁴ Constitution of the Republic of Turkey May 10, 2007, art. 24 § 1.

⁴⁵ *Id.*, art. 24 § 3 (stating that no one may be compelled to worship, or to participate in religious ceremonies and rights, to reveal their beliefs and convictions, or to be blamed or accused based on religious beliefs).

⁴⁶ The Chinese Constitution provides for freedom of religious belief, specifically proscribing the compulsion of any citizen to believe, or not to believe, in any religion at the hands of the State, public organization, or individual. Constitution of the People's Republic of China Dec. 4, 1982, art. 36.

⁴⁷ *Id.*

⁴⁸ There is a public safety limitation placed on the freedom of expression, in that the practices of any religion may not disrupt public order, interfere with the educational system of the State, or adversely affect the health of citizens. *Id.*

⁴⁹ Constitutional limits are placed on citizens' rights based upon danger to the existence of the democratic and secular order of Turkey. Moreover, all education and instruction in religion and ethics is to be conducted under state supervision and control. Constitution of the Republic of Turkey May 10, 2007, art. 24 § 2

⁵⁰ United States Commission on International Religious Freedom, *USCIRF Annual Report 2012 - Countries of Particular Concern: Turkey*, UNHCR.ORG (Mar. 20, 2012), <http://www.unhcr.org/refworld/docid/4f71a67011.html>

⁵¹ Despite the language providing for freedom of religion, in practice there is no legal concept of religious minority in China. *See* Guo, *supra* note 33.

supervision on the practice of religion.⁵² Turkey constitutionally mandates the regulation of religion⁵³ including the establishment of a regulatory government agency.⁵⁴

Human rights activists have also registered concerns about rights for religious minorities under the secularist mandate in France.⁵⁵ Specifically, in 2011 France enacted legislation forbidding the wearing of the burqa in public spaces, including schools, parks and marketplaces.⁵⁶ This law not only extended previously existing legislation forbidding public expression of religious ideology, but also was discriminatory in concept and application.⁵⁷ However, the Constitution of France does not protect religious expression at the expense of the secularism of the public realm. In fact, it empowers the State to enforce secularism at the expense of religious expression and tolerance.⁵⁸

While one could argue that the inability to participate in certain religious observances is the cost of a stable society, it is also indicative that religious minorities, and religious persons in general, may lack a voice in the democratic process and are therefore trodden upon by the majority. Thus, in France and Turkey the creation of a secular state does not ensure religious

⁵² See Joel A. Nichols, *Dual Lenses: Using Theology and International Human Rights to Assess China's 2005 Regulations on Religion*, 34 PEPP. L. REV. 105, 117-119 (2006); United States Department of State, *International Religious Freedom Report for 2011*, Bureau of Democracy, Human Rights and Labor (last visited Nov. 22, 2012), <http://www.state.gov/documents/organization/192653.pdf>; United States Commission on International Religious Freedom, *USCIRF Annual Report 2012 - Countries of Particular Concern: Turkey* (March 20, 2012), available at: <http://www.unhcr.org/refworld/docid/4f71a67011.html>.

⁵³ Specifically, all education and instruction in religion and ethics is to be conducted under state supervision and control. Constitution of the Republic of Turkey May 10, 2007, art. 24 § 4.

⁵⁴ Regulation of religion is to be exercised by the Department of Religious Affairs in accordance with the principles of secularism. *Id.* art 136.

⁵⁵ *Amnesty International Annual Report 2012 - France, 24 May 2012*, Amnesty International (last visited Nov. 21, 2012), <http://www.unhcr.org/refworld/docid/4fbc393cc.html>.

⁵⁶ Martha Nussbaum, *The Burqa and the New Religious Intolerance*, ABC RELIGION AND ETHICS (May 22, 2012), <http://www.abc.net.au/religion/articles/2012/05/22/3507845.htm>.

⁵⁷ The French State had previously outlawed the wearing of all overt religious symbols in 2004, including sikh turbans, heavy crosses, and Jewish yarmulke for school children and school administrators. The 2011 law focuses specifically on the wearing of burqa covering the wearer's face and is thus discriminatory to Muslim women specifically. Absent the overt discriminatory effect of legislation targeting only burqa clad Muslim women, there remains concern that the prohibition on wearing *any* overtly religious symbol infringes upon the wearer's freedom of religious expression, and is discriminatory in practice. See *France Overview*, MINORITY RIGHTS GROUP INTERNATIONAL (last visited Nov. 22, 2012), <http://www.minorityrights.org/?lid=1622#current>.

⁵⁸ Martha Nussbaum, *supra* note 56.

liberty. Moreover, it does not address the cultural norms created by religious leanings. Thus, the creation of a secular Egyptian state would be insufficient to prevent societal abuses of women and religious minorities, as demonstrated by Turkey.

II. Constitutional Accommodation of Judeo-Christian Religions

A. Promotion without Preference

Initially the United States Constitution established the mechanisms of governance, creating a democratic republic, with no reference to the incorporation of religion. The drafters of the Constitution had premised their authority in allusion God in documents written contemporaneously.⁵⁹ However, the Preamble to the Constitution, as well as the remainder of the document remained silent on the role of religion. However, in 1791, the Constitution was amended to reserve specific rights to the people under the new government. The first of these amendments prohibits the government from making any law “respecting the establishment of religion, or prohibiting the free exercise thereof.”⁶⁰ At a minimum the Establishment Clause dictates that neither a state nor the federal government may set up a church, pass laws that aid one religion, aid all religions, or prefer one religion over the other.⁶¹ However, unlike France and Turkey above, the United States has been equally forbidden from establishing a “religion of secularism.”⁶² It may not affirmatively oppose or show hostility to religion, thereby “preferring

⁵⁹ See Declaration of Independence, 1775 (“We hold these truths to be self evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness.”).

⁶⁰ U.S. Const. amend. I (The two clauses composing this Amendment are referred to as the Establishment Clause and the Free Exercise Clause, respectively).

⁶¹ Michael A. Rosenhouse, Annotation, *Construction and Application of Establishment Clause of First Amendment—U.S. Supreme Court Cases*, 15 A.L.R. Fed. 2d 573 (2006).

⁶² More pointedly, the Court has recognized that that the people of the United States are “a religious people whose institutions presuppose a Supreme Being,” and the Court has acknowledged that the First Amendment was not intended to create a “religion of secularism.” *Id.*

those who believe in no religion over those who do believe.”⁶³ Thus, the approach of the United States Constitutional jurisprudence is one of promoting religion, so long as all religions are treated equally.

In the more than two hundred year history since the ratification of the Constitution, the Court has developed an extensive jurisprudence set on ensuring that rights of religious observers are not unduly infringed upon by the government. Moreover, ensuring that the government is not preferential to any religious entity. In practical application, the Court has held that the constitutional rights inherent in the Establishment Clause are not violated laws prohibiting bigamy or laws increasing the level of protection of religious rights of prisoners.⁶⁴ In contrast with Turkey, a licensing and registration law has been invalidated as creating a denominational preference that is prohibited by the Establishment Clause.⁶⁵ In regards to regulation of public education, the United States Court has disapproved of laws requiring religious based curriculum, specifically creation science, be taught along with evolution. It has also rejected a law providing for the teaching of religious subjects by private teachers in public school classrooms in an effort to keep religious instruction out of public schools.⁶⁶ This approach is in line with the goal of promoting religious practice while preventing the preference of one religion over any other. This approach is not always perfect. However, religious minorities suffer no marked discrimination or prejudice. Moreover, the government has gone to great lengths to protect religious freedom by mandating that employers may not discriminate on the basis of religion.⁶⁷

Unlike freedom of religion, gender equality was not provided for in the original

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Specifically, it is unlawful for an employer to fail or refuse to hire, discharge, segregate, classify, limit or discriminate with respect to compensation or terms of employment, or in such a way as to deprive the individual of employment opportunities or otherwise adversely effect his status as an employee on the basis of religion. 42 U.S.C.A. § 2000e-2 (West).

amendments preserving individual rights in the Constitution. Women's rights, therefore, have a somewhat checkered history of development.⁶⁸ Women were not granted the right to vote until the adoption of the Nineteenth Amendment in 1920, which holds that the right to vote may not be "abridged" on the basis of sex.⁶⁹ Congress further extended equality establishing the premise of equal pay for equal work under the Equal Pay Act of 1963. It then precluded discrimination in employment based on sex when enacting the Civil Rights Act of 1964.⁷⁰ Additionally, the government took an affirmative step to address instances of domestic and other gender based violence by passing the Violence Against Women Act (VAWA) of 1994.⁷¹ Despite this measure, women are still at risk for gender-based violence.⁷² However, women in America fare much better than women in the majority of the world.⁷³ American women have greater access to education and economic opportunity, as well as greater presence in the public sphere.⁷⁴

The United States model demonstrates that it is not necessary to completely eradicate religious considerations from constitutional construction. It is possible to promote religious ideals while maintaining individual liberties of women and religious minorities. The fact that traditionally Christianity bears strong similarities to Islam in its conception of women as subordinate to males also indicates that it is possible for a society to develop mechanisms that

⁶⁸ Up until the late 19th century, when a woman married her legal identity merged with that of her husband and she could no longer own, control, or manage property. Moreover, women were not granted any recourse for marital rape or domestic violence under traditional common law, which viewed the woman as chattel of her husband. Kathleen A. Portuan Miller, *The Other Side of the Coin: A Look at Islamic Law As Compared to Anglo-American Law-Do Muslim Women Really Have Fewer Rights Than American Women?*, 16 N.Y. INT'L L. REV. 65, 72-88 (2003).

⁶⁹ U.S. Const. 19 Amend.

⁷⁰ 42 U.S.C.A. § 2000e-2 (West 2012).

⁷¹ 42 U.S.C.A. § 13981 (West 2012).

⁷² "The Bureau of Justice reports that each year one million American women suffer nonfatal violence by an intimate partner . . . 28 percent of all annual violence against women is perpetrated by intimates . . . and nearly one in three adult American women will experience at least one physical assault by a partner during adulthood." Portuan Miller, *supra* note 69, at 89.

⁷³ The United States ranks 22 in the Global Gender Gap Report. Houseman, *supra* note 39.

⁷⁴ The United States shows no gap in literacy or education achievement, and women saw an increase in perceived wage equality ratio as well as the estimated earned income ratio. Moreover, women have a significant presence as legislators, senior officials and management. *Id.*

overcome cultural and religious biases to ensure the rights of traditionally underrepresented groups. However the United States made a commitment to human dignity and individual rights from its inception, without religious qualification that would impede the evolution of minority rights. Moreover, it has had the benefit of 200 years of practice and hindsight, and even at that does not earn a perfect score in equality and protection. What the United States best exemplifies is the need to commit to human rights, and specifically rights of women and religious minorities, without qualification. This would best be achieved through the explicit delineation of rights reserved to each group within the constitution, without reference to religious canon.

B. Preference of Christianity

Italy and Ireland establish no state religion, however both provide for recognition of Christianity in their constitutions.⁷⁵ Italy recognizes dual sovereignty with the Catholic Church,⁷⁶ whereas Ireland simply recognizes an obligation of worship.⁷⁷ Both states provide explicit rights for freedom of religious practice.⁷⁸ Moreover both states are precluded from placing undue burdens on the establishment of religion or practitioners.⁷⁹ Both nations provide for religious education. However, Italy creates a preference for Catholicism,⁸⁰ whereas Ireland is required to

⁷⁵ U.S. Dep't of State, *2011 Report on International Religious Freedom – Italy*, UNHRC (July 30, 2012), <http://www.unhcr.org/refworld/docid/502105b12.html>; Constitution of Ireland Dec. 22, 1937, art 44 § 1; U.S. Dep't of State, *2011 Report on International Religious Freedom - Ireland*, UNHRC (July 30 2012, available at: <http://www.unhcr.org/refworld/docid/502105b2c.html>.

⁷⁶ The relationship is governed by the Lateran Pacts. Constitution of the Italian Republic Dec. 22, 1947, art. 7.

⁷⁷ “Acknowledge[ing] that the homage of public worship is due to Almighty God.” Constitution of Ireland Dec. 22, 1937, art 44 § 1.

⁷⁸ Irish constitutional provisions guarantee “freedom of conscience” and “free profession and practice” of religion *Id.* art 44 § 2 cl. 1. The Italian Constitution further provides that every citizen is entitled to freely profess their religious beliefs in any form, to promote them, and to celebrate rites in public or in private, so long as they are not offensive to public morality. Constitution of the Italian Republic Dec. 22, 1947 art. 19.

⁷⁹ The Italian State is constitutionally prohibited from placing undue limitations or fiscal burdens on the establishment of religious institutions or associations. Constitution of the Italian Republic Dec. 22, 1947, art. 20. The Irish State may not impose disabilities on the ground of religious profession, belief or status, and discrimination on the basis of religion is strictly prohibited. Const. of Ireland, art 44 § 2 cl. 3.

⁸⁰ The recognition of the sovereignty of the Catholic Church has granted it certain privileges pertaining to instruction in public schools. The government permits the church to select Catholic teachers, which are funded by the state, to provide instruction in “hour of religion” courses taught in the public schools. As in Greece, students who do not

provide equal funding to all educational institutions regardless of religious affiliation.⁸¹ Religious minorities, though subject to some religious instruction, enjoy a significant amount freedom and security.⁸² Thus, as a representation of incorporation of religion into a constitution, Italy and Ireland provide an excellent example of how religion can be promoted without a corresponding detriment to religious minorities.

Both nations provide for equality of social and legal status for citizens. However, Italy's provision is specifically without regard to sex,⁸³ whereas Ireland protects no specified groups.⁸⁴ Both nations provide for equal employment rights and equal pay for equal work.⁸⁵ Italy further creates an affirmative duty on the part of the state to remove obstacles preventing the participation of the individual in the social, political and economic spheres.⁸⁶ However, Italy qualifies its equality provision in terms of the home and family.⁸⁷ This has led to systemic disparity in representation of Italian women in the public and economic spheres.⁸⁸

wish to attend are free to opt out, however there is no alternative education provided. The law also provides funding for all private schools that meet government educational standards, regardless of religious affiliation. *2011 Report on International Religious Freedom – Italy, supra note 76.*

⁸¹ The Irish government permits, but does not require, religious instruction in public schools. Moreover Department of Education is constitutionally required to provide equal funding to schools of different religious denominations, including Muslim and Jewish schools, as well to non-confessional schools. As in Greece and Italy, parents may exempt their children from religious instruction in public schools. *2011 Report on International Religious Freedom – Ireland, supra note 76.*

⁸² Neither Italy nor Ireland has experienced reports of institutional discrimination. Moreover both have only seen limited reports of societal abuses. *See 2011 Report on International Religious Freedom - Ireland, supra note 76; 2011 Report on International Religious Freedom - Italy, supra note 76.*

⁸³ Equality of social status, and standing before the law, is guaranteed for all citizens without regard to sex, race, language, religion, political leanings, and personal or social conditions. Constitution of the Italian Republic Dec. 22, 1947, art. 3.

⁸⁴ Constitution of Ireland Dec. 22, 1937, art 40 § 1.

⁸⁵ Constitution of the Italian Republic Dec. 22, 1947, art 37.

⁸⁶ It is the duty of the State to remove social and economic obstacles that prevent full development of the individual and participation in the political, economic, and social organization of the country by limiting the freedom and equality of citizens. *Id.* art. 3 cl. 2

⁸⁷ In a paternalistic fashion, women are guaranteed that conditions have to be such as to *allow women to fulfill their essential family duties* and ensure an adequate protection of mothers and children. *See Constitution of the Italian Republic Dec. 22, 1947, art. 37.*

⁸⁸ In terms of numbers, Italy ranks 67 on the Global Gender Gap Report, with only 52% of women working, and women earning roughly fifty cents to every dollar men earn. Moreover, Italy slipped six places due to disparity in perceived wage equality, as well as the number of women in ministerial positions, and attainment of secondary and tertiary education. *See Houseman, supra note 39.*

Moreover, Italy's approach has allowed violence against women to proliferate.⁸⁹

Ireland's provision recognizes the role of women in the home, but does not qualify their equality in the economic sphere on the basis of that obligation.⁹⁰ Although specific rights enumerated for women are limited to employment, Ireland has managed to most effectively preserve the rights of women.⁹¹ The primary women's rights issue in Ireland centers around the death of a woman denied abortion.⁹² This has human rights activists calling for reformation of Ireland's strict approach to abortion.⁹³ It is important to note that the Irish legislation on abortion is dictated by the direct application of Christian principles. This makes the legislation inaccessible to anyone who does not share in the Christian faith. While religion may be used to inform policy, it should not be used as the basis of policy. The use of comprehensive worldviews as a basis of policy precludes adequate debate, as all sides do not equally understand the justification.

However, it is telling that Ireland does not appear to suffer from the patent inequality and gender based violence that is often endemic in countries with religious affiliation. By securing to women the right to work outside of the home, and explicitly recognizing of the value to the state provided by women who serve inside the home, the status of women has been adequately

⁸⁹ Despite the protection of "inviolable human rights" in Article 2, the UN Committee on the Elimination of Discrimination Against Women communicated concern about a range of issues affecting women in Italy. Specifically, Roma and migrant women face multiple forms of discrimination and vulnerability to violence. While such discrimination and violence is certainly predicated on racial and social factors, the fact that women are more substantially at risk is important to note. See *World Report 2012: European Union*, HUMAN RIGHTS WATCH (last visited Nov. 22, 2012), <http://www.hrw.org/world-report-2012/world-report-2012-european-union>.

⁹⁰ The Constitution preserves to women the right to an adequate livelihood, and to work to secure the provision of said livelihood, equal to the rights of men. Moreover, in recognition of the support provided to the State through the woman's role in the home, the State is mandated to endeavor to ensure that mothers are not obligated on the basis of economic necessity to work outside the home to the detriment of their duties within the home. See Constitution of Ireland Dec. 22, 1937, art 41 § 2.

⁹¹ Ranking fifth in the world in the 2012 Global Gender Gap Report, and has consistently ranked in the top ten countries for the last five years. See Houseman, *supra* note 39.

⁹² *Ireland: Death of Woman Denied Abortion Should Spur Reform*, HUMAN RIGHTS WATCH (Nov. 16, 2012), <http://www.hrw.org/news/2012/11/16/ireland-death-woman-denied-abortion-should-spur-reform>

⁹³ *Id.*

preserved. This indicates that it is imperative that constitutional provisions be drafted in such a way that the rights of women are not subject to abrogation on the basis of traditional religious subjugation of women.

C. Establishment of Christianity as a State Religion

Greece establishes the Greek Orthodox Church, a Christian denomination, as the official state religion.⁹⁴ All Greek citizens are deemed equal before the law.⁹⁵ Moreover, Greece Constitutionally guarantees all citizens the right to participate in the social, economic and political life of the country.⁹⁶ Greece grants certain constitutional protections to all persons living within the Greek territory.⁹⁷ The Constitution provides for unequivocal free exercise of religion, however proselytizing is not permitted.⁹⁸

In practice, there remains some discrimination on the basis of religious practice, affiliation or belief on the societal level.⁹⁹ Moreover, the Greek government financially supports the Orthodox Church, and mandates state funded Orthodox religious instructions for all students in primary and secondary schools.¹⁰⁰ However, the government has also recognized Shari'a as governing civic and family issues including marriage, divorce, custody of children, and

⁹⁴ Constitution of Greece June 11, 1975, art 1.

⁹⁵ *Id.*, art 4 § 1. Moreover, men and women have equal rights and obligations. *See Id.*, art 4 § 2.

⁹⁶ *Id.*, art 5 § 1.

⁹⁷ These rights include a guarantee of full protection of life, honor and liberty without regard to nationality, race or language and of religious or political beliefs. These protections appear to extend beyond the confines of citizenship, and are provided to all who live within the nation. However, gender is not enumerated as a protected status. *See Id.*, art 5 § 2.

⁹⁸ "There shall be freedom to practice any known religion; individuals shall be free to perform their rites of worship without hindrance and under the protection of the law. The performance of rites of worship must not prejudice public order or public morals. Proselytism is prohibited." *Id.*, art 13.

⁹⁹ Specifically, the European Court of Human Rights (ECHR) ruled against Greece in June 2010 for requiring all participants in court proceedings to swear an Orthodox oath on the Bible, without permitting an alternative or non-religious oath. U.S. Dep't of State, *2010 International Religious Freedom Report - Greece*, UNHCR (Sept. 13, 2011), <http://www.unhcr.org/refworld/docid/4e734c982d.html>.

¹⁰⁰ Though non-Orthodox children may opt out of the religious instruction, there are no alternative programs provided. *Id.*

inheritance for the Muslim minority living in Thrace.¹⁰¹ This is a level of accommodation for religious minorities not often seen. It is clear that Greece, though promoting the Greek Orthodox Church through the State, is attempting to find a balance wherein religious minorities' needs and rights are maintained despite the religious nature of the State. The absence of significant discrimination indicates that the specific enumeration of free exercise for religious observers is integral in a religious state.

Gender is not granted protected status constitutionally, though Greece constitutionally provides equal pay for women.¹⁰² Greece has created an affirmative constitutional duty for the state to enact positive measures to promote equality between men and women.¹⁰³ However this is the extent to which rights for women have been specifically enumerated. Sex and gender are not granted protected status under Greece's constitution.

Under this construct, women experience a lack of equal access in the economic sphere.¹⁰⁴ Because of the traditional gender roles and the pressure of economic decline and discrimination in employment is running rampant.¹⁰⁵ Moreover, these same factors have seen domestic violence on the rise.¹⁰⁶ Though enrollment in tertiary education is roughly equivalent between men and women, this does not translate into equal opportunity in employment or political empowerment.¹⁰⁷

¹⁰¹ *Id.*

¹⁰² Equal pay is secured by specifically holding that all workers, irrespective of sex are entitled to equal pay for equal work. Constitution of Greece June 11, 1975, art 22.

¹⁰³ Prescribes that the state is to take measures to eliminate inequalities actually existing, in particular those that are to the detriment of women. Additionally, they endeavored to preempt contention over these positive measures by specifically defining them as the outside the scope of discrimination. *Id.*, art 116 § 2

¹⁰⁴ Women are disproportionately representation in public service and caregiver positions indicating a relegation to traditionally female jobs. Lizzy Davies, *Greek Crisis Hits Women Especially Hard*, THE GUARDIAN (June 15, 2012), <http://www.guardian.co.uk/world/greek-election-blog-2012/2012/jun/15/greek-crisis-women-especially-hard>

¹⁰⁵ *Id.* See also Houseman, *supra* note 39.

¹⁰⁶ Davies, *supra* note 105.

¹⁰⁷ Greek women comprised 6 percent of ministerial positions in government in 2012. Additionally, only 28 percent of legislators, senior officials, and managers are women, and women comprise a meager 19 percent of ruling governmental bodies. Houseman, *supra* note 39.

Thus, though the Constitution provides for equality of women, the perpetuation of the Orthodox Church, including its traditional religious based gender roles, impedes the ability for the government to help create a culture of equality within the nation. In an environment such as this, additional constitutional safeguards are necessary to ensure the full participation of women in the social, economic and political spheres. Such safeguards would include a specific enumeration of rights reserved to women.

III. Constitutional Accommodation of Islam

A. Islamic Theocracy - Iran

Iran is self-defined as an Islamic theocracy with global intentions.¹⁰⁸ It is governed by the Ayatollah, or Supreme Leader of the Islamic religion and seeks to see Islam expanded into other nations.¹⁰⁹ The Constitution establishes an “Islamic Republic”¹¹⁰ wherein Shari’a is the definitive source of law.¹¹¹ Moreover all Iranian law is subordinate to Shari’a principles.¹¹² Thus Iran sees an “Islamic imperative” both at home and abroad,¹¹³ and its Constitution and legislation is interpreted or superseded to permit such state action.¹¹⁴

Iran’s goal of perpetuating the Islamic Revolution abroad and subordinating constitutional laws to Shari’a places Iran in conflict with any country not upholding Islam. They further prime Iran for the violation of human and constitutional rights in the perceived name of

¹⁰⁸ Richard Horowitz, *A Detailed Analysis of Iran’s Constitution*, WORLD POLICY BLOG (Oct. 12, 2010), <http://www.worldpolicy.org/blog/2010/10/12/detailed-analysis-iran’s-constitution>.

¹⁰⁹ *Id.*

¹¹⁰ Constitution of the Islamic Republic of Iran October 4, 1979, art. 1.

¹¹¹ Requiring submission to Allah and the “divine revelation” playing a “fundamental role” in the establishment of laws. *Id.* art 2.

¹¹² Providing that “all civil, penal financial, economic, administrative, cultural, military, political, and other laws and regulations must be based on Islamic criteria.” *Id.* art 4

¹¹³ Establishing that the constitution “provides the necessary basis for ensuring the continuation of the [Islamic] Revolution at home and abroad,” and makes the army responsible for fulfilling the mission of jihad by “extending the sovereignty of God’s law throughout the world.” *Id.*, Preamble.

¹¹⁴ Horowitz, *supra* note 108.

Islam. Moreover, Iran sees the separation of religion and state, and the removal of Islam from politics in any permutation, to be patently adverse to Islam.¹¹⁵ Given this backdrop, there is little expectation that Iran would deviate from traditional seventh-century interpretations of Islam.¹¹⁶ Iran has thereby become representative of the extreme end of the spectrum regarding creating an ultra-conservative or traditionalist Islamic State. It is the potential for Egypt to follow Iran's example that drives debate on the role of Shari'a in constructing Egypt's constitution.

The Iranian Constitution immutably establishes Islam, and specifically the Twelver Ja'fari School, as the official religion.¹¹⁷ However, other Islamic schools are not to be prejudiced in the performance of their rites and are afforded full legal status.¹¹⁸ Additionally, Sunni Muslims are officially given a higher status than other religious minorities.¹¹⁹

In regards to non-believers,¹²⁰ the Constitution dictates that the government of Iran, and all Muslims, have an affirmative duty to treat non-Muslims "in conformity with ethical norms and the principals of Islamic justice and equity, and to respect their human rights."¹²¹ However, as traditionally applied the norms of Islam have included violence against and limited citizenship

¹¹⁵ Such ideas are "formulated and propagated by the imperialists; [and] only the irreligious ... repeat them." *Id.*

¹¹⁶ *Id.*

¹¹⁷ Constitution of the Islamic Republic of Iran October 4, 1979, art. 12.

¹¹⁸ Other Islamic schools are to be accorded full respect, and their followers are free to act in accordance with their own jurisprudence in performing their religious rites. Moreover, the Constitution grants to these schools official status in matters pertaining to religious education, affairs of personal status (marriage, divorce, inheritance, and wills) and related litigation in courts of law. *Id.*

¹¹⁹ In regions where the majority of the population is composed of Muslims following any one of these schools, local regulations are permitted to be in accordance with the respective school, so long as the rights of followers of other schools are not infringed upon. *See Id. See also Discrimination Against Ethnic and Religious Minorities in Iran*, INTER'L FED'N FOR HUMAN RIGHTS, July 2010 (last visited Nov. 19 2012), <http://www.unhcr.org/refworld/docid/4c8622f72.html>.

¹²⁰ Individuals who are neither Muslim nor the three recognized religions in Article 13, or "People of the Book."

¹²¹ Citing the Qur'an, Sura 60:8 "God does not forbid you to deal kindly and justly with those who have not fought against you because of your religion and who have not expelled you from your homes." Constitution of the Islamic Republic of Iran October 4, 1979, art. 14.

for “non-believers.” Moreover, only Zoroastrian, Jewish, and Christian Iranians are legally recognized religious minorities, free to perform their religious rites and ceremonies.¹²²

Pursuant to the application of “traditional” Islamic law, the Iranian government consistently engages in discrimination, harassment, imprisonment, and intimidation on the basis of religious beliefs.¹²³ The government has created a threatening atmosphere for almost all non-Shi’a Muslim religious groups.¹²⁴ Under Articles 12 and 13, legal status and recognition is denied to several major Islamic schools, including some of the significant Shi’a schools,¹²⁵ as well as a number of other faiths.¹²⁶

Under this constitutional construct, there is no cause of action for religious minorities. Religions such as Judaism and Christianity exist but are denied the right to be free from harassment.¹²⁷ More troublingly, non-believers and atheists do not have the right to exist at all.¹²⁸ Thus members of religious minorities face continuing persecution.¹²⁹ This persecution is predicated on calls by the Supreme Leader and other government and religious authorities to combat “false beliefs,” which refers to evangelical Christianity, Baha’ism and Sufism.¹³⁰ Moreover, converts from Islam to Christianity, or other faiths, are vulnerable to charges of apostasy, which can result in imposition of the death penalty.¹³¹

¹²² Qualified by the limitation of the law, based on application of Shari’a. This qualification could involve imposition of taxes or other restraints. They are also provided a degree of freedom to act according to their own religious canon in matters of personal affairs and religious education. *See Id.* art. 13.

¹²³ Bureau of Democracy, Human Rights and Labor, *International Religious Freedom Report for 2011*, U.S. DEPT OF STATE (last visited Nov. 19, 2012), <http://www.state.gov/documents/organization/192653.pdf>.

¹²⁴ Most notably Baha’is, Sufi Muslims, Evangelical Christians, Jews, Sunni, and Zoroastrians. *Id.*

¹²⁵ Some excluded schools are the Isma’ilis, and the Alawites. *Discrimination Against Ethnic and Religious Minorities in Iran*, *supra* note 120.

¹²⁶ Including the Baha’is and various branches of Sufis.

¹²⁷ *Discrimination Against Ethnic and Religious Minorities in Iran*, *supra* note 120.

¹²⁸ *Id.*

¹²⁹ Including Christian converts, Baha’is, dissident Shi’a clerics and members of the Ahl-e Haq and Dervish communities. *Annual Report 2012: The State of the World’s Human Rights – Iran*, AMNESTY INTER’L, <http://www.amnesty.org/en/region/iran/report-2012>.

¹³⁰ Baha’i observers have been arrested and jailed for their beliefs, with prison terms of up to 20 years. *Id.*

¹³¹ *Id.*

Iran's perpetration of government-sanctioned persecution of religious minorities provides the clearest example of why the influence of religion in constitutional construction and operation of the state should be limited. Although the complete excise of Shari'a from the public sphere is unlikely in the current climate of the Arab Spring, there are ways of mitigating its influence through the phrasing utilized in the drafting of modern constitutions, as well as in the commitment of the government to the protection of human rights above the implementation of Shari'a.

The Preamble to the Constitution recognizes that women suffered under the previous regime, and commits the state to providing recovery vindication of rights.¹³² However the rights of women are defined as the ability to return to the home and no longer be a tool for work "in the service of consumerism and exploitation."¹³³ Thus women are to reassume their task of bringing up religiously minded men and women.¹³⁴

The Constitution further provides that all citizens of the country, both men and women, are to equally enjoy the protection of the law and "enjoy all human, political, economic, social, and cultural rights, in conformity with Islamic criteria."¹³⁵ The provisions appear comprehensive and expansive, providing for the ability of women to fully flourish. However, the inclusion of the

¹³² Under the heading of "Woman in the Constitution," the Preamble promises to aid all the human forces that had been subjects of foreign exploitation to recover their "true identity and human rights." Specifically, women are recognized as sufferers under the previous regime, and promised the opportunity to "vindicate" their rights. Constitution of the Islamic Republic of Iran October 4, 1979, Preamble.

¹³³ In recognition of the value of the home to the state as the foundation for society and the growth and elevation of man. *Id.*

¹³⁴ *Id.*

¹³⁵ The government creates for itself the duty to ensure the rights of women in all respects, in conformity with Islamic criteria, and accomplish specific goals, including: creating a conducive environment for the growth of woman's personality and the restoration of her rights, both the material and intellectual; the protection of mothers, particularly during pregnancy and childbearing; establishing competent courts to protect and preserve the family; provision of special insurance for widows, and aged women and women without support; awarding of guardianship of children to worthy mothers, in order to protect the interests of the children, in the absence of a legal guardian. *Id.*, art. 20.

clause requiring “conformity with Islamic criteria” contributes to restrictions on the role of women in society.

Specifically, women in Iran have no protection from violent treatment in public spaces.¹³⁶ They lack the power to choose their own husbands.¹³⁷ Moreover, when married, women have no independent right to education, no right to divorce, and no right to child custody.¹³⁸ Even when unmarried, women are restricted by quotas for women's admission at universities, and are arrested, beaten, and imprisoned for peacefully seeking change of such laws.¹³⁹ Moreover, though the Iranian government has created some space for women in the public sphere,¹⁴⁰ a woman can still receive 74 lashes for going out in public without a *hijab*.¹⁴¹

Women in Iran live “in a perpetual state of rights acquisition and disillusion,”¹⁴² and are discriminated against in law and in practice.¹⁴³ Iran provides the clearest example of the necessity for explicitly enumerated provisions protecting women’s access to the public and social spheres. Moreover, it is imperative that women’s equality and access not hinge on application of principals of religion, custom, or tradition, as historically this portends a diminution in women’s rights.

B. Islamic Democracies

Several Muslim nations have overthrown their governments and sought to create Islamic democracies since Tunisia sparked the Arab spring in 2010. Each has approached the

¹³⁶ Joseph Abrams, *Exclusive: U.N. Elects Iran to Commission on Women's Rights*, FOXNEWS.COM (April 29, 2010), <http://www.foxnews.com/world/2010/04/29/elects-iran-commission-womens-rights/#ixzz2DBBwCFN7>.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ The State has charged women who were seeking equality in the social sphere with threatening national security, subjecting them to arrest, and to harrowing interrogation. *Id.*

¹⁴⁰ Creating female police brigades and allowing for female news reporters and female government representatives at English news conferences. Brandon McPhail, *The Status of Women in Iran*, DIGITAL JOURNAL (June 16, 2009), <http://digitaljournal.com/article/274215#ixzz2DBMjxnqT>.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Annual Report 2012: The State of the World's Human Rights – Iran*, *supra* note 130.

accommodation of Shari'a in different ways, providing models for Egypt to take into consideration. Iraq establishes Islam as the official religion of the State and as *a* foundational source of legislation.¹⁴⁴ It further stipulates that no law may be enacted that contradicts the established provisions of Islam, the principles of democracy, or the rights and basic freedoms preserved under the Constitution.¹⁴⁵ Syria establishes no official state religion.¹⁴⁶ However, the Constitution provides that Islam is to be a "major" source of legislation¹⁴⁷ and the religion of the President must be Islam.¹⁴⁸ Libya's provisional Constitutional Declaration for the transitional stage establishes Islam as the religion of the state and makes Islamic Jurisprudence *the* primary source of legislation.¹⁴⁹ As with Egypt, there is consensus that Shari'a should have some role in the formation of government. However there is still debate regarding whether Shari'a should be *the primary* source of law or simply *a* source of legislation.¹⁵⁰ The language utilized now indicates a more inclusive comprehension of Shari'a. Making Shari'a the primary source of legislation presents an opportunity for Islamic traditionalists to preclude other bases for law. Instead of informing policy, Shari'a would form the basis of the policy making it inaccessible to anyone who does not share the majority interpretation of the religious law.

Iraq purports to guarantee full freedom of religious belief and practice for all individuals.¹⁵¹ However it stipulates that these rights apply to people "such as Christians,

¹⁴⁴ Constitution of Iraq Oct. 15, 2005, art 2.

¹⁴⁵ *Id.*

¹⁴⁶ *2011 Report on International Religious Freedom - Syria*, U.S. DEP'T OF STATE (July 30, 2012), <http://www.unhcr.org/refworld/docid/5021057f89.html>.

¹⁴⁷ Constitution of Syria Feb. 27, 2012, art. 3.

¹⁴⁸ *Id.*

¹⁴⁹ Constitutional Declaration March 8, 2011, art. 1 (Libya).

http://portal.clinecenter.illinois.edu/REPOSITORYCACHE/114/w1R3bTIKEIG95H3MH5nvrSxchm9QLb8T6EK87RZQ9pfnC4py47DaBn9jLA742IFN3d70VnOYueW7t67gWXEs3XiVJJxM8n18U9Wi8vAoO7_24166.pdf

¹⁵⁰ Carmen Geha & Gilbert Doumit, *Libya's Constitutional Twilight*, CARNEGIE ENDOWMENT FOR INTER'L PEACE (Oct. 25, 2012), <http://carnegieendowment.org/2012/10/25/libya-s-constitutional-twilight/e61k>

¹⁵¹ Constitution of Iraq Oct. 15, 2005, art 2 § 2.

Yazidis, and Mandaean Sabeans.”¹⁵² It appears that there is freedom of religious belief and practice on the face of this provision. However the list of examples, even if non-exhaustive, leaves significant room for discrimination. Article 14 proscribes discrimination based on gender, race, ethnicity, origin, color, religion, creed, belief or opinion, or economic and social status.¹⁵³ However, this provides a degree of legal status, not free exercise. It may create a mechanism by which religious minorities could seek relief in the event of religious persecution. However, there is a conspicuous absence of an unqualified free exercise provision.

Syria establishes a fairly modern and secular state, if its constitution is enforced. Constitutionally, the Syrian state is to respect all religions, and ensure the freedom to perform all rituals and practices so long as they do not violate the public order.¹⁵⁴ Moreover, freedom of belief is to be protected and every citizen has the right to freely express his views and opinions.¹⁵⁵ Alarming, however, for issues of personal status, the government requires its citizens to be affiliated nominally with Christianity, Judaism, or Islam and does not recognize the legal status of other religious groups.¹⁵⁶ Despite the “secular” nature of the Syrian state, this represents a traditional Islamic conception of religious status.

Libyans are to be equal before the law, and all discrimination on the basis of religion, belief, race, language, wealth, kinship, political opinions or social status is proscribed.¹⁵⁷ Article 1 of the Constitution guarantees for all non-Muslims the right to the free practice of their religion and “shall guarantee respect for their systems of personal status.”¹⁵⁸ This is one of the broadest sweeping provisions allowing for religious freedom in an Islamic constitution. However, it fails

¹⁵² *Id.*

¹⁵³ *Id.*, art 14.

¹⁵⁴ Constitution of Syria Feb. 27, 2012, art. 3.

¹⁵⁵ *Id.* art 42.

¹⁵⁶ U.S. Dep’t of State, *2011 Report on International Religious Freedom – Syria*, UNHRC (July 30, 2012), <http://www.unhcr.org/refworld/docid/5021057f89.html>.

¹⁵⁷ Constitutional Declaration March 8, 2011, art 6.

¹⁵⁸ *Id.* art. 1.

to provide for “non-believers” or people who don’t ascribe to any faith. Non-believers have been denied status under traditional implementation of Shari’a law. There were have been no reports of governmental abuses of religious freedom nor reports of harsh or disproportionate treatment because of religious beliefs or practices since the inception of the new government.¹⁵⁹ However, citizens have no apparent recourse if they believe their rights to religious freedom have been violated.¹⁶⁰ Specifically, citizens do not have access to courts to seek damages for, or cessation of, religious freedom violations because the judiciary is not fully functioning as a result of a recent armed uprising.¹⁶¹

In terms of women’s rights, Iraq has guaranteed the right to equal opportunity for all Iraqis¹⁶² and created an affirmative duty for the state to take necessary measures to create and achieve such equal opportunities.¹⁶³ “Iraqi citizens, men and women ... have the right to participate in public affairs and to enjoy political rights including the right to vote, elect, and run for office.”¹⁶⁴ However, there is no specific enumeration of rights for women outside of the political sphere. While engaging women in the political process provides a mechanism through which they can influence legislation, it is insufficient to adequately preserve their rights if traditionalism is imposed.

¹⁵⁹ U.S. Dep’t of State, *2011 Report on International Religious Freedom – Libya*, UNHRC (July 30, 2012), <http://www.unhcr.org/refworld/docid/502105a831.html>.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² Note that women are not specifically addressed. Though they can be presumed to be included in “all Iraqi’s,” the absence of a specific reference could create an ambiguity that would allow women to be relegated to status as second-rate citizens.

¹⁶³ Constitution of Iraq Oct. 15, 2005, art. 16.

¹⁶⁴ *Id.* art. 20.

Syria's Constitution provides that each citizen has the right to participate in the economic, social, political and cultural life.¹⁶⁵ Although this provision could encompass women as a "citizen," Syria removed any ambiguity. Article 23 specifically provides:

The state shall provide women with all opportunities enabling them to effectively and fully contribute to the political, economic, social and cultural life, and the state shall work on removing the restrictions that prevent their development and participation in building society.¹⁶⁶

This provision guarantees gender equality in an expansive way and does not qualify this guarantee with reference to Shari'a law, freeing its administration from constraints of Islamic tradition. Moreover it creates an affirmative duty on the part of the State to ensure that any restrictions are removed. This provision not only removes qualification based on traditional Shari'a law, but also requires the State to prevent restriction of rights based on traditionalist interpretation.

Libya has provided a similar enumeration of rights for women. The second clause of Article 6 provides that "the State guarantees for woman all opportunities that allow her to participate entirely and actively in political, economic and social spheres."¹⁶⁷ This clause provides the simplest example of how specified rights for women can be constitutionally incorporated in an Islamic democratic state without being qualified by fundamentalist application of Shari'a. Moreover, in application, there have been significant strides made in women's involvement in the public sphere. When elections were held in July, for the first time in 40 years, more than a million women signed up to vote.¹⁶⁸

Iraq, Syria, and Libya are each in a state of emergency due to conflicts over governmental

¹⁶⁵ Constitution of Syria Feb. 27, 2012, art. 34.

¹⁶⁶ *Id.* art. 23.

¹⁶⁷ Constitutional Declaration March 8, 2011, art. 6.

¹⁶⁸ Chris Stephen, *Libya's Politicians Finally Wake Up to the Power of Women*, THE OBSERVER, (Jul. 7, 2012) <http://www.guardian.co.uk/world/2012/jul/07/libya-politicians-wake-power-women>

establishment.¹⁶⁹ These conflicts make gauging the effectiveness of each constitution difficult. However it also highlights an important constitutional consideration for Egypt. In order for the constitution to be effective and enforceable, it must first create a stable government. This is only possible if the document is perceived as representative of the people it will govern.

Part II

Egypt's Constitutional Moment: How Best to Reconcile the Demands of Shari'a with the Creation of a Free and Democratic Society

I. Egypt's Constitutional Construction and the Accommodation of Shari'a

A. Introduction to Shari'a Law

A basic introduction of Shari'a law is necessary to address the issues it presents in the constitutional context. "Islamic law is the epitome of Islamic thought, the most typical manifestation of the Islamic way of life, the core and kernel of Islam itself."¹⁷⁰ Determining the substance of Islamic law can be a complex process because of its developmental history and its internal diversity.¹⁷¹ Islamic law is law that is either embodied in or derived from Islam's foundational legal sources.¹⁷² The terms "*fiqh*" and "Shari'a" are often used interchangeably to refer to "Islamic law," both among modern and classical commentators, however the recent trend is to distinguish between the two.¹⁷³

¹⁶⁹ Intisar A. Rabb, "*We the Jurists*": *Islamic Constitutionalism in Iraq*, 10 U. PA. J. CONST. L. 527, 528 (2008); U.S. DEP'T OF STATE, *2011 Report on International Religious Freedom - Syria*, UNHCR (July 30, 2012) <http://www.unhcr.org/refworld/docid/5021057f89.html>; Kareem Fahim, *Clashes and Car Bombing Highlight Insecurity in Libya*, NY TIMES (Nov. 4, 2012), http://www.nytimes.com/2012/11/05/world/africa/clashes-car-bombing-highlight-insecurity-in-libya.html?_r=0.

¹⁷⁰ Khaled Abou El Fadl, *Muslim Minorities and Self-Restraint in Liberal Democracies*, 29 LOY. L.A. L. REV. 1525, 1526 (1996).

¹⁷¹ Rabb, *supra* note 170, at 541.

¹⁷² *Id.*

¹⁷³ *Id.* at 542.

Shari'a is seen as the divinely ordained "path," known perfectly only by God.¹⁷⁴ In other words, it is God's will expressed in the ideals of perfect justice and equality.¹⁷⁵ *Fiqh* is a human attempt to know the Shari'a.¹⁷⁶ Thus the law embodied in the revelatory sources, primarily the Qur'an and Sunnah, is Shari'a, or God's divine law revealed in principled terms. The law derived from the sources is *fiqh*, or the human attempt to understand and apply the Shari'a in particular circumstances of individual and social life.¹⁷⁷ It is inaccurate, particularly in the scholarly context, to speak of a monolithic Islamic tradition, and there is no single form of *fiqh*.¹⁷⁸ Instead, multiple traditions and canons of interpretation developed within various Islamic schools of jurisprudence.¹⁷⁹ Jurists from each of the juristic schools unanimously accept four sources of *fiqh*, however: the Qur'an, the Sunnah, *ijma'* (consensus), and *qiyas* (analogy).¹⁸⁰

The Qur'an stands chief amongst the primary sources of the law.¹⁸¹ According to Muslim belief, the Qur'an is the Word of God, progressively transmitted to humanity through the Prophet Muhammad, and its text has remained unchanged since revelation.¹⁸² While some laws are set forth in the Qur'an, it is not a legal text.¹⁸³ Rather than legislate all possible situations, it sets forth fundamental principles for living faithfully.¹⁸⁴ Though classical jurists maintained that the Qur'an is the revealed Word of God, they recognize that the divine law can only be known through the work of human interpreters.¹⁸⁵ Thus, these jurists sought to design a systematic legal

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ Andra Nahal Behrouz, *Women's Rebellion: Towards A New Understanding of Domestic Violence in Islamic Law*, 5 UCLA J. ISLAMIC & NEAR E. L. 153, 155 (2006).

¹⁷⁹ *Id.* at 155-156.

¹⁸⁰ *Id.* at 156.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.* at 157.

¹⁸⁴ *Id.* at 157.

¹⁸⁵ *Id.*

methodology that would prevent conscious attempts at manipulation and limit the bearing of independent value judgments in the process of understanding the revealed law.¹⁸⁶

Despite this resolve to prevent human influences, however, any interpretive tools or techniques require a jurist or legislator to exercise some independent legal reasoning in determining the law, known as *ijtihad*.¹⁸⁷ As a juristic process, *ijtihad* assured that the law continued to be relevant to the changing needs of Muslim communities.¹⁸⁸ *Ijtihad* was widely practiced by the many Islamic schools until the tenth-century, when it fell into disuse.¹⁸⁹ At this time, it was replaced by a new technique that required jurists to honor the precedents of their schools.¹⁹⁰ This reliance on precedent meant that thereafter "the gate of *ijtihad* was closed" and, consequently, the juridical method no longer played an important part in legal determinations after the tenth century.²⁷ Though traditionally, juristic pronouncements were considered authoritative, but not absolute,¹⁹¹ with the closing of the gates of *ijtihad*, the law has become rigid with an all-inclusive finality.¹⁹² With the subsequent codification of *fiqh*, the Qur'anic formulations on the status of women were frozen in time, reflecting the assumptions and realities of the particular society in which the Qur'an was revealed, that of seventh-century Arabia.¹⁹³

There is a modern conflict between the approaches of Islamic traditionalists and reformists to Islamic jurisprudence.¹⁹⁴ Both regard the Qur'an as sacred and revealed. However, traditionalists tend to treat the Qur'an as a code of law without regard for historical

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 157-158.

¹⁸⁸ *Id.* at 158.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.* at 159.

¹⁹⁴ *Id.* at 175.

circumstances that existed at the time of revelation.¹⁹⁵ They rely on the specific Qur'anic verses to prescribe detailed rules on various matters, including marriage, divorce, and inheritance.¹⁹⁶ Moreover, they imbue the precedents of the jurists in the *fiqh* with binding strength, conflating it with Shari'a. Reformists, on the other hand, reject the static interpretations of traditionalists, recognizing the role of human agency in interpreting the revealed law and applying it in practice.¹⁹⁷ Thus, reformists are arguing for a re-opening of the gates of *ijtihad* to allow the law to adapt to the circumstances facing Muslims today. The increasing presence of traditionalists in Muslim societies today creates serious implications for states engaging in Islamic constitutionalism,¹⁹⁸ such as Egypt.

B. Egypt's Constitutional Accommodation of Shari'a

The decision facing Egypt today is how best to formulate a government that will persevere in perpetuity while preserving the values of its citizens. There is much international pressure placed on Egypt, and other nations, to form a democratic government, as this is seen as the most preferable form of government for achieving the goals above.¹⁹⁹ There has been much debate as to whether or not the accommodation of Shari'a is antithetical to the establishment of democratic government.²⁰⁰ This debate hinges on the placement of the sovereignty in the nation. The legitimacy of a democratic order is founded on the notion that the sovereign of the nation is its citizenry and that a democratic government gives effect to the will of that sovereign through

¹⁹⁵ *Id.* at 175-176.

¹⁹⁶ *Id.* at 176.

¹⁹⁷ *Id.*

¹⁹⁸ "At a minimum it refers to a modern governing structure of limited powers in which a written constitution designates Islamic law as a source of law." Rabb, *supra* note 171, at 527-528.

¹⁹⁹ "The system of government that has the strongest and most compelling claim to legitimacy, and moral virtue, is a democracy." Dr. Khaled Abou El Fadl, *Islam and the Challenge of Democratic Commitment*, 27 *FORDHAM INT'L L.J.* 4, 7 (2003).

²⁰⁰ See An-Na'im, *supra* note 17; Abou El Fadl, *supra* note 200; Anver M. Emon, *On Democracy As A Shar'i Moral Presumption: Response to Khaled Abou El Fadl*, 27 *FORDHAM INT'L L.J.* 72 (2003); Rabb, *supra* note 170.

representation.²⁰¹ Thus, the people are the source of the law, and the law is founded on the basis of fundamental rights.²⁰² These fundamental rights are to protect the basic well being and interests of the individual members of the sovereign.²⁰³

The question facing Muslim nations is: “If God is the only sovereign and source of law in Islam, is it meaningful to speak of a democracy within Islam, or even of Islam within a democracy, and can an Islamic system of government ever be reconciled with democratic governance?”²⁰⁴ Iran answered this question with a resounding “no” when it established a theocracy, and with the rise of traditionalist factions, there is potential that Egypt will follow their lead in practice if not in word.

Despite the argument that one cannot properly practice Islam if it is enforced by the State because it precludes the individual’s ability to engage in religious piety out of honest conviction,²⁰⁵ there is a perceived mandate on Muslim people to establish an Islamic state.²⁰⁶ Under this mandate, the separation of church and state present a particular challenge to Muslim communities.²⁰⁷ Moreover, the primacy of Islamic law as a source of state law presents a specific challenge to the realization of a functioning governmental structure in which religious norms are constitutionally balanced with human rights and democratic norms.²⁰⁸ While Islam and democratic governance are not mutually exclusive,²⁰⁹ it would be an easier and more streamlined process to create a constitution that makes little to no accommodation for Shari’a and that

²⁰¹ Abou El Fadl, *supra* note 200.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ An-Na’im, *supra* note 17, at 1.

²⁰⁶ Stating that the majority of Islamic schools hold that it is either required or preferable for Muslims to reside in Muslim territories. Abou El Fadl, *supra* note 171, at 1533.

²⁰⁷ *Id.* at 1531.

²⁰⁸ Rabb, *supra* note 170, at 555.

²⁰⁹ Abou El Fadl, *supra* note 200, at 71.

encompasses provisions for women and religious minorities. However, the Egyptian people would reject such a constitution as not representing their values.

Though the creation of an Islamic nation, or any religious state, can infringe on the rights of women and religious minorities, the creation of a secular state can lead to the opposite extreme. As seen in China and Turkey, where a secular state is established, all religious groups have the potential to see their freedom to exercise their religion circumscribed. As seen above, the accommodation of any religion, or lack thereof, does not, in and of itself, determine whether a democracy will function effectively, nor whether the rights of its citizens will be preserved. Thus, though the creation of a purely secular state could lead to greater national stability in the long run, it does not, *per se* adequately preserve rights of women or religious observers.²¹⁰

Of far greater concern is the potential for regressive laws based on narrow readings of Islamic law.²¹¹ It is widely regarded as the dual purpose of an Islamic government to enforce Shari'a and maintain security and order.²¹² However, the implementation of Shari'a as comprised of the laws codified after the closing of the gates of *ijtihad* would result in the reinstatement of a government structure promulgated by the Prophet in Medina.²¹³ This is perceived as the optimal government establishment in the view of Egypt's conservative groups.²¹⁴ However, the actual structure and operation of the Medinan Caliphate cannot be reincarnated today.²¹⁵ The underlying moral and social norms of the Medina society remain the ideal. However, Muslims should reaffirm these underlying principles through more workable systems of government,

²¹⁰ See Rabb, *supra* note 170, at 549.

²¹¹ Sarah Lynch, *Egypt Constitution: Too Strict or Too Permissive?*, USA TODAY (Nov. 13, 2012) <http://www.usatoday.com/story/news/world/2012/11/13/egypt-constitution/1700927/>.

²¹² Abou El Fadl, *supra* note 200, at 1528.

²¹³ An-Na'im, *supra* note 17 at 110.

²¹⁴ Sarah Lynch, *Egypt Constitution: Too Strict or Too Permissive?*, USA Today (13 Nov. 2012) <http://www.usatoday.com/story/news/world/2012/11/13/egypt-constitution/1700927/>

²¹⁵ An-Na'im, *supra* note 17 at 110.

administration of justice, and international relations.²¹⁶ If the traditionalist views relying on the seventh-century interpretations of Shari'a are implemented, the government would be bound to enforce them to the detriment of any citizen who is female or non-Muslim.

The drafts of Egypt's Constitution released in October and November 2012 reveal a frightening trend in the traditionalist direction. In both, Article 1 establishes that the system of government is to be democratic.²¹⁷ Article 2 goes on to establish Islam as the state religion and the principles of the Islamic Shari'a as *the* principal source of legislation.²¹⁸ However, they diverge on the role of the Al-Azhar. Both establish the Al-Azhar as state funded independent Islamic juridical institution responsible for "spreading the Islamic call and the religious scholarship" that will be consulted on issued related to Islamic Shari'a.²¹⁹ However, the October draft includes a provision that the Al-Azhar will be impeachable.²²⁰ This provision has been removed from the November draft.²²¹

These provisions are eerily similar to Iran's desire to see Islam spread to the world through its government action. Additionally, in establishing a separate ruling body of jurists, there is the potential for a shifting of powers, wherein the religious ruling body may be given more influence and control than is amenable to a democratic society. This is especially of concern where the power of impeachment has been removed. This removal creates opportunity for the religious council to act with impunity, and establish a theocracy in practice if not in form. Moreover, the establishment of Islam as the state religion, as well as the primary source of legislation is even

²¹⁶ *Id.* at 130.

²¹⁷ Draft Constitution of Egypt Oct 2012, art. 68 (last visited Nov. 22, 2012), http://www.democracy-reporting.org/files/egypt_draft_constitution_unofficial_translation_dri.pdf; *Comparison of Egypt's Suspended and Draft Constitutions*, BBC NEWS (Nov. 30, 2012), <http://www.bbc.co.uk/news/world-middle-east-20555478>.

²¹⁸ Draft Constitution of Egypt Oct 2012, art. 2; *Comparison of Egypt's Suspended and Draft Constitutions*, *supra* note 218.

²¹⁹ Draft Constitution of Egypt Oct 2012, art. 4; *Comparison of Egypt's Suspended and Draft Constitutions*, *supra* note 218.

²²⁰ Draft Constitution of Egypt Oct 2012, art. 4

²²¹ *Comparison of Egypt's Suspended and Draft Constitutions*, *supra* note 218.

more indicative of traditionalist leaning. This increases the possibility of abuses on the rights of women and religious minorities. There is some comfort to be had in the fact that the Qur'an is not quoted in either draft, and not every provision is made subservient to the application of Shari'a. However, given preeminence of Shari'a as the primary source of law, this difference may prove to be illusory in practice.

Though the drafts also differ in recognition of human rights and rights as citizens. In both, however, it is unclear precisely how much protection the constitution would afford. Though the "formation of political parties on the base of discrimination between citizens because of gender, origin, or religion shall not be permitted,"²²² and discrimination on the basis of gender and religion are proscribed in the October draft,²²³ there is no proscription of discrimination at the hands of the government come November.

Moreover, the Constitution creates an affirmative duty for the State of "safeguarding and protecting ethics and public morals, promoting genuine Egyptian traditions, [and] the eminent level of religious and patriotic upbringing ... as regulated by the law."²²⁴ This provision flings wide the door to the implementation of Shari'a in a traditionalist manner. As they seek to preserve public morals and promote traditions, they are free to do so at the expense of the rights of underrepresented groups. Moreover, the modifications between these drafts, combined with the removal of Egyptian liberal and Christian voices from the Constitutional Assembly,²²⁵ indicate a genuine threat to the rights of women and religious minorities under an ultraconservative imposition of Shari'a.

²²² *Id.* Art. 6.

²²³ *Id.* Art. 10.

²²⁴ *Id.* art. 10; *Comparison of Egypt's Suspended and Draft Constitutions*, *supra* note 218.

²²⁵ Egyptian liberals and Christians resigned due to lack of opportunity to voice concerns on key provisions, and accusations that their suggestions were being ignored. Tamim Elyan, *Egypt Liberals Quit Assembly Drafting Constitution*, REUTERS (Nov. 18, 2012), <http://www.reuters.com/article/2012/11/18/us-egypt-constitution-idUSBRE8AH0EO20121118>.

Those who argue that Islam is incompatible with democracy base their arguments on notions of Islamic constitutional governments as “ones that concentrate power in the hands of jurists and discriminate on the basis of gender and religion according to a monolithic view of the harshest legal rules articulated by jurists.”²²⁶ While this is not representative of all Islamic nations, there is potential that this is the direction Egypt is trending through the creation of the Al-Azhar. For democratic and human rights interests, the best outcome in Islamic constitutionalism requires the government to acknowledge the presence of the jurists and set up an institutional arrangement whereby it works with them in a coordinate fashion.²²⁷ In so doing, the democratic sovereign is granted control of political processes, complete with checks and balances.²²⁸ It is to be hoped that this is what will come of the Al-Azhar. Egypt must make an affirmative commitment to limit the application of Shari’a by removing it as *the* primary source of law. Moreover, it must make a similar commitment to the preservation of human rights above Shari’a, the traditionalists will find room to establish the Al-Azhar as a ruling body, and the Sthe application of Shari’a. As Islam was intended to increase justice and equity, these commitments are not antithetical to Islamic governance.

It is imperative in Egypt’s constitutional discourse, that the voices of the ultraconservative religious factions are not given free reign to prevent it falling prey to the theocratic nature of Iran. This is not the direction that the majority of Egyptians would see their country go. President Morsi and the Muslim Brotherhood won the election by the slimmest of margins.²²⁹ Moreover they have faced significant public opposition and protest in attempts to

²²⁶ Rabb, *supra* note 170, at 559.

²²⁷ *Id.* at 578.

²²⁸ *Id.* at 578-79.

²²⁹ *Clashes outside Egypt Presidential Palace in Cairo*, BBC News (Dec. 4, 2012), <http://www.bbc.co.uk/news/world-middle-east-20600920>

draft an ultraconservative constitution.²³⁰ Thus, there needs to be a balance between the demands of traditional Islam and the demands of democracy in order for the nation to agree on a constitutional construct.

Even if a constitution is ratified that specifically enumerates rights for women and religious minorities, if the government is not committed to its enforcement, or if the constitution is perceived as being the result of Western influence or imposition, there is a significant risk that conflict will continue and instability result as in Iraq and Syria. Thus, while acknowledgment of Shari'a is a functional reality for Egypt at this time, its presence in the Constitution should be limited. Much like Syria, Egypt can include Shari'a as a major source of legislation, or as a reference point for public policy. However, it should not establish Shari'a as the primary source of law. Until the reformists see greater ability to reinterpret and re-contextualize the Shari'a law using *ijtihad*, Shari'a will not be able to adequately address the needs of a pluralistic society. Therefore it should be limited in application in the constitutional context.

II. Egypt's Constitutional Construction and the Protection of Human Rights

A. Women's Rights

The perceived conflict between Shari'a and women's rights is derived from Sura 4:34 of the Qur'an, which provides, in relevant part,

(Husbands) are the protectors and maintainers of their (wives)

because Allah has given the one more strength than the other, and

²³⁰ Specifically lamenting the lack of representation of liberal and Christian voices. In addition to the rushed process demanded by Morsi. *Egypt Assembly Adopts Draft Constitution*, ALJAZEERA (Nov. 30, 2012), <http://www.aljazeera.com/news/middleeast/2012/11/20121129182338884288.html>

because they support them from their means. Therefore the righteous women are devoutly obedient...

This verse has been interpreted as establishing a guardianship of men over women, and has been extended to denying women the right to hold any public office that involves the exercise of authority over men.²³¹ Though there are various interpretations between the schools, no jurist would grant women equality with men in this regard.²³² In the context of democratic success, this verse has been applied to the interpretation limiting the right of women to appear and speak in public or associate with men,²³³ which limits their ability to participate in government.²³⁴ Thus, although Muslim women enjoy the same freedom of belief and opinion as Muslim men, under this verse, their opportunity to exercise this right has been traditionally inhibited by restriction on their access to the public domain.²³⁵

This general principle of guardianship has been utilized in interpreting other verses that appear to grant women unequal rights compared to those of men regarding marriage, divorce, inheritance and similar matters.²³⁶ Moreover, though some argue that the Qur'an proscribes domestic violence,²³⁷ verse 4:34 has been expressly read as granting men the right to physically reprimand their wives.²³⁸ Thus domestic violence is permitted under some traditional Islamic

²³¹ An-Na'im, *supra* note 17, at 109.

²³² *Id.*

²³³ See Qur'an 24:31 ("And say to the believing women that they should lower their gaze and guard their modesty; that they should not display their beauty and ornaments except what (must ordinarily) appear thereof; that they should draw their veils over their bosoms and not display their beauty except to their husbands, their fathers, their husbands' fathers, their sons, their husbands' sons, their brothers or their brother's sons..."); Qur'an 33:33 ("And stay quietly in your houses, and make not a dazzling display..."); Qur'an 33:53 ("And when you ask (his ladies) for anything ye want ask them from before a screen; that makes for greater purity for your hearts and for theirs"); Qur'an 33:59 ("Tell thy wives and daughters, and the believing women, that they should cast their outer garments over their persons (when abroad)").

²³⁴ An-Na'im, *supra* note 17, at 109.

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ Portuan Miller, *supra* note 69, at 89.

²³⁸ Qur'an 4:34: "But those as to those women on whose part ye fear disloyalty and ill-conduct, admonish them (first), (Next), refuse to share their beds; (and last) strike them."

jurisprudence.²³⁹ Under this permissive stance,²⁴⁰ Muslim women not only regularly experience domestic violence, they often expect it.²⁴¹ Moreover, although the Qur'an has purportedly abolished honor killings, women across the world live under the threat of death for perceived immorality,²⁴² whether proven or not.

Based on these representations of women's rights under Islamic jurisprudence, Western perceptions assume that the religion is inherently oppressive to women, which leaves Muslims feeling attacked and defensive.²⁴³ In response, Muslim traditionalists view the movement for women's rights as a "cultural assault," and where international standards for women's rights conflict with traditional Islamic jurisprudence they are considered "un-Islamic."²⁴⁴ What is so often forgotten in Islamic jurisprudence, is that any text ultimately speaks through and derives meaning from its reader.²⁴⁵ In Muslim discourse, therefore, divine textual revelation and the jurists' interpretation are intertwined such that the line between them is indiscernible.²⁴⁶ In this manner, patriarchal culture has been infused in Islamic laws and practices through the jurists' reasoning. Traditionalists, however, "reject the notion that assumptions and laws about gender in Islam are the result of negotiated and changing cultural constructs, produced in response to living

²³⁹ Physical correction in Sura 4:34 is held to mean "beating without hurting, breaking a bone, leaving black or blue marks, and avoiding the face at any cost." Moreover, Ibn Abbas, one of the leading scholars of early Muslims, stated that beating means "hitting only with the *siwak*, the natural wooden root that is used for brushing the teeth, and only in strict privacy." Portuan Miller, *supra* note 69, at 90.

²⁴⁰ For example, the *Muslim Handbook*, published with Turkish government funding, advocated wife beating, "but to beat women gently as a warning, but to avoid hitting them in the face." Moreover, a judge in Dubai, in the Emirates, ruled that wife-beating was not a crime as long as no bones were broken or deformity caused. *Id.*

²⁴¹ 99 percent of Pakistani housewives are subjected to violence in their homes. Additionally, the "majority of Indian women believe that wife-beating is justified under certain circumstances: for neglecting the children and the house, for going out without informing the husband, for showing disrespect to in-laws, or for a suspicion of being unfaithful." *Id.* at 90-9.

²⁴² In Jordan a quarter of the country's homicides are honor killings, Pakistan documented 132 honor killings in the first quarter of 1999 in one region alone. Moreover, close to 70 percent of all murders in Gaza and the West Bank are honor killings. *Id.* at 91-93

²⁴³ Behrouz, *supra* note 179, at 163-64.

²⁴⁴ *Id.*

²⁴⁵ *Id.* at 166.

²⁴⁶ *Id.* at 163-64.

realities.”²⁴⁷ They cling to the view that Shari’a, though developed through *fiqh*, is immutable, rather than the product of the above negotiation. Further, they justify this stance through reference to Qur’anic texts taken out of context.²⁴⁸

Contrary to the current traditionalist view, the belief and practice of full gender equality is not antithetical to Islamic belief. Such conviction is anchored in the belief that human beings were created to worship God and that every human soul must be free to carry out this purpose,²⁴⁹ which is a foundational tenet of Islam. However, Islamic jurisprudence remains entrusted to male scholars, who are guided by manuals and classical texts written by men and representing antiquated and expired customs and concerns.²⁵⁰

Egypt’s October draft provides the following liberties to women:

The State is committed to taking all measures to establish equality between women and men in political, cultural, economic and social life and all other fields without prejudice to the provisions of Islamic Shari’a.

The State provides mother and child services for free and guarantees for women health, social, and economic care, inheritance right and adjustment between her family duties and work in society.

The State pays special protection and care of breadwinners, divorced, widowed women and other women most in need.²⁵¹

This is only one of two provisions in the 231 Article document that referred to rights for women, or makes reference to gender.²⁵² This was truncated in November to provide, “[t]he state shall provide motherhood and childhood services for free. It shall also guarantee co-ordination

²⁴⁷ *Id.* at 165.

²⁴⁸ *Id.*

²⁴⁹ *Id.* at 177.

²⁵⁰ *Id.* at 174-75.

²⁵¹ Draft Constitution of Egypt Oct 2012, art. 68.

²⁵² Article 30 provided for equality before the law without discrimination based upon gender. However, this would not supersede the application of Shari’a, which traditionally has imposed unequal status upon women. *Id.* Moreover, the reference to gender was removed from the November draft, and is therefore no longer accessible as a defense to discrimination.

between the duties of the woman and her public work. The state shall provide protection and care for the divorced and widowed woman."²⁵³

It was promising that the State created an affirmative duty to ensure that women achieve equality with men in the political, cultural, economic and social spheres. However, it was troubling that they qualified it by prohibiting "prejudice to the principles of Islamic Shari'a." As seen in Iran's Preamble, traditional Islamic Shari'a promotes the full development of women within the confines of the home. Despite Egypt's professed commitment to democratic rule, the rise of traditional Islamist factions and the cry for a return to traditional Islamic norms does not bode well for the rights of women if they are qualified by application of Shari'a.

With the removal of the provision in its entirety, there is no longer any indication that the rights of women will be protected under the new government. Moreover, the remainder of Article 10 perpetuates this concern. These clauses intertwine the rights of women with the rights of mothers. This provision opens the door for ultra-conservative jurists to apply the most restrictive Shari'a laws.²⁵⁴ Moreover, it provides no access to relief if these laws are imposed, as the action would not be a violation of any constitutional right. Moreover discriminatory acts could be justified as being in line with "the provisions of Islamic Shari'a." The qualification of women's equality, and its subsequent removal, are indicative of the increasing influence that traditionalist factions are seeing in Egypt. This provides further support for the fear for underrepresented groups that another ultra-conservative state may be on the rise.

Historically, Islam improved the lives of Arab women by guaranteeing certain rights and privileges not otherwise recognized in pre-Islamic Arabia. The Qur'anic revelation was a bastion

²⁵³ *Comparison of Egypt's Suspended and Draft Constitutions*, *supra* note 218.

²⁵⁴ This is true in the absence of the provision for equality in the November draft, as well as under the Shari'a proviso in the October draft.

of women's rights in a draconian and patriarchal era.²⁵⁵ However, in many ways traditionalists have lost sight of the historical context of the society they are trying to recreate. In order to overcome the traditionalists' views in a comprehensive way is to address the culture in which the State is operating. In as much as government is shaped by the culture in which it is developed, it also is part of governmental function to respond to the culture where necessary in order to rectify disparity and discrimination. The United States had no constitutional provision for women's equality, and so had to take legislative action in order to prevent discrimination against women in the workplace with the Equal Pay Act and Title VII of the Civil Rights Act. Similarly, in order to preserve rights for women, Egypt must incorporate broad and unqualified rights for women into the constitution that specifically address the cultural perceptions under traditional Islamic view.

Syria and Libya provide clear examples of how Egypt could phrase its constitutional provision to promote the equality and welfare of its female citizens. Syria, specifically, has created a duty on the part of the state to remove all obstacles, which would presumably supersede the application of Shari'a law. Moreover, neither state has qualified the equality of women by making it dependent upon conformity with Shari'a principles. While the inclusion of Shari'a as a foundation of law creates an opening for restrictive and traditional measures, it is limited by the explicit exclusion of reference to Shari'a in these clauses. Women must be constitutionally guaranteed security of the person in the home and in public; equality before the law; equality in the social, political and economic spheres; freedom to work; and freedom from harassment and discrimination, all without reference to Shari'a principles.

²⁵⁵ "The Qur'anic revelation guaranteed all Muslim women an independent legal personality and provided the right to hold and dispose of property, share in inheritance, receive education, and participate in public life. It also restricted polygamy, guaranteed a wife's right to maintenance, and provided for the right to judicial divorce on certain grounds." Behrouz, *supra* note 179, at 165.

B. Rights of Religious Minorities

One of the challenges of applying Shari'a to constitutional construction is the treatment of religious minorities. Specifically, the Qur'an Sura 9:29 states, "[f]ight those who do not believe in Allah" until "they give the *jizyah* (sic) willingly while they are humbled." This verse has been used as the basis for a tiered level of citizenship termed the *dhimma* system.

Traditionally, Shari'a classified all people into three main religious categories, Muslim, People of the Book (those who are accepted by Muslims as having a revealed scripture, predominantly Christians and Jews), and unbelievers.²⁵⁶ Muslims were considered to be the only full members of the political community, and people of the book were partial members.²⁵⁷ Unbelievers did not qualify for any legal recognition or protection as such.²⁵⁸ Under this construct, the concept of the *dhimma* system originated as a process for the protection of basic rights and limited communal autonomy for specific non-Muslims in exchange for the groups' submission to Muslim sovereignty.²⁵⁹ Specifically, *dhimma* referred to a contract between the state ruled by Muslims and a community of People of the Book, whereby members of the community were granted security of their persons and property, the freedom to practice their religion in private, and communal autonomy to govern their internal affairs.²⁶⁰ In return, the community was to pay a poll tax (the *jizya*) and observe the terms of the contract with the state.²⁶¹ Those granted *dhimma* status were encouraged to embrace Islam, but were not allowed

²⁵⁶ An-Na'im, *supra* note 17, at 130.

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.* at 128.

²⁶⁰ *Id.* at 130.

²⁶¹ *Id.*

to proselytize.²⁶² Unbelievers were not granted status and instead were presumed to be at war with Muslims.²⁶³

Though it has been said that “the *dhimma* system is neither practiced nor advocated anywhere in the Muslim world today,”²⁶⁴ Egypt has begun gravitating towards a modern incarnation. Specifically, extremist allies of the newly elected president are already trying to enforce the Qur’anic commandment above directing Islamists to collect the *jizya* from Coptic Christians and other “non-believers.”²⁶⁵ Moreover, there have been increasing numbers of violent attacks on Christians in Egypt revolving around the extortion of the *jizya*.²⁶⁶

The new constitutional drafts do not portend to remedy this situation. The October draft delineated in Article 30, that citizens are to be equal before the law and in general rights without discrimination based on religion.²⁶⁷ While this would point to a full citizenship guarantee, there is no provision for the free exercise or expression of religion. The October draft further held that “the principles of Christian and Jewish doctrines are the main source of legislations to the followers of Christianity and Judaism in their personal status, the practice of their religious affairs and the choice of their spiritual leaders.”²⁶⁸ Reference to religion was altered in Article 43 of the November draft, which provides that “[t]he state shall guarantee the freedom of faith and the freedom of practice of religious rites and the right to establish worshipping places for monotheist religions based on law.”²⁶⁹

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ An-Na’im, *supra* note 17, at 130.

²⁶⁵ Brinkley, *supra* note 6.

²⁶⁶ *Id.*

²⁶⁷ Draft Constitution of Egypt Oct 2012, art. 30.

²⁶⁸ *Id.* art. 3.

²⁶⁹ *Comparison of Egypt’s Suspended and Draft Constitutions*, *supra* note 218.

The recognition of the regulations of Christian and Jewish law is more in line with traditional Islamic norms than with modern pluralistic approaches. As is the permission of worship under the new Article 43. Specifically, these are largely the rights granted under the *dhimma* system as delineated above. Moreover, any perceived additional grant of freedom is truncated by the application of law. As Shari'a is the primary source of law, this means that any religious practice must conform to Shari'a, and only People of the Book will receive recognition.

Though no society has openly institutionalized the *dhimma* system, it continues to influence and shape Muslim nations' treatment of religious minorities. Additionally, as the only recognized religions are Judaism and Christianity, non-believers and other religious minorities can be denied status all together. Thus the provisions under either draft are insufficient to protect the rights of religious minorities, including Jewish and Christian citizens. This was demonstrated in the application of similar provisions in China, Turkey, Iran, and Syria.

International legality and human rights can only be upheld when each society promotes the values of equality and the rule of law in its own domestic and foreign policies.²⁷⁰ This means not only the formal abolition of the *dhimma* system from a Shari'a perspective, but also the repudiation of its underlying values by Muslims.²⁷¹ Moreover, even moderate or secular Islamic countries engage in some form of religious persecution, whether penalties for apostasy, blasphemy laws, or the denial of the rights of religious minorities to practice their faiths openly.²⁷² Any redress for this reality for religious minorities will have to begin with state action. Specifically what is required is the delineation of explicit constitutional rights for religious

²⁷⁰ Abdullah Ahmed An-Na'im, *supra* note 17, at 131.

²⁷¹ *Id.*

²⁷² WEISS: Sweeping religious persecution under the rug - Washington Times
<http://www.washingtontimes.com/news/2012/jul/5/sweeping-religious-persecution-under-the-rug/#ixzz2CunFj0At>

minorities, including the right to freedom of belief, freedom of exercise, and freedom of expression, without reference to Shari'a.

The United States' approach would provide the freedom and security desired by the religious minorities of Egypt. However, the United States' approach requires a modicum of separation between church and state, and does not permit an established religion. Ireland's approach may provide a better format for Egypt to follow. The State would be able to promote the majority's religion, including religious education. However, it would also provide unqualified freedom of profession and practice, as well as protection from State imposed disabilities and discrimination on the basis of religion. If these guarantees were protected from being superseded by application of traditional Shari'a, then the dual goals of Islamic constitutionalism would be maintained. Under such a scheme, Shari'a would have a place of preeminence, fulfilling the Muslim mandate, but the values of a free and democratic society would be protected.

Conclusion

The incorporation of religion into a democratic constitution creates specific challenges to the preservation of rights and liberties, however it is not impossible to strike a balance.

"Democracy must be practiced through a culture that tolerates others, accepts disagreement, is amenable to change, and values the process, quite often regardless of the results it generates."²⁷³

So long as a society commits itself to the *practice* of democracy, and the preservation of rights, over the implementation of religious laws there should be adequate protection for the rights of the underrepresented. This is the commitment that Egypt needs to make. Egypt must dedicate itself to the values of freedom of belief and expression, and equality for all citizens in every sphere regardless of religion or sex. Moreover, it must ensure that Shari'a is merely *a* source of

²⁷³ Abou El Fadl, *supra* note 200, at 71.

law, rather than *the primary* source of law, and make affirmative provisions in its constitution guard the rights of women and religious minorities without qualification by the application of Shari'a.