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## Universal Versus Islamic Human Rights: A Clash of Cultures or a Clash with a Construct?

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# UNIVERSAL VERSUS ISLAMIC HUMAN RIGHTS: A CLASH OF CULTURES OR A CLASH WITH A CONSTRUCT?

*Ann Elizabeth Mayer\**

INTRODUCTION .....	308
I. CONSTRUCTS OF ISLAMIC PARTICULARISM ON HUMAN RIGHTS .....	309
A. <i>Conflicts Over Human Rights: A Clash of Cultures?</i> ....	309
B. <i>The Islamic Legal Heritage and Human Rights</i> .....	321
C. <i>Formulations of Islamic Alternatives to the International Bill of Human Rights</i> .....	324
II. ISLAMIC HUMAN RIGHTS: TWO NEW CONSTRUCTS .....	327
A. <i>The 1990 Cairo Declaration on Human Rights in Islam</i> .....	327
1. Equality of Women .....	329
2. Freedom of Religion .....	333
3. Freedom of the Press .....	335
4. Freedom of Assembly and Association .....	337
5. Democratic Freedoms .....	337
6. Criminal Justice .....	339
7. States of Emergency .....	343
8. Prohibition Against Genocide .....	344
9. Right to Security and Privacy .....	344
10. Prohibition of Colonialism and Slavery .....	346
11. Summation .....	347
B. <i>The 1992 Basic Law of Saudi Arabia</i> .....	350
1. Freedom of Religion .....	356
2. The Imposition of "Islamic" Limitations on Human Rights .....	358
3. Criminal Justice .....	359
4. Rights of Women .....	360
5. Freedom of Speech and Expression .....	360
6. The Right of Equality and Equal Protection .....	361

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7. The Failure to Endorse International Law .....	362
8. Summation .....	363
III. DECONSTRUCTING THE CONSTRUCTS .....	364
A. <i>Dissident Muslim Voices</i> .....	364
B. <i>Universality versus Cultural Relativism at the Second         World Conference on Human Rights</i> .....	371
C. <i>Western Visions of a Monolithic "Islam:" Orientalist         Stereotyping and Cultural Relativism</i> .....	379
D. <i>The Dissent of Iranian and Saudi Women: Political         Protest or Cultural Treason?</i> .....	389
CONCLUSION .....	402

## INTRODUCTION

This article examines the recent trend proposing that Islam and Islamic culture mandate a distinctive approach to human rights. It offers critical assessments of selected civil and political rights in two recent products of this trend: (1) the 1990 Cairo Declaration on Human Rights in Islam, issued by the Organization of the Islamic Conference and endorsed by Iran and Saudi Arabia; and (2) the rights provisions in the Saudi Arabian Basic Law promulgated in 1992. These legislative initiatives will be examined in conjunction with constructs<sup>1</sup> of an Islamic culture necessarily at odds with international human rights norms. These constructs have been put forward not only by Westerners influenced by Orientalist stereotypes or attracted to a cultural relativist approach to rights questions, but also by spokespersons for Muslim countries such as Iran and Saudi Arabia. Both Iran and Saudi Arabia have been in the forefront of the campaign to persuade international opinion that Islam mandates a distinctive approach to rights issues. The constructs of Islamic rights that have been offered by Muslims who reject the universality of civil and political rights — set forth in the International

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1. Constructs are hypothetical categories with "heuristic or interpretive value even though they do not purport to describe accurately any observable reality." They include: "Ideal or constructed types that combine selected variables in order to focus attention upon common elements in diverse concrete situations or to provide an heuristic device for examining relationships among the selected variables." A *DICTIONARY OF THE SOCIAL SCIENCES* 123 (Julius Gould & William Kolb eds., 1964). The dictionary warns against misusing constructs: "When employed self-consciously and critically, constructs constitute a legitimate and frequently invaluable device for analysing and explaining human behavior. When used without a clear identification and awareness of their nature as hypothetical categories, they may be reified and confused with 'reality,' i.e. observable phenomena." *Id.* The authors of the constructs of "Islam," "Islamic culture," and "Islamic civilization" that are criticized in this article seem not to have heeded this warning, treating their constructs as if they corresponded to real world categories.

Bill of Human Rights — will be contrasted with the views of Muslims who advocate the universality of human rights and who are inclined to view governmental rights policies as deriving from political, and not cultural, considerations. An examination going beyond the official rhetoric about Islamic human rights reveals that there is no real consensus on the part of Muslims that their religion mandates a culturally distinctive approach to rights or that it precludes the adoption of international human rights norms. In fact, the relationship of Islamic culture to the positions that Muslims inside and outside governments are currently articulating on human rights is neither a simple nor a direct one, and the range of Muslims' attitudes on human rights defies Orientalist stereotypes and facile generalizations about a supposedly monolithic Islamic culture.

Part I of this article summarizes the recent debate over universal versus culture-bound human rights, provides a brief review of the role of human rights in the Islamic legal tradition, examines how Islamic elements have been combined with international human rights principles, and discusses the recent trend to promulgate Islamic human rights schemes. Part II analyzes and compares two recent legislative initiatives espousing supposedly Islamic approaches to human rights — the 1990 Cairo Declaration and the 1992 Saudi Arabian Basic Law. Part III examines the perspectives of some Muslim human rights dissidents, contrasting their views with official pronouncements by Muslim governments at the 1993 Vienna Human Rights Conference. An analysis illustrates how Western Orientalist and cultural relativist views of the impact of Islamic culture on human rights correlate with these governmental positions and disregard dissenting Muslim opinions, relying instead on stereotypes of a monolithic Islamic culture that is inimical to modern human rights. Finally, Part III.D examines the way religious and cultural pretexts for Iranian and Saudi policies maintain the subjugation of women and obscure the real political conflicts over women's role in society.

## I. CONSTRUCTS OF ISLAMIC PARTICULARISM ON HUMAN RIGHTS

### A. *Conflicts Over Human Rights: A Clash of Cultures?*

A prestigious Western scholar has recently added his voice to the ongoing debate about whether human rights are distinctively Western and fundamentally discordant with Islamic culture. In an article in *Foreign Affairs*, Samuel P. Huntington (head of the Olin Institute for Strategic Studies at Harvard University) links the international debate over whether

human rights are Western, and thus unsuitable for nonWestern cultures, to a broader cultural conflict.<sup>2</sup> He claims that in the current phase of world politics, "the dominating source of conflict will be cultural."<sup>3</sup> He further argues that Western concepts "differ fundamentally from those prevalent in other civilizations." Among these "Western concepts," he includes: individualism, liberalism, constitutionalism, human rights, equality, liberty, the rule of law, democracy, free markets, and the separation of Church and State, which he asserts "often have little resonance" in nonWestern cultures.<sup>4</sup> Because of the centrality that Huntington accords to religion as a determinant of culture in Muslim countries, he posits an "Islamic" civilization opposed to the geographically-designated "West," noting that conflicts "between Western and Islamic civilizations" have gone on for 1,300 years.<sup>5</sup>

"Differences in culture and religion create differences over policy issues" such as human rights, according to Huntington.<sup>6</sup> Moreover, he contends that these cultural differences have consequences for foreign relations; after the end of the Cold War, the West confronted nonWestern cultures as the new adversary.<sup>7</sup> Huntington quotes approvingly from an Indian Muslim author who maintains that the West's next confrontation will come from "the Islamic nations from the Maghreb to Pakistan,"<sup>8</sup> and cites the eminent Orientalist Bernard Lewis, who predicts a clash arising between the West and Islam as a reaction by "an ancient rival against our Judeo-Christian heritage, our secular present, and the world-wide expansion of both."<sup>9</sup>

According to Huntington's thesis, the promotion of the universality of human rights by the West is counterproductive; it merely provokes civilizational clashes and backlash movements in nonWestern cultures:

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2. Samuel P. Huntington, *The Clash of Civilizations?*, FOREIGN AFF., Summer 1993, at 22. The article generated sufficient controversy and attention to prompt the same journal to publish several comments on Huntington's thesis. *Responses to Samuel P. Huntington's The Clash of Civilizations?*, FOREIGN AFF., Sept.-Oct. 1993, at 2. Huntington offered a rebuttal in *If Not Civilizations, What? Paradigms of the Post-Cold War World*, FOREIGN AFF., Nov.-Dec. 1993, at 186.

3. Huntington, *The Clash of Civilizations?*, *supra* note 2, at 22.

4. *Id.* at 40.

5. *Id.* at 31.

6. *Id.* at 29.

7. *Id.* at 41. Another recent analysis of the post-Cold War era predicting international conflicts along religious lines can be found in MARK JUERGENSMEYER, *THE NEW COLD WAR? RELIGIOUS NATIONALISM CONFRONTS THE SECULAR STATE* (1993).

8. Huntington, *The Clash of Civilizations?*, *supra* note 2, at 32.

9. *Id.* For Lewis' most recent book on this theme, see BERNARD LEWIS, *ISLAM AND THE WEST* (1993).

Western efforts to propagate such ideas produce instead a reaction against "human rights imperialism" and a reaffirmation of indigenous values, as can be seen in the support for religious fundamentalism by the younger generation in non-Western cultures. The very notion that there could be a "universal civilization" is a Western idea, directly at odds with the particularism of most Asian Societies and their emphasis on what distinguishes one people from another.<sup>10</sup>

Many points in these assertions are debatable, but Huntington's claim that Western propagation of the universality of human rights is a causal factor in the rise of Islamic fundamentalism<sup>11</sup> is one aspect of the article that can be easily discounted. The rise of Islamic fundamentalism is a complex phenomenon and one that cannot plausibly be linked to Western promotion of human rights, not the least because the chronology is wrong.<sup>12</sup> Islamic fundamentalism, long present in the Middle East, was on the upsurge after the 1967 Arab-Israeli war — well before the Carter Administration (1977–81) adopted human rights concerns as prime components of U.S. foreign policy, and U.S. initiatives to promote human rights became controversial.<sup>13</sup> Moreover, since Islamic

10. Huntington, *The Clash of Civilizations?*, *supra* note 2, at 40–41.

11. In another article on this same theme, Huntington reiterates his thesis that the propagation of Western values, like the universality of human rights, helps to stimulate "reactions such as the religious fundamentalism taking hold in many Islamic societies." Samuel P. Huntington, *The Islamic-Confucian Connection*, *NEW PERSP. Q.*, Summer 1993, at 19.

12. The word "fundamentalism" is used in different senses by different authors. It is used here according to the definition put forward in the article by Martin Marty, *Fundamentalism as a Social Phenomenon*, 42 *BULL. AM. ACAD. ARTS & SCI.* 15 (1988). According to Marty, fundamentalism is, among other things, reactive and reactionary, separatist, exclusivist and oppositional, absolutist, authoritarian, and antipermissive, and it involves selective retrieval of elements of a religious tradition.

For analyses of Islamic fundamentalism, none of which ascribe its growth to the Western promotion of human rights, see *THE ISLAMIC RESURGENCE IN THE ARAB WORLD* (Ali Dessouki ed., 1982); *FROM NATIONALISM TO REVOLUTIONARY ISLAM* (Said Arjomand ed., 1984); *RELIGION AND POLITICS IN THE MIDDLE EAST* (Michael Curtis ed., 1981); OLIVIER ROY, *ISLAM AND RESISTANCE IN AFGHANISTAN* (1990); BASSAM TIBI, *THE CRISIS OF MODERN ISLAM: A PREINDUSTRIAL CULTURE IN THE SCIENTIFIC-TECHNOLOGICAL AGE* (1988); *THE POLITICS OF ISLAMIC REVIVALISM: DIVERSITY AND UNITY* (Shireen Hunter ed., 1988); HENRY MUNSON, JR., *ISLAM AND REVOLUTION IN THE MIDDLE EAST* (1988). Two Egyptians, in a pseudonymous article published in the same issue of *New Perspectives Quarterly* in which Huntington's piece on the Confucian-Islamic connection appeared, offered a more realistic assessment of the causes of fundamentalism, arguing that it was a response to internal crises in Muslim societies frustrated by problems of development and unsettled by an incomplete transition to modernity. Mahmoud Hussein [pseud.], *The Stranded Individual of the South*, *NEW PERSP. Q.*, Summer 1993, at 41.

13. There had been various congressional initiatives designed to advance human rights abroad before the Carter Administration, among the most important of which was the 1974

fundamentalist movements had achieved power in only a few Muslim countries, the Western propagation of human rights ideals, such as it was, was mainly directed against Middle Eastern regimes that were opposed to fundamentalism and condemned by fundamentalists. Fundamentalists' grievances against the West were often in the nature of complaints that the West was failing to hold the existing regimes accountable under international human rights standards.<sup>14</sup>

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Jackson-Vanik Amendment, linking the expansion of U.S.-Soviet trade to liberalized Jewish emigration. However, it was not until the Carter Administration that the executive branch began energetically — if erratically — to promote human rights in U.S. foreign policy. See, e.g., A. GLENN MOWER, JR., *THE UNITED STATES, THE UNITED NATIONS, AND HUMAN RIGHTS: THE ELEANOR ROOSEVELT AND JIMMY CARTER ERAS* (1979).

14. For example, powerful Islamic fundamentalist movements surged under regimes like Sadat's and Mubarak's in Egypt and King Fahd's in Saudi Arabia. For reasons of political expediency, U.S. criticisms of the human rights abuses committed by these regimes were muted. The important nongovernmental organization (NGO) Middle East Watch chided the United States for its passivity and failure to hold Mubarak accountable for human rights abuses. See *U.S. Leaders Should Grill Mubarak on Rights Abuses: Watchdog*, Agence France Presse, Oct. 22, 1993, available in LEXIS, Nexis Library, ALLWLD file. For a discussion of the dilemma for U.S. policy makers that Egypt's repression of fundamentalists poses, see Stanley Reed, *The Battle for Egypt*, FOREIGN AFF., Fall 1993, at 94. Fundamentalist forces opposed to monarchies like Saudi Arabia's that are supported by the United States have noted the disparity between actual U.S. policies and U.S. professions of belief in democracy and human rights. See Peter Ford, *Can an Islamic Government Foster Democratic Rights?*, CHRISTIAN SCI. MONITOR, Apr. 28, 1992, at 10. Thus, U.S. policy in countries like Egypt and Saudi Arabia gives fundamentalists little in the way of "human rights imperialism" to react against. It does, however, confirm their impressions that the United States does not apply its human rights policy rigorously to friendly governments. The lack of strong Western protests when Algeria's military regime interrupted the democratization process in January 1992 in an effort to forestall the imminent electoral victory by the fundamentalist FIS party, did nothing to discredit Muslims who charged that the West was not concerned about human rights violations where fundamentalists were affected. See, e.g., *Iran Reports Anti-U.S. Rally in Mecca*, Reuter Library Report, June 8, 1992, available in LEXIS, Nexis Library, ALLWLD file (Iranian religious leader asserting that the United States is against human rights).

Even in the case of the rare regime that is fundamentalist, U.S. concern for human rights is erratic at best. Iran's fundamentalist regime is the only one towards which the United States has been consistently hostile and whose rights violations it has regularly excoriated. In contrast, the United States has been quite subdued in condemning the rights abuses committed by friendlier regimes pursuing fundamentalist policies, such as the Nimeiri regime in the Sudan during 1983-85 and the Zia regime in Pakistan during 1977-88. Only after the fundamentalist Bashir regime seized power in the Sudan in 1989 and U.S.-Sudanese ties soured because of the Sudan's alleged support for terrorism and groups inimical to U.S. interests, did the Sudanese government's poor rights record prompt strong U.S. condemnation, leading to a severe worsening in U.S.-Sudanese relations and an angry response by the Sudanese dictator. See *Al-Bashir Cites Reasons for U.S. "Hostility"*, Middle East Intelligence Report, Jan. 18, 1994, available in LEXIS, Nexis Library, ALLWLD file.

Moreover, in the 1980s, the United States funded the war waged by the Afghan resistance against the Soviet-backed Kabul regime. The resistance groups included Islamic fundamentalist groups, like Gulbedin Hekmatyar's, which played a prominent role in the war. The United States displayed little concern for the impact a fundamentalist victory would have on human rights. For a critical appraisal of the inconsistency of U.S. policy in dealing with Islamic fundamentalism and the Algerian and Afghan situations, see Robert Fisk, *Too Hot for Democracy? Robert Fisk asks how long hangman dictators will hold sway in the Arab world*, INDEPENDENT, Oct. 14, 1994, at 21. For a general review of problems facing the United

Similarly, Huntington's failure to distinguish between Muslim reactions to human rights ideals as such and their hostile reactions to the double standards employed by Western governments in their approach to human rights issues rests on a grievous misperception. In actuality, as this article will seek to demonstrate, many Muslims have responded positively to human rights ideals. Many Muslims do, however, resent the West's rhetorical endorsement of universality where it is accompanied by a double standard in the actual application of rights principles. To Muslims, this suggests that the West is biased against Islam and more inclined to charge Muslims than others with rights violations, while at the same time the West minimizes or disregards the sufferings of Muslims deprived of their rights.<sup>15</sup> Instances where Muslims have perceived bias include the West's condemnations of the human rights violations perpetrated by the Islamic Republic of Iran after long tolerating the abuses committed by the proWestern regime of the Shah, and the West's indifference toward abuses inflicted on Muslims in Bosnia and in the territories occupied by Israel since 1967. These situations are contrasted with the alacrity of Western military intervention to force

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States in promoting democratization in the Middle East in the face of the growing power of fundamentalist movements, see Alan Elsner, *U.S. Ponders How to Push Democracy in Middle East*, Reuter Library Report, Mar. 25, 1993, available in LEXIS, Nexis Library, ALLWLD file.

15. Thus, for example, Frej Fennich, the executive director of the Arab Institute for Human Rights in Tunis, criticized the U.S. position at the 1993 Vienna Human Rights Conference, not because he challenged the universality of human rights, but because he saw the United States using a double standard, one that effectively disregarded the rights abuses afflicting Bosnian Muslims, Palestinians, and Iraqis — as if violations of their human rights were less serious than ones affecting Westerners. These comments were made during an interview with the author in Tunis on June 30, 1993, after Fennich's return from the Vienna Conference.

Western double standards were decried and exploited by antiWestern forces, thus causing governments friendly to the West to be concerned about the antiWestern backlash that they were creating. See, e.g., *Baghdad Raid Said Sign of U.S. Arrogance, Hypocrisy*, Middle East Intelligence Report, June 29, 1993, available in LEXIS, Nexis Library, MDEAFR File; *Bosnian and Iranian Foreign Ministers Denounce Plan to Partition Bosnia*, BBC Summary of World Broadcasts, June 21, 1993, available in LEXIS, Nexis Library, MDEAFR File; *Fear the Attack on Iraq Will Distract Summit*, International Press Service, June 28, 1993, available in LEXIS, Nexis Library, MDEAFR File; *ICO Secretary-General Addresses Economic and Commercial Meeting*, BBC Summary of World Broadcasts, Sept. 6, 1993, available in LEXIS, Nexis Library, MDEAFR File; *Iran; Rafsanjani's New Year Message: Development Achievements; Opposing "Adventurism,"* BBC Summary of World Broadcasts, Mar. 22, 1993, available in LEXIS, Nexis Library, MDEAFR File; *Iraq: North African Countries Condemn U.S.-Led Attacks*, International Press Service, Jan. 21, 1993, available in LEXIS, Nexis Library, MDEAFR File; Tom Hundley, *Little Arab Support for Hussein*, CHI. TRIB., Jan. 15, 1993, at 17; *Other Reaction to Actions by Allies; Jordanian Crown Prince on "Double Standards"; Says Raid in Line with Resolutions*, BBC Summary of World Broadcasts, Jan. 17, 1993, available in LEXIS, Nexis Library, MDEAFR File; *West Said Using Human Rights to Hide Own Conduct*, Middle East Intelligence Report, Mar. 14, 1993, available in LEXIS, Nexis Library, MDEAFR File.



Iraq to withdraw from Kuwait, accompanied by Western condemnations of Iraqi rights abuses. Perceptions that the West employs a double standard on human rights do play into the hands of Islamic fundamentalists.<sup>16</sup> The latter are philosophically opposed to rights and are ready to exploit cases like the sufferings of the Muslims of Bosnia or the Iraqi population under the impact of Western sanctions to fuel antipathy toward the West and to convince Muslims that Western appeals to human rights are cynical ploys motivated by calculations of political advantage.

Curiously, Huntington notes Muslim criticism of Western double standards on Israel, Iraq, and Bosnia, but does not acknowledge that they could be a factor in increasing anti-Western sentiment among Muslims. Instead, he casually dismisses the significance of the double standards, asserting that “[a] world of clashing civilizations is inevitably a world of double standards,” where the West naturally applies different standards to “kin-countries” than to others.<sup>17</sup> It therefore seems that Huntington accepts the use of double standards in human rights policies as a natural ploy in the game of global politics — a position sharply at odds with international law on human rights, which aims at one universal standard.<sup>18</sup> Huntington may not grasp that any human rights policy worthy of the name must be one that is grounded on universality, which in turn precludes the allowance of favoritism and selectivity, whether in the promotion of human rights or in criticisms of human rights violations.

Although some factual claims in Huntington’s article are obviously ill-founded, when it comes to his vision of cultural clashes resulting

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16. See, e.g., John F. Burns, *In the War for Bosnia, the Only Winner is Despair*, N.Y. TIMES, Nov. 15, 1993, at A1, A10.

17. Huntington, *The Clash of Civilizations?*, *supra* note 2, at 36.

18. Thus, for example, the Preamble to the Universal Declaration of Human Rights proclaims itself as “a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society . . . shall strive . . . to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance.” Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., pt. 1, at 71, U.N. Doc. A/810 (1948) [hereinafter UDHR]. The Preamble to the International Covenant on Civil and Political Rights speaks of “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family,” stating that “these rights derive from the inherent dignity of the human person” and that “the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights,” and recalls “the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms.” International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171; G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966) [hereinafter ICCPR].

from the West pressing the universality of human rights, it might seem that he has better grounds. After all, one does have angry responses by various Middle Eastern governments to the Western propagation of human rights and to Western criticisms of human rights violations, like the reactions of officials of the Islamic Republic of Iran and Saudi Arabia. Their remarks seem, at least superficially, to back Huntington's contention that a civilizational cleavage divides the West from Islam on rights questions. Although this article will indicate why such pronouncements should be treated skeptically, a sampling should be reviewed to understand the reasons governments give for objecting to Western criticisms.

In 1983, Iran's U.N. Ambassador, Sa'id Raja'i Khorasani, offered an exceptionally forceful repudiation of the universality of international human rights norms. Speaking as a representative of a self-professed Islamic State,<sup>19</sup> he stated that, because of its Islamic values, Iran would have no qualms about violating such norms. He proclaimed, according to the paraphrased record of his speech, that:

conventions, declarations and resolutions or decisions of international organizations, which were contrary to Islam, had no validity in the Islamic Republic of Iran . . . . The Universal Declaration of Human Rights, which represented secular understanding of the Judeo-Christian tradition, could not be implemented by Muslims and did not accord with the system of values recognized by the

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19. One should bear in mind that Iran considers itself a model Islamic State. However, Iran's theocratic regime does not come from a generally accepted model of Islamic governance, but rather from Ayatollah Khomeini's own distinctive theory of government-by-the-*faqih* (the Islamic jurist). For his theory of Islamic governance, see IMAM [RUHOLLAH] KHOMEINI, *ISLAM AND REVOLUTION: WRITINGS AND DECLARATIONS OF IMAM KHOMEINI* 27-166 (1991). Iran's Constitution places a *faqih* at the head of government, even though after the death of Ayatollah Khomeini, the original *faqih*, the office has been downgraded and it is now clear that the president enjoys greater power. In addition to an executive branch, there are separate judicial and legislative branches, the latter with the power to enact laws. The members of the legislative branch are chosen in elections, in which all citizens 16 years old and above may vote, but candidates who are not supportive of the Islamic government, or not in favor with the clerical elite that has dominated the country since 1979, are precluded from standing for office. For details of the system of government set up in 1979, see FEDERAL RESEARCH DIVISION, LIBRARY OF CONGRESS, *IRAN: A COUNTRY STUDY* 195-203 (4th ed. 1989). For details of the current scheme incorporating constitutional amendments adopted in 1989, see *IRAN YEARBOOK '93*, at 37-60 (1993). Human legislation is eschewed in traditional Islamic legal theory and was also rejected in Ayatollah Khomeini's original conception of how the government would operate. See, e.g., KHOMEINI, *supra*, at 137. Despite this, legislation by the *Majles*, or Parliament, is treated as the law of the land. However, it can be blocked by a ruling of the Council of Guardians on the grounds that it violates Islamic law. Legislative stalemates resulting from such rulings can in turn be reviewed by a Council for the Determination of Exigencies and potentially resolved thereby. See *IRAN YEARBOOK '93*, *supra*, at 52.

Islamic Republic of Iran; his country would therefore not hesitate to violate its provisions, since it had to choose between violating the divine law of the country and violating secular conventions.<sup>20</sup>

Thus, Raja'i Khorasani specifically relied on a supposed incompatibility between values derived from the Islamic heritage and the Judeo-Christian heritage to justify Iran's deviation from the international human rights norms, which he associated with the West. Implicit in his remarks was the notion that Islam imposed a ceiling on permissible rights and freedoms, so that adhering to Islamic law would require Iran to violate international human rights conventions, because the latter expanded rights and freedoms beyond the limits established by Islam. However, in the same remarks he inconsistently asserted that secular and non-Muslim States "who could not live up to the divine standards of Islam should at least meet the minimum requirements established by international organizations,"<sup>21</sup> thereby suggesting that the international standards provided a standard of rights protections that was inferior to what was afforded under Islamic law. Raja'i Khorasani's alternating presentations of Islam as the reason justifying the regime's failure to observe international rights standards and Islam as the guarantor of a higher standard of rights than was afforded by international law may have been contradictory, but they were presumably necessitated by the regime's reliance on Islam as a legitimating device. For Iran's official Islam to be useful as a legitimating device, the proposition that Muslims could only claim an inferior standard of rights protections as a result of their religion could not be mooted as such — even though Raja'i Khorasani's argument amounted to this. Although any critical review would reveal that Iran's human rights standards fell below the international ones, it was politically preferable to try to obscure this point as much as possible and to plead that the Islamic standards were simply different — whence Raja'i Khorasani's need to maintain that Islam did, in fact, protect human rights, but according to its own values, values that, because they were fixed in divine law, could be presented as being in some sense superior to those based on mundane authority, like those "established by international organizations."<sup>22</sup>

The comments published in 1992 by an Iranian journalist supportive of Iran's official Islamic ideology illustrate what "the system of values

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20. U.N. Doc. A/C.3/39/SR.65, ¶ 95 (1984).

21. *Id.*

22. Similar confusion has appeared in the remarks of official Saudi spokesmen, who have alternately appealed to Islam to justify their government's resistance to calls for democratization and rights and have, at the same time, extolled Islamic rights principles as divinely mandated. See *infra* text accompanying notes 34–39, 312–15.

recognized by the Islamic Republic of Iran" would mean for rights. Although dealing with Iran's policies of press censorship, the comments have broader relevance and seem to confirm Huntington's thesis that Islamic religion and culture shape attitudes toward rights. The journalist claims that the Islamic Revolution rejected "modern civilization in favor of the religious culture which has superseded it," and that there is no place for intellectuals in the revolution, because they follow "philosophers who believed in democracy and individualism."<sup>23</sup> In statements that embody a philosophy congenial to those favoring cultural relativist approaches to human rights,<sup>24</sup> he invokes the distinctiveness of Islamic values:

Freedom is a concept defined within specific cultural and ideological boundaries. There is no universal definition of freedom. The problem we face is the demands by some religious and secular intellectuals for freedom in its modern, humanist form in the environment created by a religious revolution. . . . Religion does not deny freedom, but its freedom starts with servitude to God. Accepting this means interpreting freedom within the boundaries of *sharia* . . . and Islamic values. . . . In the Islamic *sharia*, freedom of expression does not extend to the freedom to corrupt. The purpose of religion is to lead human beings to perfection; not everything can be permitted.<sup>25</sup>

Huntington's thesis that the Western promotion of the universality of human rights would provoke clashes seems to be borne out by other Iranian reactions. For example, in 1992, the Iranian regime displayed its anger over international criticisms of Iran's rights record by expelling all of the staff of the International Committee of the Red Cross, and it also rejected the critical report submitted by U.N. special representative Galindo Pohl on the Iranian human rights situation,<sup>26</sup> claiming that the West used human rights as a "pretext for interfering in its internal affairs."<sup>27</sup>

As the June 1993 World Conference on Human Rights approached, Ayatollah Khamene'i, Ayatollah Khomeini's successor as Iran's religious leader, frequently returned to the theme of the U.S.'s unfair criticisms of Iran's human rights record. In lieu of attempting to defend Iran's human

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23. Untitled essay by Shahriar Zarshenaz, in *Inside Iran: A Special Survey*, INDEX ON CENSORSHIP, Mar. 1992, at 10.

24. For an examination of how flaws in cultural relativist analyses pertain to the issues raised by Huntington's "clash of civilizations," see *infra* text accompanying notes 330-80.

25. Zarshenaz, *supra* note 23, at 11.

26. See *Final Report on the Situation of Human Rights in the Islamic Republic of Iran by the Special Representative of the Commission on Human Rights, Mr. Reynaldo Galindo Pohl, pursuant to Commission Resolution 1992/67 of 4 March 1992*, U.N. GAOR, Hum. Rts. Comm., 49th Sess., Agenda Item 12, U.N. Doc. E/CN.4/1993/41 (1993) [hereinafter *Final Report*].

27. See Peter Feuilherade, *Iran: An Astute Move*, MIDDLE E. INT'L, June 11, 1993, at 11.

rights violations on cultural grounds, Iranian officials at this stage shifted tactics and were presenting Islam as the guarantor of human rights and denying that there were any rights violations. In January 1993, Khamene'i proclaimed that Iran was standing by all the innocent Muslims in the world, which angered "despotic powers;" the latter in turn showed their enmity by making baseless claims that Iran was violating human rights.<sup>28</sup> In speaking thus, he may have been offering a preemptive strike aimed at the criticisms that could be anticipated to appear in the forthcoming report on Iran's 1992 human rights performance by the U.S. Department of State.<sup>29</sup>

Ayatollah Khamene'i asserted: "America's claims to lead the world and its interference in the affairs of other countries amount to bullying."<sup>30</sup> In May 1993, he charged that U.S. accusations of human rights violations in Iran were baseless lies. He claimed that the United States was actually angry at Iran because of Khomeini's message that religion and politics were one and because Iran defended the rights of the Muslims of the world.<sup>31</sup> In a speech on June 4, 1993, in response to U.S. charges that Iran was violating human rights and was involved in terrorism, Khamene'i condemned the United States for interfering in the affairs of other countries, insisting that human rights were fully observed "in the Islamic state of Iran," and he accused the United States of hostile attitudes not just toward Iran but also against Islam, generally.<sup>32</sup> After the 1993 Human Rights Conference in Vienna, in which the United States had pressed for the universality of human rights, an Iranian Deputy Foreign Minister insisted that "[h]uman rights has come to mean Western culture and that human rights is a tool [for Western powers] to whitewash their intervention and

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28. *Iran Will Never Be Reconciled with Enemies of the Islamic Revolution*, BBC Summary of World Broadcasts, Jan. 28, 1993, available in LEXIS, Nexis Library, BBCSWB File [hereinafter *Iran Will Never Be Reconciled*].

29. For the actual report, which was critical, see DEPT. OF STATE, 1993 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1992, at 999 (1993). In this same period, there had been other critical assessments of Iran's rights record, as well. See, e.g., *Final Report*, supra note 26; *Little Discernible Progress in Respect for Human Rights in Iran Despite Eight Years of International Scrutiny*, in LAWYERS COMMITTEE FOR HUMAN RIGHTS, MIDDLE EAST (Nov. 12, 1992).

30. *Iran Will Never Be Reconciled*, supra note 28. Meanwhile, the official press was insisting that "world-devouring imperialism" led by "the Great Satan criminal America" was intent on destroying Islam and Iran's leaders. See *Reasons for Yazdi's Travel to U.S. Queried*, Middle East News Network, Dec. 24, 1992, available in LEXIS, Nexis Library, ALLWLD File.

31. *Iran; Khamene'i on Terrorism; Human Rights; Religion and Politics: Palestine*, BBC Summary of World Broadcasts, May 9, 1993, available in LEXIS, Nexis Library, BBCSWB File.

32. *U.S. Real Advocate of Terrorism: Iranian Leader*, Xinhua General Overseas News Service, June 4, 1993, available in LEXIS, Nexis Library, XINHUA File.

aggression against the weaker countries.”<sup>33</sup>

Milder comments in a similar vein were made by Prince Nayef, the Saudi Arabian Minister of the Interior in May 1993, just before the Vienna Human Rights Conference. Because of its political and military ties to the United States, ties that had expanded in the aftermath of the Gulf War, the Saudi regime was inhibited from attacking U.S. human rights policies as forthrightly as the Iranians had done. However, Prince Nayef appeared to include the United States when he responded to an interviewer’s question about his reactions to reports “by certain Western media” about human rights violations in Saudi Arabia:

As a human being and a Muslim, and because the people who suffer from this are Muslims, I am surprised at certain states and world organizations which claim to protect or urge respect for human rights. . . . Every year they issue a statement about human rights and blame other states for violations.<sup>34</sup> Most of the blame is primarily addressed to some Arab states and the Kingdom might have its share of this blame. I tell them frankly that governed by our Muslim beliefs, we in the Kingdom respect human rights more than any other state or society in the world. We are committed to our Islamic principles.<sup>35</sup>

That is, he seemed aggrieved at Western criticisms of the Saudi human rights record, which he portrayed as unjustified, and defended the Saudi record by appealing to Islamic principles. Prince Nayef’s claims that Islamic principles governed Saudi rights policies echoed King Fahd’s comments made at the time of the issuance of the new Basic Law in March 1992.<sup>36</sup> On that occasion, the King had felt obliged to explain why having made the leap to adopt a constitution, he had afforded his subjects virtually none of the rights that constitutionalism normally ensures. Defending the lack of provision for any democratic freedoms, he appealed to “Islamic beliefs:”

The democratic system that is predominant in the world is not a suitable system for the peoples of our region. Our people’s make up and unique qualities are different from those of the rest of the world. We cannot import the methods used by people in other countries and

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33. *Iran; Officials on Human Rights Issue; International Court on Human Rights Proposed*, BBC Summary of World Broadcasts, June 25, 1993, available in LEXIS, Nexis Library, BBCSWB File.

34. The “they” here most likely refers to the U.S. State Department, and the “statement” most likely refers to the annual issuance of *Country Reports on Human Rights Practices*. However, it is also conceivable that he was referring to the reports of Amnesty International.

35. *Interior Minister Discusses Human Rights, Extremism*, F.B.I.S. (NES-93-093), May 17, 1993, at 38, 39.

36. For an assessment of this law, see *infra* part II.B.

apply them to our people. We have our Islamic beliefs that constitute a complete and fully-integrated system. . . . In my view, Western democracies may be suitable in their own countries but they do not suit other countries.<sup>37</sup>

Following the issuance of a critical report by Amnesty International in September 1993 about human rights violations in Saudi Arabia,<sup>38</sup> a news report from Jeddah blasted the organization:

Amnesty officials are secularists and atheists. They could not infiltrate into the Kingdom to spread their venomous ideas. Now they wanted to tarnish the image of Shariah. The enemies of Islam are using Amnesty in their worldwide anti-Islam campaign. . . . We would like to remind the organization that each sovereign country has the right to select the rules and regulations it deems suitable. . . . They say at international forums that they respect Islam and Muslims but hide their hatred and vengeance against Islam and Muslims. We have to take precautions against these enemies. And all Muslim countries should implement Shariah. Let the enemies of Islam die of rage.<sup>39</sup>

Notwithstanding Huntington's assessment and the cited Iranian and Saudi statements, it is actually doubtful whether in the human rights arena a struggle is being waged that, when properly analyzed, amounts to a clash of international human rights norms with the Islamic religion *per se* or anything that could properly be denominated "Islamic civilization" or "Islamic culture." In Huntington's case, his argument that there exists a monolithic Islamic culture that dictates attitudes on rights issues apparently results from a reliance on Orientalist stereotypes;<sup>40</sup> in the cases of Iran and Saudi Arabia, their argument that they are following Islamic norms on rights correlates with their adoption of Islam as a legitimating device for their undemocratic regimes and retrograde rights policies. In either case, this article disputes the assertion that it is Islamic civilization that stands in the way of adopting international human rights.

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37. Interview with King Fahd, King of Saudi Arabia, in Kuwait (Mar. 28, 1992), *quoted in Empty Reforms, Saudi Arabia's New Basic Laws*, MIDDLE E. WATCH, May 1992, at 2 [hereinafter *Empty Reforms*].

38. AMNESTY INTERNATIONAL, SAUDI ARABIA: RELIGIOUS INTOLERANCE: THE ARREST, DETENTION AND TORTURE OF CHRISTIAN WORSHIPPERS AND SHI'A MUSLIMS (1993) [hereinafter AMNESTY INTERNATIONAL, SAUDI ARABIA: RELIGIOUS INTOLERANCE].

39. Maali Hamouda, *Amnesty — Thin End of the Wedge?*, Moneyclips, Oct. 6, 1993, available in LEXIS, MDEAFR Library, Saudi File.

40. For a discussion of Orientalism and Orientalist stereotypes, see *infra* text accompanying notes 336-42.

### B. *The Islamic Legal Heritage and Human Rights*

Before proceeding with a brief review of elements of the Islamic legal heritage pertaining to human rights, it is essential to clarify how terms will be employed; otherwise, their connotation may not be clear. Although the adjectives “Islamic” and “Muslim” are often used interchangeably, it is preferable to make a distinction between them — using “Islamic” to designate matters pertaining to the religion and the term “Muslim” to designate its adherents. More particularly, “Islamic” is best reserved for indicating normative religious principles — or ones that are presented as being normative. Thus, there is an Islamic duty to pray facing Mecca or to testify to the unity of God, principles that Muslims accept as normative. One should distinguish also between what Muslims universally accept as being Islamic in the sense of being mandated by their religion and what only a segment of Muslim opinion or a governmental elite endorses as Islamic. Thus, for example, Iran’s clerics assert that their regime is an Islamic Republic, but it is in reality a government constituted according to an idiosyncratic interpretation of Twelver *Shi`ism*. The Saudi royal family claims Islamic authority for its monarchical rule, in which it enjoys the support of *Sunni* clerics allied with the regime. Neither Iran’s clerics nor the Saudi royal family recognize each other’s claims to constitute an Islamic government even though each regime is by self-designation Islamic; indeed, Iran’s and Saudi Arabia’s rulers routinely anathematize each other in the name of their respective Islams. In calling these regimes “Islamic,” the outside observer is merely acknowledging that they characterize themselves as having religious character and authority. In contrast, it is confusing to use “Islamic” to designate a country like Syria, where Islam is not the religion of the State and the official ideology is secular, or Turkey, which is an avowedly secular country. It is better to call them “Muslim” countries, to indicate that the majority of their inhabitants are Muslims.

Concepts analogous to human rights have certain precursors in the Islamic heritage of philosophy and theology, but human rights as they are presently formulated in international law lack precise equivalents in the Islamic legal heritage.<sup>41</sup> Governments of Muslim countries had to define their stances vis-à-vis human rights in the aftermath of World War II, when the modern international formulations of human rights were produced, setting standards that became incorporated in public international law. In the decades immediately following World War II, Muslim countries for the most part appeared to accept the international consensus on human

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41. See ANN E. MAYER, ISLAM AND HUMAN RIGHTS: TRADITION AND POLITICS 47–50 (1991).



rights. Muslim countries were among the founding members of the United Nations, which in its 1945 Charter called for respect for human rights and fundamental freedoms, and all Muslim countries eventually joined the United Nations. Aspects of the Universal Declaration of Human Rights (UDHR), passed by the General Assembly in 1948, had provoked criticism by the representative of Saudi Arabia, who asserted that the declaration conflicted with Islamic law, but Saudi Arabia was the only Muslim country in the United Nations that failed to vote for it.<sup>42</sup>

By the 1970s, assertions that international human rights norms were incompatible with adherence to Islamic law were being voiced more frequently, and after the 1979 Islamic Revolution in Iran, Iran became a vigorous advocate of the proposition that international human rights were at variance with Islamic norms. The trend to plead Islamic particularism culminated in 1990, when Muslim countries joined in putting forward the Cairo Declaration of Human Rights in Islam.<sup>43</sup>

When Muslims charged that international human rights norms had a Western or Judeo-Christian bias that precluded their acceptance in Muslim milieus, the alleged conflicts centered around civil and political rights; problems of the compatibility of Islam with economic, social, and cultural rights were rarely raised. The principles of freedom of religion — notably the right to convert from Islam to another faith — and equality for all, regardless of religion or sex, seemed to pose particular problems for many Muslims, and in these areas they could point to Islamic authority, albeit contested authority, for their resistance to international standards.

In the past, Islamic sources have been construed as barring conversions from Islam, requiring apostates to repent and return to the fold or face the death penalty, for males, or imprisonment, for females. Contemporary Muslims have questioned such interpretations, pointing out that there are principles in the sources that also ban compulsion in religion.<sup>44</sup> The death penalty for apostasy from Islam, developed when the Islamic community was a struggling, nascent political entity, has been abandoned in most contemporary penal codes. To liberal Muslims, retaining the ban on apostasy appears to be an anachronism in the laws of modern nation States, where religious affiliations and political boundaries are no longer coterminous.<sup>45</sup> Although executions for apostasy have become rare,

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42. See John Kelsay, *Saudi Arabia, Pakistan, and the Universal Declaration of Human Rights*, in *HUMAN RIGHTS AND THE CONFLICT OF CULTURES: WESTERN AND ISLAMIC PERSPECTIVES ON RELIGIOUS LIBERTY* 35, 35–37 (David Little et al. eds., 1988).

43. See *infra* text accompanying notes 67–76.

44. See MAYER, *supra* note 41, at 169–70.

45. See *id.* at 170.

restrictions on the ability of non-Muslim faiths to seek converts among Muslims remain in effect in most countries.

Before adopting modern notions of citizenship in the nation State, Muslim societies followed Islamic rules that called for according an inferior status to non-Muslims.<sup>46</sup> Although progress toward according non-Muslims *de jure* equality is well-advanced in most countries, Muslims are still wrestling with the problem of reconciling certain aspects of Islamic law with the principle of full equality for non-Muslims.<sup>47</sup>

The most extensive conflicts between past interpretations of Islamic requirements and international human rights norms lie in the area of women's rights, although Muslim feminists argue that it is actually patriarchal attitudes and misreadings of Islamic sources, not Islamic tenets, that inspire the patterns of discrimination against women.<sup>48</sup> *De jure* discrimination against women, purportedly resting on Islamic principles, has persisted in the laws of most Muslim countries, resulting in the denial of full civil and political rights for women, often in the face of constitutional provisions mandating the equality of all citizens. Under conservative interpretations of the requirements of Islamic law, which are replicated to varying degrees in the actual laws in force in Muslim countries, women may suffer from many disadvantages.<sup>49</sup> Against this background, it is not surprising that few Muslim countries ratified the 1979 Convention on the Elimination of All Forms of Discrimination Against Women, and those that chose to ratify did so subject to reservations regarding various central provisions. The reservations made by Bangladesh, Egypt, Libya, and Iraq

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46. See *id.* at 143–48.

47. See *id.* at 147–50.

48. See *id.* at 110–15. See generally FATIMA MERNISSI, *THE VEIL AND THE MALE ELITE: A FEMINIST INTERPRETATION OF WOMEN'S RIGHTS IN ISLAM* (Mary Jo Lakeland trans., 1991).

49. Women are required to be monogamous, whereas men are allowed to have up to four wives at a time. Muslim women may not marry outside the faith, whereas Muslim men may marry Christians and Jews. Wives owe obedience to their husbands, who are entitled to beat them and withhold maintenance if they are disobedient. The husband may compel his wife to stay within the home, and women may not travel without the permission of a husband or male relative and without a male relative to chaperone them. Husbands can terminate marriages at will, whereas wives must establish grounds. Men have advantages in questions of guardianship and custody. Women inherit one-half the amount of males inheriting in the same capacity. Moreover, women's testimony as witnesses may be devalued or excluded, and they are valued as being worth one-half of a man for purposes of compensation. Depending on views, they are to be kept veiled and segregated from men, barred from obtaining education, and excluded from various prestigious positions such as the judiciary, the clergy, and political leadership. For an overview, see GHASSAN ASCHA, *DU STATUT INFÉRIEUR DE LA FEMME EN ISLAM* (1987); MAYER, *supra* note 41, at 109–13. On personal status laws, see SYED TAHIR MAHMOUD, *PERSONAL LAW IN MUSLIM COUNTRIES* (1987).

were specifically justified by their need to adhere to Islamic law.<sup>50</sup> Even Tunisia, a country where the laws affecting women have in many areas been reformed to give them approximate parity with men, effectively indicated that its adherence to Islam limited its compliance with the Convention.<sup>51</sup>

In short, religious freedom and equality for all are ideas regarding which conservative and liberal Muslims have long disagreed, differing about whether and to what extent the inherited rules of Islamic law can be updated. With the rise of powerful Islamic fundamentalist movements opposed to many rights, including the right to freedom of religion and equal rights for religious minorities and women, the debates on these topics are not merely academic.<sup>52</sup> Promulgating Islamic versions of human rights that consistently side with the views of Muslims who are opposed to international human rights is not likely to end the controversies as to how the Islamic heritage relates to contemporary rights issues but rather to exacerbate them.

### C. Formulations of Islamic Alternatives to the International Bill of Human Rights

In reaction to the growing influence of international human rights, a number of alternative Islamic human rights schemes have been propounded since the 1960s that reflect the dissatisfaction of conservative forces and Islamic fundamentalists with the international human rights framework and a determination to rework the formulations in light of their theories of Islamic requirements.<sup>53</sup> Such Islamic versions of human rights have tended in most respects to fall far below the standard of protections for civil and political rights guaranteed under the International Bill of Human Rights. Protections of religious freedoms and guarantees of full equality and equal protection of the law for women and religious minorities have been notably absent.<sup>54</sup> Insofar as they reject freedom of religion

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50. See Belinda Clark, *The Vienna Convention Reservations Regime and the Convention on Discrimination Against Women*, 85 AM. J. INT'L L. 281, 299-300 (1991).

51. See Rebecca Cook, *Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women*, 30 VA. J. INT'L L. 643, 688 (1990).

52. For a survey of the negative consequences for rights and freedoms that resulted from fundamentalist takeovers of three countries, see Ann E. Mayer, *The Fundamentalist Impact in Iran, Pakistan, and the Sudan*, in FUNDAMENTALISMS AND THE STATE: REMAKING POLITICS, ECONOMIES, AND MILITANCE 110 (Martin Marty & Scott Appleby eds., 1993) [hereinafter Mayer, *Fundamentalist Impact*].

53. See generally MAYER, *supra* note 41, where several of these schemes are analyzed in detail. Before the adoption of the 1992 Saudi Basic Law, only the distinctive Islamic rights formulations contained in the 1979 Iranian Constitution had actually been enacted into law.

54. See generally *id.* at 93-187.

or equal rights for non-Muslims and women, Islamic human rights schemes propounded by Muslims with conservative agendas are at least congruent with certain principles found in traditional interpretations of Islamic requirements.<sup>55</sup> However, many of their provisions have either a tenuous or nonexistent connection to the Islamic sources or Islamic tradition. In areas where issues addressed in modern rights provisions were not prefigured in the Islamic legal legacy, these schemes may resort to outright borrowing from selected international human rights provisions — but with a distinctive twist. They subordinate the borrowed international human rights provisions to newly-fashioned Islamic derogation clauses, circumscribing them by subjecting them to “Islamic” conditions.<sup>56</sup> This practice of utilizing religious criteria to circumscribe rights protections afforded under international law conflicts with international human rights theory, which does not permit religious criteria to override or circumscribe human rights.<sup>57</sup> Because the permissible scope of the Islamic qualifications was left undefined by the authors of the new Islamic human rights schemes and because there were no settled historical guidelines for how to integrate Islamic conditions with modern human rights norms, the Islamic qualifications in practice left governments free to determine the scope of the rights provided and potentially to nullify the rights involved.<sup>58</sup> No reasons were offered adequately explaining why granting the government of a modern nation State, an institution borrowed from the West and unknown in Islamic tradition, such great latitude in defining the grounds for denying and restricting rights should be deemed appropriate in a system based on Islam.<sup>59</sup>

The authors of provisions in Islamic human rights schemes that are designed to curb and deny human rights have tended toward disingenuousness. Only infrequently have authors shown a readiness forthrightly to proclaim their determination to reduce and dilute international

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55. However, as already indicated, these interpretations are themselves under fire.

56. MAYER, *supra* note 41, at 73, 76–91.

57. *See id.* at 74. In international law, the conditions that can be placed on human rights are restricted, and some principles of human rights — such as the right to freedom of religion — allow no derogations in any circumstances. *See id.* at 73–76 and sources cited therein. *See generally* Thomas Buergenthal, *To Respect and to Ensure: State Obligations and Permissible Derogations*, in *THE INTERNATIONAL BILL OF HUMAN RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS* 72 (Louis Henkin ed., 1981).

58. *See* MAYER, *supra* note 41, at 73.

59. The author points out elsewhere the difficulties of reconciling the authority claimed by governments of many modern nation States to determine what will constitute Islamic law on their territory with the established Islamic theory of sources. *See* Ann E. Mayer, *The Shari'ah: A Methodology or a Body of Substantive Rules?*, in *ISLAMIC LAW AND JURISPRUDENCE: STUDIES IN HONOR OF FARHAT J. ZIADEH* 177–98 (Nicholas Heer ed., 1990) [hereinafter Mayer, *The Shari'ah*].

rights protections. Instead, they have tended to resort to equivocal formulations that are designed to obscure the underlying intent to curb or deny human rights, employing wording that, unless closely scrutinized, might seem to be aimed at promoting them.<sup>60</sup> For example, authors of Islamic human rights schemes who wish to accommodate discrimination based on sex and religion rarely admit squarely that they are repudiating the principle of equality for women and minorities. Instead, they use coded or confusing language that disguises their aim to permit such discrimination.<sup>61</sup> These attempts to equivocate and to minimize the appearance of deviation from the international norms are in effect forms of tribute to the normative force that the International Bill of Human Rights has acquired in Muslim milieus. It suggests that the authors fear that their Islamic formulations risk being dismissed as unsuitable archaisms if they forthrightly acknowledge how widely they diverge from the international standards.

Some features of the rights principles in the 1979 Iranian Constitution deserve mention, as they correlate in a general way with the features found in other Islamic human rights schemes, although varying in some important particulars. Article 20 is crucial; it stipulates that human rights are to be subordinated to Islamic criteria.<sup>62</sup> That article expressly provides that all citizens enjoy human, political, economic, social, and cultural rights according to Islamic standards (*mavazin-e eslam*).<sup>63</sup> Furthermore, Article 4 provides that all laws should be based on Islamic standards<sup>64</sup> and that this principle will, in general, prevail over all of the principles in the Constitution.<sup>65</sup> In addition to setting forth the general proposition that the Constitution and its rights provisions were subordinate to Islamic standards, many rights are expressly limited by Islamic criteria — as in Articles 21 (on women), 24 (on publications), 26 (on associations), 27 (on assembly), 28 (on choice of profession), and 168 (on definitions of political crimes and “crimes of the press”).<sup>66</sup>

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60. See MAYER, *supra* note 41, at 106–07, 120–28, 155–60 (analyzing examples of such formulations).

61. See *id.* at 95–96, 98–106.

62. IRAN CONST. art. 20, reprinted in 8 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 25 (Albert Blaustein & Gisbert Flanz eds., 1971) [hereinafter CONSTITUTIONS].

63. *Id.* Notwithstanding the reference in Article 20 to economic, social, and cultural rights, the actual concern seemed to be for using Islamic criteria to curb civil and political rights.

64. Since Article 12 establishes Twelver *Shi'ism* as the sect officially followed in Iran, it should actually be Twelver *Shi'i* standards — as interpreted by Iran's ruling clerics — that are controlling in this regard.

65. IRAN CONST. art. 4, in 8 CONSTITUTIONS, *supra* note 62, at 18.

66. *Id.* at 25–29, 85. See also MAYER, *supra* note 41, at 81–82.

The basic notion of the Iranian Constitution and similar Islamic human rights schemes, that Islamic criteria should be employed to circumscribe human rights, has since been followed in the Cairo Declaration issued by the Organization of the Islamic Conference and by the authors of the new Basic Law in Saudi Arabia. The latter deserve particular attention as recent, important products of a trend that may have misled some outside observers into believing that it is Islam that stands in the way of the reception of human rights. This article evaluates these officially endorsed constructs, contrasting their basic tenets with the dissimilar approaches to rights put forward by some independent Muslims and nongovernmental organizations in the Middle East.

## II. ISLAMIC HUMAN RIGHTS: TWO NEW CONSTRUCTS

### A. *The 1990 Cairo Declaration on Human Rights in Islam*

The Cairo Declaration assumes more general significance than the previous Islamic human rights schemes because it embodies an approach to rights that has been endorsed by the foreign ministers of the Organization of the Islamic Conference (OIC). The Charter of the OIC, an international organization founded in 1973 to which all Muslim countries belong,<sup>67</sup> indicates in its preamble that its members are “[r]eaffirming their commitment to the UN Charter and fundamental Human Rights, the purposes and principles of which provide the basis for fruitful co-operation amongst all people.”<sup>68</sup> However, on August 5, 1990, a meeting in Egypt of OIC foreign ministers issued the Cairo Declaration on Human Rights in Islam,<sup>69</sup> a document sharply at variance with the International Bill of Human Rights. With the issuance of the Cairo Declaration, the OIC indicated that it was asserting the existence of an Islamic countermodel of human rights. Such a document would appear to validate Huntington’s thesis of a cleavage between Islamic culture and the West, provided, of course, that this Declaration can be taken as representative of an Islamic civilizational model. If the Cairo Declaration represents the epitome of Islamic teachings and values — and this article will argue that it does not — it proves that constitutionalism, human rights, equality,

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67. For background on this organization, see generally HASSAN MOINUDDIN, *THE CHARTER OF THE ISLAMIC CONFERENCE AND LEGAL FRAMEWORK OF ECONOMIC CO-OPERATION AMONG ITS MEMBER STATES* (1987).

68. *Id.* at 186.

69. An English translation of the Declaration is included in U.N. GAOR, World Conf. on Hum. Rts., 4th Sess., Agenda Item 5, U.N. Doc. A/CONF.157/PC/62/Add.18 (1993) [hereinafter *Contribution of the OIC*].

liberty, democracy, separation of Church and State, and other "Western" concepts are irreconcilable with Islamic culture.

Preparation of the OIC document took place in Tehran in December 1989 in the course of a meeting of experts.<sup>70</sup> The Iranian Foreign Minister, Ali Akbar Velayati, claimed that the OIC invitation to Iran to host this preparatory meeting indicated that Iran enjoyed the confidence of the organization.<sup>71</sup> Velayati noted that Iran had been accused by the West of violating human rights, and he countered by condemning the use of the human rights issue for political purposes.<sup>72</sup> In context, it seemed appropriate that Iran hosted the meeting for the drafting of the Cairo Declaration, which closely supported Iran's position that Islam mandated a distinctive approach to human rights, a position Iran had been taking since the 1979 revolution. It may have been hoped that the meeting would provide a united response by Muslim countries that would, by implication, rebut charges that Iran engaged in human rights violations.

Like other Islamic human rights schemes, the Cairo Declaration is actually a hybrid of international and Islamic elements. It does not have an exact counterpart in the Islamic legal legacy. Like the preceding Islamic human rights schemes, the Cairo Declaration, in formulating its civil and political rights, borrows extensively from terms and concepts taken from the International Bill of Human Rights and combines them with elements inspired by Islamic law or the authors' conceptions of Islamic values. Other principles simply reflect the authors' policy choices. The rights in the Declaration diverge significantly from international human rights standards, thereby prompting questions about how this Declaration is to be reconciled with other conflicting obligations to respect international standards, which had already been undertaken by OIC members in terms of their international commitments or their domestic laws.<sup>73</sup>

The central feature of the Cairo Declaration is its implicit conception of international human rights in the civil and political arena as excessive — with the concomitant need for Islamic criteria to restrict and reduce them. After asserting that "fundamental rights and universal freedoms in Islam are an integral part of the Islamic religion,"<sup>74</sup> the authors proceed

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70. See *Meeting on Human Rights in Islam Ends*, Xinhua General Overseas News Service, Dec. 28, 1989, available in LEXIS, Nexis Library, XINHUA file.

71. *Id.* In actuality, Iran's relations with a number of fellow OIC members were seriously troubled, and, without official explanation, the meeting took place in the absence of 20 member countries, including Saudi Arabia, Iraq, Jordan, Egypt, and Turkey. See *id.*

72. *Id.* The purposes were presumably to discredit Iran's Islamic revolution.

73. See *infra* text accompanying notes 169–72 for a discussion of these conflicts.

74. *Contribution of the OIC*, *supra* note 69, at 3.

to enumerate rights and freedoms on which "Islamic" qualifications have been imposed, indicating that in reality the authors saw in Islam justifications for restricting or denying rights and freedoms. Article 24 provides that: "All the rights and freedoms stipulated in this Declaration are subject to the Islamic *Shari`ah*" — without any attempt at defining what limits the *shari`a* would entail.<sup>75</sup> No added clarity is provided by article 25, which states: "The Islamic *Shari`ah* is the only source of reference for the explanation or clarification of any of the articles of this Declaration," because there is, as previously noted, no settled jurisprudence on the question of how reference to overriding Islamic criteria should affect modern rights norms.<sup>76</sup>

A close examination of the Cairo Declaration reveals deficiencies in the human rights protection that it affords, evasive wordings designed to disguise its deficiencies, and elements that are not necessitated by Islamic doctrine, but that reflect borrowings from international human rights formulations or the influences of politics. The issues to be examined include the treatment in the Declaration of: (1) equality for women; (2) freedom of religion; (3) freedom of the press; (4) freedom of assembly and association; (5) democratic freedoms; (6) criminal justice; (7) states of emergency; (8) the prohibition of genocide; (9) the right to security and privacy; and finally, (10) the prohibition of colonialism and slavery.

### 1. Equality of Women

Ambiguous wording in the Cairo Declaration may obscure the fact that it is deficient in providing for equality. Article 1 of the Declaration states that human beings (the neutral term *al-bashar* in the Arabic version) "are equal in terms of basic human dignity and basic obligations and responsibilities, without any discrimination on the grounds of race, colour, language, sex, religious belief, political affiliation, social status or other considerations."<sup>77</sup> This is an example of the evasiveness in the formulations often seen in Islamic human rights schemes. At first blush, article 1 may seem to be a guarantee of equality. However, it speaks only in terms of "basic human dignity and basic obligations and responsibilities," offering no guarantee of equality in rights and freedoms. The deficiencies in this formulation become clearer if one compares this wording with articles in the UDHR which it superficially resembles. Article 1 of the UDHR provides that "[a]ll humans are born free and

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75. Cairo Declaration [hereinafter Cairo Decl.] art. 24, in *Contribution of the OIC*, *supra* note 69, at 10. *Shari`a*, the path or law, is the Arabic term used to designate Islamic law.

76. *Id.* art. 25. See *supra* text accompanying notes 58–59.

77. Cairo Decl. art. 1, in *Contribution of the OIC*, *supra* note 69, at 4.



equal in dignity and rights,” and article 2 states that “[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”<sup>78</sup>

Due to the failure to provide for equality in rights or freedoms, article 1 of the Cairo Declaration affords no protection for a woman or non-Muslim affected by the discrimination that some Muslim conservatives believe is mandated by Islamic law. Moreover, neither here nor elsewhere does the Declaration make provision for equality before the law or equal protection of the law in the terms set forth in article 26 of the International Covenant on Civil and Political Rights (ICCPR). The latter provides:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>79</sup>

In contrast, article 19(a) of the Cairo Declaration provides that: “All individuals are equal before the law, without distinction between the ruler and the ruled.”<sup>80</sup> This wording is ambiguous. It might, if read separately, be construed to be a mandate for full equality for all persons before the law, with an indication that rulers are no exception. However, in the context of this Declaration, wherein guarantees for equal rights for women and non-Muslims have been deliberately eliminated, and in connection with the other provisions affecting equality, the deviation from ICCPR article 26 is bound to be detrimental for rights. Taken in context, article 19(a) indicates only that there may be no favoritism in the law for rulers — not that all individuals are entitled to equality before the law regardless of categories like sex or religion.

The significance of the omission of guarantees of equality can be shown by examination of provisions affecting women. Article 6 provides that “woman is equal to man in human dignity” — again not equal in “rights.”<sup>81</sup> In a human rights scheme that purports to follow a religious law that, as traditionally interpreted and applied, has reinforced patriarchy and denied women equality, invocations of women’s “dignity” or equality

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78. UDHR, *supra* note 18, arts. 1, 2.

79. ICCPR, *supra* note 18, art. 26.

80. Cairo Decl. art. 19(a), in *Contribution of the OIC*, *supra* note 69, at 9.

81. *Id.* art. 6, at 5.

in "dignity" in lieu of rights are not likely to provide legal grounds for challenging ingrained patterns of discrimination. As a scholar who has carefully examined possible counterparts of modern human rights in traditional cultures has concluded, "dignity" is a concomitant of one's ascribed status and is granted to the adult "who adheres to his or her society's values, customs, and norms," and "who accepts normative cultural constraints on his or her particular behavior."<sup>82</sup> "Dignity" is not to be confused with "human rights," since it entails "quiet endurance and acceptance of what a human rights approach to the world would consider injustice or inequality."<sup>83</sup> That is, in the peculiar context of the Cairo Declaration, the election to affirm women's equal "dignity," in lieu of their equal rights, can be seen as a coded way of reaffirming the subordinate role that has been assigned to women in the patriarchal social order that prevails in most Muslim countries. Moreover, nothing elsewhere in the Cairo Declaration indicates that its guarantee of equality in "human dignity" was understood by the authors to require law reforms to eliminate the legal disabilities that still affect women in most Muslim countries.

Article 6 continues its equivocation, providing that a woman "has rights to enjoy as well as duties to perform," avoiding the stipulation that the rights and duties of the two sexes are equal.<sup>84</sup> Thereafter, no details of women's duties are listed. Only three rights are enumerated, ones that are enjoyed by women even under conservative interpretations of Islamic law: (1) the right to enjoy legal personality; (2) the right to own and manage her property; and (3) the "right to retain her name and lineage."<sup>85</sup> The same article also imposes support obligations and the responsibility to care for the family on the husband. The husband's duty to provide maintenance, *nafaqa*, established in Islamic law, continues in force in many personal status laws in effect in Muslim countries.<sup>86</sup> The husband's duty to support the wife correlates with the husband's legal prerogatives vis-à-vis the wife, including his right to demand obedience.<sup>87</sup> In imposing one-sided support obligations, the Cairo Declaration effectively calls for

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82. Rhoda E. Howard, *Dignity, Community, and Human Rights*, in HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES: A QUEST FOR CONSENSUS 81, 83 (Abdullahi An-Na'im ed., 1992) [hereinafter Howard, *Dignity*].

83. *Id.* at 84.

84. Cairo Decl. art. 6, in *Contribution of the OIC*, *supra* note 69, at 5.

85. *Id.*

86. *See, e.g.*, MAHMOUD, *supra* note 49, at 278-79; JAMAL J. NASIR, THE STATUS OF WOMEN UNDER ISLAMIC LAW AND UNDER MODERN LEGISLATION 59-60 (1990).

87. *See* MAHMOUD, *supra* note 49, at 278-79.

the perpetuation of the traditional pattern of inequality in the husband-wife relationship in which the husband is the master and provider.<sup>88</sup>

Even where women are not mentioned, implied restrictions on their rights may be lurking in the Islamic qualifications. Article 12 imposes a disguised restriction on women's freedoms. It begins: "Every man [the neutral *insan* in Arabic] shall have the right, within the framework of the Shari`ah, to free movement . . ."<sup>89</sup> This reference to the *shari`a* as a framework opens the way to allowing restrictions on women's movements, because according to conservative readings of Islamic requirements, wives cannot leave home without their husbands' permission and women cannot travel unless chaperoned by male relatives.<sup>90</sup> Moreover, in Saudi Arabia, Islam is interpreted to bar women from driving — a significant restriction on their freedom of movement.

Similarly, article 13 promises that work is "a right guaranteed by the State and Society for each person able to work."<sup>91</sup> In a progressive step, the article also provides that men and women are entitled to fair wages "without discrimination."<sup>92</sup> However, it provides no guarantee against discrimination in hiring or against excluding women from certain kinds of work — discrimination that frequently occurs in Muslim countries. It is instructive to compare this deficient formulation with principles of international law. The UDHR provides in article 23(1) that everyone has the right to work and to free choice of employment,<sup>93</sup> and article 6 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) provides that the right to work includes the right "of everyone to gain his living by work which he freely chooses or accepts."<sup>94</sup> In contrast, the wording of article 13 of the Cairo Declaration provides that "[e]veryone shall be free to choose the work that suits him best and which serves his interests and those of society. . . . He may neither be assigned work beyond his capacity nor be subjected to compulsion or

88. This pattern of according the husband superior rights by virtue of his unilateral support obligations, its Western counterparts, and recent reforms are discussed in Ann E. Mayer, *Les lois sur le statut personnel en Afrique du Nord: Une evaluation comparative*, in FEMME, CULTURE ET SOCIÉTÉ AU MAGHREB (Rahma Bourquia et al. eds., forthcoming 1994).

89. Cairo Decl. art. 12, in *Contribution of the OIC*, *supra* note 69, at 7.

90. See, e.g., MINNESOTA LAWYERS INTERNATIONAL HUMAN RIGHTS COMMITTEE, SHAME OF THE HOUSE OF SAUD: CONTEMPT FOR HUMAN RIGHTS IN THE KINGDOM OF SAUDI ARABIA 81-84 (1992) [hereinafter SHAME OF THE HOUSE OF SAUD].

91. Cairo Decl. art. 13, in *Contribution of the OIC*, *supra* note 69, at 7.

92. *Id.*

93. UDHR, *supra* note 18, art. 23(1).

94. International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 19, 1966, 993 U.N.T.S. 3; G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966) [hereinafter ICESCR].

exploited or harmed in any way.”<sup>95</sup> The language would seem to afford a number of ways to justify excluding women from jobs — for example, on the grounds that employment of women in certain jobs is not in the interests of society, that certain occupations are beyond their capacity, or that employment will be harmful for them. Given the prevalence of sex stereotyping, stereotyping that has been endorsed by Islamic conservatives,<sup>96</sup> it seems likely that such grounds could be utilized to bar women from desirable professional and public service employment.<sup>97</sup>

The Cairo Declaration does not guarantee the freedom to marry the partner of one’s choice. Article 5 provides that on the right to marry there should be “no restrictions stemming from race, color or nationality,” but does not prohibit restrictions based upon religion.<sup>98</sup> In this respect, it contrasts with the UDHR which states in article 16(1): “Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry.”<sup>99</sup> The wording in the Cairo Declaration appears to accommodate the ban that Islamic law places on Muslim women marrying outside the faith, as well as the rule that Muslim men may marry only Muslims, Christians, and Jews — rules that most Muslim countries have retained as part of their law or public policy.<sup>100</sup> As with many Islamic human rights provisions, the discriminatory potential of article 5 will only be apparent to persons familiar enough with the principles of Islamic law to appreciate the significance of the failure to incorporate a right to marry regardless of religion.

## 2. Freedom of Religion

No guarantee of freedom of religion is afforded by the Cairo Declaration, even though by the standards of the international human rights

95. Cairo Decl. art. 13, in *Contribution of the OIC*, *supra* note 69, at 7.

96. See MAYER, *supra* note 41, at 138–41; ASCHA, *supra* note 49, at 161–81.

97. See, e.g., the comments of Iranian President Rafsanjani’s adviser on women’s issues, explaining why, since the revolution, women’s employment has suffered: “It is because we don’t want women to work in factories. . . . We want them to have a job that matches their personality, like doctors, cultural work, or work in education.” Annika Savill, *Sisters of the Veil*, INDEPENDENT, June 7, 1992, at 12. The 1993 report by U.N. Special Representative Galindo Pohl included reports that Iranian women were banned from studying agriculture, engineering, mining and metallurgy, and from becoming judges. Women were said to be barred from 55 fields out of 84 in technology and mathematics and 7 out of 40 in natural sciences. See *Final Report*, *supra* note 26, at 37. In the Sudan, since 1989, the rise of a particularly retrograde version of fundamentalism has coincided with the dismissal of women from desirable public sector jobs and the harassment of women working in the informal sector of the economy. See *Sudan: Threat to Women’s Status from Fundamentalist Regime*, AFR. WATCH, Apr. 9, 1990, at 1–5.

98. Cairo Decl. art. 5, in *Contribution of the OIC*, *supra* note 69, at 5.

99. UDHR, *supra* note 18, art. 16(1).

100. See NASIR, *supra* note 86, at 27–28.

norms, freedom of religion is a fundamental and nonderogable right.<sup>101</sup> In failing to incorporate such a principle, the Cairo Declaration follows the lead of previous Islamic human rights schemes, which similarly failed to recognize a right to religious freedom.<sup>102</sup> Naturally, the absence of a provision for freedom of religion will be detrimental for non-Muslims. However, the failure to provide for religious freedom also has serious practical implications for Muslims, given the number of Muslim dissenters from officially-imposed constructs of Islam and members of local minority sects who have been mistreated, charged with apostasy from Islam, or subjected to pressures or threats to compel them to abjure nonconforming belief.<sup>103</sup> Which minority sect will suffer depends on the politics of religion in the country involved. For example, the Twelver *Shi`i* minority is the target of repression and discrimination in Saudi Arabia,<sup>104</sup> a country that is officially committed to the puritanical Wahhabi sect of *Sunni* Islam. In contrast, in Iran, there has been a recent report noting the mistreatment by Iran's Twelver *Shi`i* regime of members of the *Sunni* minority in Southeastern Iran.<sup>105</sup>

In context, the lack of protection afforded for religious freedom accommodates condemnations and executions for apostasy. Because of the rising influence of Islamic fundamentalism, which is prepared to label as apostates any Muslims expressing critical perspectives on religion or challenging fundamentalist doctrines, the issue of whether apostates may be executed is growing in practical importance.<sup>106</sup>

The Cairo Declaration provisions regarding religion make no pretense of neutrality; they are forthright in their favoritism of Islam at the expense of other religions. The Declaration assumes that Islam is the true faith and that adherence to Islam is natural, with the consequence that it effectively bans other faiths from proselytizing. Article 10 of the Cairo

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101. Article 18 of the UDHR provides: "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private to manifest his religion or belief in teaching, practice, worship and observance." UDHR, *supra* note 18, art. 18. In the ICCPR, article 18(1) begins: "Everyone shall have the right to freedom of thought, conscience and religion." ICCPR, *supra* note 18, art. 18(1).

102. See MAYER, *supra* note 41, at 163-87.

103. See *id.* at 159-60, 165, 177-86; Mayer, *Fundamentalist Impact*, *supra* note 52, at 117, 125, 137; *Persecuted Minorities and Writers in Pakistan*, ASIA WATCH, Sept. 19, 1993, at 11-21.

104. See AMNESTY INTERNATIONAL, SAUDI ARABIA: RELIGIOUS INTOLERANCE, *supra* note 38.

105. See AMNESTY INTERNATIONAL REPORT 1993, at 161 (1993).

106. See, e.g., Mayer, *Fundamentalist Impact*, *supra* note 52, at 117, 125, 137; Max Rodenbeck, *When Islam Can't Take a Joke: Liberal Muslim Writers Endure Risky Lives*, FIN. POST, Aug. 10, 1992, at 47; *Persecuted Minorities and Writers in Pakistan*, *supra* note 103.

Declaration states that: "Islam is the religion of unspoiled nature" and prohibits "any form of compulsion on man or to exploit his poverty or ignorance in order to convert him to another religion or to atheism."<sup>107</sup> Article 10 appears to be based loosely on article 18(2) of the ICCPR, but involves a serious distortion of the principle set forth in article 18(2), which provides: "No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice."<sup>108</sup> Thus, whereas the prohibited coercion in article 18(2) is coercion that interferes with religious freedom, in article 10 of the Cairo Declaration, "compulsion" — along with exploitation — is prohibited only when it is employed to convert a Muslim to another faith or to atheism, not when it is used to make someone adopt Islam.<sup>109</sup> Against the background of the existing restraints on proselytizing by nonMuslims, it is likely that efforts to convert Muslims away from their faith would be punishable on the theory that they involve "exploitation," if no "compulsion" could be found.

### 3. Freedom of the Press

The Cairo Declaration also does not provide for freedom of the press, and, as in previous Islamic human rights formulations, Islamic criteria are used in the Cairo Declaration to curb freedom of speech. Article 22(a) grants a right to express opinions freely "in such manner as would not be contrary to the principles of the *Shari`ah*."<sup>110</sup> Article 22(b) echoes the *Qur'an*, being derived from the *Qur'anic* verse 22:41, commending those who command the good and forbid the evil. Article 22(b) provides: "Everyone shall have the right to advocate what is right, and propagate what is good, and warn against what is wrong and evil according to the norms of Islamic *Shari`ah*."<sup>111</sup> Of course, there is a negative pregnant in this provision: no right is being provided to advocate what is wrong or evil according to Islamic law. Vague, value-laden terms like these could be broadly construed by censors, thereby opening the way for the curbing of speech in ways that would suit the political purposes of governments, albeit using ostensibly religious criteria.

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107. Cairo Decl. art. 10, in *Contribution of the OIC*, *supra* note 69, at 6.

108. ICCPR, *supra* note 18, art. 18(2).

109. Thus, in Saudi Arabia, one of the more energetic sponsors of the Cairo Declaration, coercion has been used recently to "convert" at least one Christian and two *Shi`is* to Wahhabi Islam. See AMNESTY INTERNATIONAL, SAUDI ARABIA: RELIGIOUS INTOLERANCE, *supra* note 38, at 12, 15, 16–17.

110. Cairo Decl. art. 22(a), in *Contribution of the OIC*, *supra* note 69, at 9.

111. *Id.* art. 22(b).

Article 22(c) bars the exploitation or misuse of information "in such a way as may violate sanctities and the dignity of Prophets, undermine moral and ethical values or disintegrate, corrupt or harm society or weaken its faith."<sup>112</sup> In a document that already provides several grounds for curbing speech, this provision affords additional pretexts for justifying sweeping censorship based on vague criteria.

Taking the position, as article 22 does, that Islam justifies censorship opens the door to the suppression and punishment of a wide range of speech and opinions that religious authorities deem could convert or corrupt Muslims or weaken their faith. Islamic criteria are routinely invoked in many Muslim countries to censor speech and publications.<sup>113</sup> Fundamentalist groups independent of governments, but not held in check by them, may also employ threats and terrorism to punish and intimidate Muslims who express ideas and opinions that they find offensive,<sup>114</sup> and the language in article 22 seems to legitimize such tactics.

As is often the case with Islamic human rights schemes, the rights provisions in the Cairo Declaration may take on added significance when viewed in relation to the context in which they were devised. It appears that article 22 was deliberately drafted in such a way as to accommodate the banning of the book, *The Satanic Verse*, and the condemnation of its

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112. *Id.* art. 22(c).

113. See, e.g., Karim Alrawi, *The Still Small Voice Within Egypt*, INDEX ON CENSORSHIP, Feb. 1992, at 25; Sadik [sic] J. al-Azm, *The Importance of Being Earnest about Salman Rushdie*, 31 DIE WELT DES ISLAMS 1, 30-34 (1991) [hereinafter al-Azm, *Importance of Being Earnest*]; Youssef Ibrahim, *Egypt Fights Militant Islam With More of the Same*, N.Y. TIMES, Aug. 18, 1993, at A3. On the complex situation of Islamic censorship in Iran, see *Inside Iran*, INDEX ON CENSORSHIP, Mar. 1992, at 7; *Guardians of Thought: Limits on Freedom of Expression in Iran*, MIDDLE E. WATCH, Aug. 1993. Recent examples of Islamic grounds for censorship indicate how far-reaching the impact of censorship using Islamic criteria has become in recent years. See Rodenbeck, *supra* note 106.

114. For example, the secularist Egyptian intellectual Farag Fuda was assassinated by fundamentalist terrorists in 1992; Nasr Hamid Abu Zayd, a University of Cairo professor, was declared an atheist in 1993 on the grounds of his linguistic research and found himself living under death threats; and six Algerian intellectuals were assassinated by fundamentalists within three months in 1993. See Ibrahim, *supra* note 113. On the details of the Abu Zayd case, see "Silencing is at the Heart of my Case": Ayman Bar and Elliott Colla Talk with Nasr Hamid Abu Zayd about Ideology, Interpretation and Political Authority, MIDDLE E. REP., Nov.-Dec. 1993, at 27-29; Caryle Murphy, *An Islamic Twist on Divorcing*, PHILA. INQUIRER, July 29, 1993, at G1. Women who challenged fundamentalist ideals were subject to similar threats, as in the case of the Jordanian journalist turned politician, Toujan al-Faisal. An outspoken feminist, she was charged with atheism by fundamentalists in 1989, who sought to get a court ruling that her marriage should be dissolved, her children taken from her, and immunity given to whomever would kill her. See, e.g., Alistair Lyon, *Islamic Court Throws out Apostasy Case Against Jordanian Woman*, Reuter Textline, Nov. 2, 1989, available in LEXIS, News Library, TXTNWS File. Having waged a public war against her fundamentalist critics for years, she was vindicated by her election to parliament in the free elections held in November, 1993. See Rana Sabbagh, *Jordan: Jordanian Parliament Has First Woman Member*, Reuter Textline, Nov. 9, 1993, available in LEXIS, News Library, TXTNWS File.

author, Salman Rushdie, as an apostate. Ayatollah Khomeini had issued his *fatwa* calling for Rushdie's assassination on February 14, 1989.<sup>115</sup> Before the drafting of the 1990 Cairo Declaration and at the behest of Iran, the OIC foreign ministers, during a meeting in Riyadh on March 16, 1989, had already condemned the novel as blasphemous. They had also called for banning the novel and declared Rushdie an apostate but had refused to endorse the death sentence that had been decreed by Ayatollah Khomeini or Iran's call for economic sanctions against Great Britain.<sup>116</sup> Having adopted this antiRushdie stance, it was obvious that the OIC believed Islamic criteria could be used as a criterion for censoring publications.

#### 4. Freedom of Assembly and Association

Noteworthy by their absence in the text of the Cairo Declaration are guarantees of freedom of assembly, as provided in article 21 of the ICCPR, which establishes a right of peaceful assembly, or the right to freedom of association, as provided in article 22 of the ICCPR. Because restrictive laws on associations are utilized by Middle Eastern governments to ban human rights associations or to exert pressure on them, the absence of a right of freedom of association or a guarantee of human rights advocacy in the Cairo Declaration cannot help the cause of human rights.<sup>117</sup>

#### 5. Democratic Freedoms

The vagueness of the Cairo Declaration on the elements of an Islamic political system results from the sharp division among Islamic political theorists and governments of Muslim countries.<sup>118</sup> The Cairo Declaration

115. For a copy of the *fatwa*, see THE RUSHDIE FILE 68 (Lisa Appignanesi & Sara Maitland eds., 1990).

116. See Anton La Guardia, *Moslem States Urge Rushdie Book Ban*, DAILY TELEGRAPH, Mar. 17, 1989, at 15.

117. In contrast, the 1989 Algerian Constitution, conceived in a period of openness when the trend was toward democratization, specifically protects human rights advocacy in Article 32. See ALG. CONST. art. 32, in 1 CONSTITUTIONS, *supra* note 62, at 8.

118. Disputes continue to rage about what form of government is required by Islamic law — or whether Islam even provides for a specific form of government. There is a vast literature on this topic. Relevant background is provided in LEONARD BINDER, ISLAMIC LIBERALISM (1988); HAMID ENAYAT, MODERN ISLAMIC POLITICAL THOUGHT (1982); JOHN ESPOSITO, ISLAM AND POLITICS (1991); ISLAM, POLITICS AND THE STATE: THE PAKISTAN EXPERIENCE (Mohammad Asghar Khan ed., 1985); EDWARD MORTIMER, FAITH AND POWER: THE POLITICS OF ISLAM (1982); ABDERRAHIM LAMCHICHI, ISLAM ET CONTESTATION AU MAGHREB (1988); SAMI ZUBAIDA, ISLAM THE PEOPLE AND THE STATE (1989); Shahrugh Akhavi, *Islam, Politics and Society in the Thought of Ayatullah Khumayni, Ayatullah Taliqani, and Ali Shariati*, 24 MIDDLE E. STUD. 403 (1988).



provisions that do relate to government do not have a particular Islamic character; they are distinguishable from their international counterparts simply by reason of their failure to endorse the democratic principles that are included in international human rights norms.<sup>119</sup>

Instead of providing for democratic elections, article 23(a) of the Cairo Declaration stipulates that authority is a trust — without explaining the political mechanisms by which leaders are to accede to or be removed from this trust.<sup>120</sup> It also provides that “abuse or malicious exploitation” of authority is prohibited, “so that fundamental human rights may be guaranteed.”<sup>121</sup> Without any guarantees of free elections or procedural provisions for holding rulers accountable to the ruled, it is difficult to imagine what steps the citizenry could take to prevent such abuse of authority. Moreover, the expression of concern for “fundamental human rights” seems misplaced in a document geared to strip away rights protections already afforded by international law. The provisions regarding access to government functions are likewise deficient. Article 23(b) provides that “[e]veryone shall have the right to participate, directly or indirectly in the administration of his country’s public affairs. He shall also have the right to assume public office in accordance with the provisions of *Shari`ah*.”<sup>122</sup> The latter provision has been drafted to accommodate the use of Islamic criteria to bar persons from public office, thereby opening the door to discrimination based on sex or religion, discrimination that many conservative Muslims would say is required by Islamic principles.<sup>123</sup> This article differs significantly from the ICCPR, which in article 25 provides that:

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 [barring distinctions based on criteria such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status] and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

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119. See, e.g., article 21(3) of the UDHR, which provides: “The will of the people shall be the basis of the authority of the government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.” UDHR, *supra* note 18, art. 21(3).

120. Cairo Decl. art. 23(a), in *Declaration of the OIC*, *supra* note 69, at 10.

121. *Id.*

122. *Id.* art. 23(b).

123. See ASCHA, *supra* note 49, at 175–81; MAYER, *supra* note 41, at 143–61.

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

(c) To have access, on general terms of equality, to public service in his country.<sup>124</sup>

In the Cairo Declaration, the provision for “freely chosen representatives” has disappeared, and there is no provision for free elections or equality of access to public service. In short, the provisions of article 23 of the Cairo Declaration are designed to establish neither a democratic system of government nor the equal participation of all citizens, irrespective of gender or religion, in public affairs.

## 6. Criminal Justice

Only a few features of the extensive rights and procedural safeguards in the area of criminal procedure provided in articles 9 and 14 of the ICCPR<sup>125</sup> are duplicated in articles 19, 20 and 2 of the Cairo Declaration, which deal with aspects of criminal justice. *Shari`a* law was historically underdeveloped in the area of criminal procedure,<sup>126</sup> and until the recent Islamization trend, it had long been abandoned in almost all countries and replaced by criminal procedure rules of Western provenance. Thus, in practice, Islamic rules on criminal procedure are not a facet of the Islamic legacy that has commanded much loyalty or that has constituted a serious obstacle to the modernization of criminal justice. Therefore, it is difficult to make an argument that the decision by the authors of the Cairo Declaration to omit the safeguards of articles 9 and 14 of the ICCPR was compelled by a generally accepted view of which elements in the Islamic legal legacy deserve high priority.

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124. ICCPR, *supra* note 18, art. 25.

125. These include but are not limited to: the right not to be deprived of liberty, except on such grounds and in accordance with such procedure as are established by law (article 9(1)); the right to be informed of the reasons for one's arrest and to be informed promptly of any charges against one (article 9(2)); the right to prompt arraignment before a magistrate and prompt trial (article 9(3)); the right to challenge the reasons for one's detention in court (article 9(4)); the right to equality before the courts and a fair and public hearing before an impartial court (article 14(1)); the right to be present at one's trial and to the assistance of counsel (article 14(3)(d)); the right to examine witnesses against one (article 14(3)(e)); the right to the appeal of criminal convictions (article 14(5)); and the right not to be tried or punished for an offense for which one has already been tried and either convicted or acquitted (article 14(7)). See ICCPR, *supra* note 18.

126. For this reason, criminal procedure was one of the first areas where Muslim countries resorted to borrowing laws from European countries. These borrowings started in the nineteenth century. See NOEL COULSON, A HISTORY OF ISLAMIC LAW 151-58 (1964).

Article 19(b) of the Cairo Declaration provides that the right "to resort to justice is guaranteed to everyone."<sup>127</sup> This is a weak provision, because the Declaration does not provide sufficient procedural guarantees to ensure that this right "to resort to justice" includes a fair hearing with safeguards (for both civil and criminal litigants) according to the rights provided under international law.

Article 19(d) provides: "There shall be no crime or punishment except as provided for in the *Shari`ah*."<sup>128</sup> This contrasts with article 15 of the ICCPR, which states: "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offense, under national or international law, at the time when it was committed."<sup>129</sup> By referring to the *shari`a* rather than national and international law, article 19(d) opens the way for nonobservance of the principle of legality as set forth in article 15 of the ICCPR. In Islamic law in the past, there was no principle that an act had to be defined as a crime in the text of a law for it to be the basis for prosecution or punishment. Thus, the article 19 provision that there should be no crime or punishment except as provided for in the *shari`a* seems to open the door to the application of discretionary *ta`zir* penalties, where the judge assesses punishment according to his personal notions of what constitutes criminal behavior and what penalty should be imposed.<sup>130</sup> Such discretionary justice, whether under the rubric of *ta`zir* or otherwise, is deeply ingrained in the legal system of Saudi Arabia, where both the dearth of codified law and the government's authority to interpret the scope of laws have meant that advance notice — of what acts will be treated as criminal and what the applicable penalties will be — is not provided to the public.<sup>131</sup>

The principle set forth in article 19(d), as already noted, allows the *shari`a* to determine crimes and punishments. The *hadd* penalties, ones that are set forth in the *Qur'an*, either expressly or by implication, include flogging, amputation, stoning to death, and crucifixion. *Qur'anic qisas* penalties include mutilations and executions imposed in retaliation for injuries or killings. These penalties had been abandoned in the criminal laws in almost all Muslim countries due to their unsuitability by the standards of modern criminal justice, although Saudi Arabia is one of

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127. Cairo Decl. art. 19(b), in *Contribution of the OIC*, *supra* note 69, at 9.

128. *Id.* art. 19(d).

129. ICCPR, *supra* note 18, art. 15.

130. See LAW IN THE MIDDLE EAST 231-32 (Majid Khadduri & Herbert Liebesny eds., 1955).

131. See *Empty Reforms*, *supra* note 37, at 31.

the rare exceptions in this regard. The Islamization trend of the 1970s and 1980s, however, led to the reinstatement of elements of *Qur'anic* criminal laws in several countries. The imposition of Islamic criminal penalties in countries like Iran and Saudi Arabia has been criticized by international human rights organizations.<sup>132</sup> Article 19(d) accommodates Islamization and the application of penalties that conflict with norms barring cruel, inhuman, or degrading punishment established in ICCPR article 7,<sup>133</sup> and it is also difficult to reconcile with the language of article 20 of the Cairo Declaration, which bars torture, humiliation, cruelty, or indignity.<sup>134</sup> The article 19(d) principle that Islamic standards govern punishments is reinforced by article 2(a) of the Cairo Declaration, which prohibits taking away life "except for a *Shari'ah*-prescribed reason."<sup>135</sup> If one follows interpretations of the scope of the death penalty of *shari'a* law like those used by Iran and Saudi Arabia, this permits the imposition of the death penalty for *hadd* crimes such as fornication, highway robbery, apostasy, and also potentially for political opposition or adherence to disfavored religions or sects, which contemporary regimes may classify as religious offenses.<sup>136</sup> The application of the death penalty to this range of activities creates potential conflicts with international law in a number of areas. The imposition of the death penalty for moral offenses such as fornication seems to violate ICCPR article 6(2), which states that the death penalty "may be imposed only for the most serious crimes."<sup>137</sup> In the case of the death penalty for apostasy, which by itself violates the human rights guarantee of freedom of religion, the conflict between the Cairo Declaration and international rules is especially grave.

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132. See, e.g., AMNESTY INTERNATIONAL, IRAN: VIOLATIONS OF HUMAN RIGHTS: DOCUMENTS SENT BY AMNESTY INTERNATIONAL TO THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN 45-46, 63-65 (1987) [hereinafter AMNESTY INTERNATIONAL, IRAN VIOLATIONS]; *Empty Reforms*, *supra* note 37, at 30-31.

133. ICCPR, *supra* note 18, art. 7.

134. See *infra* text accompanying note 143.

135. Cairo Decl. art. 2(a), in *Contribution of the OIC*, *supra* note 69, at 4.

136. For discussions of the application of the death penalty in Iran and Saudi Arabia, see AMNESTY INTERNATIONAL, IRAN VIOLATIONS, *supra* note 132, at 63-65; *Iran: Victims of Human Rights Violations*, AMNESTY INTERNATIONAL REPORT, 5-7 (Nov. 1993); *Empty Reforms*, *supra* note 37, at 30-31. See also the discussion of the beheading of a Saudi *Shi'i*, *infra* note 217, for what may have been a combination of religious and political opposition.

In the contemporary context, not only may political opposition be treated as a "religious" offense warranting capital punishment by regimes purporting to possess Islamic authority, but political and moral offenses may also be conflated in curious ways. For example, in 1992 a prominent *Sunni* leader was executed in Iran after being charged with the combination of spying for the United States and Iraq, along with adultery and "homosexuality." AMNESTY INTERNATIONAL REPORT 162 (1993).

137. ICCPR, *supra* note 18, art. 6(2).

Article 19(e) of the Cairo Declaration provides that a defendant “is innocent until his guilt is proven in a fair trial in which he shall be given all the guarantees of defence.”<sup>138</sup> What these “guarantees of defence” would entail is left open to speculation. Since article 25 states, as noted, that the *shari`a* “is the only source of reference or the explanation or clarification of any of the articles of this Declaration,”<sup>139</sup> it could mean that a trial would be deemed “fair” as long as it was conducted in conformity with *shari`a* norms, regardless of how many international norms it violated. This is not an academic point, because the standards of criminal procedure in effect in countries that purport to be following Islamic rules, such as Iran and Saudi Arabia, fall far short of the relevant international human rights standards.<sup>140</sup>

Article 20 of the Cairo Declaration is an example of provisions that have little specific connection with Islamic tradition. It begins: “It is not permitted without legitimate reason to arrest an individual, or restrict his freedom, to exile or to punish him.”<sup>141</sup> In the absence of other procedural safeguards, this vague provision is inadequate, as is shown by a comparison with counterpart provisions in article 9 of the ICCPR, which are more specific and comprehensive.<sup>142</sup> Here the dilution of international norms appears attributable to the authors’ own policy choices. Article 20 continues: “It is not permitted to subject him to physical or psychological torture or to any form of humiliation, cruelty or indignity. Nor is it permitted to subject an individual to medical or scientific experimentation without his consent or at the risk of his health or of his life.”<sup>143</sup> This wording, which has no direct antecedent in Islamic doctrine, is reminiscent of article 7 of the ICCPR, from which it apparently derives.<sup>144</sup> Enunciating a ban on torture and grounding it in Islamic principles appears to be a constructive step, particularly since torture has been a routine feature of criminal justice in many Muslim countries. However, the disparity between theory and practice raises troubling questions. The evidence that self-professed Islamic States like Iran and Saudi Arabia

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138. Cairo Decl. art. 19(e), in *Contribution of the OIC*, *supra* note 69, at 9.

139. *Id.* art. 25, at 10.

140. See, e.g., AMNESTY INTERNATIONAL, IRAN: VIOLATIONS OF HUMAN RIGHTS 1987–1990, at 11–34 (1990); *Empty Reforms*, *supra* note 37, at 26–31.

141. Cairo Decl. art. 20, in *Contribution of the OIC*, *supra* note 69, at 9.

142. See *supra* note 125, at 9.

143. Cairo Decl. art. 20, in *Contribution of the OIC*, *supra* note 69, at 9.

144. Article 7 of the ICCPR states: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.” ICCPR, *supra* note 18, art. 7.

subsequently continued their patterns of recourse to egregious torture<sup>145</sup> suggests that this Islamic rights model, in practice, lacked normative force even among countries that ranked among its most vigorous official proponents in the international fora. Such a gap between the law and reality prompts doubts as to whether the OIC members who supported the Cairo Declaration ever intended to follow its supposedly culturally-based principles, especially in cases where those principles would redress the imbalance of power between the ruling elites and the average citizen or act as a restraint on government repression. It thus appears that the OIC simply borrowed the prohibition of torture from international law, where it figures as a central principle of modern human rights, and used it as window dressing — in hopes of making the Cairo Declaration appear more serious and respectable.

In their treatment of torture or cruel, inhuman, or degrading punishment, provisions in different articles of the Cairo Declaration seem to be at odds with each other. As has already been noted, it is no easy matter to reconcile the principle in article 20 of the Cairo Declaration barring humiliation, cruelty, or indignity with corporal punishments like crucifixion and stoning, or other capital penalties permitted under Islamic law, which the Declaration is designed to accommodate<sup>146</sup> — nor is it clear how these penalties are to be reconciled with the article 20 prohibition of torture.

### 7. States of Emergency

In a rule that is loosely modelled on international law, article 20 of the Cairo Declaration concludes: “Nor is it permitted to promulgate emergency laws that would provide executive authority for such actions,” a prohibition that, in context, appears only to reach the promulgation of “emergency laws” authorizing “such actions” as were barred by the preceding three sentences of article 20.<sup>147</sup> Article 20 therefore does not appear to deal with the general, and serious, problems of regulating states of emergency or derogations from human rights protections in these times, and it provides far fewer safeguards against the governmental abuse of states of emergency to deny rights than does article 4 of the ICCPR.<sup>148</sup> Because there were no settled Islamic principles dealing with

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145. See, e.g., AMNESTY INTERNATIONAL REPORT (1990, 1991, 1992, 1993).

146. For a discussion of article 19(d), see *supra* text accompanying notes 128–37.

147. Cairo Decl. art. 20, in *Contribution of the OIC*, *supra* note 69, at 9.

148. Among other things, article 4 of the ICCPR limits measures derogating from rights to states of emergency, officially proclaimed when the life of the nation is threatened and to the extent strictly required by the exigencies of the situation — provided that the emergency

states of emergency, there were no Islamic cultural norms that stood in the way of borrowing the more comprehensive safeguards afforded by the ICCPR against abusive use of states of emergency. This is, again, an instance where international human rights were watered down to suit the political agendas of the authors and not because any Islamic dictates preclude the adoption of the fuller human rights protections afforded under international law.

### 8. Prohibition Against Genocide

According to article 2(b) of the Cairo Declaration, it is prohibited "to resort to such means as may result in the genocidal annihilation of mankind."<sup>149</sup> Loosely modelled on modern international law provisions,<sup>150</sup> this is another instance where the authors went beyond the Islamic sources in fashioning their principles. The concept of genocide is not a concept expressly prefigured in Islamic principles.

### 9. Right to Security and Privacy

Article 18(a) of the Cairo Declaration provides that "[e]veryone shall have the right to live in security for himself, his religion, his dependents, his honour and his property."<sup>151</sup> This guarantee of "security" is vague, offering little reassurance in the context of a document where other rights guarantees are weak and ambiguous. Again, it possesses no distinctively Islamic character.

Article 18(b) of the Cairo Declaration stipulates a right to privacy in the conduct of personal affairs, in the home, in the family, and regarding property and relationships.<sup>152</sup> Article 18(b) states: "It is not permitted to

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measures are not inconsistent with other obligations under international law, precludes any derogations from certain rights even under a state of emergency, and requires the government involved to notify the Secretary General of the United Nations of the derogations and the reasons therefor. ICCPR, *supra* note 18, art. 4.

149. Cairo Decl. art. 2(b), in *Contribution of the OIC*, *supra* note 69, at 4.

150. The borrowing of the notion that genocide was a crime may have been encouraged by the fact that many Muslim countries are parties to the Convention on the Prevention and Punishment of the Crime of Genocide of 1948. However, the Convention does not deal with the "genocidal annihilation of mankind," the connotations of which are unclear. The Convention, in article 2, lists five specific categories of acts, providing that such acts constitute genocide where they are "committed with intent to destroy, in whole or in part, a national, ethnical [sic], racial or religious group." Convention on the Prevention and Punishment of the Crime of Genocide, *adopted* Dec. 9, 1948, 78 U.N.T.S. 277, G.A. Res. 260, U.N. GAOR, 3d Sess., 179th plen. mtg., pt. 1, at 174, U.N. Doc. A/810 (1948). As elsewhere, the decision of the authors of the Cairo Declaration to deviate from international legal standards and to use ambiguous substitutes raises doubts about their motives.

151. Cairo Decl. art. 18(a), in *Contribution of the OIC*, *supra* note 69, at 8.

152. *Id.* art. 18(b), at 9.

spy on him [sic], to place him under surveillance or to besmirch his good name. The State shall protect him [sic] from arbitrary interference."<sup>153</sup> This principle resembles article 17 of the ICCPR, from which it apparently derives.<sup>154</sup> Article 18(b) actually contains a constructive principle that, if honored in practice, could do much to ameliorate the situation in many Muslim countries, where spying and surveillance by State security police is widespread, intrusions on privacy by government agents are extensive,<sup>155</sup> and government campaigns to damage opponents' reputations may occur.<sup>156</sup> Article 18(c) provides that a private residence "is inviolable in all cases. It will not be entered without permission from its inhabitants or in any unlawful manner, nor shall it be demolished or confiscated and its dwellers evicted."<sup>157</sup>

Article 18 is notable for its lack of Islamic character, although it is congruent with features of Islamic culture supporting the notion that the home is a private sanctuary. Because warrantless searches of homes frequently occur in Middle Eastern countries<sup>158</sup> and persons may be evicted and their homes destroyed,<sup>159</sup> the protections in this section, if honored in practice, would also advance the cause of rights and freedoms. Although no comprehensive survey of actual human rights practice can be attempted in this article, the disparity between the Cairo Declaration and actual government practice in this area deserves consideration. OIC members have shown little inclination either before or after the issuance of the Cairo Declaration to honor the principles set forth in articles 18(b) and 18(c). Like other provisions in the Declaration that could, if implemented, curb actual patterns of governmental rights abuses, these seem to have remained a dead letter — notwithstanding their official grounding

153. *Id.*

154. The article states that "[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor and reputation." ICCPR, *supra* note 18, art. 17.

155. See, for example, the sections, *Arbitrary Interference with Privacy, Family, Home, or Correspondence*, in the reports on Middle Eastern countries in the U.S. Department of State's annual COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES; *Empty Reforms*, *supra* note 37, at 32; AMNESTY INTERNATIONAL, IRAN VIOLATIONS, *supra* note 132, at 9–13.

156. See, for example, the language used in the Saudi government's attempts in 1993 to discredit the members of the new human rights organization, *infra* text accompanying notes 262–64.

157. Cairo Decl. art. 18(c), in *Contribution of the OIC*, *supra* note 69, at 9.

158. See, for example, the sections *Arbitrary Interference with Privacy, Family, Home, or Correspondence*, *supra* note 155.

159. For example, in Iran, the razing of houses of poor people by the authorities caused rioting in several cities in 1992. See Vahe Petrossian, *Iran: Housing Problems Reach Boiling Point*, MIDDLE E. ECON. DIG., Nov. 6, 1992, at 18; AMNESTY INTERNATIONAL REPORT 1993, at 161.



in Islamic values that OIC members are ostensibly committed to respect. The failure to implement these principles suggests that they lack normative force for the governments involved, which in turn suggests that whether or not these governments violate human rights does not depend on whether these rights are grounded in "Western" principles or an authentic "Islamic" model.

### 10. Prohibition of Colonialism and Slavery

Reflecting the Third World setting in which Muslim nations elaborate their positions on rights, article 11(b) of the Cairo Declaration states that colonialism is "totally prohibited."<sup>160</sup> Again, this article has no express antecedent in Islamic doctrine. Article 11 seems to say that there can be no qualifications, not even Islamic ones, of this particular principle and states that "peoples suffering from colonialism have the full right to freedom and self-determination."<sup>161</sup> However, the history of OIC members since the organization was founded in 1973 indicates that this commitment to self-determination has not been interpreted to require OIC members to yield territory to their own restive minorities demanding self-determination. The right to self-determination only appears to address situations where colonialism by the West or the former U.S.S.R. is involved.<sup>162</sup>

Article 11(a) of the Cairo Declaration provides that no one has the right to enslave human beings — without any Islamic qualifications.<sup>163</sup> This is emblematic of the selectivity with which rules taken from Islamic law have been resuscitated in Islamic human rights schemes. Slavery was a deeply ingrained feature of many Muslim societies and was extensively regulated in Islamic law.<sup>164</sup> It survived in milieus where traditional

160. Cairo Decl. art. 11(b), in *Contribution of the OIC*, *supra* note 69, at 6.

161. *Id.* For an examination of the way that Muslim approaches to contemporary self-determination issues relate to Islamic legal tradition, see Ann E. Mayer, *War and Peace in the Islamic Tradition and International Law*, in *JUST WAR AND JIHAD: HISTORICAL AND THEORETICAL PERSPECTIVES ON WAR AND PEACE IN WESTERN AND ISLAMIC TRADITIONS* 195, 211–17 (John Kelsay & James T. Johnson eds., 1991).

162. The charter of the OIC affirmed "the right of self-determination" in article II(B)(2). MOINUDDIN, *supra* note 67, at 187. However, article II(B)(3) also affirmed the "respect of [sic] the sovereignty, independence and territorial integrity of each member State." *Id.* at 188. How the two principles were to be reconciled was not indicated, but this was hardly an academic point, because many OIC members were themselves struggling to suppress internal separatist movements by "peoples" claiming the right to self-determination.

163. Cairo Decl. art. 11(a), in *Contribution of the OIC*, *supra* note 69, at 6.

164. See, e.g., 'Abd, in *ENCYCLOPEDIA OF ISLAM* (new ed. 1960) ("'abd" is the ordinary word for "male slave," "female slave" being "ama"); BERNARD LEWIS, *RACE AND SLAVERY IN THE MIDDLE EAST* 6–15 (1990); JOSEPH SCHACHT, *INTRODUCTION TO ISLAMIC LAW* 127–30 (1964).

formulations of Islamic law remained in force until recently; it was only abolished in Saudi Arabia in 1962.<sup>165</sup> However, because slavery was an institution that by 1990 had fallen into practical desuetude and international disrepute, the authors of the Cairo Declaration were ready to lay down a principle that flew in the face of norms ingrained in Islamic institutions and the Islamic legal heritage. In so doing, they were proving that, in the formulation of their rights provisions, they were actually prepared to respond to considerations other than those contained in the Islamic tradition. Moreover, they proved that they did not feel themselves bound to adhere to venerable Islamic principles and could, where circumstances warranted, adopt conflicting modern norms.

### 11. Summation

In a country like Saudi Arabia, where slavery has only recently been eliminated, article 11(a) might seem to be a breakthrough. But when one measures the Cairo Declaration by the standards of the civil and political rights afforded by the International Bill of Human Rights, its deficiencies are revealed to be both serious and extensive. The retrograde character of the Cairo Declaration led to its vigorous denunciation by the International Commission of Jurists (ICJ) when it was submitted in 1992 to the U.N. Human Rights Commission.<sup>166</sup> Adama Dieng, the Senegalese Secretary General of the ICJ, condemned the Declaration for challenging the intercultural consensus on the international human rights standards, introducing discrimination against non-Muslims and women, deliberately restricting certain fundamental rights and liberties, and ratifying, under the cover of *shari`a*, the legitimacy of practices like corporal punishment.<sup>167</sup>

Because it strips Muslims of a wide range of civil and political rights that are afforded under international law and because it purports to be relying on Islamic criteria in doing so, if one takes the Cairo Declaration as a definitive "civilizational" statement of rights, it would support Huntington's assumption that human rights do not fit into Islamic culture. Whether the divergences actually result from a cleavage between Islamic and Western culture is another question. That Iran and Iraq joined in promoting the Declaration, indicated that the Islamic religion is unlikely to have been the determinative factor in shaping this regime of pseudo-rights. The two countries, which had fought a destructive war from

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165. See SAUDI ARABIA. A COUNTRY STUDY 208 (Richard Nyrop ed., 1984).

166. See Isabelle Vichniac, *La commission internationale de juristes dénonce un projet de "déclaration des droits de l'homme en Islam,"* LE MONDE, Feb. 13, 1992, at 6.

167. *Id.*

1980–88, stood at opposite extremes in terms of their actual religious policies. After the 1979 revolution, Iran became a Twelver *Shi'i* theocracy dedicated to carrying out an Islamic fundamentalist agenda, whereas Iraq was a military dictatorship dominated by *Sunnis* who followed a secular Arab nationalist ideology and ruthlessly persecuted Islamic fundamentalists and the large and disaffected Twelver *Shi'i* population. These two bitter enemies did share a common political interest in their approaches to rights questions, however; they shared policies of disregard for the rule of law, riding roughshod over human rights, resorting to terror and torture to crush dissent, and carrying out mass executions of political opponents.<sup>168</sup> Both were badly in need of a scheme that would legitimize their deviations from international standards, and it was this need, more than a shared Islamic culture, that dictated both regimes' support for the Cairo Declaration.

Any appearance of an emergent unified Islamic stance on human rights at the time of the issuance of the Declaration in 1990 proved chimerical. In the three years since the issuance of the Cairo Declaration, there has been no sign that it signals a genuine consensus among OIC member countries. Countries that were not previously disposed to exploit Islam as the rationale for denying human rights have not been more inclined to do so, and they have not been moved to modify their laws to reflect the standards set forth in the Declaration, which in many cases would lie far below the rights standards heretofore embodied in their domestic laws and constitutions. For example, the 1979 Iranian Constitution, itself purportedly based on Islam, continues at least in theory to afford a higher level of protection for rights than does the Cairo Declaration.<sup>169</sup> Not only do the constitutions of individual Muslim countries

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168. Their equally unsavory records can be compared by reading the relevant sections in the annual Amnesty International reports. An important recent analysis of how Iraq's Baathist ideology has shaped a regime that tramples on rights and how the regime of Saddam Hussain dominates Iraqi society is offered in SAMIR AL-KHALIL [pseud.], *REPUBLIC OF FEAR: THE INSIDE STORY OF SADDAM'S IRAQ* (1989).

169. For example, in Article 20, the Iranian Constitution offers the equal protection of the secular law for all citizens, albeit in a formulation that in context is problematic. IRAN CONST. art. 20, in 8 CONSTITUTIONS, *supra* note 62, at 25; *see also* MAYER, *supra* note 41, at 100–01. Article 14 calls for the human rights of nonMuslims to be honored, albeit with troubling qualifications and without clarifying the relationship of this Article to other Articles that seem to curb rights of religious minorities. IRAN CONST. art. 14, in 8 CONSTITUTIONS, *supra* note 62, at 22; *see also* MAYER, *supra* note 41, at 155–58. Article 23 prohibits the interrogation of people regarding their beliefs or attacking any person for his beliefs, and Article 38 provides that coerced testimony or confessions are null and void. Article 32 bars arrests, save where permitted by law and in accordance with proper legal procedures and requires immediately notifying the accused of the reason for the arrest and passing on the file to the judicial authorities within 24 hours. There are also provisions for the right to counsel in Article 35. Moreover, at least in theory, the government is to be democratic. Article 6 provides for

diverge from the rights set forth in the Cairo Declaration, but also the rights provisions in any given constitution may vary significantly from those set forth in another.<sup>170</sup> Moreover, the OIC endorsement of the Cairo Declaration with its supposedly authoritative Islamic standard of rights did not affect the positions of Muslim countries vis-à-vis international rights conventions. OIC members have differed dramatically in their willingness to ratify international human rights conventions, some ratifying most and some virtually none.<sup>171</sup>

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elections of officials like the president and members of the national assembly, Article 62 provides that members of the national assembly are to be elected by direct and secret ballots, and Article 59 provides for referendums. See IRAN CONST. arts. 6, 23, 32, 35, 38, 59, in 8 CONSTITUTIONS, *supra* note 62, at 19, 26, 29–30, 40.

In practice, Iran has disregarded its own Constitution, and even asking for it to be respected has proven dangerous. See *infra* text accompanying notes 278–82.

170. A comparison of the rights formulations in the constitutions of various Muslim countries will readily establish the wide range of models that they exemplify, of which only a few will be cited.

One OIC member, Turkey, remains resolutely secular. Article 2 of the 1982 Turkish Constitution proclaims Turkey to be, among other things, a democratic, secular, and social law State “respecting human rights” — without imposing any Islamic qualifications on such rights. Article 12 states that everyone possesses inherent fundamental rights and freedoms which are inviolable and inalienable. The provisions in Article 13 on permissible restrictions on fundamental rights and freedoms are both specific and secular; furthermore, the restrictions must be by law, in conformity with the letter and spirit of the Constitution. The provisions in Article 14 prohibiting the abuse of fundamental rights and freedoms are likewise specific and secular. TURK. CONST. arts. 2, 12, 13, 14, in 19 CONSTITUTIONS, *supra* note 62, at 3, 5.

Recent constitutions that are products of democratizing trends deviate from the OIC model of rights. Article 31 of the 1989 Algerian Constitution guarantees fundamental liberties and human rights. It imposes no Islamic qualifications. ALG. CONST. art. 31, in 1 CONSTITUTIONS, *supra* note 62, at 8.

The Yemeni Constitution, approved by referendum in 1991 after the adoption of the Cairo Declaration, provides in Article 5 that the State shall abide by the U.N. Charter, the UDHR, the Charter of the League of Arab States, and the generally accepted norms of international law. YEMEN CONST. art. 5. See Draft Version of Yemen Constitution, in CONSTITUTIONS (supp.), *supra* note 62, at 15.

The preamble to the 1992 Moroccan Constitution, which also was drafted after the Cairo Declaration had been adopted, provides that Morocco “reaffirms its attachment to human rights such as they are universally recognised.” See *Text of Draft Revisions of the Constitution as Proposed by King Hassan*, BBC Summary of World Broadcasts, Aug. 24, 1992, available in LEXIS, Nexis Library, BBCSWB File. For an analysis of this Constitution and human rights issues in contemporary Morocco, see Ann E. Mayer, *Moroccans: Citizens or Subjects? A People at the Crossroads*, 26 N.Y.U. J. INT’L L. & POL. (forthcoming 1994) [hereinafter, Mayer, *Moroccans*].

Kuwait has been intermittently democratic since its independence. The 1962 Kuwaiti Constitution provides in Article 6 that the system of government shall be democratic and in Article 29 that all people are equal in human dignity and in public rights and duties before the law, without distinction as to race, origin, language, or religion (but not sex). KUWAIT CONST. arts. 6, 29, in 9 CONSTITUTIONS, *supra* note 62, at 12, 16.

171. The current status of ratifications can be found in the table appended to U.S. DEPARTMENT OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PENALTIES FOR 1992, at 1189–92 (1993). Even in the policies of one country, one might find inconsistencies. For example, despite its attacks on international human rights and its pursuit of policies that were at odds with international norms on civil and political rights, Iran did not terminate its status as party to the ICCPR, which it had ratified under the late Shah in 1975.

The lack of uniformity in the legislation in effect in Muslim countries shows that this Declaration does not represent a true meeting of the minds on the part of Muslim governments about how Islam applies to rights — whether at the level of domestic legislation or international law. The Islamic Conference of Foreign Ministers in April 1993 issued a resolution that specifically acknowledged “the existence of different constitutional and legal systems among OIC Member States and various international or regional human rights instruments to which they are parties”<sup>172</sup> — without explaining how these differences can be reconciled with their endorsement of the Cairo Declaration, which presupposes a uniform Islamic approach to rights questions. The inefficacy of the Cairo Declaration suggests that many delegations’ endorsements may have been no more than perfunctory or rhetorical, perhaps motivated by nothing more than a reluctance to differ in public with a document that is nominally associated with “Islam” and “human rights” — both of which have positive connotations.

Thus, a document that might, at first blush, appear to offer a confirmation of Huntington’s thesis, reveals, after close scrutiny, to embody one variation out of many differing approaches to human rights questions that Muslim countries have adopted. These deep and persisting differences belie the notion that governments of Muslim countries do share a common rights philosophy or that there is anything like a monolithic “Islam” determining their laws affecting human rights or their willingness to endorse the internationally accepted norms.

### B. *The 1992 Basic Law of Saudi Arabia*

Although Saudi Arabia, like Iran, strongly supported the Cairo Declaration, the rights set forth in the Cairo Declaration did not dictate the rights provisions of the subsequently promulgated Saudi Basic Law. In the Saudi case, as the following analysis will show, the level of domestic rights protections are revealed to be generally much lower. Even though Islam is repeatedly referred to, any careful examination prompts doubts as to whether the deficiencies of the Saudi Basic Law on rights questions should be attributed to Islam, as opposed to the strategies of the Saudi family to maintain their monopoly on political power and their control of the national wealth.

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172. Resolution No. 41/21-P on Coordination Among Member States in the Field of Human Rights, included in the OIC submission to the 1993 World Conference on Human Rights. *Contribution of the OIC*, *supra* note 69, at 11.

Islamic jurisprudence, as set forth in the treatises of medieval jurists, survived as the official law in Saudi Arabia,<sup>173</sup> a country whose rulers derive their legitimacy from their alliance with leaders of the Wahhabi sect of *Sunni* Islam. The Saudi family emerged from obscurity in the eighteenth century near what is now the capital city of Riyadh. The Saudis were allied with Muhammad Ibn `Abd al-Wahhab (1691–1787), an exponent of a rigid, intolerant, puritanical version of Islam that became known as Wahhabism.<sup>174</sup> In 1801, demonstrating their vehement opposition to *Shi`ism*, which continues to characterize Saudi policy, a Saudi-Wahhabi force, impelled by iconoclastic zeal, crossed the border into Iraq and destroyed one of the most sacred shrines of *Shi`i* Islam.<sup>175</sup> After many vicissitudes, in 1932, the Saudis succeeded in establishing themselves as the rulers of what later became known as Saudi Arabia. Although the Saudi monarchs are not from a religiously-sanctified lineage, they have buttressed their claims to power by careful deference to Islamic jurists allied with the regime — consulting with them, honoring their opinions, and retaining Islamic law as the law of the land. In return, Saudi Arabia's Islamic jurists have issued rulings supporting the Saudis' absolute monarchy.<sup>176</sup> Although superficially stable, the Saudi system faces internal opposition forces, which include both secular critics and disaffected fundamentalists who call for a more rigorous adherence to Islamic tenets.<sup>177</sup>

Partly because of their commitment to the traditional notion that all laws are to be founded in Islamic sources and that there is no place for human legislation in an Islamic system, Saudi leaders were reluctant to adopt a constitution. Moreover, they seem to have feared that constitutionalism could threaten the Saudi family's monopoly on all power.

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173. Farouk Sankari, *Islam and Politics in Saudi Arabia*, in *THE ISLAMIC RESURGENCE IN THE ARAB WORLD* 181–82 (Ali Dessouki ed., 1982).

174. *Id.* at 179.

175. *Id.* at 180.

176. *Id.* at 181–88. For background on the relationship between the royal family and Wahhabi Islam, see MORTIMER, *supra* note 118, at 63–64, 159–85, and AYMAN AL-YASSINI, *RELIGION AND STATE IN THE KINGDOM OF SAUDI ARABIA* (1985). According to al-Yassini, the interaction between religion and State in Saudi Arabia is unique, being: "a quasi-capitalist mode of development in a semi-tribal traditional society; abundant financial resources and extreme affluence in a society governed by an austere and puritanical ideology; and a quasi-secular polity in which the *ulama* [religious scholars] continue to influence national politics." *Id.* at 130.

It would be strange for anyone to classify Saudi Arabia with Japan and Singapore as "modern, prosperous societies" that are "clearly non-Western," but Huntington has done precisely that. See Huntington, *If Not Civilizations, What?*, *supra* note 2, at 192. In this, as in other areas, Huntington does not seem in touch with the realities of the "Islamic civilization" he characterizes.

177. On the secular and religious opposition to the Saudi regime, see generally AL-YASSINI, *supra* note 176, at 117–31.

The mounting dissatisfaction of their subjects over the delay in establishing a constitutional form of government was indicated by two petitions demanding democratic reforms, one distributed by liberal Saudis in December 1990 and another distributed by conservative religious scholars in February 1991. The petitions clearly revealed that Saudi subjects of differing political stripes were chafing under the Saudis' absolute monarchy.<sup>178</sup>

The secular petition called for, *inter alia*, recognition that human interpretations of *shari`a* requirements were subject to question, the issuance of a Basic Law, formation of a consultative council that would exercise effective scrutiny over executive agencies, independence of the judiciary, total equality for all citizens and protection against interference in their lives, an advanced media policy for enriching dialogue "in an open Muslim society," comprehensive reforms of the *mutawwa* (religious police), allowing women to participate in public life, and educational reform.<sup>179</sup>

The petition from religious figures called for, *inter alia*, an independent consultative council to decide issues according to the *shari`a*, repeal of legislation not in conformity with the *shari`a*, justice applied equally among all citizens, independence of the judiciary, accountability of government officials and elimination of corrupt ones, fair distribution of wealth, a strong army, media that follow Islamic criteria, a foreign policy to serve Islam, a strengthening of religious institutions, and guarantees for the rights of individuals and society within religious guidelines.<sup>180</sup>

Neither petition demanded respect for international human rights and neither directly challenged the Saudi monarchy. However, in the catalogue of demands, one can sense a common frustration over the absence of checks and balances in the system of government, the lack of judicial independence, and the inequalities and inequities in the administration of justice. The disparity between the petitions regarding the role accorded to religious law was striking; unlike the religious figures, the authors of the secular petition did not stipulate that rights were to be governed by religious guidelines.

The combination of restiveness among their subjects, the disruptive impact of the Iraqi invasion of Kuwait, and the Gulf War finally prompted the Saudi royal family to recognize the need for reforms.<sup>181</sup>

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178. Translations of these petitions are contained in *Empty Reforms*, *supra* note 37, at 59-62.

179. *Id.* at 59-61.

180. *Id.* at 61-62.

181. See Roger Matthews, *Saudi Arabia; Rulers under Pressure*, FIN. TIMES, Jan. 30,

Change was officially inaugurated on March 1, 1992, when a Basic Law of Government, a *Shura* Council Decree, and a Decree on Provinces were issued. These governmental acts suggested that the country was belatedly moving toward a system that would accord at least limited recognition to constitutionalism. However, in a speech about the Basic Law, King Fahd seemed anxious to deny that there had been any break with tradition; in fact, he maintained that for the two and a half centuries since the establishment of the first Saudi State, Saudi rulers had continuously abided by Islamic law and that "the basis of the program of Islam is fixed and is not subject to change or alteration."<sup>182</sup> That is, he specifically ruled out the possibility of changing Islamic law as it had existed in Arabia in the eighteenth century, when the Saudi family had begun its conquests. He also denied that the new laws in any way constituted a break with tradition; according to King Fahd, they simply aimed at strengthening the existing system and formulating what was already in operation.<sup>183</sup> Significantly, he maintained that the ruler had rights as well as duties but made no mention of any rights accruing to the subjects.<sup>184</sup>

King Fahd also asserted that the Basic Law was an outgrowth of Saudi culture and tradition, considering "the distinguished position of the Kingdom on the Islamic scene and its traditions, customs, and its social, cultural, and civilized conditions. Therefore, these statutes spring from our reality, taking into consideration our traditions and customs, and adhering to our true religion."<sup>185</sup> In his speech, King Fahd claimed that the relationship between ruler and ruled was "governed by the law of God."<sup>186</sup> He further maintained that the people governing the country adhered to "the Islamic line," as did officials and the people,<sup>187</sup> thereby positing that all Saudis followed a common Islamic standard.

The Basic Law (*al-nizam al-asasi li'l-hukm*),<sup>188</sup> drafted by an *ad hoc* committee under Prince Nayef,<sup>189</sup> presents the form of government as Islamic. Article 1 asserts the identity of Saudi Arabia as an Arab Islamic

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1992, at 5; *Empty Reforms*, *supra* note 37, at 5-7.

182. F.B.I.S. (NES-92-041), Mar. 2, 1992, at 35.

183. *Id.* at 35.

184. *Id.*

185. *Id.* at 36.

186. *Id.* at 35.

187. *Id.* at 36.

188. English translations of the law, which have been relied on for aspects of the translations offered here, are presented in *id.* and in *Saudi Arabia — The New Constitution*, 8 ARAB L. QTLY. 258 (1993) [hereinafter Basic Law]. An Arabic version was kindly provided by the Saudi Arabian Embassy in Washington, D.C.

189. See *Empty Reforms*, *supra* note 37, at 2.



State with Islam as its religion and strains to maintain the pretense that the Basic Law has not supplanted the Islamic sources, claiming that the *Qur'an* and the *sunna*, or custom, of the Prophet are its Constitution. In article 7, the government is said to derive its power from the *Qur'an* and the Prophet's tradition.<sup>190</sup> There is a gap between these Islamic references and the bald assertion of the Saudi family's royal prerogatives that follows. According to article 5(a), the "law of government in the Kingdom of Saudi Arabia is monarchy,"<sup>191</sup> and article 5(b) puts the power of government in the hands of the House of Saud.<sup>192</sup> According to article 5(c), the King determines the heir apparent and possesses the power to remove him.<sup>193</sup> Article 6 tells the citizens that they "are to pay allegiance to the king in accordance with the Holy Koran and the Prophet's tradition, in submission and obedience and in times of ease and difficulty, fortune and adversity."<sup>194</sup> Presumably, Saudis who object to this system of dynastic rule will be punished by the State, which is ordered in article 12 to "prevent anything that may lead to disunity, sedition, or separation."<sup>195</sup> Incongruously, article 12 is placed in the chapter on components of Saudi society, along with provisions regarding the family. The King is the linchpin of this system, as indicated in article 55: "The king carries out the policy of the nation, a legitimate policy in accordance with the provisions of Islam; the king oversees the implementation of the Islamic *shari'ah*, the systems/regulations [*al-anzima*], the State's general policies, and the protection and defense of the country."<sup>196</sup>

In these provisions, one sees another example of why the assumption that there is a monolithic Islam that determines politics is misguided. Here, the local "Islam" confirms the monarchical prerogatives of the dynasty in power and serves as a legitimating device for the Saudi family's autocratic rule, just as Iranian "Islam" officially confirms the legitimacy of the radically dissimilar system of *Shi'i* clerical rule there. Although an examination suggests that the Basic Law actually strengthens the hand of the monarch,<sup>197</sup> there are various vague provisions conveying the impression that the system has been reformed along principles more

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190. Basic Law, *supra* note 188, art. 7.

191. *Id.* art. 5(a).

192. *Id.* art. 5(b).

193. *Id.* art. 5(c).

194. *Id.* art. 6.

195. *Id.* art. 12.

196. *Id.* art. 55.

197. *Empty Reforms*, *supra* note 37, at 10-11.

in accord with modern constitutionalism. There is a pretense of separation of powers: In article 44 the powers of the State are said to be divided into the judicial, executive, and regulatory (*tanzimiya*) branches — with no provision for legislative powers.<sup>198</sup> However, an assessment of the Basic Law has concluded that the powers of government remain concentrated in the hands of the King, who is accountable to no other institution in the scheme of government.<sup>199</sup>

Article 8 states that the government “stands on the bases of justice, *shura* (consultation), and equality in accordance with the Islamic tradition.”<sup>200</sup> Article 15 outlines various functions of the new *Shura* Council, which replaces a council established in 1926, which had no real impact on curbing the monarch’s prerogatives.<sup>201</sup> Although the *Shura* Council may offer suggestions and opinions to the King on matters referred to it by the Council of Ministers, the members of which are appointed by the King,<sup>202</sup> there is no indication that the King needs to abide by them. An examination of how *shura* is conceived in the *Shura* Council Decree reveals that it is not designed to constrain the King’s discretion.<sup>203</sup> Not until August 1993 was the *Shura* Council actually set up<sup>204</sup> — suggesting that the royal family had been reluctant even to allow such an anemic consultative body to undertake its functions.

Given the thrust of the King’s speech on March 2, 1992, one would have anticipated that any rights provisions in the new Basic Law would be ones that would preserve the existing hierarchies in Saudi society. As a critical analysis has already demonstrated, the rights provisions are

198. Basic Law, *supra* note 188, art. 44. The absence of provision for legislation or a legislature fits with traditional Islamic legal theory, according to which all laws are derived from the *Qur’an* and the example of the Prophet Muhammad. Even a self-professed Islamic State like Iran has come to terms with the need in a modern nation State for man-made laws. In Saudi Arabia, where man-made legislation exists, it seems it will continue to be disguised, being called “regulations” or “administration” to minimize the friction with Islamic theory. Thus, the Basic Law itself is called *al-nizam al-asasi li’l-hukm*, which translates roughly as “the basic order/regulation of government.”

199. *Empty Reforms*, *supra* note 37, at 2, 11–13.

200. Basic Law, *supra* note 188, art. 8.

201. *Id.* art. 15.

202. *Empty Reforms*, *supra* note 37, at 12.

203. *See id.* at 15–18, 56. Article 3 of the *Shura* Council Decree calls for a Consultative Council of 60 members, to be chosen by the King from among scholars and knowledgeable and experienced men, their “rights and duties and all their affairs” being defined by royal decree.” The King is in a strong position vis-à-vis this Council. There is no immunity for members of the Council: Article 6 provides that members of the Council should be investigated and tried if they fail to carry out their duties in accordance with rules and measures to be issued by royal decree. The members therefore serve at the King’s pleasure and are not shielded from the consequences of royal dissatisfaction.

204. *See* Mark Nicholson, *Saudis Widen Political Horizons*, FIN. TIMES, Aug. 24, 1993, at 4.

seriously deficient according to the standards set forth in the International Bill of Human Rights.<sup>205</sup>

It is noteworthy that only a few political or civil rights are actually provided for in the text of the provisions of chapter five on rights and duties. Moreover, the Basic Law tends to formulate provisions in terms of obligations of the State to make provisions for citizens, only infrequently using the terminology of rights belonging to the individual or to the citizenry. That is, it seems to offer a conception of Saudi subjects as dependent on the State, presenting the State as a paternalistic entity with duties to care for Saudi subjects, rather than treating Saudi citizens as individuals with entitlements.<sup>206</sup> Even where rights are spoken of, the provisions may be designed to perpetuate the existing Saudi system of paternalistic monarchical rule, in which citizens remain dependent on their rulers' favor.<sup>207</sup>

In sum, the Basic Law aims to assuage the dissatisfaction of Saudi subjects by offering them a document that can be represented as a constitution and, simultaneously, to reaffirm the absolute power and religious legitimacy of the Saudi dynasty. These aims are not compatible, and the human rights in the Basic Law are, as a consequence, inadequate. Their deficiencies can be seen in the provisions involving: (1) freedom of religion; (2) the imposition of "Islamic" criteria limitations on human rights; (3) criminal justice; (4) the rights of women; (5) freedom of speech and expression; (6) the right to equality and equal protection; and finally, (7) the failure to endorse international law.

### 1. Freedom of Religion

Article 23 is incongruous as the first article in a chapter ostensibly treating rights and duties. Instead, it belongs in the second chapter on law of government.<sup>208</sup> The article affirms that the State protects Islam and

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205. See *Empty Reforms*, *supra* note 37.

206. Outside the sphere of political and civil rights, a number of articles impose obligations on the State to provide for people's needs. See articles 27 (on social welfare and social security), 28 (on employment), 30 (on education), and 31 (on health care). Article 32 calls on the State to protect the environment. Basic Law, *supra* note 188, arts. 27, 28, 30, 31.

207. For example, article 43 protects the right of "citizens" to petition the King and Crown Prince. There is no provision for a neutral judicial process to evaluate the merits of petitions submitted; instead, the petitioners will be entirely dependent on the goodwill and benevolence of the King and Crown Prince for redress of their grievances. Basic Law, *supra* note 188, art. 43. The same article provides for the right of the individual "to address the public authorities in all matters affecting him," but without indicating what the individual can do if dissatisfied with the authorities' response. *Id.*

208. Several provisions in the chapter dealing with rights and duties have little connection with that subject (see articles 24, 25, 29, 33, 35); whereas certain provisions outside the chapter do relate to rights, albeit sometimes indirectly. From the disorganized approach to rights

implements Islamic law and calls on the State to order people to do right and to shun evil.<sup>209</sup> In context, the principle set forth in article 23 is tantamount to an endorsement of the traditional functions of Saudi Arabia's notorious religious police, a force known to act in ways that are harmful for rights and freedoms. It has been under the auspices of a committee that is assigned to propagate virtue and to prohibit vice that the Kingdom's *mutawwa`in*, or religious police, have operated.<sup>210</sup> The committee relies on retrograde readings of Islamic requirements and a reactionary version of Islamic morality to guide them in attacking all manifestations of vice. Acting in vigilante fashion, the *mutawwa* members carry out patrols throughout the Kingdom, resorting to arrests or beatings if they discover anything that offends their puritanical sensitivities, such as infringements of the dress code for women.<sup>211</sup> Moreover, it appears that they have undertaken to monitor worship by nonMuslims,<sup>212</sup> even though all nonMuslim worship must be conducted in private in Saudi Arabia, so that policing religious services entails invading private quarters. Article 23 also calls on the State to fulfill the obligation to propagate the faith, thereby engaging the government in the task of proselytizing on behalf of Islam, which in context can only mean the officially-approved *Sunni* Wahhabism.<sup>213</sup>

As in the Cairo Declaration, there is no provision for freedom of religion, an omission that seems especially ominous given the upswing in religiously-based persecutions of nonMuslims that has occurred since the Gulf War.<sup>214</sup> However, it is ultimately Muslims who have the most to fear from the absence of any protection for religious freedom. Members of Saudi Arabia's large *Shi`i* minority are often condemned as infidels or apostates by defenders of the State-sponsored Wahhabi orthodoxy.<sup>215</sup> In part due to intercommunal tensions, which have been exacerbated by the antagonism between the Saudis and the Islamic Republic of Iran, the Saudis treat members of their *Shi`i* minority as if they are likely to be

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embodied in the document, one would tend to surmise that the drafters of the Basic Law possessed only a rudimentary grasp of constitutionalism and human rights principles.

209. The Islamic basis for this has been discussed above in connection with article 22 of the Cairo Declaration. See *supra* text preceding note 111.

210. See AMNESTY INTERNATIONAL, SAUDI ARABIA; RELIGIOUS INTOLERANCE, *supra* note 38, at 6.

211. See *Empty Reforms*, *supra* note 37, at 28–29.

212. AMNESTY INTERNATIONAL, SAUDI ARABIA: RELIGIOUS INTOLERANCE, *supra* note 38, at 7.

213. Basic Law, *supra* note 188, art. 23.

214. See generally *id.*

215. See *id.* at 14–17; MUNSON, *supra* note 12, at 72–73.

disloyal, subjecting *Shi`is* to discrimination and religious persecution.<sup>216</sup> In September 1992, a young *Shi`i* was beheaded for apostasy and blasphemy.<sup>217</sup> In turn, members of the *Shi`i* minority have agitated for the overthrow of the House of Saud, viewing Saudi monarchs as "the most dangerous enemy of Islam because they used the cover of religion to legitimate their otherwise unIslamic rule."<sup>218</sup> Of course the unwillingness of the *Shi`is* to accept that the Saudi family has a legitimate Islamic claim to rule Arabia has made them targets for persecution.

## 2. The Imposition of "Islamic" Limitations on Human Rights

The most critical principle in the Basic Law that specifically relates to human rights is article 26, which, as in other Islamic human rights schemes, borrows the concept of human rights but subordinates such rights to Islamic law. It provides that "the state protects human rights in accordance with the Islamic *shari`a*."<sup>219</sup> The *shari`a* limits on rights cannot be definitely fixed, since Saudi law is uncodified and the legal sources remain open to a variety of interpretations.<sup>220</sup> To clarify what these limits are, the executive might choose to refer to the government-appointed Council of senior religious scholars. However, as has been noted, this Council "has traditionally deferred to the King's interpretation of the *Shari`a* in political matters, including the treatment of most human rights."<sup>221</sup> This is yet another illustration of how the content of Islamic restrictions on rights is likely to reflect the local balance of power and interests of the ruling group in any given political setting. Given the

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216. See, e.g., SHAME OF THE HOUSE OF SAUD, *supra* note 90, at 95-106; *Empty Reforms*, *supra* note 37, at 37-39; AMNESTY INTERNATIONAL, SAUDI ARABIA: RELIGIOUS INTOLERANCE, *supra* note 38, at 13-17.

217. The reports relating to this case, which concerned a young man named Sadiq `Abd al-Karim Malallah, are not as solid or as consistent as one would wish, except on the matter of the victim having been beheaded for apostasy and blasphemy in al-Qatif. It appears that during four years of detention he was told that he should convert to the Wahhabi version of *Sunni* Islam favored by the Saudi regime but refused. He may have been involved in efforts to improve the rights of the *Shi`i* minority. See AMNESTY INTERNATIONAL, SAUDI ARABIA: AN UPSURGE IN PUBLIC EXECUTIONS 6 (1993). Other reports stated that he had been arrested because he had been found carrying a Bible, which he was reading out of curiosity to learn about other religions. See, e.g., DIALOGUE (Public Affairs Committee for Shia Muslims in London) Nov. 1992, at 1.

218. See MUNSON, *supra* note 12, at 73. Profoundly embarrassed by critical exposés of the Saudi human rights record that were published by dissident *Shi`is* in Europe and the United States, the Saudi regime in 1993 somehow succeeded in reaching an accommodation with the dissidents, so that the exposés ceased to be published. See HUMAN RIGHTS WATCH, HUMAN RIGHTS WATCH WORLD REPORT 1994: EVENTS OF 1993, at 328-30 (1994).

219. Basic Law, *supra* note 188, art. 26.

220. See *Empty Reforms*, *supra* note 37, at 21-22, 25.

221. *Id.* at 25.

human rights record of the Saudi regime, one can predict that Islamic criteria will be extensively invoked by the monarchy to justify curbs placed on rights and freedoms,<sup>222</sup> particularly where its critics are concerned.

### 3. Criminal Justice

The rights specifically covered include the provision that no one shall be arrested, imprisoned, or have his actions restricted except as provided by law,<sup>223</sup> that homes shall not be entered or searched save in cases specified by statutes,<sup>224</sup> and that communications shall not be confiscated, delayed, read, or listened to except in cases defined by statutes.<sup>225</sup> These provisions, which have no particular Islamic character and are not specifically qualified by Islamic criteria, resemble provisions in articles 18(b) and 20 of the Cairo Declaration.<sup>226</sup> They appear to be useful reforms, ones designed to curb actual patterns of abuses that violate international human rights norms. However, it remains to be seen whether the Saudi government intends to take the reforms needed to ensure that they will be implemented.<sup>227</sup>

Article 38 is a rare instance where the Saudi law improves on the Cairo Declaration. Article 19(d) of the latter had provided that crimes and punishments were to be defined by the *shari`a*.<sup>228</sup> In contrast, article 38 of the Saudi law provides that there shall be no crime or penalty except in accordance with a *shari`a* text (*nass shar`i*) or "regulatory" text (*nass nizami*), and that there shall be no punishment except for acts committed subsequent to the entry into force of the regulatory text (*nass nizami*).<sup>229</sup> This amounts to borrowing the modern criminal justice standard of legality, meaning that crimes and penalties, including ones based on Islamic law, need first to be set forth in the texts of regulations promulgated by the government before conduct can be penalized. This is a progressive reform and would entail ending the practice of imposing *ta'zir* penalties. It is, however, unclear whether the welcome incorporation

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222. In this connection, consider the Islamic ruling issued in 1993 to justify the suppression of the Saudi human rights organization, discussed *infra* text accompanying notes 258-65.

223. Basic Law, *supra* note 188, art. 36.

224. *Id.* art. 37.

225. *Id.* art. 40.

226. See *supra* text accompanying notes 141-43, 152-56.

227. See *Empty Reforms*, *supra* note 37, at 26-27, 32.

228. See *supra* text accompanying notes 128-34.

229. Basic Law, *supra* note 188, art. 38.

of this principle in the Saudi Basic Law will mean that it will be honored in practice.

#### 4. Rights of Women

There is, notably, no provision whatsoever in the chapter on rights and duties regarding the rights of women — even though disputes over the rights of women are one of the main preoccupations of many contemporary Saudi Arabians. Instead of squarely addressing women's rights, the Basic Law has chosen to treat the subject indirectly, touching on women's status by implication in the provisions on the family in chapter three, such as article 9. It provides that:

The family is the kernel of Saudi society . . . and its members shall be brought up on the basis of the Islamic faith and loyalty and obedience to God, the Prophet, and to guardians . . . respect for and implementation of the law, love of and pride in the homeland, and the glorious history that the Islamic faith stipulates.<sup>230</sup>

The traditional patriarchal Saudi family structure, reinforced by Islamic personal status law and Saudi rules segregating women and requiring them to be fully veiled, is one that keeps women subordinated, secluded, and deprived of basic freedoms.<sup>231</sup> The treatment of the family in the Basic Law, in endorsing these restrictions, reinforces the constraints imposed on women by familial structure and religious law. Similar ideas are recapitulated in article 10, where the State is called on to “aspire to strengthen family ties” and to maintain “Arab and Islamic values.”<sup>232</sup> That is, in addition to *shari`a* law, the Saudi version of Arab-Islamic culture will govern the family. Given the nature of Saudi traditions, this provision effectively invokes cultural grounds to justify the historical and present subjugation of women.

#### 5. Freedom of Speech and Expression

No guarantee of freedom of speech or freedom of expression is included in the Basic Law. Instead, there are indications that the Law affords various rationales that could be used to suppress any speech, especially speech that could attack or threaten the monarchy. Article 39 provides that the media, publications, and all methods of expression shall adhere to courteous language and State regulations and shall contribute

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230. *Id.* art. 9.

231. See *Empty Reforms*, *supra* note 37, at 36–37.

232. Basic Law, *supra* note 188, art. 10.

to the education of the nation and support its unity.<sup>233</sup> It forbids publishing anything that can lead to sedition or strife or harm the security of the State or its public relations or degrade man's dignity and rights as specified by the laws — thereby providing broad, vague bases for censorship.<sup>234</sup> This article appears to endorse the existing censorship standards, which are extensive and stringently enforced by the government, not just against secular speech but also against clerics and fundamentalists whose interpretations of Islam are at variance with those sponsored by the Saudi regime.<sup>235</sup>

## 6. The Right of Equality and Equal Protection

In addition to the deficiencies already mentioned, among the human rights set forth in international law that are missing from the Saudi Basic Law are rights of equality and equal protection of the law. The lack of guarantees for such rights will be detrimental for women and non-Muslims, who were already disadvantaged under *shari`a* law. However, the fact that noncitizens do not have equal protection rights will mean that millions of foreign workers, many of whom are Muslims, will be disadvantaged vis-à-vis Saudi citizens.<sup>236</sup> Many expatriate laborers are desperately poor migrants from developing countries who have been exposed to grievous hardships and even torture while working in Saudi Arabia, without hope of redress.<sup>237</sup> Many of these laborers are Muslims and should be entitled, under traditional interpretations of Islamic law, to exactly the same treatment as those Muslims who do possess Saudi citizenship. Because the new Basic Law affords no new protections to noncitizens, the categories of citizenship or alien status in the nation State, unknown categories in Islamic law in the past,<sup>238</sup> will continue to provide the basis for discriminatory treatment. Thus, via provisions that allow discriminatory treatment of Muslims on the basis of nationality, Saudi Arabia is breaking with the same traditions of Islam that it invokes

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233. *Id.* art. 39.

234. *Id.*

235. See *Empty Reforms*, *supra* note 37, at 33–35.

236. Whether one possesses Saudi citizenship conditions the scope of rights and duties in articles 27, 31, 34, 36, and 43. In contrast, article 47 affords the right to litigate to citizens and residents alike on an equal basis. See Basic Law, *supra* note 188.

237. See SHAME OF THE HOUSE OF SAUD, *supra* note 90, at 52–77. For examples of the serious ill-treatment of nonSaudis, sometimes solely on the basis of their status as aliens, see AMNESTY INTERNATIONAL REPORT 1991, at 196–98.

238. The legitimacy of the nation State in Islam remains a contentious issue. Given the pervasiveness of the nation State in practice, Islamic doctrine is struggling to come to terms with it. For background on this subject, see JAMES PISCATORI, ISLAM IN A WORLD OF NATION-STATES (1986).



as inviolable when seeking to justify other policies, such as those that subjugate women. As in the case of the Cairo Declaration, one sees that the adherence *vel non* to Islamic norms is highly selective.

Just as resident Muslim aliens are denied the equality with indigenous Muslims that would be afforded under traditional interpretations of Islamic law, so too are resident non-Muslim aliens, who are denied the freedom to follow their own customs and carry out their religious observances that they would expect to enjoy under such interpretations. Article 41 in the chapter on rights and duties requires that residents in Saudi Arabia "shall abide by its laws and shall observe the values of Saudi society and shall respect its traditions and sentiments."<sup>239</sup> Through this provision, the Saudi government presumably intends to reaffirm its policy of forcing the expatriate community to comply with Saudi versions of Islamic norms — such as the bans on consumption of alcohol, driving by women, or religious worship by non-Muslims. The incidents of serious harassment of non-Muslim expatriates that were reported in 1993 indicated that "the values of Saudi society" permit raids, arrests, beatings, imprisonment, and torture of non-Muslims caught in the act of peacefully worshipping in private.<sup>240</sup>

### 7. The Failure to Endorse International Law

There are passing references to international law; for example, it is mentioned in article 70, where it is stated that international treaties are approved by royal decrees.<sup>241</sup> There is no indication what should happen in the case of an international treaty that is approved by the King but that is arguably not in conformity with Islamic law. Article 42 provides that "the state shall grant political asylum when the public interest demands this," implying that it will only grant political asylum in cases where it is in the Saudi public interest to do so, regardless of the humanitarian stakes in the case, a provision that is at odds with international norms.<sup>242</sup> This position also conflicts with its counterpart in the Cairo Declaration.<sup>243</sup> The Saudi regime does not have a record of showing sympathy for

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239. Basic Law, *supra* note 188, art. 41.

240. See AMNESTY INTERNATIONAL, SAUDI ARABIA: RELIGIOUS INTOLERANCE, *supra* note 38, at 7–12. The non-Muslims victimized by this mistreatment were largely Asian expatriate laborers like Filipinos, Indians, Koreans, and Sri Lankans, whose embassies lacked the power of the major Western countries to register effective protests against mistreatment of their nationals.

241. Basic Law, *supra* note 188, art. 70.

242. *Id.* art. 42. See also *Empty Reforms*, *supra* note 37, at 39 n.32.

243. Article 12 of the Cairo Declaration provides that every person, if persecuted, is entitled to seek asylum in another country, and that the country of refuge shall ensure his

refugees and asylum seekers,<sup>244</sup> and this provision does not suggest that it intends to follow international norms for treating political refugees.

## 8. Summation

The deficiencies of the Saudi Basic Law by the standards of international human rights norms are patent. In addition to those already mentioned, other deficiencies include the lack of provision for freedom of association and assembly and the failure to protect freedom of thought. The Basic Law affords no guarantee of due process and no right to a fair trial in public, to the assistance of counsel, or to appeal.<sup>245</sup> There is no indication that reforms in the judiciary are envisaged that could satisfy the critics of the legal system.<sup>246</sup>

In most respects, the Saudi Basic Law falls below the already inadequate standards of the Cairo Declaration. In addition to the disparities that have already been noted, the Cairo Declaration established a right to privacy,<sup>247</sup> to express one's opinion freely (in a formulation the deficiencies of which have already been indicated),<sup>248</sup> of equality before the law (in a formulation the deficiencies of which have already been indicated),<sup>249</sup> and a presumption of innocence,<sup>250</sup> as well as a provision which bans sex-based discrimination in wages,<sup>251</sup> and a guarantee against torture or cruel and unusual punishment.<sup>252</sup> Article 11(a) of the Cairo Declaration states that no one has the right to enslave people, a principle that is also not replicated in the Saudi Law.<sup>253</sup> These significant disparities belie the official Saudi professions of commitment to the Islamic human rights model set forth in the Cairo Declaration, which were made at the 1993

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protection until he reaches safety unless the asylum claim is based on an act which the *shari'a* regards as a crime. Cairo Decl. art. 12, in *Declaration of the OIC*, *supra* note 69, at 7.

244. See *Empty Reforms*, *supra* note 37, at 39-41.

245. For a discussion of Saudi practice in relating to criminal procedure, see SHAME OF THE HOUSE OF SAUD, *supra* note 90, at 30-51; *Empty Reforms*, *supra* note 37, at 26-27, 55.

246. On the inadequacy of the judiciary, said to lack independence and to administer justice in an arbitrary fashion, see *Empty Reforms*, *supra* note 37, at 21-23.

247. Cairo Decl. art. 18(b), in *Contribution of the OIC*, *supra* note 69, at 9.

248. *Id.* art. 22, at 10.

249. *Id.* art. 19(a), at 9.

250. *Id.* art. 19(e).

251. *Id.* art. 13, at 7.

252. *Id.* art. 20, at 9. With regard to the Saudi failure to prohibit torture or cruel and unusual punishment, it seems relevant that Saudi Arabia has not become a party to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature Dec. 10, 1984, G.A. Res. 46, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/RES/39/46 (1984).

253. Cairo Decl. art. 11(a), in *Contribution of the OIC*, *supra* note 69, at 6.

World Human Rights Conference.<sup>254</sup> Another disparity lies in the unequivocal affirmation of the divine right of Saudi Kingship. Freed from the need to accommodate the variety of regimes in the Muslim world, which includes Iran's theocracy as well as military dictatorships, monarchies, and sundry emirates and sultanates, and the rare democracy such as Turkey, which had prevented the Cairo Declaration from making specific stipulations about what form of government Islam required, the Saudi royal family insured that their Basic Law endorsed the divine right of Saudi Kingship. Far from embodying a definitive Islamic version of rights, the Saudi Basic Law disregards the rights of Saudi citizens in the process of reinforcing the existing system of family rule in the Arabian peninsula, ratifying the dynasty's long-standing opposition to democratization and any granting of greater rights and freedoms to the Saudi people.

### III. DECONSTRUCTING THE CONSTRUCTS

#### A. *Dissident Muslim Voices*

Before dissecting the Iranian and Saudi stances at the 1993 Vienna Conference, it is illuminating to contrast the official positions on Islamic human rights with the radically different perspectives of Muslims in nongovernmental human rights organizations (NGOs). Muslims who support the universality of human rights view with profound skepticism governments' appeals to Islam to justify their human rights violations. The views of such Muslims deserve to be considered before jumping to the conclusion that it is Islamic culture that is being assaulted and insulted when Western nations or international organizations decry governmental human rights violations and call for the universal observance of international human rights norms. Far from charging Western nations and international organizations with cultural insensitivity, independent human rights organizations in the Middle East have encouraged outsiders to criticize human rights violations and to express support for their domestic initiatives on behalf of human rights, and they have collaborated with international human rights organizations that were likewise committed to international norms.<sup>255</sup>

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254. See *infra* text accompanying notes 312–15.

255. Based on the author's personal experience researching human rights issues, they cooperate with institutions such as Amnesty International, the Federation Internationale des Droits de l'Homme, the International Commission of Jurists, The International Committee of the Red Cross, Middle East Watch, Africa Watch, and the Lawyers Committee for Human Rights.

Independent NGOs that are founded for the defense of human rights in Muslim countries have spearheaded campaigns to improve respect for human rights. Such NGOs proliferated throughout the Middle East and North Africa in the 1980s in the face of daunting obstacles and dangers.<sup>256</sup> One of the most important of the NGOs is the Arab Organization for Human Rights (AOHR), founded in 1983, which still continues to operate in the face of daunting obstacles. Like other major independent human rights organizations, it espouses the human rights standards set forth in international law.<sup>257</sup>

Because of the high level of repression and the intolerance of dissent in Saudi Arabia, independent human rights organizations have been unable to function inside the country.<sup>258</sup> Thus, it was a startling development when the Committee for the Defense of Legitimate Rights, the first independent human rights group seeking to operate inside Saudi Arabia, emerged on May 3, 1993, only to be banned a mere thirteen days later.<sup>259</sup> As punishment for setting up this Committee, four university professors and a civil servant were dismissed and two lawyers were banned from practicing.<sup>260</sup> The AOHR reported that about 400 supporters of the group had been arrested and that more than 10,000 Saudis had signed a petition supporting the Committee.<sup>261</sup>

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256. See, e.g., the collection of articles on human rights in MIDDLE E. REP., Nov.-Dec. 1987; KEVIN DWYER, ARAB VOICES: THE HUMAN RIGHTS DEBATE IN THE MIDDLE EAST (1991); Susan Waltz, *Making Waves: the Political Impact of Human Rights Groups in North Africa*, 29 J. MOD. AFR. STUD. 481 (1991); and numerous reports by Africa Watch, Middle East Watch, and the Lawyers Committee for Human Rights on the treatment of human rights activists. Even in the extremely inhospitable setting of Syria, human rights activists pursue their work — and suffer the expected consequences. See Syria, *Human Rights Workers on Trial*, NEWS FROM MIDDLE E. WATCH, Mar. 9, 1992. For a discussion of the fates of independent human rights organizations in Iran and Saudi Arabia, see *infra* text accompanying notes 260-64, 282-85.

257. See Adib al-Jadir, *Forward to the Special Edition on Human Rights in the Arab World*, 9 J. ARAB. AFF. 1, 2-3 (1990). The author's own human rights activity has entailed contacts with human rights NGOs from Egypt, Kuwait, Morocco, Sudan, and Tunisia. All of them refer to the international human rights norms, like the UDHR and the subsequent rights conventions; not one of them utilizes an "Islamic" version of human rights. On the efforts of individual Moroccans to have international human rights norms recognized, in lieu of norms supposedly derived from distinctive Moroccan values, see Mayer, *Moroccans*, *supra* note 170.

258. Saudis had joined the Gulf National Forum, a movement set up in 1992 to promote democracy and freedom of expression in the Gulf region, but they met with other members in the relatively free setting of Kuwait. See Diana Abdallah, *Gulf Democrats Set up Regional Pressure Group*, Reuter Library Report, May 19, 1992, available in LEXIS, Nexis Library, ALLWLD File.

259. See *Arab Group Condemns Saudi Action on Rights*, Reuter Library Report, May 16, 1993, available in LEXIS, Nexis Library, ALLWLD File [hereinafter *Arab Group*]; Helga Graham & Marie Colvin, *Saudi Royals Act to Quell First Open Opposition*, SUNDAY TIMES, May 16, 1993, at 18.

260. See F.B.I.S. (NES-93-092), May 14, 1993, at 19-20.

261. See F.B.I.S. (NES-93-093), May 17, 1993, at 37.

Naturally, the regime invoked Islamic reasons for the banning and sought to cast aspersions on the members' motives. The official media maintained that, since Saudi Arabia was already implementing "God's law," there was no need for an organization to speak about rights; it also attacked the members of the Committee for behaving "as tools in the hands of suspicious people who do not wish good things for this country and its people."<sup>262</sup>

The Saudi regime took the precaution of securing a ruling from the Council of senior religious scholars to support the banning of the organization. The Council attacked the new Committee, denouncing it as if it had been proven that the Committee was acting in concert with persons who belonged to terrorist and extremist groups and who utilized "the cover of religion to spread corruption among people," while themselves "living in isolated towers away from actual life and far from the real Islam."<sup>263</sup> The Council referred to groups — presumably fundamentalists — in Egypt, Algeria, and Tunisia as "wild vicious beasts" hiding behind the banner of Islam, and asserted that the Committee was "a tool to execute this extremist plot in this secure country" and a "terrorist ploy in the name of Islam."<sup>264</sup> Buttressed by this ruling, the Saudi authorities could claim that they were banning the new Committee for religious reasons. However, outside observers were not equally convinced that there was an Islamic basis for the banning; the AOHR, for example, expressed its "shock and sadness" at this ruling, pointing out that the scholars had offered no evidence to support the ban.<sup>265</sup>

Despite the prompt clampdown, the inauguration of this independent human rights Committee provided additional, concrete evidence of divisions inside Saudi Arabia on rights questions. Official pretensions that there was one single normative version of human rights that was founded on Saudi culture and religion were exposed as specious.

The human rights Committee manifested its dissent from the official Saudi construct of Islam, asserting the Islamic character of its own

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262. See F.B.I.S. (NES-93-092), May 14, 1993, at 19.

263. See *Opinion: Saudi "Human Rights Committee" A Tool for Religious Extremists*, ARAB TIMES, May 15, 1993, available in LEXIS, Nexis Library, ALLWLD File.

264. *Id.*

265. See *Arab Group*, *supra* note 259. The AOHR also claimed that the banning violated the commitments made by Saudi Arabia in agreeing to the Cairo Declaration, which, in article 22, had allowed for freedom of opinion within a system of Islamic law. Of course, article 22 had left full discretion to governments to decide what Islamic limits should be imposed on the expression of opinions. See generally *supra* text accompanying notes 110–14. Acting as an advocate, the AOHR may have decided to overlook the problematic aspects of the religious qualifications that had been included in the article.

principles and claiming that its actions were inspired by Islamic law.<sup>266</sup> It professed to realize "the difference between human rights as decreed in Islam and human rights in other countries."<sup>267</sup> There was, therefore, reason to doubt whether members of this organization were dedicated to human rights as established in international law. Not only did they appeal to a distinctive Islamic version of human rights, but they also came from conservative Wahhabi milieus. The religious orientation of the membership prompted doubts about the genuineness of the Committee's support for human rights, so that when the Committee indicated its desire to open dialogue with Saudi liberals, a leading liberal figure refused, saying that he mistrusted the members, challenging them to demonstrate their moderation by making statements on women's rights.<sup>268</sup> The members' previous involvement in the denunciations of the women's driving demonstration in Riyadh in November 1990, also raised questions about their professed concern for women's rights and made them suspect in liberal milieus.<sup>269</sup> However, these same conservative religious credentials effectively immunized the members from the charges of being "Westernized secularists," which the Saudi religious establishment normally hurls at any critics of the regime. The very fact of the members' impeccable standing in conservative religious circles seems to have emboldened them to speak out; they knew that the royal family could not deal too roughly with them without risking the alienation of essential elements of its own traditional power base among conservative elements in Saudi society.<sup>270</sup>

Some of the Committee's stated objectives replicated the concerns that had been expressed earlier by other critics of the Saudi regime. The Committee stated that its objectives were to fight oppression and injustice and to secure the release of political prisoners.<sup>271</sup> According to one report, the new Committee called for human rights, democracy, and the right of men and women to vote, and it spoke of the need to end corruption in the royal family.<sup>272</sup> According to another report it also demanded an end to the Kingdom's strong ties to the United States,<sup>273</sup> ties that had been

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266. See F.B.I.S. (NES-93-093), May 17, 1993, at 38.

267. See *Saudi Rights Groups Says It is Not Out to Stir Trouble*, Reuter Library Report, June 14, 1993, available in LEXIS, Nexis Library, ALLWLD File.

268. See Kathy Evans, *Saudi Rights Group Seeks Dialogue with Opposition As Police Question Leaders*, GUARDIAN, May 17, 1993, at 8.

269. See Mamoun Fandy, *New Crackdown on Rights in Riyadh Must Stop*, CHRISTIAN SCI. MONITOR, May 21, 1993, at 18.

270. See Graham & Colvin, *supra* note 259, at 18.

271. F.B.I.S. (NES-93-093), May 17, 1993, at 38.

272. Kathy Evans, *Fundamental Difficulties*, GUARDIAN, May 15, 1993, at 27.

273. *Id.*

strengthened during the Gulf War to the displeasure of Saudi conservatives. Further, it demanded changes in the judicial system and the labor laws, and called for elections like those that had been held in Kuwait and Yemen.<sup>274</sup> It reportedly called on Saudi citizens to report any kind of injustice or discrimination.<sup>275</sup> The call for elections by these religious conservatives presented an interesting contrast to King Fahd's statement, in 1992, which ruled out free elections on the pretext that they were not suited to the traditional Arab societies of the Gulf.<sup>276</sup> These Saudi subjects, although archconservatives, obviously did not share his views. Moreover, the decision of the Committee members to voice their concerns, not merely in terms of religious precepts but also in terms of human rights and democracy, indicated the extent to which conservative religious milieus recognized the popular resonance of such concepts and their awareness of the frustrations felt by Saudi citizens, who had witnessed free elections in Kuwait (October 1992) and in Yemen (April 1993).<sup>277</sup>

That *Shi'i*, liberal Saudis, and Saudi women had been restive was already well known; with the emergence of the demands by the new Committee, it appeared that, even in conservative Wahhabi circles, dissatisfaction with Saudi autocracy was growing. To ensure that the impact of this dissent from the official construct of Islam was minimized, the Committee had to be throttled in its infancy.

In Iran, just as in Saudi Arabia, criticisms of the government's human rights policies by independent individuals and NGOs have been suppressed, regardless of where the critics figured in the local political spectrum and regardless of whether they were secular or claimed Islamic authority for their views.<sup>278</sup> One liberal, who is committed to working within an Islamic framework and who has stood up to the post-revolutionary clerical regime and consistently supported human rights, is Mehdi

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274. Fandy, *supra* note 269.

275. *Id.*

276. See Youssef Ibrahim, *Saudi King Rules Out Free Election*, N.Y. TIMES, Mar. 30, 1992, at A6.

277. The Saudi Government itself was showing nervousness about the appeal and potentially destabilizing impact of the democratic model in neighboring Yemen. See Eric Watkins, *Success of Yemeni elections prompts worries for Saudis*, FIN. TIMES, May 14, 1993, at 4.

278. A prime victim of the regime's repression of dissent has been a leftist movement promoting a Marxist-influenced version of Islam. For an account of this leftist movement, see ERVAND ABRAHAMIAN, *THE IRANIAN MOJAHEDIN* (1989). Spokespersons for the *mujahedin* have been vigorous in their denunciations of the regime's human rights record and its reactionary construct of Islam. See, e.g., SECRETARIAT OF THE NAT'L COUNCIL OF RESISTANCE OF IRAN, *HUMAN RIGHTS BETRAYED: GALINDO POHL'S IRAN REPORT UNDER SCRUTINY* (1990).

Bazargan.<sup>279</sup> In 1961, Bazargan had been one of the founders of the Liberation Movement of Iran (LMI), a party that campaigned for human rights and democracy using Islamic references.<sup>280</sup> After the 1979 revolution, Bazargan served briefly as Iran's first Prime Minister, before running afoul of the conservative clerics who were consolidating their control over the government and Iran's political life. Bazargan and members of the LMI, to which Iran's clerical regime has refused to accord legal recognition, subsequently suffered persecution when their demands for human rights and democratic freedoms put them at odds with the regime's fundamentalist policies.<sup>281</sup> Despite the dangers, their protests continued. Twenty-one associates of Bazargan were arrested and nine were imprisoned in June 1990 after ninety liberals signed a petition criticizing governmental repression and demanding respect for the rights and freedoms set forth in the Iranian Constitution.<sup>282</sup> Such calls for the government to abide by its own, supposedly "Islamic," rights principles were necessarily regarded as subversive, because the regime's rights philosophy did not allow for citizens using any rights principles, whether Islamic or otherwise, to hold it accountable or to attempt to constrain its repression.

It seemed that only Bazargan's advanced age (eighty-six) and great moral authority stood between him and the fate that had befallen his fellow dissidents. To discourage further appeals for adherence to human rights norms, the regime also dissolved the Association to Defend the Freedom and Sovereignty of the Iranian Nation in June 1990. This association, which had been established to promote human rights and the rule of law, included members who had also been involved in sending the 1990 letter.<sup>283</sup> Eight of them were pardoned in April 1992<sup>284</sup> after their imprisonment had aroused the concern of the international human rights community and prompted calls for their release.<sup>285</sup>

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279. For a general account of his career, see H.E. CHEHABI, *IRANIAN POLITICS AND RELIGIOUS MODERNISM: THE LIBERATION MOVEMENT OF IRAN UNDER THE SHAH AND KHOMEINI* (1990).

280. *See id.* at 156-60.

281. *See id.* at 278-304.

282. *See Freedom Movement of Iran, IBC USA*, Nov. 1, 1991, available in LEXIS, Nexis Library, Iran File; *Iran: Political Dissidents, Held for Over a Year, Are Reportedly Sentenced*, NEWS FROM MIDDLE E. WATCH, Sept. 3, 1991 [hereinafter *Iran: Political Dissidents*].

283. *See Iran: Political Dissidents, supra* note 282.

284. *See Iran: Eight Associates of Former Prime Minister Pardoned by Ayatollah Khamenei*, MIDDLE E. ECON. DIG., May 15, 1992, at 24.

285. *See, e.g.,* ALI ARDALAN, LAWYERS COMMITTEE RELEASE, ACTION UPDATE: ISLAMIC REPUBLIC OF IRAN (Sept. 1991).



Although Iran was nominally a democracy, in actuality, no parties challenging the official Islamic ideology and attendant rights policies were allowed to contest elections. In the June 11, 1993, presidential elections, in which President Rafsanjani's reelection was a foregone conclusion, Bazargan's movement did not even try to field a candidate.<sup>286</sup> Bazargan continued to speak out, lamenting that all dissenting voices had been silenced, all opposition eliminated, and that the regime controlled all the media. He complained of the lack of freedom of assembly and association, which made it impossible to create a party.<sup>287</sup> In Bazargan's view, a revolution that had sought to establish freedom, independence, and justice based upon Islam had been betrayed by Iran's clerics.<sup>288</sup> The expression of discordant opinions by such a devout Muslim and respected human rights advocate undermined the Iranian government's pretensions to be merely following the dictates of Islam in its rights policies.

Just before the onset of the Vienna Conference, the Iranian Parliament decided to establish a human rights committee. It was officially "nongovernmental." However, with five out of the seventeen members of the Executive Council from the Parliament and with Sa'id Raja'i Khorasani as the head, the independence of the Committee was doubtful.<sup>289</sup> Raja'i Khorasani is Iran's former U.N. ambassador and a member of the Foreign Relations Committee of the Parliament. Indeed, this Committee appeared to be a thinly disguised governmental human rights organ designed to polish the regime's image in the area of human rights. In setting up such a Committee, Iran was acting like other countries that have been eager to improve their international images after criticisms by NGOs. Realizing that NGOs have more credibility in the human rights fora than do governmental spokespersons, a number of countries have found it expedient to set up human rights organizations that superficially resemble NGOs but that actually function as instruments of government propaganda.<sup>290</sup>

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286. See Charles Richards, *Mullahs Look Askance as the Iranians Look to the West*, INDEPENDENT, June 20, 1993, at 11.

287. Mouna Naim, *Iran: Election Presidentielle*, LE MONDE, June 10, 1993, available in LEXIS, Nexis library, Le Monde file.

288. Richards, *supra* note 286.

289. See Feuilherade, *supra* note 27. Raja'i Khorasani's statement indicating his antipathy to international human rights norms is discussed *supra* in text accompanying notes 19-20.

290. As these have proliferated, they have come to be known among authentic human rights advocates as "GONGOs," an acronym for "governmental non-governmental organizations." An example of a GONGO is the Sudan Human Rights Association that was set up after the fundamentalist Bashir regime seized power in 1989. This entity replaced an independent organization by the same name, whose members were forced to flee to foreign exiles, and had as its mission "protecting the reputation of the Sudan, fending off attacks on the Sudanese government and way of life by the western media and western organizations, and refuting unfounded allegations concerning the Sudan." See *Sudan: Sudanese Human*

In short, both Iran and Saudi Arabia had repressed dissident voices calling for greater democratic freedoms and the recognition of human rights, voices that did not proclaim that Islamic culture was an impediment to such aspirations. These dissident voices were echoing the demands for enhanced human rights set forth by NGOs throughout the Middle East, demands that had to be suppressed lest they discredit the authority of the official constructs of Islamic rights on which both regimes relied to legitimize their opposition to international rights norms. Thus, Iran and Saudi Arabia both attended the June 1993 World Conference on Human Rights with full awareness that they were representing only one side of a contested issue.

*B. Universality versus Cultural Relativism at the Second World Conference on Human Rights*

The Twenty-first Islamic Conference of Foreign Ministers was held in Karachi, Pakistan, in April 1993, and issued a resolution in anticipation of the upcoming World Conference on Human Rights.<sup>291</sup> OIC foreign ministers reconfirmed the position on human rights that they had previously endorsed in the Cairo Declaration, hailing "the contribution that can be made to the World Conference by Islamic countries on the basis of the valuable guidelines" contained in the Cairo Declaration.<sup>292</sup> It also reaffirmed its commitment to these guidelines and those in the OIC Charter and the U.N. Charter.<sup>293</sup> However, there was no affirmation of any commitment to the principles set forth in the International Bill of Human Rights, a significant omission.

This OIC conference expressed itself ambiguously on the question of the universality of human rights, referring to universality at various points but at the same time maintaining that "while human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, taking into account the various historical, cultural and religious backgrounds and the principal legal systems."<sup>294</sup> The strategy indicated a preference for avoiding a direct challenge to universality via the endorsement of a qualified universality, one that would have to be adjusted to accommodate various cultural, religious, and other factors. The position adopted on the rights of women reveals that the OIC foreign ministers meant to give priority to "cultural

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*Rights Organizations*, NEWS FROM AFR. WATCH, Nov. 4, 1991, at 6.

291. See *Contribution of the OIC*, *supra* note 69, at 1.

292. *Id.* at 11.

293. *Id.* at 12.

294. *Id.*

and religious" factors over human rights, because they reaffirmed the OIC's "strong commitment in accordance with article 6 of the 'Cairo Declaration on Human Rights in Islam' to the promotion and protection of the rights of women."<sup>295</sup> In reality, the Declaration made no commitment to the promotion and protection of women's rights. One recalls that article 6 of the Declaration had not advanced women's rights beyond what they had been in medieval versions of *shari`a* law and had offered nothing approaching the guarantees of women's rights afforded by international law;<sup>296</sup> only article 13 made an advance in women's rights by prohibiting discrimination in pay. Thus, the statement that women's rights were to be promoted and protected in accordance with article 6 of the Cairo Declaration was tantamount to an announcement that the OIC was repudiating the rights that women enjoyed under international human rights conventions.

Given the determination on the part of a number of developing country delegations to challenge the principle of the universality of human rights, it was natural that the second World Conference on Human Rights, which was held in Vienna in June 1993, should become preoccupied with that topic. Among the proponents of the universality of human rights were U.S. Secretary of State, Warren Christopher, who rejected various Asian and Middle Eastern States' challenges to the universality of human rights, asserting that "[w]e cannot let cultural relativism become the last refuge of repression."<sup>297</sup> The U.N. Secretary General Boutros Boutros-Ghali, an Egyptian Copt, also endorsed the universality of human rights.<sup>298</sup>

It was to be expected that Iran would play a prominent role in the debate on the universality of human rights. The Iranian delegation represented a regime that had been in the forefront of those attacking the universality of human rights and seeking to forestall the development of a more effective rights enforcement machinery. However, Iran was far from alone; its associates in this endeavor included countries as diverse as China, Cuba, Vietnam, Singapore, Malaysia, Syria, Indonesia, Pakistan, and Yemen.<sup>299</sup> All of the countries that joined in fighting against univer-

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295. *Id.* at 14.

296. *See supra* text accompanying notes 81-84.

297. Elaine Sciolino, *U.S. Rejects Notion That Human Rights Vary With Culture*, N.Y. TIMES, June 15, 1993, at 5.

298. Isabelle Vichniac, *M. Boutros-Ghali défend les principes de l'universalité des droits de l'homme et de leur garantie internationale*, LE MONDE, June 16, 1993, at 5.

299. *See* Roger Thurow, *U.N. Conference Plagued by Demands That Rights Must Bow to National Goals*, WALL ST. J., June 25, 1993, at 7. Already at the final preparatory meeting for the Vienna Conference, Syria and Yemen attempted to block a paper stating that human rights

sality had human rights records that were, to say the least, spotty; many had been guilty of egregious violations of human rights. It was therefore in their political interest to find rationales for asserting the nonapplicability of international rights norms.

Having posited that "Western" human rights concepts "differ fundamentally from those prevalent elsewhere in Islamic, Confucian, Hindu or Buddhist cultures,"<sup>300</sup> Huntington might be said to have foreseen that the Western propagation of human rights meant "the emergence of a dynamic of conflict" that would pit "the West against the rest,"<sup>301</sup> thereby anticipating some aspects of the antirights coalition that appeared at the Vienna Conference.<sup>302</sup> Indeed, in a subsequent article, he argued that the confrontation between "the West" and "a coalition of Islamic and Confucian States rejecting Western universalism" at the Vienna Human Rights Conference confirmed the accuracy of his paradigm of a "clash of civilizations."<sup>303</sup> However, Huntington seems not to have scrutinized critically the relevant Saudi and Iranian statements, apparently taking their self-serving claims at face value. He also ignored the significance of what transpired at the Conference below the level of the official delegations, and failed to consider the real basis for Iran's alliance with China.

As already noted, Iran's government did claim to be speaking on behalf of Islam, although in reality it represented only an unusual Twelver *Shi'i* model of theocratic rule, the popularity of which it was unwilling to put to the test in free elections.<sup>304</sup> In contrast, few governments in the world could be less qualified to claim to speak on behalf of Asian religion and culture than the Communist Chinese regime, which had only come to power in 1949. Adherents of atheist Marxist-Leninist ideology, an ideology borrowed from German and Russian ideologues, the Chinese Communists have repressed both Asian and Western religions.<sup>305</sup> Moreover, during the Cultural Revolution of 1966–76, the Communist regime encouraged violent and destructive rampages that damaged many aspects of China's cultural heritage. Despite some recent

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were universal. Their obstructionism prevented the completion of the draft declaration before the Conference. Mark Clayton, *Rights Controversy Clouds U.N. Conference*, CHRISTIAN SCI. MONITOR, June 10, 1993, at 7.

300. Huntington, *The Islamic-Confucian Connection*, *supra* note 11, at 19.

301. *Id.* (quoting Kishore Mahbubani).

302. Of course, other aspects were not explained, such as why Cuba's position was not distinguishable from China's "Confucian" one or why the Dalai Lama, one of the most eminent Asian Buddhist leaders, emerged as one of the most forceful spokespersons for universality. See *infra* text accompanying notes 326–29.

303. Huntington, *If Not Civilizations. What?*, *supra* note 2, at 188.

304. See *supra* text accompanying note 286.

305. See FREDERIC KAPLAN ET AL., *ENCYCLOPEDIA OF CHINA TODAY* 268–70 (1979).

signs of liberalization, religion continues to be repressed, and in 1992 the Minister of Public Security labelled religion as one of the six hostile forces that could undermine the government.<sup>306</sup> In addition to persecuting believers in China, after its 1949–50 takeover of Tibet, China ravaged Tibetan Buddhist culture, razing thousands of temples and monasteries and persecuting and killing Buddhist monks and nuns.<sup>307</sup> Because the Chinese Communists' record made them singularly ill-qualified to represent Asian religion or civilization or to claim that fidelity to Asian culture mandated their opposition to universal human rights,<sup>308</sup> they chose the strategy of appealing to national sovereignty. Like other Communist States in the past, China elected to portray human rights issues as pertaining to its internal affairs, asserting "the right of each country to formulate its own policies on human rights protection."<sup>309</sup> According to the Chinese statement at the Vienna Conference: "[T]here are no absolute individual rights and freedoms, except those prescribed by and within the framework of law. Nobody shall place his own rights and interests above those of the state."<sup>310</sup> Through their cooperation in opposing the universality of rights, Iran and China showed that appeals to culture and religion, on the one hand, and to national sovereignty, on the other, were equally serviceable and, in practice, interchangeable for countries sharing the same political goal — finding ways to discredit external criticisms of shaky human rights records. The radically opposed policies of the two countries on religious matters indicated that religion was not the crucial variable in

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306. See Loretta Tofani, *China's Catholic Voices Rising: Though hounded by government, an underground church thrives*, PHILA. INQUIRER, Nov. 28, 1993, at A1.

307. See PRADYUMNA P. KARAN, *THE CHANGING FACE OF TIBET 70–71* (1976); Robert Adams, *Tibet: Brutal Chinese Policies Crush Local Buddhist Culture*, Inter Press Service, May 12, 1993, available in LEXIS, Nexis Library, ALLWLD file; Fox Butterfield, *Tibet's Days of Despair and China's Harsh Response*, N.Y. TIMES, Mar. 12, 1989, at A3; Daniel Southerland, *Tibetan Monasteries Choked by China, Monk Declares; Buddhist Education Being Restricted, Leader Charges*, WASH. POST, Feb. 6, 1993, at G11. In addition, the Chinese treatment of Tibetan Buddhism is reviewed in reports issued by Asia Watch and in the China sections of the annual reports of Amnesty International. See also JOHN AVEDON, *IN EXILE IN THE LAND OF SNOWS* (1984); DAVID PATT, *A STRANGE LIBERATION: TIBETAN LIVES IN CHINESE HANDS* (1992); GEORGE PATTERSON, *REQUIEM FOR TIBET* (1990).

308. Although implausible, it was not impossible for the Chinese government to try to exploit a cultural defense. Thus, after the Vienna Conference, Wu Jianmin, a foreign ministry spokesman, sought to defend China's human rights record by asserting that the conflict with the West represented a cultural misunderstanding, asserting that Asians give "greater emphasis to the rights of the people than privileges of a few." See Daniel Williams, *Chinese Leader Plays to Audience at Home; Jian, Who May Succeed Deng, Varies Little From Script*, WASH. POST, Nov. 21, 1993, at A34.

309. Matthew D'Ancona, *China Leads Asian Challenge to the Principle of Universal Human Rights*, TIMES [London], June 17, 1993, at 13.

310. *Id.*

shaping their human rights policies, and this raised doubts as to whether Huntington's "Confucian-Islamic connection"<sup>311</sup> was not something of a misnomer.

Once the Conference was in session, there was a noteworthy speech by Foreign Minister Prince Saud al-Faysal, who headed Saudi Arabia's delegation. He offered a ringing endorsement of the Cairo Declaration, claiming that Islamic law was "a comprehensive system for universal human rights," meant not as moral exhortations but as "legislative orders," and contained "all the legal texts necessary for ensuring their implementation and enforcement, while combining them with implicit duties."<sup>312</sup> The source of human rights in Islam was the Creator of the universe, according to the Saudi foreign minister, and, in Saudi Arabia, laws gave the State the primary responsibility for the protection of human rights in accordance with Islamic law.<sup>313</sup> He asserted that Saudi Arabia had been in the forefront of the OIC members that "ratified" the Cairo Declaration,<sup>314</sup> considering that it provided:

a proper foundation for positive and practical international cooperation, and which would flow into the main stream [sic] of universal support for human rights and freedoms, coming as an expression of the will of over one billion people which gives it a truly universal character by any measure. While the principles and objectives upon which human rights are founded are of a universal nature their application requires consideration for the diversity of societies, taking into account their various historical, cultural, and religious backgrounds and legal systems.<sup>315</sup>

That is, following the line taken by the OIC foreign ministers in April, the Prince offered support for a qualified universality — as did the Iranian representative at the Conference.<sup>316</sup> These delegations thus sought

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311. See Huntington, *The Clash of Civilizations?*, *supra* note 2, at 45–48. It should be noted that Huntington is inconsistent in his usage of the term; sometimes Huntington phrases it as the "Islamic-Confucian" connection, other times as the "Confucian-Islamic" connection.

312. *Islam Guarantees Human Rights, Says Saud*, RYADH DAILY, June 17, 1993, available in LEXIS, Nexis Library, Saudi File.

313. *Id.*

314. This was an odd choice of words, since the Declaration is not a treaty.

315. *Id.* The language resembles some of the wording in the statement emanating from the OIC conference in April, 1993. See *supra* text accompanying note 294.

316. The latter asserted that human rights were universal and not subject to cultural relativism, but argued that "drawing from the richness and experience of all cultures, and particularly those based on divine religions, which have throughout history provided the primary source and inspiration for . . . human rights, would only logically serve to enrich human rights concepts." See Dr. H.E. Mohammad-Javad Zarif, Deputy Foreign Minister and Head of Delegation of the Islamic Republic of Iran, Statement before the World Conference

to disguise their real position, which was tantamount to rejecting the fundamental premises and core values of the international principles. They apparently feared that, if they candidly admitted the extent of their opposition to human rights, they would be courting international opprobrium. Instead, they took pains to associate their position with one that a Muslim who was truly supportive of human rights might legitimately put forward — that cross-cultural differences might need to be taken into account in fine-tuning human rights standards and their interpretation.<sup>317</sup> At no point did the Saudi representative offer any candid acknowledgment of the vast gulf that separated the rights and freedoms set forth in the International Bill of Human Rights and the eviscerated “Islamic” counterparts that had been set forth in the Cairo Declaration or in the still flimsier rights in the Saudi Basic Law. Thus, like many other proponents of Islamic versions of human rights, he wanted to have it both ways: to maintain that Islamic culture warranted a culturally distinctive approach to rights, thereby providing a pretext for deviating from international norms, and to present Islamic versions of human rights as if they were basically consonant with the formulations found in international law.

The Saudi foreign minister seemed to be making the case for international acceptance of Islamic human rights as a plausible and legitimate alternative to the human rights protections afforded under international law, an alternative that expressed the will and the cultural aspirations of all the world’s Muslims. In presenting this Islamic model as efficacious, he chose to ignore the fact that Saudi Arabia and other OIC States were not carrying out programs that would ensure protections even for the minimal rights that it afforded. On the contrary, they referred to Islamic human rights exclusively in situations when they needed rationales for denying internationally protected rights, as when they sought to rationalize according women second class status or executing apostates from Islam. Moreover, he was speaking as if a definitive and efficacious Islamic model of human rights were embodied in the Cairo Declaration,

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on Human Rights 2 (June 18, 1993) (transcript available through the Permanent Mission to the United Nations of the Islamic Republic of Iran).

317. Calling for taking into account differing cultural traditions does not necessarily mean that one is seeking to dismantle the protections afforded under international law. Thus, for example, the prominent Sudanese scholar and proponent of human rights, Abdullahi An-Na`im, now the executive director of Africa Watch, sees certain Western biases in current interpretations of international human rights principles. For his argument that amputating the hand of a thief, when applied to Muslims, should not necessarily be deemed to violate the prohibition of cruel, inhuman, or degrading treatment or punishment, see Abdullahi An-Na`im, *Toward a Cross-Cultural Approach to Defining International Standards of Human Rights: The Meaning of Cruel, Inhuman, or Degrading Treatment or Punishment*, in HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES: A QUEST FOR CONSENSUS, *supra* note 82, at 19–43.

when, in reality, there had been no consensus supporting the Cairo Declaration on the part of the world's more than one billion Muslims, who had never been consulted regarding their views on human rights.

In fact, the Saudi delegation did not receive much public backing from other Muslim delegations for its position. Although the Cairo Declaration had been endorsed at the OIC Foreign Ministers' Conference the previous April, at the Vienna Conference, it turned out that many Muslim countries were unwilling to go on the record as supporting the Cairo Declaration in lieu of the rights provided under international law.<sup>318</sup> Ultimately, the declaration that emerged from the Conference did not expressly endorse cultural relativism. Instead the declaration reaffirmed the universal nature of rights and freedoms, but included a notation of the significance of regional particularities and required that historical, cultural, and religious backgrounds should be borne in mind.<sup>319</sup> The Conference did little to strengthen the U.N.'s capacity to protect these rights, a proposal to set up the office of a U.N. High Commissioner for Human Rights having been abandoned due to pressures from hostile developing country governments.<sup>320</sup> This final declaration might have afforded stronger protections for rights had the attending NGOs not been barred from participating in its drafting.

There were essentially two conferences in Vienna; one involved the official delegations and the other involved the approximately 1,500 NGOs in attendance.<sup>321</sup> In this setting, the genuine human rights activists often found themselves at odds with the official delegations, which were engaged in serving and protecting governmental interests. Over their protests, the NGOs were excluded from the process of drafting the final declaration, a process that was also closed to media observation.<sup>322</sup> Allowing NGO input could have made the document more representative

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318. See Liesl Graz, *Human Rights: The Vienna Declaration*, MIDDLE E. INT'L, July 9, 1993, at 14.

319. See Michael Posner, *Reflections on the Vienna Conference*, AMERICAN SOC'Y OF INT'L L. NEWSLETTER, Sept.-Oct. 1993, at 19-20.

The Iranian delegation indicated that it would accept the principle of universality in the final declaration of the Conference, albeit with the reservation that the law of God would override any international law. See Graz, *supra* note 318. Other delegations may not have appreciated the devastating consequences that the Iranian reservation would entail.

320. See Christopher Reardon, *U.N. Conference Sustains Universal Nature of Rights*, CHRISTIAN SCI. MONITOR, June 28, 1993, at 2.

321. A report on how the Conference appeared from the NGO's perspective is provided in *Upstairs, Downstairs: While Governments Squabbled, The World's Human Rights Community Went to Work*, AMNESTY ACTION, Summer 1993, at 1.

322. See Pamela Bone, *Austria: Rights Conference a Sham*, Amnesty, AGE (Melbourne), June 23, 1993, and John West, *Amnesty Chief Slams U.N. Rights Conference*, Reuter Library Report, June 30, 1993, both available in LEXIS, Nexis Library, ALLWLD File.



of the views of persons on the receiving end of governmental human rights policies. Had that been the case, the text might have included a denunciation of the exploitation of culture as a rationale for rights violations.<sup>323</sup> As it was, the NGOs had to resort to the media to vent their dissatisfaction with the Conference.

Pierre Sane, the Senegalese President of Amnesty International, one of the most prestigious of the attending NGOs, was able to press his views outside the Conference. He criticized the exclusion of the NGOs from the drafting of the final declaration of the Conference and also condemned the efforts that had been made to dilute human rights.<sup>324</sup> In an article that appeared at the same time as the Conference, Sane pronounced that genuine differences between cultures were being misused to justify violations of rights by authoritarian regimes like Saudi Arabia's and maintained that the arguments did not stand up to the fact that "people living in the Middle East and Asia are demanding that their rights be respected."<sup>325</sup>

Sane's views were echoed in remarks made by the Dalai Lama in a speech to the NGOs' section of the Conference after he had been barred, at China's behest, from addressing the official delegations. As the Conference facilities were arranged, the section allotted to the NGOs was physically separated from that of the governmental delegations — an apt physical representation of the philosophical gulf dividing the governmental and NGO perspectives. The Dalai Lama, a winner of the Nobel Peace Prize and the most influential leader of Tibetan Buddhism, received an enthusiastic reception from the attending NGOs. He criticized China's position that developing countries could not be bound by Western notions of human rights, maintaining that the majority of Asians did not agree with China's position<sup>326</sup> — criticism that received support from China's own dissidents.<sup>327</sup> From this Buddhist monk from one of the countries of

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323. See the discussion of the comments of Dorothy Thomas of Human Rights Watch, one of the attending NGOs, *infra* text accompanying notes 427–28.

324. See Bone, *supra* note 322.

325. Pierre Sane, *Human Rights and the Clash of Cultures*, 10 *NEW PERSP. Q.* 27 (1993).

326. Raymond Whitaker, *Vienna Gives Dalai Lama a Hero's Welcome*, *INDEPENDENT*, June 16, 1993, at 12.

327. For example, Chinese prodemocracy advocates living in exile in the United States denounced the decision to bar the Dalai Lama from speaking at the Conference, saying that they shared his commitment to universality. Sarah Shard, *Outlook for World Human Rights Conference Stormy*, *Agence France Presse*, June 12, 1993, available in LEXIS, Nexis Library, ALLWLD File. One of China's most famous dissidents, Wei Jingsheng, had in 1992, specifically attacked Deng Xiaoping's human rights policy, which he characterized as one of allowing "different countries to use different standards," and asserted that it played into the hands of "fascist" and "Nazi" thinkers who wanted the world to believe that "concepts of human rights of white people in the West should not be applied to the Chinese and other 'inferior' national-

the world that had been least affected by Westernization, the NGOs heard that it was “the inherent nature of all human beings to yearn for freedom, equality, and dignity,” and that it was not only the right of “the global human family to protest when our brothers and sisters are being treated brutally, but it is also our duty to do whatever we can to help them.”<sup>328</sup> In an interview after the Conference, the Dalai Lama took aim at cultural relativism, noting that people in positions of power were usually the ones who said that human rights are culturally determined — not ordinary citizens.<sup>329</sup> None of the spokespersons for the governments that fought against the universality of human rights enjoyed a fraction of the authority possessed by the Dalai Lama to represent a nonWestern people or to speak on behalf of its religion and culture. The Dalai Lama’s prompt dismissal of the cultural relativist argument demonstrates the hollowness of the thesis that international human rights are incompatible with Asian civilization.

### C. *Western Visions of a Monolithic “Islam:” Orientalist Stereotyping and Cultural Relativism*

“Who the hell are they to judge how other countries should behave? Different peoples and cultures respect different rights — why should America be able to impose its own values on the rest of the world?”<sup>330</sup> These were the acerbic comments of Wilfred Thesiger, a famous British explorer of the wilder regions of Arabia, the Sudan, Abyssinia, and the Iraqi marshes, upon hearing a BBC World Service broadcast about what a later newspaper report called “a United Nations committee on human rights” in Saudi Arabia in May 1993. This radio news report was received by Thesiger in Kenya, where he was living in a village in a house made of cow dung, lamenting the passing of traditional life and decrying Western influences, which were encroaching on his haven.<sup>331</sup> To Thesiger, the notion of human rights intruding into Saudi Arabia was offensive. Like the members of the Saudi establishment who had condemned the founders of the new human rights Committee, Thesiger viewed human

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ties.” See Patrick E. Tyler, *A Dissident's Letter From Prison To Beijing Will Appear in China*, N.Y. TIMES, Oct. 24, 1993, at A8.

328. Whitaker, *supra* note 326, at 12.

329. Kevin Griffen, *Dalai Lama: He's Utterly Unpretentious in Nature*, VANCOUVER SUN, June 28, 1993, at A8.

330. See Simon Courtauld, *The Last Great Explorer*, SUNDAY TELEGRAPH, May 30, 1993, available in LEXIS, Nexis Library, ALLWLD File.

331. On the mindset of the great explorer in this stage of his life, see Christian Tyler, *The Savage in the Three-piece Suit*, FIN. TIMES, Oct. 30, 1993, at XXIV.

rights activism in the Saudi context as alien and unnatural and, therefore, necessarily attributable to foreign initiatives. In actuality, the broadcast, which seems to have been about the indigenous Saudi human rights Committee discussed *supra*,<sup>332</sup> and not about “a United Nations committee,” gave no indication that the United States had been involved, or that it was seeking to impose its values on Saudi Arabians.<sup>333</sup> However, like many Saudis, Thesiger automatically associated any calls for human rights with “Americans,” whom he confessed to disliking,<sup>334</sup> and with U.S. interference in the internal affairs of nations with dissimilar cultures. The possibility that there could be an indigenous Saudi human rights movement, that Arab Muslims could choose to adopt political values that had in the past been associated with Western culture, did not seem to have occurred to Thesiger.

Thesiger’s attitude toward human rights in Saudi Arabia is an apt example of one facet of Orientalism, the Western mindset that posits a fundamental difference between the essential natures of “Oriental” culture (meaning Middle Eastern/Islamic culture) and Western culture, a mindset that appears to determine Huntington’s approach. Thesiger’s view is a heavily romanticized variant of Orientalism. In a recent article, Rhoda Howard calls persons who accord primacy to cultural values over international human rights “cultural absolutists,” and she caustically characterizes such romanticizing of the unsullied primitive as follows:

Absolutists’ defense of indigenous cultures against universalized human rights is to a large extent a consequence of their concern that human rights will encourage the emergence of an individualized, atomistic, and competitive social world. Absolutists idealize the third world community, which exemplifies for Western culture the primitive arcadia we have lost, even as the third world displays some of the worst human rights abuses of early modernization. . . . [T]he contemporary primitives of third world societies are not permitted to be attracted to, to adopt or advocate, individualist ideals of personal autonomy or human rights. Those individuals from the third world who do express such ideas are quickly dismissed as

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332. See *supra* text accompanying notes 259–78.

333. The only U.S. connection was the briefing of U.S. diplomats in the Riyadh Embassy by the leader of the human rights committee. See *Saudi Arabia; Human rights committee member: U.S. diplomats informed of committee’s activities*, BBC Summary of World Broadcasts, May 12, 1993, available in LEXIS, Nexis Library, BBCSWB File.

334. See Courtauld, *supra* note 330.

“Westernized;” that is, as unauthentic, offending our view of the psychological role they play for us.<sup>335</sup>

A widely discussed critique of the Orientalist mindset and the accompanying scholarship has been presented by Edward Said,<sup>336</sup> who attacks Orientalism for impeding recognition of the common human experience shared by East and West. Said’s focus is less on the romanticized vision of traditional Arab culture that had entranced explorers like Thesiger than on the pejorative view of “the Orient” purveyed by certain Western scholars of the Middle East and Islam, whom Said sees as being in league with Western colonialism and neoimperialism. According to Said, because of misplaced emphasis on Islam as the central determinant of what occurs in Oriental societies, Orientalists have obscured the diversity and complexity of Muslims’ experiences.<sup>337</sup> Said proposes that “‘the Orient’ is itself a constituted entity, and that the notion that there are geographical spaces with indigenous, radically ‘different’ inhabitants who can be properly defined on the basis of some religion, culture, or racial essence proper to that geographical space is . . . a highly debatable idea.”<sup>338</sup> Huntington’s assumption that one can generalize about a monolithic “Islamic civilization” rests on a similar and equally debatable construct of “Islam.” It is not surprising that Huntington and other nonspecialists continue to fail to grasp the perils in overstating the role of Islam and the uniformity of Islamic culture. Despite Said’s powerful

335. Rhoda Howard, *Cultural Absolutism and the Nostalgia for Community*, 15 HUM. RTS. Q. 315, 329 (1993) [hereinafter Howard, *Cultural Absolutism*].

336. See generally EDWARD SAID, *ORIENTALISM* (1978). He has recently updated his criticism of the Western overemphasis on Islam to explain developments in the Arab world. See Edward Said, *The Phony Islamic Threat*, N.Y. TIMES MAG., Nov. 21, 1993, at 62. A Christian Palestinian American who has long lived in the United States but retains ties to the Arab world, Said has both an internal and external perspective on developments in Arab societies and culture, which may in part account for his greater awareness of the complexity of “the Orient” than Western observers like Huntington display.

337. Said complains that for Arabists and scholars of Islam:

[T]here are still such things as *an* Islamic society, *an* Arab mind, *an* Oriental psyche. Even the ones whose specialty is the modern Islamic world anachronistically use texts like the Koran to read into every facet of contemporary Egyptian or Algerian society. Islam, or a seventh-century ideal of it constituted by the Orientalist, is assumed to possess the unity that eludes the more recent and important influences of colonialism, imperialism, and even ordinary politics. Cliches about how Muslims (or Mohammedans, as they are still sometimes called) behave are bandied about with a nonchalance no one would risk in talking about blacks or Jews. At best, the Muslim is a “native informant” for the Orientalist.

SAID, *ORIENTALISM*, *supra*, at 336. The clichés about Islamic civilization in Huntington’s writing suggest that he has unquestioningly accepted Orientalist perspectives.

338. *Id.* at 322.

critique of Orientalism, quintessentially Orientalist works continue to be published by influential scholars.<sup>339</sup>

Said's own perspective on these matters has been subjected to criticism by Professor Sadiq al-'Azam. Like Said, al-'Azam has decried the assumption that the differences between Western and "Oriental" societies are "emanations from a certain enduring Oriental (or Islamic) cultural, psychic, or racial essence . . . bearing identifiable fundamental and unchanging attributes."<sup>340</sup> However, unlike Said, who characterizes the Orientalist stereotypes perpetuated by the West as a form of Western neocolonialism, al-'Azam emphasizes that Western Orientalism is mirrored by Muslims' own "Orientalism in reverse." He believes that some Muslims have a tendency to exaggerate the influence of Islam, treating it as the prime factor in shaping Middle Eastern culture,<sup>341</sup> which he finds "no less reactionary, mystifying, ahistorical, and anti-human" than its Orientalist counterpart.<sup>342</sup> The phenomenon of Orientalism in reverse manifests itself in the constructs of Islamic human rights advocated by countries such as Iran and Saudi Arabia.

Orientalist stereotyping and manifestations of Orientalism in reverse would be less likely to shape Westerners' perceptions of Muslims and the cultures in which they live but for the reinforcement they receive from powerful cultural relativist currents. Cultural relativism posits that culture is the source of validity of rules and that, since cultures vary, rules that are valid within one culture will not necessarily be valid in others. Thus, cultural relativists elevate tolerance to a paramount value and reject the legitimacy of external critiques of culturally-based practices.<sup>343</sup> Where human rights are concerned, cultural relativists are inclined to claim that pressing for the universality of human rights in their international formulations involves a failure to respect the diversity of cultures.<sup>344</sup> In

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339. See, e.g., LAWRENCE ROSEN, *THE ANTHROPOLOGY OF JUSTICE: LAW AS CULTURE IN ISLAMIC SOCIETY* (1989), critically appraised in Ann E. Mayer, *Islam Inside and Out*, 22 J. INTERDISCIPLINARY HIST. 89 (1991). The book posits a monolithic and static Islamic culture, replete with archaisms, that dominates societies where Muslims live, determining Muslims' attitudes and conduct and setting "Islamic society" apart from all its counterparts in the West.

340. Sadiq Jalal al-'Azam, *Orientalism and Orientalism in Reverse*, in FORBIDDEN AGENDAS: INTOLERANCE AND DEFIANCE IN THE MIDDLE EAST 349, 367 (John Rothschild comp., 1984) [hereinafter al-'Azam, *Orientalism*]. Less accessible but valuable analyses of related problems can be found in MOHAMMED ARKOUN, *POUR UNE CRITIQUE DE LA RAISON ISLAMIQUE* (1984).

341. al-'Azam, *Orientalism*, *supra* note 340, at 371-72.

342. *Id.* at 376.

343. See Douglas Lee Donoho, *Relativism Versus Universalism in Human Rights: The Search for Meaningful Standards*, 27 STAN. J. INT'L L. 345, 353 (1991).

344. For general discussions of the issues in dispute between cultural relativists and universalists regarding human rights, see *id.*; see also JACK DONELLY, *UNIVERSAL HUMAN*

particular, partisans of cultural relativism charge that Western critiques of human rights practices in nonWestern cultures are based on an ethnocentric assumption of the superiority of Western philosophical and moral values, which are embedded in international human rights standards, so that such critiques constitute a form of cultural imperialism.<sup>345</sup>

Westerners who adopt a cultural relativist stance on human rights may do so with the laudable intention of showing sensitivity to and respect for cultural differences and of avoiding ethnocentricity in their use of Western-derived rights principles to evaluate nonWestern cultures. However, in their attempts to show appropriate respect for cultural differences, Westerners may go overboard; they may exaggerate the extent to which modern civil and political rights are tied to Western culture,<sup>346</sup> accept constructs of nonWestern cultures that inflate the role that culture actually plays in shaping attitudes towards human rights, and minimize the diversity of views that will normally exist within all but the smallest cultural units.<sup>347</sup> With regard to this latter tendency, it has been

RIGHTS IN THEORY AND PRACTICE (1989).

345. See, e.g., ALISON DUNDES RENTELN, *INTERNATIONAL HUMAN RIGHTS: UNIVERSALISM VERSUS RELATIVISM*, 47, 77, 86, 139–40 (1990).

346. This is not the place to enter into a review of the literature about how distinctively “Western” international human rights norms really are, but it should at least be noted that doubts have been raised about whether human rights are in fact as ineluctably tied to Western culture as cultural relativists generally seem to presume.

Rhoda Howard, who has examined human rights issues in Africa, has stressed that human rights principles address universal problems facing all societies due to the adoption of the nation State, and argues that:

Human rights are a modern concept now universally applicable in principle because of the social evolution of the entire world toward state societies. The concept of human rights springs from modern human thought about the nature of justice; it does not spring from an anthropologically based consensus about the values, needs, or desires of human beings.

Howard, *Dignity*, *supra* note 82, at 81.

She has also argued: “A far stronger case can be made that human rights are *not* the dominant Western cultural tradition than that they are. The Western philosophical and cultural traditions of social justice include not only liberalism, but also communism, corporatism, racism, and fascism.” Howard, *Cultural Absolutism*, *supra* note 335, at 335.

Whether there is a philosophical linkage to Western natural rights theory or Western theology and metaphysics has been deftly challenged in a provocative essay by the Norwegian philosopher Tore Lindholm. Based on a penetrating analysis of the UDHR, Lindholm has proposed that the Declaration should be seen as a political, sociological, and historical interpretation of the peculiar situation of world society in the aftermath of World War II and that it and its rights concepts derive from “an exercise in ‘situated’ geopolitical rationality.” See Tore Lindholm, *Prospects for Research on the Cultural Legitimacy of Human Rights: The Cases of Liberalism and Marxism*, in *HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES: A QUEST FOR CONSENSUS*, *supra* note 82, at 397.

347. In this connection, Donoho has observed that within one society there are usually diverse social groups with competing interests and values and that one of the serious problems of cultural relativism is its failure to explain to which one of the groupings within a society one should refer to in deciding what a society’s human rights values are. Donoho, *supra* note 343, at 381 n.138.

noted that cultural relativists tend to totalize the concept of culture, as if wanting to believe that there must be a single, uniform dominant culture within any given society.<sup>348</sup> Moreover, they may rely on "misleading generalizations, stereotypes, and abstractions, thereby reifying their own conceptions about the societies they describe."<sup>349</sup> The result is a tendency to posit *a priori* cultural uniformity and to disregard empirical evidence of diversity.

Where Islam is concerned, the Western inclination to totalize a nonWestern culture seems especially strong, although even a moment's reflection should prompt doubts about whether well over a billion people dwelling in dissimilar social and economic circumstances in countries ranging from Morocco to Indonesia, all of which are undergoing the disruptive process of modernization, would be likely to constitute a meaningful unit or share a common cultural perspective that would warrant lumping them all together under the rubric of "Islam" or "Islamic civilization." This totalizing of "Islam" is linked to Orientalist stereotyping. Indeed, despite the relatively benign motivations that may underlie cultural relativists' insistence that international human rights norms should not be applied to Muslim countries, the cultural relativists' stance has the same corollary as the Orientalists' vision of an inherently backward and static Orient; since international human rights are not part of Islamic culture, an inferior standard of rights is normal and sufficient where Muslims are concerned.

Sadiq al-'Azm's work is a valuable corrective to Orientalist stereotypes and cultural relativist excesses. His erudite, detailed analysis of the scandal involving *The Satanic Verses*, a prime example of "Islam" being invoked against rights and freedom, is especially instructive. Al-'Azm demonstrates fascinating parallels between Salman Rushdie's work and that of Western authors like Rabelais, Voltaire, and James Joyce, and he lays out the political and social issues that Rushdie explored and the political motivations of both the governments that condemned Rushdie and the individuals who stood by him.<sup>350</sup> He explains why he believes that Rushdie is merely expressing a broader socio-historical crisis of Muslim societies,<sup>351</sup> raising issues that persons desperate to defend aspects

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348. See Patrick Macklem, *Distributing Sovereignty: Indian Nations and Equality of Peoples*, 45 STAN. L. REV. 1311, 1343 (1993).

349. Donoho, *supra* note 343, at 349 n.14.

350. al-'Azm, *Importance of Being Earnest*, *supra* note 113. For a variety of "readings" of the Rushdie affair, see INDEX ON CENSORSHIP, May/June 1989.

351. al-'Azm, *Importance of Being Earnest*, *supra* note 113, at 41.

of a threatened status quo cannot allow to be critically debated.<sup>352</sup> Al-`Azam complains of "the all too evident tendency of western critics and commentators to depoliticize Rushdie's fiction (and predicament),"<sup>353</sup> noting that the Western history of repression of analogous writing tends to be forgotten.<sup>354</sup> Al-`Azam, who has himself been charged with apostasy for his critique of Islamic religious thought,<sup>355</sup> has reflected on the pattern of governmental denunciations of authors as apostates and blasphemers because their work threatens received opinions and vested interests.<sup>356</sup> After reviewing the history of condemnations of works by Middle Eastern authors who represent a wide range of different positions along the political spectrum, all of whom suffered the same fate of being labelled an apostate or blasphemer, al-`Azam asserts that "every one of these affairs had far more to do with the affairs of state than the affairs of faith."<sup>357</sup> In short, he insists that patterns of governmental censorship in the Middle East are politically, not religiously, motivated, even in cases like Salman Rushdie's, where Khomeini's decree, calling for his execution as an apostate might suggest that the banning of his book had been motivated by religious criteria.

As al-`Azam reminds the reader, Arab intellectuals had at great risk spoken out in vigorous defense of Rushdie,<sup>358</sup> and others have since recorded their expressions of support.<sup>359</sup> Having hoped for a strong

352. See *id.* at 47-48.

353. *Id.* at 36. Writing from a different perspective, the author has pointed out how Khomeini's 1989 *fatwa* had more to do with politics than religious requirements, the ruling calling for Rushdie's murder deviating from principles of Islamic law in various respects. Khomeini also had political reasons in 1989 for trying to position himself at the forefront of Muslims calling for Rushdie's death. His acceptance of the 1988 ceasefire ending Iran's long war with its neighbor Iraq had damaged his credentials as the leader of militant Islam. Moreover, *The Satanic Verses* poked fun at Khomeini in the guise of a reactionary Imam opposed to rights and progress. See Ann E. Mayer, *Islam and the State*, 12 CARDOZO L. REV. 1015, 1050-51 n.118 (1991).

354. al-`Azam, *Importance of Being Earnest*, *supra* note 113, at 43-44.

355. See *id.* at 36.

356. See *id.* at 30-34.

357. *Id.* at 34. Even where the condemnations of apostates come from nongovernmental sources, there may be State complicity in the general patterns of intolerance and censorship that correlate with outbreaks of fundamentalist violence against intellectuals and artists. Thus, Farag Fuda, one of the most prominent victims of fundamentalism, before his June 1992 assassination had denounced the Egyptian government for policies that led to a situation where "people pay with their lives because they express a differing opinion." See Farag Foda [sic], *A Murdered Writer's Prophecy*, N.Y. TIMES, Nov. 10, 1993, at A27.

358. al-`Azam, *Importance of Being Earnest*, *supra* note 113, at 35.

359. Many of the most distinguished cultural figures from the Arab world have contributed to a volume honoring Rushdie and expressed their dedication to precisely those liberal values that Huntington has deemed incompatible with "Islamic civilization." See Alan Riding, *Muslim Thinkers Rally for Rushdie*, N.Y. TIMES, Nov. 4, 1993, at C17.



showing of Western solidarity, al-`Azm laments the tepid support that Rushdie has been afforded by the Western intelligentsia.<sup>360</sup> He notes the failure of Sweden's Academy of Letters to support Rushdie, pointing out that the Academy (which awards the Nobel Prize for literature) has a history of demonstrating its solidarity with dissident authors in the former U.S.S.R and Eastern Bloc States. Al-`Azm complains that the parallels between Rushdie's predicament and the literary dissidents in those former Communist countries elude many Western observers:

Perhaps the political unconscious looms here much larger than one would initially have suspected. Perhaps the deep-seated and silent assumption in the West remains that Muslims are simply not worthy of serious dissidents; do not deserve them, and are ultimately incapable of producing them; for, in the final analysis, it is the theocracy of the Ayatollahs that becomes them.<sup>361</sup>

According to al-`Azm, because of Westerners' stereotypes about what is natural in Islamic culture, they tend to delegitimize the political protests of Muslim dissidents, presuming that "[s]uch practices as religious tolerance, democracy, the right of free speech and all that goes with them are really Western values, which other adjacent cultures (especially Muslim societies and cultures) find alien, repelling and generally antithetical to their most authentic values . . . ."<sup>362</sup> Given these presumptions, Westerners may condescendingly think of other human beings "as eternally sealed within their own cultural totalities and/or permanently condemned to live their lives within the confines of their 'most authentic' systems of beliefs and values."<sup>363</sup> The kind of Orientalist thinking that al-`Azm decries means that Muslims' dissent winds up being characterized, not only by reactionary forces in their own societies, but also by Westerners as a betrayal of their culture and religion, which Westerners may presume is necessarily supposed to be static.<sup>364</sup>

In discussing Arab dissent, al-`Azm mentions the case of Mahmud

360. Not all Arab and Muslim writers share this opinion, some complaining that the West supports Rushdie but not the "Arab Rushdies" who are being killed, just as the West shows indifference to the suffering of Bosnian Muslims. *See id.*

361. al-`Azm, *Importance of Being Earnest*, *supra* note 113, at 2.

362. *Id.* at 42.

363. *Id.*

364. *See, e.g., id.* at 2-4. As Edward Said indicates in a discussion of Orientalists like H.A.R. Gibb and after quoting Gibb, who was impressed by "the aversion of the Muslims from the thought processes of rationalism," the Orientalist mindset is one ill-disposed to accept the specter of "Orientals" coming to terms with the modern world: "If Islam is flawed from the start by virtue of its permanent disabilities, the Orientalist will find himself opposing any Islamic attempts to reform Islam." SAID, *ORIENTALISM*, *supra* note 336, at 106.

Muhammad Taha, the progressive modernist thinker, who pressed for Islamic reform and respect for human rights. He was executed in January 1985 as an apostate for his outspoken criticism of the fundamentalist policies followed by Jaafar al-Nimeiri's military dictatorship in the Sudan. Nimeiri personally ordered the public hanging of the seventy-six year old religious leader.<sup>365</sup> Al-'Azm's thesis that Muslim dissidents are not taken seriously in the West is confirmed by the cordial White House reception that President Reagan accorded to Nimeiri during his 1985 visit to Washington<sup>366</sup> — hardly the reception Nimeiri could have expected had he only two months previously ordered the execution of a prominent Christian or Jewish religious leader for his beliefs. As it turned out, Nimeiri's brutal version of Islamization, while acceptable to his U.S. allies, was less palatable to his own people; his overthrow in April 1985, after mass demonstrations by disaffected Sudanese, was enthusiastically celebrated.<sup>367</sup> Taha's execution was subsequently memorialized when the date of his death was selected for the annual commemoration of Arab Human Rights Day.

Al-'Azm's observations were recently echoed by two Egyptian-born intellectuals. Speaking on behalf of the person whom they aptly — and poignantly — label “the stranded individual of the South,” they observe the Western tendency to look from afar at “the non-European societies of the South as culturally homogeneous entities based on consistent value systems — Islam, Confucianism, and Hinduism. In general, they are viewed as hostile to the modern ideals of individual liberty and democracy,” so that Muslims supporting secular and liberal values are seen as part of marginal, fringe groups.<sup>368</sup> Far from concurring with Huntington's opinion that Western support for human rights encourages the growth of fundamentalism, like al-'Azm, they look for solidarity and call on the West to support groups defending the democratic option against Islamic fundamentalism, arguing that “the most important need in the coming years for the individual in the South is for the solidarity of democratic, humanistic and universalist currents in both the North and the South.”<sup>369</sup>

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365. al-'Azm, *Importance of Being Earnest*, supra note 113, at 34 n.17. This case is examined in Abdullahi Ahmed An-Na'im, *The Islamic Law of Apostasy and Its Modern Applicability, A Case from the Sudan*, 16 RELIGION 197 (1986).

366. Mark Whitaker et al., *A Strongman's Fall*, NEWSWEEK, April 15, 1985, at 73. Not only was Nimeiri warmly received as a trusted ally, but also the United States granted him \$67 million in new economic assistance. See Gerald M. Boyd, *U.S. Releasing \$67 million for Sudan*, N.Y. TIMES, April 2, 1985, at A8.

367. See Whitaker, supra note 366, at 73.

368. Hussein, supra note 12, at 41.

369. *Id.*

These authors would find scant signs of the solidarity that they hoped for in a recent essay by Richard Falk. Falk's essay embodies the double standards Westerners employ in analyzing Western dissidents and their Muslim counterparts.<sup>370</sup> Hailing the liberty of expression in the West<sup>371</sup> and the production of subversive *samizdat* in the Eastern Bloc,<sup>372</sup> Falk maintains that the cultural preparation for freedom of expression "is definitely not present at this time in the Muslim world,"<sup>373</sup> and that "the problems of repressiveness should not be superciliously posited in nonWestern cultures such as Islam, whose interests can then be ignored as unworthy of concern."<sup>374</sup> Ironically, after treating "Islam" as a cultural totality, Falk labels liberal support for Rushdie in the West as "Orientalism," involving negative Western stereotyping of Islam<sup>375</sup> — apparently unaware that his own vision of Islamic culture as a monolithic, static entity, incapable of accommodating rights and freedoms, incorporates Orientalist stereotypes. As so frequently happens, in Falk's case, the Westerner who observes the clash between an individual Muslim challenging limits on rights and freedoms that are being imposed in the name of "Islam" ultimately sides with the persons and institutions demanding compliance with a retrograde, intolerant version of Islamic orthodoxy.<sup>376</sup> Oblivious to the merits of the civil and political rights claims being put forward by the individual, the Westerner, who would otherwise rarely be inclined to privilege arguments put forward by repressive, undemocratic regimes, becomes the advocate of the interests of "Islam," a reified construct severed from the aspirations, feelings, and interests of its individual adherents. Whether this is the byproduct of Orientalist proclivities or a misguided application of the principles of cultural relativism, the result is the same: "the stranded individual of the South" is denied the sympathy and solidarity that Westerners routinely accord dissidents and persons demanding respect for human rights who hail from what Huntington would call "kin-countries."<sup>377</sup>

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370. See Richard Falk, *Cultural Foundations for Protection of Human Rights*, in HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES: A QUEST FOR CONSENSUS, *supra* note 82, at 44.

371. *Id.* at 57.

372. *Id.* at 60.

373. *Id.* at 58.

374. *Id.* at 59.

375. *Id.*

376. A telling example of this occurred in the case of "Nada," the Saudi Arabian asylum-seeker whose unsympathetic reception by Canadian immigration officials is described below. See *infra* text accompanying notes 394–416.

377. Rhoda Howard has noted this tendency among Westerners who adopt what she calls a "cultural absolutist" approach where developing country societies are concerned. Putting herself in the place of Westerners who care more for the preservation of the community than

D. *The Dissent of Iranian and Saudi Women: Political  
Protest or Cultural Treason?*

The clashes of the Iranian and Saudi regimes with nonconforming Iranian and Saudi women illustrate the groundlessness of the assumptions made by Western cultural relativists and proponents of Orientalism that a unitary Islamic culture divides Muslim societies from the West. As has been shown, the Cairo Declaration, supported by both Iran and Saudi Arabia, for the most part neglected the issue of women's rights, failing to provide for equality in rights or equal protection of the law regardless of gender.<sup>378</sup> The Saudi Basic Law did not even deem the issue of women's rights deserving of notice.<sup>379</sup> If one accepts these governmental constructs of Islamic teachings pertaining to rights as definitive statements of Islamic precepts, one would not expect there to be indigenous conflicts or protests over women being denied rights. However, Iranian and Saudi women continue to resist and struggle against discriminatory policies and laws, illustrating the need to venture beyond official assertions and to investigate the attitudes of Muslims who are on the receiving end of such policies.<sup>380</sup>

In Iran and Saudi Arabia, the drastic curbs that are imposed on women's rights are officially justified as mandated by Islamic culture and religion. Public manifestations of rejection of the officially-approved constructs of culture and religion are therefore embarrassing, as they expose the fallaciousness of the regimes' claims to act pursuant to the dictates of indigenous cultural models. If Muslim women protest, if they publicly reject the authority of the governmental constructs of Islam, the constructs become less convincing. Logically, if authentic cultural norms

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for vindicating the rights of individuals in developing countries, she writes: "While we value intellectual independence in our own tradition, we refuse it to intellectuals in others; they are supposed to be conservative exemplars, not radical challengers, of their own traditional values." Howard, *Cultural Absolutism*, *supra* note 335, at 329.

378. See *supra* text accompanying notes 84-90.

379. See *supra* text preceding note 231.

380. Donoho has noted the general imprudence of allowing governments wide discretion in defining acceptable state practice in the area of rights and that:

[r]elativism clearly has a tremendous capacity to serve as the rhetorical justification for repressive practices by ruling elites. The fact that relativism is most often supported by repressive regimes . . . is ample grounds for a healthy skepticism regarding vague claims of cultural or ideological necessity for deviations from the specific requirements of human rights norms.

Donoho, *supra* note 343, at 380. If skepticism is generally warranted about the good faith of regimes that deny human rights pursuant to official constructs of culture, a high degree of skepticism becomes essential where the groups that are being denied rights are ones excluded from the governing elites, as women are in both Iran and Saudi Arabia.

were actually involved, one would expect them to enjoy automatic authority among Muslims and not to depend on positive laws or harsh police enforcement tactics to obtain compliance. The more obvious the need to rely on legal sanctions and police measures to enforce what are officially described as "cultural" norms, the more the legal regimes repressing women begin to resemble regimes of apartheid, in which the State establishes and maintains the domination of one group and the systematic oppression of another.

To date, both Iran and Saudi Arabia have resorted to stringent laws and aggressive policing in hopes of cowing women into, at least, an outward submission to the constraints placed on their freedoms. However, they have been placed on the defensive when forced to explain why they need to resort to such measures to compel conformity with what are supposed to be indigenous cultural norms. In attempts to discredit manifestations of women's dissent from the regimes' policies, both have tried to disassociate the women involved from the local culture, charging that their protests are products of Western conspiracies or that the women involved are "Westernized."<sup>381</sup> On occasion, the regimes have even found it expedient to deny that they were resorting to coercion to get women to submit — despite the overwhelming evidence to the contrary.<sup>382</sup>

In Iran, after the exodus of perhaps two million Iranians, including much of the country's educated elite, and after fourteen years of fundamentalist propaganda and vigorous repression, arrests, floggings, and executions, the clerical regime has not succeeded in eradicating nonconformity and resistance to its official construct of Islamic culture.<sup>383</sup> The problems of enforcing compliance with the much-resented requirements that women should wear either the *chador*, or veil, or other approved

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381. For example, this was the approach taken by the Saudi Minister of the Interior in attempting to discredit the women who participated in the Riyadh driving demonstration in November, 1990. See Khalid Nazir, *Women's Demo was a Stupid Act, Says Naif*, Middle East News Network, Nov. 16, 1990, available in LEXIS, Nexis Library, ALLWLD File. See also the condemnations of the women in the Riyadh driving protest by Saudi conservatives and the *mutawwaa*, in Judith Caesar, *Big Saudi Brother*, CHRISTIAN SCI. MONITOR, Jan. 4, 1991, at 18. For a typical charge that there was a Western conspiracy to corrupt Iranian women by propagating Western culture, put forward by President Rafsanjani, see F.B.I.S. (NES-90-004), Jan. 7, 1991, at 51.

This echoed the militant perspective that Ali Khamene'i had articulated earlier before his elevation to *faqih*, when he had railed against corruption and immorality (meaning in context freedom for women) as being propagated by Western colonialist powers as part of a plot against the Islamic revolution. *Iranian President Calls for an End to Recent Demonstrations*, BBC Summary of World Broadcasts, Apr. 25, 1985, available in LEXIS, Nexis Library, BBCSWB file.

382. See *infra* text accompanying notes 391, 398–400.

383. See, e.g., Richards, *supra* note 286, at 11.

Islamic dress continue.<sup>384</sup> In June 1993 a new crackdown was started, involving arrests of hundreds of women deemed to be in violation of the dress requirements — often with confiscations of the cars they were driving or in which they were riding,<sup>385</sup> with flogging penalties imposed on offenders.<sup>386</sup>

By July 1993 the Iranian government had decided to mobilize the military strength of the *basij* forces that had originally been mobilized to fight in the Iran-Iraq war to combat “cultural corruption,” meaning signs of Western influence or deviations from the official construct of Islamic morality. To fight the war against “the enemy within,” the *basijis* were to be given regular military training.<sup>387</sup> This policy of resorting to force to crush nonconformity was not new. In 1985, then President Khamene’i denounced laxity in the observance of Islamic dress and demanded that the Public Prosecutor’s office, the Ministry of the Interior, and other relevant officials prosecute immorality, indecency, and acts contrary to public chastity.<sup>388</sup> This was followed by an announcement by the Ministry of the Interior that law enforcement forces would be employed to fight corruption and vice.<sup>389</sup> To remind women of the consequences of not wearing the concealing *chador*, a circular was published saying that women who appeared in public “without wearing a religious veil” would be punished with up to seventy-four lashes.<sup>390</sup> To stop laxity in Islamic dress among government employees, the circular ordered ministries and government departments to execute strictly the orders for observance of Islamic dress.<sup>391</sup> Although the evidence was overwhelming that the regime had long employed force to compel Iranian women to comply with the requirement that they wear *hijab*, or Islamic dress, the Iranian government recently felt compelled to deny that its Islamic dress requirements were

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384. For background on the variety of Iranians’ perspectives regarding the post-revolutionary veiling requirement, see the essays and statements included in *IN THE SHADOW OF ISLAM: THE WOMEN’S MOVEMENT IN IRAN* (Azar Tabari & Nahid Yeganeh eds., 1982) and Anne Betteridge, *To Veil or Not to Veil: A Matter of Protest or Policy*, in *WOMEN AND REVOLUTION IN IRAN* (Guity Nashat ed., 1983).

385. See *Crackdown on Improperly Dressed Women is “Duty”*: Rafsanjani, Agence France Presse, June 22, 1993, available in LEXIS, Nexis Library, ALLWLD File.

386. See *It’s the Whip for Breaking Islamic Dress Code*, Agence France Presse, June 24, 1993, available in LEXIS, Nexis Library, ALLWLD File; *Iran: Victims of Human Rights Violations*, supra note 136, at 7–8.

387. See Chris Hedges, *Mobilizing Against Pop Music and Other Horrors*, N.Y. TIMES, July 21, 1993, at A4.

388. *Iranian President Calls for an End to Recent Demonstrations*, BBC Summary of World Broadcasts, Apr. 25, 1985, available in LEXIS, Nexis Library, BBCSWB file.

389. *Id.*

390. *Id.*

391. *Id.*

being imposed by force on resisting Iranian women. In February 1993, in response to a critical U.N. report on Iran's human rights record, which included negative evaluations of its discriminatory treatment of women,<sup>392</sup> the Iranian government asserted that its dress requirements and personal status laws affecting women were part of religion and, as such, were willingly accepted by Iranians. Iran's response thus posited a uniform Islamic culture:

Considering the fact that the majority of the Iranian people are Muslim, the holy Islamic codes form the basic guidelines for the laws. . . . [Women] freely accept regulations regarding marriage and the limitation of the rights and duties of both men and women, based on such Islamic criteria. . . . The legal philosophy of the observation [sic] of "Hijab" for women and men in an Islamic society is fully credible and within the context of conventional international laws. Therefore, since more than 95 per cent of people in Iran are Muslim and thereby follow the laws prevailing upon [sic] an Islamic society, all follow and support the appropriate laws and regulations on the rights of society. . . . Although some political groups believe that women should observe "Hijab" entirely and have criticized the Government for not responding to this matter, until now there have been no confrontations with females who do not observe the "Hijab" properly.<sup>393</sup>

Several things are noteworthy in this statement, which reveals the regime's uneasiness with international scrutiny of its discriminatory laws and the forcible imposition of its veiling requirements. Faced with charges that criminal sanctions for noncompliance with Islamic dress requirements were violations of international human rights norms, the regime felt obliged to dissimulate, denying its own policies and pretending that Iranians as Muslims were all voluntarily complying with these requirements. The contrast between the regime's domestic policy of aggressive denunciation of women's nonconformity, accompanied by criminal sanctions for violations, and its representation to the United Nations that all Iranian Muslims willingly adhered to the same version of Islamic morality, shows that the regime appreciated that the protracted pattern of women's resistance to its Islamic dress requirements exposed their lack of authority — the kind of authority that genuine cultural norms would naturally possess. Furthermore, despite the fact that the

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392. See *Final Report*, *supra* note 26, at 37–38.

393. U.N. ESCOR, Hum. Rts. Comm., 49th Sess., Agenda Item 12, at 7, 8, U.N. Doc. E/CN.4/1993/41/Add.1 (1993).

dress requirements were theoretically based on Islamic law, as of 1993 the regime did not appear to feel comfortable asserting that the religious derivation of the official requirements for Islamic dress would justify breaching international law. Instead, it tried to present these dress requirements as congruent with international norms. This indicates that, even in the minds of Iran's clerical leaders, there was diminished confidence that appeals to cultural particularism could provide adequate defenses for violations of international law. In an effort to make the dress requirements appear less discriminatory, the regime argued that Islamic dress rules applied to men, as well, even though the record demonstrates that the regime's preoccupation has been with forcing women to wear the *hijab*.<sup>394</sup>

Western cultural relativist and Orientalist perspectives dovetail with the constructs of Islamic culture employed by governments and incline Westerners to delegitimize Muslims' rejection of these constructs when the latter appeal to international human rights norms. The case of "Nada," the fictitious name of an actual Saudi Arabian woman in her twenties who sought political refugee status in Canada in 1991, exemplifies how the plight of the Muslim dissident may be depoliticized in Western eyes. Although Nada articulately condemned Saudi policies depriving women of rights and freedoms, she found it difficult to persuade Canadian officials to take her plight seriously or to convince them that a Saudi woman was entitled to question the official Saudi norms for female conduct.

According to Nada's account, she had been persecuted in Saudi Arabia for refusing to wear the required veil and for protesting against the Kingdom's sexist laws.<sup>395</sup> When Nada went about with her face unveiled (she always concealed her body with a tent-like covering), she was stoned and spat upon, and people hissed and yelled obscenities. She had to navigate the streets carefully to avoid encountering the *mutawwa'in*, the religious police, who, had they caught her, would have beaten her with their bamboo sticks for being immodestly dressed. She was not allowed to drive, to travel without the consent of a male relative, or to study her preferred subject, physical education, and was forced instead to study nursing, a field deemed open to women.<sup>396</sup>

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394. Since the revolution, it has been regarded as "un-Islamic" for men to wear ties or unconventional clothing. Since Iranian men can otherwise dress in Western garb, their freedom to wear what they choose is not substantially curbed. Thus, an Iranian male dressed in an Armani suit is wearing "Islamic dress;" a woman wearing a black *chador* who allows a stray lock of her hair to show, is not.

395. See Julie Wheelwright, *One Giant Step for Women in Search of Asylum*, GUARDIAN, Mar. 22, 1993, at 11.

396. See Jacquie Miller, *A Saudi Arabian Woman, Seeking to Escape her Country's Restrictive Laws, has been Denied Asylum in Canada*, OTTAWA CITIZEN, Sept. 4, 1992, at A1.



After Nada had at last managed to escape to Montreal from Saudi Arabia in the company of a male relative, she claimed refugee status upon her arrival, telling Canadian immigration officials that, if she were forced to return home, she might be arrested and tortured by the Saudi religious police. Far from showing sympathy for her complaint, the Canadian officials merely laughed at her.<sup>397</sup> These Westerners considered the notion that an Arab Muslim woman could legitimately express attitudes that were associated with Western culture as ludicrous — exactly as it was deemed outrageous by defenders of Saudi orthodoxy.

As truculent and aggressive as the Saudi regime has been in its treatment of dissident women domestically,<sup>398</sup> it was embarrassed when Nada made her charges in full view of the Canadian public. By and large, it seemed reluctant to comment, but in one response to this cause célèbre it sought to minimize the perception that nonconforming women were exposed to harsh treatment in Saudi Arabia; a Saudi representative in Ottawa stated blandly that he did not think it was “dangerous” for Nada to live in Saudi Arabia and that not all Saudi women wore veils.<sup>399</sup> In reality, as the spokesperson must have known, not only were women subject to beatings by the *mutawwa'in* for nonconformity with the Saudi version of Islamic morality, but they might also be arrested and tortured as well.<sup>400</sup> Like Iran, Saudi Arabia apparently deemed it damaging to admit that its official Islamic morality was enforced by forceful police measures, including torture.

Under then prevailing Canadian standards, which resembled standards commonly in use elsewhere in the West and which are derived from the U.N. Convention on Refugees,<sup>401</sup> to qualify for asylum, it is necessary to establish a well-founded fear of persecution for reasons of race, religion, nationality, or membership in a particular social group or political opinion.<sup>402</sup> Since persecution for reasons of gender is not included in the

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397. See Wheelwright, *supra* note 395, at 11.

398. See, e.g., the response to the women in the Riyadh driving protest of November, 1990. *Protests won't be tolerated: Naif*, Middle East News Network, Nov. 19, 1990, available in LEXIS, MDEAFR Library, Saudi file; Nazir, *supra* note 381, at 9.

399. *Canada to Consider Asylum for Women Fleeing Discrimination*, GUARDIAN, Feb. 3, 1993, at 8.

400. See SHAME OF THE HOUSE OF SAUD, *supra* note 90, at 80–81.

401. Convention Relating to the Status of Refugees, July 28, 1951, art. 1(A)(2), 189 U.N.T.S. 150, as modified by the Protocol relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267 [hereinafter Protocol]. On the general subject of the problematic nature of the current international requirements for establishing refugee status, which allow officials eager to limit the number of asylum-seekers various routes for denying refugee status, see JAMES HATHAWAY, *THE LAW OF REFUGEE STATUS* (1991).

402. The Protocol defines a refugee as any person who: “owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social

list of categories for which a persecuted individual might claim asylum, Nada could not advance her claim by asserting that she was a victim of gender-based discrimination. Instead, she tried to persuade Canadian officials to see her as a political dissident.<sup>403</sup> She wrote that, for her, being trapped in Saudi Arabia was like death and indicated that she wanted to regain her dignity and personal integrity. However, her belief in gender equality was not deemed by Canadian officials to rank as a "political opinion"<sup>404</sup> that would qualify her for refugee status. The Canadian Immigration and Refugee Board refused to grant Nada asylum, concluding that she should "comply with the laws of general application she criticises" and "show consideration for the feelings of her father," who was opposed to her liberal ideas.<sup>405</sup> To avoid being returned to Saudi Arabia, Nada went into hiding. After receiving the backing of human rights organizations and women's groups, she was finally given permission in February 1993 to remain in Canada on humanitarian grounds.<sup>406</sup> Meanwhile, Bernard Valcourt, the Canadian Minister of Employment and Immigration, had announced that he did not think that Canada should "unilaterally try to impose its values on the rest of the world," and also indicated that he would not recognize gender-based persecution as a basis for asylum.<sup>407</sup> For the Minister of Employment and Immigration, allowing Nada to claim refugee status and the freedoms afforded under Canadian law was seen as the unjustifiable extension of Canadian values to a person properly subject to Saudi laws.<sup>408</sup>

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group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country . . . ." Protocol, *supra* note 401, art. 1, ¶ 2.

403. Her lawyer argued that Nada was persecuted in Saudi Arabia because of her political beliefs, her feminism, and her social group: women. She made a separate claim that Nada's minority religion — presumably *Shi'ism* — also exposed her to discrimination. See Miller, *supra* note 396, at A1.

404. See Jessica Neuwirly, *A Test of Canada's Gender Equality*, CHRISTIAN SCI. MONITOR, Nov. 18, 1992, at 18.

405. See Wheelwright, *supra* note 395, at 11.

406. See Miller, *supra* note 396, at A1.

407. See Judy Steed, *Refugee Board Chief Knows Racism First Hand*, TORONTO STAR, Feb. 28, 1993, at B5.

408. Although the reaction of Canadian officialdom is what one would have expected from persons influenced by Orientalist stereotypes, it would not be at all surprising if these perceptions of the matter had been encouraged by Saudi Arabia's diplomats in Canada. One can also not rule out the possibility that the rejection of Nada's claim was for reasons of expediency — in hopes of avoiding setting a precedent that would encourage the flight of other Muslim women to Canada to claim refugee status, a prospect that was becoming more likely as the strength of Islamic fundamentalism kept growing. See, e.g., Charles Trueheart, *Canada Opens Doors to Refugee Claims Based on Gender*, WASH. POST, Feb. 27, 1993, at A17.

In addition to the sexist bias displayed by the Canadian officials, Orientalist stereotyping played a role in prompting them to dismiss Nada's claim so cavalierly. In this regard, Nada's situation is similar to the plight of Salman Rushdie. In both cases, Westerners have assumed that Islam has extraterritorial reach; as Muslims, both Rushdie and Nada were deemed to remain beholden to Islamic criteria, even when physically present on the territory of Western nations. The Board's ruling reflected the implicit notion that, however out of keeping Islamic norms might be with the freedoms to which Canadian women were accustomed, no valid objections to them could be raised on the part of a Saudi woman.

The rejection of Nada's asylum claim correlates with the way Western cultural relativists posit the nature of the tie between the individual and culture in nonWestern societies and their failure to think through the implications of the advent of the nation State for the rights of the individual. As Rhoda Howard has noted, their expectation is that the nonWestern individual should renounce her human rights for the greater good of the collectivity and that:

This renunciation is costless to her because her identity is merged with that of the group, so that human rights on an individual basis would seem not only irrelevant, but laughable. She is merged with her family and society in an organic oneness that fulfills both her creative and her social needs. And of course, since in this rendering she either does not live in a state or class society or is untouched by the state's or the ruling class' political and economic interests, she is entirely without need for the classic civil and political rights.<sup>409</sup>

In an article offering her own perspective on how she had been treated "as a Muslim and an Arab woman," Nada characterizes her own situation as one of political oppression.<sup>410</sup> She reacts to the sexism and Orientalist stereotypes she encountered in Canada, insisting on the commonality of women's experiences of male oppression. She states that women around the world are suffering, and governments are using all their powers "not to develop but to repress their people."<sup>411</sup> When, she asks, will women be taken seriously? Nada maintains that the Canadian Minister of Employment and Immigration missed the point when he argued that Canada should not intervene and impose its cultural values on Saudi Arabia:

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409. Howard, *Cultural Absolutism*, *supra* note 335, at 332.

410. See *A Serious Step Toward Accepting Female Refugees*, OTTAWA CITIZEN, Mar. 11, 1993, at A13 [hereinafter *A Serious Step*].

411. *Id.*

The discrimination and repression I lived with in Saudi Arabia had political and not cultural roots.

When governments impose a certain set of beliefs on individuals, through propaganda, violence or torture, we are dealing not with culture but rather with political expediency.

The claim that such practices are cultural is dangerous, if not racist.

When a woman walks down the street in Saudi Arabia without a veil and the Mutawwi'in (religious police) flog her, this is not cultural, it's political. Who gave permission to the Mutawwi'in? The government.<sup>412</sup> They fear that women will try to change things, and they'll lose their political power. . . .

The status of women in the Middle East is deteriorating, not because of Islam as some claim, but because of political oppression.

Islam is being manipulated. In the Middle East, as everywhere else, men would do anything to preserve their power and authority.<sup>413</sup>

In Saudi Arabia, the veil is just a form of oppression, a way for men to say they have power over women. . . .

In the Middle East, men have chosen to exploit Islam for their own interests, not out of piety or fear of Allah. But elsewhere men have used other religions or ideologies to achieve personal political gains.

Women are repressed everywhere around the world, no matter what the religions, no matter what the culture.<sup>414</sup>

Having confronted both Saudi and Western constructs of the way Arab Muslim women should behave, Nada sees herself as a woman fighting the same political battle as other women, a battle in which any religion or ideology might be manipulated by men to achieve the goal of subordinating women. Ultimately, she concludes that "women's oppression ha[s] less to do with Islam than with men's power."<sup>415</sup>

412. Claims that the *mutawwa'in* function as agents of the government in their policing of women have been made by others, as well. See, e.g., Caesar, *supra* note 381.

413. In this regard, Nada's perspective resembled that of other Muslim feminists, who are unimpressed by the Islamic rationales exploited for their repression. A prominent example is Fatima Mernissi, a Moroccan feminist, who has written extensively on the plight of the Muslim woman seeking emancipation. In her view, the Islamic tradition, when stripped of the distortions imposed by self-interested male interpreters of the sacred, is itself consonant with feminism, allowing Muslim women "the quest for dignity, democracy, and human rights, for full participation in the political and social affairs of our country." MERNISSI, *supra* note 48, at viii. Mernissi insists that "if women's rights are a problem for some modern Muslim men, it is neither because of the Koran nor the Prophet, nor the Islamic tradition, but simply because those rights conflict with the interests of a male elite." *Id.* at ix.

414. A *Serious Step*, *supra* note 410, at A13.

415. Wheelwright, *supra* note 395, at 11.

Nada also questions the Canadian government's expression of concern for Saudi cultural integrity.<sup>416</sup> That a government would dispose of an asylum claim by a claimant already on its soil in the name of avoiding the damage to the cultural integrity of a foreign country does seem improbable. Why, after all, should one nation State see the culture of another nation State as being affected by its decision?

The attitude of Canadian officialdom on the need to respect Saudi sovereignty and culture may have been influenced by Canada's dealings with the native Indian nations on Canadian territory, which did present issues of respect for cultural differences in relation to Indian sovereignty. Such issues were being raised in contemporaneous lawsuits involving Indians' claims that Indian or part-Indian children should be kept by Indian families and that ones who had been adopted by non-Indian parents living in mainstream Canadian culture should be returned to Indian reservations,<sup>417</sup> as well as in the Thomas case, discussed *infra*. To the extent that Canadian officials perceived Islam as a culture that placed its adherents in a separate community bounded by distinctive values at odds with Canadian rights and freedoms, Nada may have been perceived as falling in the same category as an Indian child who had strayed off her tribal reserve and whose appeal to Canadian rights protections had to be balanced against the claims of the collectivity to which she properly belonged, the latter being conceived of as something like an Indian nation.

The government of Canada is legally bound to respect the cultural differences of its native peoples, even where this entails violations of Canada's own constitutional norms.<sup>418</sup> Canada cannot apply Canadian constitutional rights provisions to Indians in ways that abrogate or derogate from "any aboriginal, treaty, or other rights or freedoms that pertain to aboriginal peoples of Canada."<sup>419</sup> As benign as this notion of respect for cultural difference might seem, Canada's duty to respect Indian culture can entail awkward conflicts when Indians themselves step forward, as some do, to demand the same rights as other Canadian

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416. *A Serious Step*, *supra* note 410, at A13.

417. See, e.g., Adrienne Tanner, *Who Gets Baby David? Two Different Worlds Tugging at Indian Boy*, GAZETTE (Montreal), Aug. 19, 1993, at A1; Wendy Dudley, *Native Bands Recognized as Individual Governments*, CALGARY HERALD, Oct. 2, 1993, at A2; *Minister Promises to Trim Incidents of Removing Children from Families*, VANCOUVER SUN, Dec. 4, 1992, at A7.

418. See Allan McChesney, *Aboriginal Communities, Aboriginal Rights, and the Human Rights System in Canada*, in HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES: A QUEST FOR CONSENSUS, *supra* note 82, at 232.

419. Macklem, *supra* note 348, at 1324.

citizens against the norms of their own culture.<sup>420</sup> Nonetheless, Canada's concern for preserving the cultural integrity of its indigenous Indian peoples and its policy of refraining from applying Canadian constitutional rights norms to members of Indian nations are arguably appropriate because Canada has incurred special responsibilities by encroaching on Indian civilization to the point that the very survival of the latter has been placed in jeopardy. In contrast, whether the restraints on freedom mandated by Saudi Wahhabism will survive in Arabia does not in any way depend on Canadian asylum policies. Moreover, with regard to its duty to respect the culture of Indian nations, Canada is dealing with groups within which all members are more likely to share the same cultural values than are the citizens of any modern nation State, including Saudi Arabia. Therefore, the analogy between Saudi Arabia and an Indian nation is far from perfect. The justifications for according primacy to preserving the collective culture over protecting the rights of the individual are much stronger in the case of Canada's dealings with its Indian nations.

As it happened, an important case that tested how to deal with the clash between collective rights asserted on behalf of an Indian nation and the individual rights asserted by an Indian had been decided by the British Columbian Supreme Court during February 1992, precisely in the period in which the controversy about Nada's asylum claim was growing.<sup>421</sup> In that case, David Thomas, a Coast Salish Indian who lived off the reservation, sued other Salish who had forcibly abducted him to the Salish reservation, where they subjected him against his will for four days to the initiation ceremonies needed to become a spirit dancer. When Thomas sued for assault and battery and false imprisonment, the defendants defended on the grounds that ruling for the plaintiff would deny the collective aboriginal rights of the Salish nation. The Court ruled against the defendants, deciding that:

While the plaintiff may have special rights and status in Canada as an Indian, the "original" rights and freedoms he enjoys can be no

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420. See, e.g., Howard, *Dignity*, *supra* note 82, at 84 and the discussion of *Thomas v. Norris*, *infra* in text accompanying notes 421-23.

As McChesney notes regarding the nonapplication of Canadian rights norms to Indians: "This is problematic from an individual rights perspective, because sometimes Native leaders are thought to carry out discriminatory practises." McChesney, *supra* note 418, at 232.

Such discrimination might place Indian women at a disadvantage. In 1991-92, some Indian women's organizations worried about sexism in the Indian nations, had wanted to secure legal guarantees that would protect the rights and freedoms of individuals in the Indian nations. See Thomas Isaac, *Individual versus Collective Rights: Aboriginal People and the Significance of Thomas v. Norris*, 21 MAN. L. J. 618, 627-28 (1992).

421. See *Thomas v. Norris*, [1992] 2 C.N.L.R. 139 (B.C.S.C.).

less [sic] than those enjoyed by fellow citizens, Indian and non-Indian alike. He lives in a free society and his rights are inviolable. He is free to believe in, and to practise [sic], any religion or tradition, if he chooses to do so. He cannot be coerced or forced to participate in one by any group purporting to exercise its collective rights in doing so. His freedoms and rights are not subject to the collective rights of the aboriginal nation to which he belongs.<sup>422</sup>

The *Thomas* decision stands in marked contrast to the decision in *Nada's* case, where, although the reasons for showing concern for preserving the integrity of the nonCanadian culture involved were much weaker, the immigration authorities originally accorded priority to the claims of the collectivity over the rights of the individual. The Canadian immigration authorities seemed disinclined to conceptualize *Nada* as an individual like *Thomas*, one endowed with the freedom to believe in or practice any religion or tradition of her choice. They were therefore prepared to deport her, even though shipping *Nada* back to Saudi Arabia would have been likely to result in deprivations of rights and freedoms more pervasive and far more protracted than the four days' ordeal suffered by *Thomas*.<sup>423</sup> Orientalist stereotyping and the prevailing pattern of trivializing the plight of Muslim dissidents may have influenced Canadian officials to believe that a Saudi woman's opposition to Islamic rules that would permanently deprive her of rights and freedoms should be accorded less weight than a Salish Indian's objections to being an unwilling participant in a spirit dancing initiation rite.

The controversy over *Nada's* plight continued and prompted a rethinking of Canadian asylum standards. In March 1993, Canada's Immigration and Refugee Board introduced new guidelines to address the plight of women who claimed refugee status on the grounds of gender-based persecution stemming from their failure to obey laws or religious customs that discriminated against women.<sup>424</sup> The guidelines were introduced under the leadership of the new head of the board, Nurjehan

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422. Isaac, *supra* note 420, at 623.

423. Among other things, *Thomas* was denied food and forced to walk naked in a creek, and he was carried by assailants who bit him and dug fingers into his stomach. See Macklem, *supra* note 348, at 1343.

424. Peggy Curran, *Ottawa Eases Way for Women Seeking Refugee Status*, GAZETTE (Montreal), Mar. 10, 1993, at A1. Practices that would be included in the new category of gender-based persecution are: bride-burning in India; genital mutilation of young girls in the Sudan; and the stoning or decapitation of women who commit adultery or fail to obey the dictates of Islamic fundamentalism. *Id.* The guidelines stipulate: "The religious precepts, social traditions or cultural norms which women may be accused of violating can range from choosing their own spouses instead of accepting an arranged marriage to such matters as the wearing of makeup, the visibility or length of hair, or type of clothing a woman chooses to wear." *Id.*

Mawani, a Muslim woman who had grown up in Kenya, where she had experienced both the racism of British colonialism and her brother's transformation during his studies in London into an activist committed to Kenya's struggle for independence.<sup>425</sup> Unlike Valcourt, the Canadian Minister who had acted as though granting Nada's claim was tantamount to imposing Canadian values on Saudi Arabia, Mawani, with her roots in a Muslim community in Africa and with first hand experience of life under British colonialism, rejected the notion that judging Nada's case by the norms of international human rights entailed cultural imperialism. She asserted: "This is not simply a matter of imposing Western standards on other countries. It is a matter of respecting internationally accepted human rights standards."<sup>426</sup>

Nada's assessment, that appeals to religion and culture are merely covers for political oppression and that women around the world are fighting the same battle, coincides with the views articulated by Dorothy Thomas, a representative of Human Rights Watch, after her experience of interacting with women's delegations from around the world during the 1993 Vienna Conference on Human Rights. In response to an interviewer's remark that persons opposing the universality of human rights were claiming that it meant an attack on their cultures and religions, Thomas acknowledged that cultural relativism had been the most contentious issue at the Vienna Conference and stated that culture was being used to justify abuses of human rights and abuses of women's rights in particular.<sup>427</sup> However, according to her, women campaigning for their rights denied that the question of women's rights was a cultural issue:

Women from every single culture and every part of the world are standing up and saying we won't accept cultural justification for abuses against us anymore. We are human, we have a right to have our human rights protected, and the world community must respond to that call and throw out any attempts to justify abuse on the grounds of culture . . . .<sup>428</sup>

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425. See Steed, *supra* note 407, at B5.

426. *Id.* In the wake of the Canadian reforms, there were pressures for reform of U.S. asylum standards, which also did not recognize gender-based persecution as a basis for claiming refugee status. See Deborah Sontag, *Asking for Asylum in U.S., Women Tread New Territory*, N.Y. TIMES, Sept. 27, 1993, at A1.

427. Interview with Dorothy Thomas, *Human Rights Watch, Women Succeed in Pressing for Rights Hearing at Vienna*, CNN television broadcast, June 22, 1993, available in LEXIS, Nexis Library, ALLNWS File.

428. *Id.*



In sum, seen from the ground up, from the perspective of women from all cultures who are being denied internationally guaranteed human rights, the appeals to Orientalist stereotypes of Islamic culture to rationalize deviations from the international norms are not special; they are simply one component of a general pattern of self-serving constructs of culture being exploited by men for their own political advantage. The women's groups were not interested in being drawn into the quarrels about the universality of human rights that had preoccupied the official delegations at the Vienna Conference. Unimpressed and unimpressed by any "clash of civilizations," the groups representing women from around the world had discovered that they shared the common goal of seeing human rights universally implemented and the willingness to work in concert toward the realization of that goal.

#### CONCLUSION

Attempts are being made to convince the world that there exists a distinctive, Islamic "civilizational" approach to human rights questions that differs from the Western approach, so that international human rights standards are inappropriately applied where Islamic culture prevails. It is also argued that human rights have little resonance among Muslims: governments of Muslim countries and Islamic fundamentalists argue that international standards of human rights are Western and in conflict with Islamic culture. In the West, certain scholars also promote such views, perhaps encouraged or confused by Muslim assertions of Islamic particularism or by ingrained Orientalist stereotypes and cultural relativist proclivities. Thus, in Huntington's sweeping generalizations about "Islamic civilization," Islamic values are portrayed as inimical to human rights and democratic freedoms, and attempts to propagate "Western" human rights ideals in "Islamic culture" are dismissed as misguided endeavors, ones necessarily associated with cultural imperialism and doomed in any case to be counterproductive. Meanwhile, governments of Muslim countries make statements and endorse positions that seem to bear out Huntington's thesis. Recently propounded constructs of Islamic human rights, which diverge widely from international standards and effectively curtail or repudiate human rights and democratic freedoms, suggest that Western values, like human rights and democracy, must inevitably clash with Islamic values. Protests by some Muslims over Western calls for the universal application of international human rights also seem to confirm Huntington's claim that promotion of universality only provokes cross-cultural tensions.

However, as this article has attempted to demonstrate, the constructs of Islamic rights in the civil and political sphere, that one finds in

schemes like the Cairo Declaration and the Saudi Basic Law, are designed to shore up the political interests of those promoting them and have only a tenuous connection to Islamic culture. They borrow extensively from Western rights models and mine the Islamic heritage only very selectively — shutting out the enlightened, modern perspectives of Muslims who are supportive of human rights. The features of Islamic human rights schemes sometimes clash with Islamic principles or set forth rules that represent nothing more than the authors' own policy preferences or political agendas. Although they purport to reinstate Islamic doctrine, they are not truly Islamic, either in stating principles that rest on uncontested authority in the Islamic heritage of the past, or in enjoying the general endorsement of Muslims as definitive contemporary formulations of rights principles. In reality, the world's Muslims have never been consulted about what rights they would like to have or about whether they truly prefer to be governed by so called "Islamic" rights norms that fall far below the protections guaranteed to non-Muslims under international law. The failure of governments to resort to the democratic process to test their citizens' real feelings on such matters suggests that they have qualms lest their citizens' freely expressed preferences should demonstrate that the official constructs lack popular support.

Although nongovernmental forces such as Islamic fundamentalist movements oppose international human rights, where Muslims independent of governments have spoken out, it has frequently been to assert — often at enormous personal risk or professional cost — the universality of human rights and to express their aspirations to enjoy the rights established under international law. The vigorous efforts by governments in countries such as Iran and Saudi Arabia to suppress independent human rights advocacy and to silence Muslims who have dared to criticize their official rights policies indicate that they surmise that human rights ideals resonate all too potently among their citizenry and that the Islamic rationales they offer for denying them are not convincing.

In reality, as more skeptical observers often conclude, the invocations of "Islam" by countries such as Iran and Saudi Arabia to justify their opposition to the universality of rights is not an authentic, "civilizational" response to rights issues. Despite Huntington's uncritical assessment to the contrary, the real clash is not so much a clash of Western rights concepts with "Islamic civilization," as a clash between undemocratic governments of some Muslim countries and the Muslims they rule — a conflict between the opponents and proponents of rights and freedom. In this conflict, Huntington and other Western adherents of cultural relativism or Orientalism effectively array themselves on the side of the undemocratic governments, whose retrograde concepts of "Islamic human

rights” they are prepared to accept as authoritative. Meanwhile, Western supporters of universality who take the trouble to inform themselves about the actual reactions of Muslims on the receiving end of governmental rights policies are establishing that, at the grassroots level, they have many Muslim allies.

In these circumstances, one is drawn to the point of view encapsulated in the remarks made by the Dalai Lama after his warm welcome by the NGOs at the Vienna Human Rights Conference. In his speech, this quintessentially Asian religious figure focused on individual human beings, the intended beneficiaries of international human rights, and offered this assessment: “As far as human rights are concerned, whether Easterner, or Westerner, Southerner, or Northerner, white or black or yellow — no matter — all individual human beings have the same rights from birth to death. We are all the same.”<sup>429</sup>

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429. Griffen, *supra* note 329, at A8.