

# Nothing is Written

## The Impact of Modern International Law on the Revivalist/Reformist Debate of the Shari'ah

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### Introduction

The struggle to define Islam's destiny has begun. Islam as a religion is part of more than a billion people's lives in every nation of the world. Islamic history, spanning fourteen centuries, has given the world a multiplicity of cultures, languages, and peoples contributing to every major human endeavor from philosophy to anatomy. However, Islam is undergoing a major revolution in which Muslims must ask themselves what part of their multifaceted history will define the future. One element what makes modern Muslims distinctly Islamic is an adherence to Islamic law (or the Shari'ah).(1)

Islamic law, unlike other legal *modus operandi* (such as the common law or the civil code) is not confined to the present world. Instead, the Shari'ah focuses on how present world actions will affect their people's afterlife. The Prophet's message, the Qur'an, is not only a religious text, but to Muslims, the very Word of God. Once the Word was reveled to humanity, it was difficult for Muslims to ignore both a text that detailed God's expectations and the exemplary life of the Prophet. Muslims, in attempting to emulate the Prophet and continue the legal legacy imparted by the Qur'an however, were thwarted by a directionless approach. Nevertheless, the expanse of Muslim populations reached new heights and the law concomitantly stretched in many directions. As the law was left further to the trust of scholars, division ensued as to what constituted a proper course of conduct, leading to a legal standstill and leaving behind the rationality of everyday people. By the time, the Shari'ah began to ossify; the political leadership began to fade. The task of creating a complete legal legacy and a religious doctrine was difficult, if not impossible, especially in the modern world.

European attempts to extricate the Shari'ah were replaced by a re-emphasis on religious law. As Islamic nation-states began to form, they also carried with them a dormant, yet revered Shari'ah. Today, however, social and political institutions have failed Muslims and many are living in the midst of constant war, and repression while being ignored or despised by the more wealthy and alien West. Muslims, now, as during the life of the Prophet, see religion, as an integral part of their lives. The common, yet inadequate, answer has been to look beyond present failures for a religious solution. For Revivalists (rather than entitling them disingenuously "fundamentalists"), recapturing Islam's past glory requires that followers of the Faith cast away present concerns for a strict adherence to the example set by the life of the Prophet and the Qur'an, i.e., the reinstatement of the Shari'ah. For Reformists, the future offers an opportunity for followers to re-examine the past and bring forth Islam's most innovative ideas as a blueprint for the future. The present malaise of social and political waywardness is a Revivalist justification for Muslims returning to their fundamental roots as the basis for life. In addition, Revivalists narrowly look to Islam's bellicose past as an indication that only purely Islamic solutions will wrest Muslims from their problems and not secular Western solutions.

Challenging the notion that religious solutions imparted by *humans* could ever create a sustaining Islamic society, Reformists see the blind adherence to Shari'ah as the antithesis to progress. Reformists point to examples of where the Qur'an has been taken out of context and how present political regimes that have instituted the Shari'ah have only produced more misery. The Shari'ah stands as a façade to growing unrest. Reformists see the post-Cold War era as an opportunity to reform the Shari'ah so that it can be responsive to the needs of everyday people.

The post-Cold War world has produced what many believe is a stasis in the international regime. Revivalists instead have resorted to a paranoid mentality charging that Muslims should not be engaged in the international arena for to do so would continue the capitulation of Islamic standards to secular Westernized ideas. Reformists counter that such a suspicious mentality should be dismissed in favor of moderation and understanding based on the law created by the equity of nations.

Revivalists, Reformists, and the West alike have noticed the disparity between the Shari'ah and modern international legal standards of women's rights especially under the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and her progeny. Understanding the Reformist arguments for and the Revivalist arguments against the

convention's aim helps illustrate what impact the Reformist/Revivalist debate in the international arena will have on the daily lives of Muslim peoples. The present international legal regime, operating on an egalitarian system among states, offers a moderating reformulation of the Shari'ah by imparting moderate Islamic solutions that also alter the political and social face of Islamic states and helping Muslims and non-Muslims end the mentality of mistrust and ignorance.

### History

The religion of Islam (lit. "surrendering to the will of God") was founded in Mecca, Arabia by Muhammad.(2) At about 610 CE, Muhammad had a vision of the angel Gabriel announcing his role as the Prophet of God.(3) This marked the beginning of his career as messenger (or apostle) (*rasul*), of God. Muhammad, declared successor to the lineage of Prophets, was to receive God's last message to humanity.(4) From this time, at frequent intervals until his death, he received revelations directly from God. Sometimes Muhammad and his followers kept these in memory, and sometimes they were written down. Later, (by the year 650) they were collected and written in the Qur'an, in a form that has endured. Muslims believe the Qur'an is a divine revelation, written in the words of God Himself. By all accounts, Muslims and non-Muslims alike dually appreciate the Qur'an's distinct style: "The style of expression underlying the Qur'an is a curious blend of poetic rhymed prose and a lyrical flow." (5)

According to Muslim tradition, the Qur'an was revealed to Muhammad in separate pieces over some twenty years. On such occasions, Muhammad, it is said, was in a kind of trance or ecstasy, during which the archangel Gabriel brought the revelations to him. On his return to normal consciousness, he recited the words of revelation to those present. There are many traditions about the occasions on which a certain *sura* (chapter) or part of a *sura* was revealed. Thus, the revelation of the Qur'an is connected with events in the life of the Prophet. Even the traditional version of the Qur'an itself classifies the *suras* as Meccan or Medinan. What no perusal of the Qur'an fails to yield is that divine morality is heavily intertwined with legality. Clearly any verse of the Qur'an, no matter its designation, earns an autonomic reverence that borders on idolatry. What remains for the legal mind, is that the Qur'an is distinct among legal and religious texts: joining legality with the infallible word of God could only manufacture weak human emulations aiming to follow the prescribed Law.

Although Muhammad's preaching was religious, there was implicit in it a critique of idolatrous tribes of Mecca. Islam preached an extreme monotheism and drew extreme

hostility from many in the Meccan community. Consequently, the Prophet, in the midst of increasing tensions and a failed assassination attempt, was forced to leave Mecca, and eventually arrived in the distant city of Yathrib whose people invited him to be their leader. Like Yathrib's name change to *Medinat al Nabi* (the City of the Prophet) or Medina in honor of their new ruler and legislator, so too had the Islamic faith changed character from that of a religion to a pronounced religious society. The Prophet Muhammad and his followers left Mecca and reached Medina safely on September 24, 622.(6) This, the celebrated *hijrah*, marks the beginning of the Islamic calendar. Interestingly, the Muslim calendar does not center on the birth of Muhammad or a miraculous event, but rather on the establishment of the *umma* (the nation of believers). For Islam, the establishment of a religion coincided with the creation of a *nationality* and since its national inception, Islam sought to ensure the validity of law within a moral society. During the Prophet Muhammad's tenure in Medina, an informal orthopraxy and a relatively simple belief system were converted into a full-fledged theocracy. The Prophet Muhammad introduced a revolution:

Like other prophets before him, Muhammad's message was both feared and shunned by the powerful and entrenched interests of the economic and political elite, who represented the social and economic inequities of society which the Prophet censured. His teachings included outright condemnation of false contracts, usury, the neglect and exploitation of orphans and widows, the suppression of the rights of the poor, and the neglect of the downtrodden by the rich. Muhammad had come to shake up the status quo in his world, and the radical nature of his message was clear.(7)

Medina was a relatively cosmopolitan society for Arabia: a considerable contingent of immigrant Muslims from Mecca, a vast population of newly converted followers in Medina, and in their midst, a considerable Jewish population who early on saw Muhammad as the promised Messiah. Although, the Jews rejected Muhammad as their religious leader, they accepted him as the ordained political leader of the city. As the Qur'an grew in size and Muhammad's rule strengthened, war broke out when neighboring Mecca saw the Prophet's rising power as a threat. Ever since the *hijrah*, Muhammad had been forming alliances with nomadic tribes and non-aggression pacts like the Treaty Hudaibiya, but, when he was strong enough to offer protection, he made it a condition of alliance that the tribe should become Muslim. Soon, however, Muhammad consolidated his power, recaptured Mecca without bloodshed, and granted universal amnesty in the name of Islam. A few years later, the Prophet

declared the religion “complete” and the Qur’an finished.(8) The Prophet Muhammad died in Medina in 632 CE.(9)

### **The Evolution of the Shari’ah**

In its traditional form, the Shari’ah differs from Western systems of law in two principal respects. In the first place, the scope of the Shari’ah is much wider, since it regulates humanity’s relationship not only with one’s neighbors and with the state, which is the limit of most other legal systems, but also with one’s God and one’s own conscience.(10) Ritual practices, such as the daily prayers, almsgiving, fasting, and pilgrimage, are an integral part of Shari’ah law and usually occupy the first chapters in the legal manuals. The Shari’ah is also concerned as much with ethical standards as with legal rules, indicating not only what man is entitled or bound to do in law, but also what one should, in conscience, to do or refrain from doing. The Shari’ah is not merely a system of law, but a comprehensive code of behavior that embraces both private and public activities.

The second major distinction between the Shari’ah and Western legal systems is the result of the Islamic concept of law, as the expression of the Divine Will. With the death of the Prophet Muhammad in 632, communication of the divine will to man ceased so that the terms of the divine revelation were henceforth fixed and immutable. When, therefore, the process of interpretation and expansion of this source material was held to be complete with the crystallization of the doctrine in the medieval legal manuals, Shari’ah law became a rigid and static system. Unlike secular legal systems that grow out of society and change with the changing circumstances of society, the Shari’ah was imposed upon society from above. In Islamic jurisprudence it is not society that moulds and fashions the law, but the law that precedes and controls society.

For the first Muslim community established under the leadership of the Prophet at Medina after the *hijrah*, the Qur’anic revelations laid down basic standards of conduct. Most of the jurisprudence centered on easily referenced positions within the Qur’an including matters of taxes, property, and inheritance.(11) Nevertheless, the Qur’an is in no sense a comprehensive legal code. No more than 80 verses deal with strictly legal matters; while these verses cover a wide variety of topics and introduce many novel rules, their general effect is simply to modify the existing Arabian customary law in certain important particulars.(12) During his lifetime, the Prophet Muhammad, acting as the supreme judge of the community, resolved legal problems as they arose by interpreting and expanding the general provisions of the Qur’an.

For Muslims, although Muhammad did not ascribe to himself any attributes of the Deity, he was renowned not only as God's messenger of His final message, he also was the vicegerent of God, a father, a husband: a human *par excellence*. The Prophet's exemplary standing in the Muslim cosmological view made the Prophet's practices (*sunna*) ideal and his actions helped to expound the Qur'an beyond mere words. To obey the Prophet Muhammad was by its very definition to obey God.(13)

Since direct revelation from God ceased, a *caliph* (the Prophet's political successor) has no legitimate claim or right of continuing the religious legacy of the Qur'an. Following Muhammad's ministry, a caliph's attempts to maintain order within the religious *state*, revolved around a clumsy legal adherence to religious rules.(14) At the end of the day, this attempt to create a full-fledged legal system proved contrary to Islamic principles. Thus, early religious law was left to the *ad hoc* machinations of the Caliphs.(15) After the death of the Rightly Guided Caliphs, (the Prophet's immediate successors) Qur'anic laws of the Medinian period had become lost with the expanding horizons of activity.

One reaction to the incongruity of religious practice arose in the early 8th century when pious scholars, grouped together in loose, fraternities, formally known as the schools of law, began to debate whether legal practice was properly implementing the religious ethic of Islam. Caliphs, who came to power in the mid-8th century pledging to build a true Islamic state and society, zealously sponsored the jurist (*faqih*) activities within early Schools of Law. Believing that the *qadis* (judges) were failing in their duty to integrate and implement the spirit of Qur'an inspired increased discontent. As the discontent grew, so did the number of schools of law within the major cities throughout the Islamic world. *Imams* (religious leaders), not popular movements, inspired increased legal proliferation. The four major surviving schools, the Shafi'i, Hanafi, Maliki, and Hanbali were subsequently named after the Imams who founded them.

Congruently, decades after the Prophet's death, legal constructions not delegated by the Qur'an were codified by arguably the greatest Islamic legal theorist, Muhammad Ibn Idris al-Shafi'i (d. 820).(16) To the minor detriment of other thinkers, Shafi'i's doctrines have been the principle focus of this study only for purposes of possessing, what many scholars argue, is the mean of Islam's theological and legal underpinnings. Ironically, al-Shafi'i, early on had the support neither of the self-purported rationalists or the strict-constructionist conservatives, but in time, both sides accepted his theological positions. Today much his attribution to the modern systemic has been extinguished by time.(17)

During Islam's rise, a group of rationalists known as the Mu'tazilites, known for their extreme rationalization, argued that belief principles should be grounded in the cogent thoughts of human beings. Believers, guided by a *philosophical* and religious study of the Qur'an were induced to a proper course of action.(18) Soon, however, because their theological stance invited troubling questions about the wisdom of Islamic doctrine the mainstream orthodoxy rejected the Mu'tazilites. The Mu'tazilites wanted to avoid everything that might compromise or encroach upon the oneness of God, denied the doctrine that the Qur'an was uncreated and eternal, because this would mean that something else besides the God of eternity would exist eternally and thus create an eternal and irreconcilable "dualism." Consequently, they asserted that God *created* the Qur'an. Orthodox adherents of Islam, however, rejected this doctrine and consequently began to remove the role of human rationality within the law and the subsequent decline of democratic principles.(19)

Al Shafi'i aimed to eliminate legal and religious schisms by producing a uniform theory of how to derive authorized principles from the prolixity of sacred advice.(20) Al Shafi'i's fundamental teaching was that true knowledge of the Shari'ah could be attained through a derivation of divine revelation found either in the Qur'an and/or in the divinely inspired traditions through authenticated reports of the Prophet Muhammad (*hadith*). The corpus of the legal authority, i.e., Qur'an and compilations of the *hadith* were known collectively as *Ilm*.(21) Human reason played only a limited role by being confined to the process of analogical deduction, or *qiyas*--problems not specifically answered by the divine revelation were to be solved by applying the principles upon which the Qur'an had regulated closely parallel cases. (22) As a result, even if there was human inclusion in the production of legal theory, it was limited not only to the literate, but to also a cadre of religious scholars. A full-fledged legislative role soon evaporated in the elite halls of eclectic scholarship.

Al Shafi'i's insistence upon the importance of the *sunna* as a source of law produced a great activity in the collection and classification of *hadith*, particularly among his own supporters, who formed the Shafi'i School, and the followers of Ahmad ibn Hanbal (d. 855) who formed the Hanbali School.(23) Muslim scholarship maintained that the classical compilations of *hadith*--especially those of Bukhari (d. 870) and Muslim (d. 875)(24) --constituted an authentic record of the Prophet's precedents. Empiricists today, however, argue that a considerable portion of the *sunna* is fictitiously ascribed to the Prophet by jurists during the formulation of the various schools in order to give their own legal doctrine greater validity.(25) Steady reformation of the law came in the form of scholars and jurists imposing

binding advisory opinions upon legal practices in the light of Qur'anic principles and then on this basis, adopt, modify, or reject the practice as part of their grand scheme of the law.

Of the early Schools of Law, the two most important were the Malikis in Medina and the Hanafis in Kufa, named after the Principled Thinkers, Malik ibn Anas and Abu Hanifah, respectively. Inevitably the Maliki and Hanafi doctrines, as they were being recorded in the first compendiums of law, differed considerably from each other, not only because free juristic speculation was bound to produce varying results but also because the thought of the scholars was conditioned by their different social environments.(26) A deep conflict of juristic principle emerged within the schools between those who maintained that outside the terms of the Qur'an scholars were free to use their reason (*ra'y*) to ascertain the law and those who insisted that the only valid source of law outside the Qur'an lay in the precedents set by the Prophet himself.(27)

Al Shafi'i's thesis formed the basis of the classical theory of the science of jurisprudence (*usul al-fiqh*), which was crystallized in the early 10th century.(28) Juristic "effort" to comprehend the terms of the Shari'ah is known as *ijtihad*, and legal theory first defines the course that *ijtihad* must follow. A jurist (who was both legislator and judge) had to have the regulation of law divinely correct. The question constantly posed to an early Shari'ah jurist was, "[H]ow can one know that a particular decision in a world of confusion is right, is what God wills?"(29) To seek the answer to a legal problem, the jurist must first consult the Qur'an and the *sunna*. Failing any specific solution in this divine revelation he must then cautiously employ a learned analogy (*qiyas*) or certain subsidiary principles of reasoning. The legal theory then evaluates the results of *ijtihad* based on the criterion of *ijma'* (consensus). As an attempt to define the law, the *ijtihad* of individual scholars could result only in a tentative conclusion termed *zann* ("conjecture"), but where a conclusion became the subject of *unanimous* agreement by the qualified scholars, it became a certain (*yaqin*) and infallible expression of God's law.(30)

Two major effects flowed from the classical doctrine of *ijma'*. First, it served as a permissive principle to admit varying opinions as equal attempts to define the Shari'ah. Second, it operated as a restrictive principle to ratify the status quo. However, once the *ijma'* had cast an umbrella authority not only over those points that were the subject of a consensus but also over existing variant opinions, propounding any other views contradicting the infallible *ijma'* was tantamount to heresy.(31) Hallaq states the essence behind this intensity to devise a proper ruling:



When the texts explicitly state the ruling of a case, then there should be no room for doubt whether or not it is God's intention. However, when the texts provide only indications and signs, the jurist then must attempt to find out the divine intention, although *there is no guarantee that the ruling he reaches will be identical with what is lodged in God's mind.*(32) (emphasis added)

*Ijma'* set the final seal of rigidity upon the doctrine, and from the 10th century onward independent juristic speculation ceased. In the Arabic expression, "the door of *ijtihad* was closed," and henceforth jurists were *muqallids*, or *imitators*, bound by the doctrine of *taqlid* ("clothing with authority" *i.e.*, unquestioned acceptance) to follow the doctrine as it was recorded in the authoritative legal manuals (*ilm*). The process of developing further jurisprudential inroads ended.(33)

By the 13th century, Islamic empires were in disarray.(34) Soon the corpus of law stilled. The explication of law only continued under some Muslim societies. By the era of the modern state and the rise of European powers, much time intervened since the full-fledged explication of law. Some schools of law like the Maliki School survived in Northern Africa by disposing their formal strict constructive approach. However, for example such reforms did not affect the popular, but rigid Hanbali School of Law.

[The Maliki School] took considerable notice of conditions prevailing in fact, not by changing the ideal doctrine of the law in any respect, but by recognizing that actual conditions did not allow the strict theory to be translated into practice, and that it was better to control the practice as much as possible than to abandon it completely.(35)

Even though the Schools of Law recognized their own canons of works and attributed much of their learning to their Imams, reformists were always present through the last stages of legal development in the fourteenth century. Thus, an informal survey of Islamic law concludes that legitimating human actors trying to discern God's reason or "finding" Divine morality led to a legal exhaustion which still affects the present state of law and society.

### **The Revivalist Argument for Reinstitution of Islamic Law**

In the modern era, the Islamic world faces serious economic and social problems. Many attribute the turmoil to the lax, non-existent application or a rigid application of the Shari'ah. Today, the economic and social stagnation of the Islamic world has attracted the attention of a powerful revivalist movement aimed at reinstating what is deemed Islamic "fundamentals." The Cold War subdued fanatical interests by forcing Islamic states to pick their side.

Interestingly, many Islamic states ideologically *split* between the two great political and social forces. For some, it promoted a measured adherence to western liberal notions of rights and democracy. After the Cold War, a thorough self-evaluation confirmed Revivalist suspicions that all things are not well within Islam: the Armenian-Azerbaijani conflict, the Israeli-Palestinian conflict involving Syria, Lebanon, and Israel, constant (nuclear) rumblings between India and Pakistan, conflict between Chechnya/Dagestan and Russia, civil war in Algeria, Muslim-Christian violence in Nigeria and Sudan, Sunni-Shi'a conflicts in Pakistan, Bosnia, Kosovo and the Serbia, Osama bin Ladin's terrorist bombings, Iraqi, Turkish and Iranian persecution of the Kurds, violence in the Xinjiang province of China all are illustrative of Islam's many problems. In essence, "Islamic history is largely the history of a people at war." (36) According to the most zealous Revivalist, even the existence of the mighty petrodollar in some Muslim states constitutes a capitulation by influential states to continue the trend of Islamic subservience to Western nations in the most essential matters. Revivalists constantly remind the rest of the world that the present state of turmoil in the Middle East, intensified by the Gulf War, is yet another example of Western nations (especially the United States) imposing their religious and strategic interests in the land of Islam.

Indeed, what Arabs find at home is economic lethargy and social stagnation. The energy, the daring entrepreneurial experience that suddenly appeared in the Pacific societies remains long absent in the Middle East. The Arab world seems weighed down by the pessimism over its future, if not outright despair. Unfortunately, the rest of the world seems indifferent to this condition. The headlines in the international press that deal with the Middle East point instead to the violence and terrorism that are made out to be that region's product. (37)

Muslim-Christian superpower rivalries, leading to the infamous Crusades, have matured into present stereotypes of Islam and Muslims. As William Muir pointed out, in his position at the University of Edinburgh in 1897, Islam is "the only undisguised and formidable antagonist of Christianity." He continues by arguing that Muslim's [pre-Crusades] view of Europe, although more sedately, resonates a similar measure of antagonism:

As regards the people of the northern quadrant. [T]he warm humor is lacking among them; their bodies are large, their natures gross, their manners harsh, their understanding dull, and their tongues heavy. [T]heir religious beliefs lack solidity, and this is because of the nature of cold and the lack of warmth. The farther they are to the north the more stupid, gross, and brutish they are. These qualities increase in them as they go further northward. (38)

Anti-Muslim sentiment continued with the rise and fall of European empires that carved much of the Islamic world among territories that knew nothing of previous political boundaries nor enmities that presently exist. In spite of the desire to reduce ingrained religious hostility, it is clear that militant Islam has persuaded Muslims that basic “Western” notions of democracy and liberalism are alien to their *faith*. Instead, many of these militants have instead advocated an exclusionary legal doctrine to further separate themselves from the West.

According to scholars, Revivalist misgivings about the West will likely continue. In *The Clash of Civilizations and the Remaking of the World Order*, Harvard Professor Samuel Huntington argues that the aberration of the Cold War has left the world in disarray. The shift to a multipolar world has only increased tensions between the West and her sister civilizations. Huntington continues by arguing that of the seven major civilizations, the Islamic and Western civilizations are being propelled toward a major global war.(39) For Huntington and others well immersed in the Cold War experience, many believe that Islam remains the last great *ideological* contestant to the West and liberal democracy. Contiguously, the West has looked at Islam with skepticism, fear, and misunderstanding. For most non-Muslims, Islam is an indistinct religion of white tunics, much kneeling, and the fanatic violence of bloodthirsty savages. Americans, especially, have little understanding for the challenge that Muslims face where fledgling democracies are thwarted by military subversion and where unlike the rest of the globe, the last decade of economic expansion has passed by many Muslim states. Illustrating fully this mistrust, Americans ask themselves questions such as, “[W]hy are we so hated there?” or “[T]hose people must be crazy!” and finally, “[W]hat are they fighting over now?” (40) At the same time, many Islamic countries view the United States and Europe as having greater power than they over their daily lives.(41)

Hence, the growing quantum of cultural and economic problems has only helped inflame Islamic revivalist movement. Present social and ideological problems signal an urgent need by Muslims, whether Reformist or Revivalist, to set their own house in order. John L. Esposito, Professor of Religion and International Affairs and Director of the Center for Muslim-Christian Understanding at Georgetown, points out that early Islamic revivalists, like the early Muslims of the formative era of the Schools of Law, aimed at improving social conditions:

This manifestation of Islam in politics comes from a broader phenomenon: in many parts of the Muslim world, there has been a religious resurgence, both in private and in public life. People are more concerned about Islamic dress, values, and fasting during Ramadan. But what

has caught our attention is the extent to which Islam has exploded, as it were, in terms of political and social activism.(42)

Islam has always sought a level of legitimacy between rulers and the ruled, but Revivalists state further that little attention has been paid to the role of God. In response to worldwide exclusion, economic and social hardships, Revivalism has been the driving force behind present attempts to re-institute the Shari'ah.(43) However, no matter the countervailing position, removing Revivalist complaints will not drive out a need to understand them. In general, the Revivalist considers solely political solutions as inept and rather replaces them with Islamic solutions. Empirically however, most political solutions are unable to remedy the municipal legal stranglehold among Revivalists against the more typical wealthy and moderate ruling class. Many Revivalists argue that as Muslim nation-states emerge in the modern era, governments should have no role to play in the development of the judiciary. Revivalists argue that judicial matters should be left solely to religion without formal training or certification except in the Shari'ah. Calls for a renewed Islamic legal system has gained resonance in many states where Western and Soviet legal systems, prompted by widespread revivalism, are in the process of being dissolved in favor of a complete reversion to a disseminated Islamic legal system, (Note Appendix I).(44) Revivalists, in an attempt to recapture the Islamic *umma* of the Prophet Muhammad, believe that the only true revitalization of Islamic world will be through the reinstatement of the (antiquated) Shari'ah:

For the vast majority of Muslims, the resurgence of Islam is a reassertion of cultural identity, formal religious observance, family values, and morality. The establishment of an Islamic society is seen as requiring a personal and social transformation that is a prerequisite for true Islamic government. Effective change is to come from below through a gradual social transformation brought about by implementation of Islamic law.

On the other hand, a significant minority views the societies and governments in Muslim countries as hopelessly corrupt. They believe that un-Islamic societies and their leaders are no better than infidels and that the religious establishment has been co-opted by the government. Such critics believe that both established political and religious elites must be overthrown and a new Islamically committed leadership chosen and Islamic law imposed. These radical revolutionary groups, though relatively small in membership, have proved effective in political agitation, disruption, and assassination.(45)

Revivalists see the present discontent as a choice: Muslims will either fully engage in their societies or fully dismiss their religious roots. For Revivalists, the Shari'ah is a proven system,

ready with an implicit religious legitimacy and authority to re-establish the link enjoined by the Prophet and his earliest followers.

The immediate response to religious revivalism has been the *further* exclusion of Muslims from the West. Even assuming that present Revivalist movements are fragmented and their motives disparate, empirically, as the revivalist movement grows, it has increased cultural tensions. Most notably Western Europe has instituted a precarious counter response by establishing social barriers and an uncompromising political backlash against Muslim immigrants and enabling right-wing parties to gain ascendancy.(46)

### **The Reformist Response**

Despite the rhetoric, Revivalists and Reformists seek the same ends, however, few Reformists have found the means to alter the prevalent mode of moderate thinking under such economic and social duress.

The intellectuals, the liberal-minded [of] the Islamic world are so apologetic and defensive; they concede to the fundamentalists more than what the fundamentalists are asking for themselves. Most of all, they concede to the fundamentalists the legitimacy and the right and the ability to define the issues and to define the space of discourse. That is something that we have to question among ourselves. We are not simply dealing with someone who holds a counterview, but we are dealing with our own internal defeat, which gives that counterview more weight than it deserves. One of the issues that one finds in discussing questions of cultural specificity or relativism and religious fundamentalism is the fear that by engaging in a cultural or religious discourse you are conceding the platform, you are conceding the terms of reference to the other side.(47)

Islamic nations are under enormous pressure to restore Islamically based governments while at the same time empower their populations economically. In the end, the great challenge for Islam will be to emerge in the twenty-first century as it did one thousand years ago: a respected center of a socially advanced culture and a center of international trade. The dilemma posed before the Reformists is to either “adopt the culture of the West, and lose one’s culture and thus one’s self, or renounce the culture of the West and lose one’s role in the modern world.”(48) Such a dilemma is an oversimplification because implicitly any significant changes to the Islamic world must be religiously valid. As Abdullahi Ahmed An-Na’im, renowned Islamic scholar, points out as a recurrent theme, “If we are to understand anything at all about what has happened in the past and is happening today in the Muslim world, we

must appreciate the universality and centrality of religion as a factor in the lives of the Muslim peoples.”(49)

In response to the outright cynicism of liberal Muslims who argue for a complete recession of the Shari’ah, there exists a broad historical basis for legal change in Islam. Early Islam displayed a great deal of legal ingenuity and freedom as expressed in the formulation of the *ijtihad*.(50) With the end of rationalism, Qur’anic injunctions were interpreted in a strict fashion. However, insisting on the same rubric of thought (as the Revivalists argue) maintained centuries ago without an evolving sense of how to reflect the modern world defeats the purposes of the Qur’an. Ultimately, the message of Islam when relegated to a particular place and time becomes useless. Although religious law has played a powerful role in the affairs of humanity, in the case of Islam, it has been used to maintain the status quo. Stated simply, “The literal interpretation of the Shari’ah over the past few centuries which continues almost unabated in present Muslim countries, has done the greatest harm to Muslims.”(51)

The Shari’ah was more than quasi-injunctions; rather it was sum of philosophies, now dulled by a lack of purposeful engagement of Muslim scholars and too revered or ingrained to be altered by progressive Western legal intuitions. *Reformists* see Islam as a progressive faith, not one so entrenched in antiquated laws that it fails to convene with modern expectations. In recalling the discussion about the *usul al fiqh’s* development, the Reformist, for future discussion on the Shari’ah, must conclude the essential fact that Islamic law is fabricated, and not God willed:

Islamic countries have a deeply rooted tradition in religious and secular law as the co-existing force. Although the force itself is rooted in the region’s most sacred texts, the Qur’an, the majority of Islamic law is man-made not God made. Further, it is adaptable and changing.(52)

Accepting the major premise that the Shari’ah *is* a malleable legal system, there needs to be a proper course for change. One major criticism of the Shari’ah and attempts at its re-institution lies with the misuse and inability for everyday Muslims to question or revise the *usul al fiqh*. Reformists in proposing (what Revivalists term radical) innovative changes to the Shari’ah must balance the apparent difficulty of rejecting earlier held beliefs presently functioning in downtrodden societies clamoring for change. Noticeably absent from the debate is the role of democracy. Most Muslims remain silenced by a general lack of education combined with a religious reverence for the Shari’ah even when such religious precepts seem

at odds with the very nature of the Qur'an and Islam. Stated another way, when most Muslim populations know of only one book and believe that book to be the Word of God, it is difficult to ignore municipal calls for religious idealism in the midst of social turmoil. By summarily dismissing a domestic impetus to alter the law, Muslims should see the present system of international law as a venue to articulate changes to municipal governance. Instead of posing as the West's antithesis, Islamic states have an opportunity of using international law to dissolve archaic paradigms in order to promote a new religious setting so that Muslims can begin to implement legal innovations within municipal Islamic law in order to ameliorate present social and economic turmoil.

### **Islam and International Law**

The Islamic debate between Reformist and Revivalist now focuses on the emerging field of international law as a supranational legal corpus not entirely restrained by individualistic municipal laws. International law stands to witness what may be a valuable time: forcing a reformation of the Shari'ah by engaging Islamically sovereign nations with distinct, yet intertwined, approaches to implement broad-based changes in the municipal Shari'ah. However, such a revitalization and reformation of the Shari'ah must not come at the expense of divorcing Islam from Islamic states, but a revival of legal principles *en masse*. At the onset, there is two very separate hurdles that the Reformist must accept: first, the Shari'ah is ill suited to the modern world and will continue to doom Islamic states without fundamental reforms and second, that the Reformist argument for integration of international law into Islam has only *begun* and requires further solidity. We have already seen the failings of the present system; we now turn our attention to the development of an Islamic international law.

Accepting the premise that the Shari'ah has little chance of reformation through purely popular movements when deprived of full-fledged democracy requires Reformists to seek an alternative venue of jurisprudence.<sup>(53)</sup> of well-developed institutions national and cultural sovereignty combined with a coefficient for creating broad-based legal principles, the international legal arena becomes a vital forum for the Shari'ah's enunciation. Recall that present attempts to reform the Shari'ah look much like the initial development of the Divine Law: formulated during the genesis of the Schools of Law that were culturally varied and geographically distant. An international Islamic legal discourse would flow through similar channels of international dealings and by transcending national boundaries reach the same revolutionary result as the scholastic stage of the Shari'ah's development.

There are two conceptualizations of Islamic international law (*as siyar*); one paradigm deals with the time *before* the modern nation state and the other *following* the emergence of the nation state.(54) Despite secular and theoretical notions, the standard view of Islamic international law is at first glance, contradictory to present international legal norms. For some, there simply *is no* basis for Islamic international law. Hasan Moinuddin, conducting a study of international Islamic organizations, states that Islamic international law is no more than a common juridical background. His connotation suggests a minimalist international view further consigning the Shari'ah as simply an independent common language of Islamic nations.(55) This premise ignores not only the evolution of Islam since its imperial period, but goes so far as to assume that the fictional *dar al islam* (world of belief) is truly segregated from the rest of the world. The scholarly conclusion that there is no comprehensive Islamic international law, however, is not a historical accident, but rather the inability to accommodate (by Muslims and Westerners alike) an evolving Shari'ah within the constructs of present international law.(56)

Early Islamic internationalism tied itself to a religious distinction rather than defined political distinctions. Early Muslim thinkers and present Revivalists divide the world between distinct polarities: one of belief (*dar al islam*) the world of peace and (*dar al harb*) the world at war, delineating between believers and non-believers.(57) However, the forced dichotomy between religious believers and non-believers has been completely altered by historical and religious reality. To break this *religious* impasse, Reformists and everyday Muslims need only articulate a Qur'anic axiom: there is no textual premise for the *dar al harb/dar al Islam* divide.(58) Theoretically, this bifurcation of belief began because of religious hostilities surrounding the Prophetic mission in Medina. Recall our terse examination of history: during Islam's early years in Medina, the religion was under the onslaught of rival faiths requiring a reluctant militancy to repel adversarial forces. However, before this bellicose era, --during Islam's rise in Mecca, Muslims were commanded to engage peaceable relations and focus especially on their personal religious development. When the Prophet Muhammad died in 632, the collective religio-political *umma* for which the Revivalist clamors *died* with the Prophet. Even under the Rightly Guided Caliphs, the political dimensions of the *umma* changed. The subsequent Umayyad and Abbasid dynasties were actual contenders, not allies. In essence, the People of the Faith could no more reconcile Islam with themselves let alone act as a unified force against other faiths. Once Muslims accept that they are unable to incorporate the whole of humanity into Islam (which is already evident in the Qur'an) then



the *dar al harb/dar al islam* distinction makes little sense.(59) Consequently, the “idyllic” Islam of Medina no longer functions in the modern world. Unfortunately, the hostile divide between Islam and the West remains to be reversed.

The modern international paradigm is defined by *historical* hostilities between Western nations and Islamic states. Because Islamic legal scholars believe that the true definition of internationalism is confined to the operation of war and peace, Islamic international law still operates on a *jus ad bellum* standard.(60) Subsequently, Islamic international law is ill defined and ill suited for the modern world. “The *siyar* (pre-nation-state paradigm) cannot be said to be compatible with the modern international jurisprudence with respect to treaty principles, customary law, precedent or even the teachings of eminent publicists.”(61) Specifically, to alter the *jus ad bellum* approach, Reformists must tackle the issue of *jihad* (the Muslim concept of war). Today, *jihad* is a readily abused term in the West, and like the more amorphous terms in the Qur’an, Muslim fanatics also abuse it.(62) Safely stated a valid *jihad* is a historical and religious rarity. Instead, *jihad* became a catchall to describe any kind of controversy between Muslims and non-Muslims. Recall, from history, that the notion of *jihad* in the Meccan *suras* of the Qur’an first existed as a “spiritual exertion” while the Medinan *suras* point to a literal “war” against Islam’s enemies.(63)

After the European development of the modern nation-state, the rest of the world began to establish the first notions of international law. To fully comprehend the Islamic mindset of exclusion from international law requires only a perusal of political history: the European genesis of creating standards among imperial powers, deliberately excluded their Muslim counterparts. Typically, the expansion of the modern international regime has been at the expense of declining Muslim powers. In the past, European expansion to the East came with mixed interludes with the exotic Muslim world and the colonial period that followed helped to harbor major mistrust between Muslims and the West.

What remains of the residual effects of colonialism is Islam’s increased assertive role in the world and attempts to foist a competing ideology. When a Muslim writes of international law, they write in *response* to established Western norms and where the West is usually disinterested to the Islamic response, Muslims take a defensive or an almost regressive stance: an “apologetic preoccupation” rather than a proactive stance.(64) David Westbrook, one of few scholars who have put forth a study of the *siyar*, concludes that in international law, “Islam needs to account for, respond to, explain, or make useless. For the Islamic scholar, public international law is foreign. As a consequence, the authority of public international law

over Muslims, its legal quality, is inherently problematic.”(65) The Islamic road to internationalism is distinct from the (Western) historical rhetoric because of its emergence as a *political and economic* response to the West, only intensified by present failures of Islamic social institutions.

As a matter of establishing political statehood, the Islamic *umma* was doomed to division after the Prophet’s death. Since the time of the Prophet, the *umma* presupposed a monist view of the world, but history points to a diametrical reality. “From the tenth century onwards, the fission of the Islamic ‘nation’ continued as an increasing number of secular rulers competed for power. By 1258, the Mongols sacked Baghdad and brought an end the last of Abbasid caliphate, thereby shattering the last vestiges of the unitary (Sunni) Islamic theocracy.”(66) Formally, conceptual Muslim nation states stabilized with the complete abolition of the Ottoman caliphate in the early 20<sup>th</sup> century and the establishment of secular Turkey.(67)

However, the more powerful impetus for broader Islamic engagement has been the social and political stagnation in the post-Cold War era. Muslims living in the post-colonial arena are either too young, not particularly homogeneous with regard to lingual differences, incorporated in various states, and/or lacked any strong motive to engage in nationalism. The political, social, and economic stagnation of the present Islamic world has forced many Muslims to gather under a disparate Revivalist movement in order to *create* a national and/or cultural identity.(68) However, the post-Cold War world offers Islamic nations a new level of external security coalesced with a greater assertion of Islamic identity.

Accepting the premise that Islam did not grow under the traditional history of modern nation states, combined with the fact that the “fundamental” law is man-made and is alterable, the formal, legal, and political recognition of varied interests, state divisions may do much to persuasively develop a consistent and moderate view of the Shari’ah. Islam as a civilization flourished at its highest levels of engagement with other civilizations. Nation states once formalized by distinct borders, help segregate a people’s function. Unlike past empires there is no need to harmonize (or brutalize) particular popular distinctions. As states function in the modern international framework, they supply independent consent based upon their own interpretation of religious law. Today, Islam dominates more than fifty national populations.(69) The infancy of modern international law further invites Islamic states to adhere to universal principles by producing forum among equal states to push the Shari’ah into the modern era, but by its own terms and by its own momentum to reach a new progressive framework. Consequently, the division of the *umma* among state equals and fuller

integration of Islamic states in the international legal arena has already pushed the progressive development of municipal Islamic law.

Although scholars such as Westbrook point to a lack of established international law, they fail to recognize that Islamic law is inherently *international*.<sup>(70)</sup> The Shari'ah occupies a superlative point in the legal arena of many nations (see Appendix I) such that it functions much like a modern international framework. Within this framework, one finds resonant concepts of *jus cogens* and preemptory norms found within the Qur'an and the Shari'ah. At present, the core international principles and legal groundwork has been laid:

Muslim states have accommodated themselves to the prevailing international norms while stopping short of assimilating them into Islamic political or legal theory. In other words, although they have committed themselves to the principles of international law, there has yet to occur a theoretical incorporation of these principles into a coherent and modern elaboration of Islamic international law. <sup>(71)</sup>

A growing international Islamic awareness to international norms has already begun. The formulation of the Organization of the Islamic Conference (OIC) and the concomitant formulation of the *Islamic International Law Commission* has drawn some attention. These homegrown solutions have not produced the results anticipated. As Appendix II demonstrates, the distinction between the *dar al harb* and *dar al islam* remains as long as political leaders insist on a rubric of cooperation rather than full integration in the international community.

The Organization of Islamic Conference charter does concede two important international distinctions. First, the State parties to the Charter recognize the legitimacy of international boundaries, implicitly recognizing the concept of the modern nation state which helps further erode the *dar al islam/dar al harb* distinction. Second, despite the trivialities deduced from respective municipal laws, the Charter's close resemblance to *Western* notions of the nation-state are another indication that Islamic willingness and capability, *arguendo*, to participate in the wider scope of international dealings. Despite present definitional shortcomings, it is difficult to call Islamic law anything *but* an international law. After appreciating the theoretical notions of the *siyar*, those things Islamic and those things international have much in common. One litmus test of international legal compatibility is found in Article 38 of the Statute of the International Court of Justice (ICJ).

ICJ Article 38 argues that the sources of law for international legal considerations shall apply in the following situations:

International conventions whether general or particular, establishing rules expressly recognized by the contesting states;

International custom, as evidence of a general practice accepted as law;

The general principles of law recognized by civilized nations;

Subject to provisions of Article 59, judicial provisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law. (72)

One constant in the international legal process is the notion of *pacta sunt servanda* (the obligation that the treaty's obligations be fulfilled). Concomitantly, a Muslim is obliged to uphold contracts in both letter and spirit as detailed in the Qur'an itself. "The principle of *pacta sunt servanda* is recognized by all Muslim jurist-theologians." (73) The Shari'ah maintains that full faith be placed in the observance of all *bona fide* contracts. Following in the Christian conviction of Grotius, Islamic international law draws its authority from God. Thus, religious compliance with a treaty eclipses temporary "state" arrangements of mutual convenience. Consequently, there is a stronger moral force for self-proclaimed Islamic states to adhere to treaty obligations even if the underlying substantive law proves less than celestial. More important, proof of *bona fide* and purely Islamic efforts to uphold an international treaty is found in the standard set forth in the Treaty of Hudaibiya. (74) The treaty between the Prophet Muhammad and the idolatrous tribes of Mecca was aimed at achieving a truce between the warring sides. Even after repeated breaches by the Meccans, Muhammad's entry by force into Mecca came without incident. Instead, the Prophet Muhammad granted general amnesty to all of the non-believers. The treaty offers two important points of consideration: the treaty, at that time, was in fact an international treaty of peace between Muslims and some of the more aggressive tribes of Arabia, and although a military reprisal was justified under the terms set forth in the treaty, an extreme counter-response never materialized. (75)

The Shari'ah has always accepted the powerful role of custom in framing legal standards. Custom, like treaty obligations is central to the practice of international law. One need only examine the Islamic reliance on the custom of the Prophet (*hadith*) to realize like the Islamic faith, withholding custom would impair the entire structure of thought. Like the role of custom in international law, the *hadith* helps fill gaps in international law. Considering both the letter and the policy provisions articulated in Article 38 of the ICJ statute, and their importance in expounding the Qur'an, custom and peremptory norms of nation function in

much the same way as articulated in the Vienna Convention on Treaties, (Art. 53 & 64). Even the distinction between *jus cogens* as a more historical and “natural” law and customary law as a common conventional law, finds a mirror image in the history replicated in the *hadith* and the conventions endorsed by the Qur’an under the Shari’ah.

General principles among civilized nations of the world in Art. 38(c) resonates within the Shari’ah.(76) Recognition of basic principles has always empowered states to clarify and distinguish the law and legal systems in order to arrive at a fair global synthesis. Although some Muslims note the word *civilized* is laden with European presumption, the present world community accepts the (nebulous) Islamic legal tradition and ergo collective Islamic responses. However, states being vigilant in demanding a clarification to what the general Islamic view should be will only help to define what such Islamic legal views are for themselves and others. Because of a desire for Islamically *initiated* and *adjudicated* results, Reformist attempts to change municipal legal systems require a responsive Muslim articulation in the international arena to push the Islamic corpus forward.

Khadduri, as one of the few experts on Islamic international law, demonstrates how international paradigms based on consensus is much like the *ijma’* become binding. This binding force will help to articulate principles in municipal Islamic law.(77) A new era of international law will follow when the theology in place finally rejects the *dar al islam/dar al harb* distinction and accepts the empirical positions of the Reformists. For Islamic international law to continue, it must defeat the Revivalist attempts to masquerade social reforms that are inconsistent with religious Islam. Reforms of the municipal Shari’ah require that Islamic international law must take aim at certain considerations. First, international decrees must consider all relevant socioeconomic conditions before the application of any binding general principles. Any articulation of the Qur’an must stand firm without being compromised by either *hadith* or an obscure lingual context requiring that principles be drawn only from purely Qur’anic textual references. Second, the application of religious law must look at the flow of the Qur’an in its entirety. Although at first glance this contention seems identical to the previous principle, it actually forces scholars to square the flowing of concepts of the entire legal corpus, not just the rigidity of choice phrases. Third, a new international paradigm must be expansionary and malleable in order to bring forth new legal doctrines reflecting future exigencies. Although the process set forth, is admittedly vague, there is a fourth addition of a further catalyst: full-fledged institution of democracy. By accepting the accurate premise that the Shari’ah is almost entirely artificial, a complete

revolution must consider popular demands and assent to all-encompassing restrictions. As a result, Reformists must place a premium in pushing for educational reform so that legitimate democracy can take over the process. Until there is a point of self-sufficient democracy, there is an important role for international law to play in forcing an evolution of the Shari'ah.

### **Women, Islam and International Law**

International law has played a significant role in altering the Islamic municipal landscape in the area of women's rights. A major point of contention between Islamic custom and modern international expectations is the role of women's rights in Islam.<sup>(78)</sup> Women's rights have constantly attracted the attention of the West, Revivalists, and Reformers alike. Modern international laws have illustrated disparities between the domestic rights of women in Islamic states and the tenancy for Islamic states to mask not only their international, but their domestic failings in upholding women's rights. In particular, as the processional of the treaties has continued, albeit a noticeable waxing and waning of municipal support, Islamic states have altered many of their municipal laws in response to international obligation paralleled by domestic Islamic support. In particular, several international legal obligations, instigated by treaty bodies have not only produced ephemeral results, but also a *permanent* domestic impact. Illustrating such progress has been the growth of women's political rights under the United Nations Declaration on Women and other freedoms established in the Convention for the Elimination of all forms of Discrimination Against Women (CEDAW). However, Islamic states have signaled their unwillingness to compromise religious belief for an adherence to international norms articulated in the Platform for Action at the 1995 Beijing Conference on Women.

Despite Revivalist calls to ignore "Western cultural rights," Islamic nations have not only begun to respond to the influences of international treaties, but have begun, in earnest, to create an evolved set of Islamic principles in the form of the *Cairo Declaration of Human Rights in Islam*. However, Reformists, rightly, have not been conciliating by anything less than complete international integration. Worse, Revivalist forces threaten to remove progresses in women's rights in the name of upholding religion. Thus, the international community has an obligation to force Islamic nations to conform not only with internationally acceptable norms, but allow the proliferation of norms within the Shari'ah to permeate in their municipal legal arenas. Acknowledging that Shari'ah development has been tainted by the ossification of time combined with a strenuous Revivalists push to impose more strict rules, the debate is

discomfiting at best. Nevertheless, failing to implement established standards of international law will only encourage a continuation of the abuses of an antiquated Shari'ah.

At present, there can be little rationale for the deplorable treatment of women under the Shari'ah. The irony is that Islam in the 7th century was the most progressive religion in the Near East, which included provisions including the banning female infanticide, granting women the right to inherent land, to divorce and to maintain their own pay/dowries, and the slow end to polygamy in the Arabian Peninsula.

[The Qur'an] replaced, modified, or supplemented earlier tribal laws. Practices such as female infanticide, exploitation of the poor, usury, murder, false contracts, fornication, adultery, and theft were condemned. In other cases, Arab customs were gradually replaced by Islamic standards. Much of the Qur'an's reforms consist of regulations or moral guidance that limit or redefine rather than prohibit or replace existing practices. Slavery and women's status are two striking examples.(79)

Yet, much of the progressive spirit of Islam died with the Prophet's death in 632. Instead many jurists, despite full knowledge that the Qur'an had allotted women rights and responsibilities to bringing them on par with men, suddenly stopped. For the vast majority of religious scholars, where the Qur'an gave no more, they gave no further. However, Reformists correctly point to the Qur'an's implicit gradualism as a justification for the historical liberalization of women in early Islamic Arabia, but acts as a template for present reforms:

As the name suggests, gradualism is a method of interpretation that proceeds by degrees, over time, advancing slowly but regularly. Gradualism is ideally suited to Islam because, while the Qur'an does enumerate certain legal standards, it consists primarily of very broad and general moral directives. (80)

Renewed attention from the international community and subsequent refusal by Reformists and Western nations to accept blanket reservations to treaty obligations because of an adherence to the nebulous Shari'ah has forced a moderating Islamic response. Although the responsibility lies with Reformists *within* Islamic nations to present a domestic counter argument, there comes the concomitant responsibility of Western and international legal scholars to accept the permanency of Islam within states and reject, for the time being, a complete dissolution of the Shari'ah because removing Islam from people's lives will only intensify Islamic revivalism. Forcing moderation to their point that it no longer conforms with culture and society will only invite a greater and repressive counterrevolution as in the case of Iran in 1970's.(81)

Revivalists, who have invoked notions of Islamic exclusivity, have been inflamed by increased world attention and scrutiny. Present Revivalist movements have pushed the need to adhere to the Shari'ah in both public and private matters. For many Muslims the way out of one's own economic struggle is to make God present and dismiss all other earthly concerns. The reality, however, is that ruling political groups have used the banner of Islam to mask their own desire to retain some semblance of power. Ann Mayer, in her thorough study of human rights and Islam, believes the Shari'ah masks underlying women's rights concerns, warning that continued delay in the adherence of international standards will invite increased hostility between Islamic states and international sensibilities.(82) Instead, as she adeptly points out, the machination of Islamic law is more the long arm of politics rather than the true disposition of Islam.

Although Revivalists have used the Shari'ah as a tactical weapon against women's rights, Reformists have also used it against *itself* through progressive religious reinterpretations. Deeply entrenched abuses against women such as the nefarious practice of genital mutilation, long asserted as an *Islamic* principle, has *never* had the implicit or explicit support of the Shari'ah or the Qur'an. Like genital mutilation, older institutional laws have been defeated by an *expressio unius est exclusio alterius* test using the Qur'an as the emphatic document of choice to the exclusion of the *sunna*. This test allows policy makers to affect legal changes until purely domestic Islamic movements can assure change. As the law stands now, failures of municipal law have come under the scrutiny of increased international pressure.

One particular area where a religious pretext was brought to the forefront of international attention was the 1967 United Nations Declaration on Women followed by the more popular Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). The Women's Convention has been described as the "definitive international legal instrument requiring respect for the observance of the human rights of women."(83) The Convention's ambitious agenda gained widespread popularity: "The Convention provides the basis for realizing equality between women and men through ensuring women's equal access to, and equal opportunities in, political and public life -including the right to vote and to stand for election- as well as education, health and employment. States parties agree to take all appropriate measures, including legislation and temporary special measures, so that women can enjoy all their human rights and fundamental freedoms."(84) Adopted in 1979 and entered into force in 1981, the Convention seeks to eradicate the harassment against women and to promote equality among the sexes in their social and legal rights. Unlike past



considerations about the legal status of international agreements, Muslim nations paid very close attention to the development of women's rights because of the Convention's widespread popularity in all parts of Islamic society. In particular, certain Islamic reservations to the treaty obligations garnered a full-fledged rebuke by the international community. In particular, Article XVI of the Treaty enjoining states to end prejudicial and customary forms of discrimination drew initial Islamic hostility.<sup>(85)</sup>

The Islamic response to international calls for the withdrawal of such overbroad reservations was mixed. Despite a wide disparity of religious opinion, some Islamic countries (Egypt, Tunisia, and Morocco) registered reservations to Article XVI of the Women's Convention predicated on the Shari'ah.<sup>(86)</sup> These Islamic states' thinly veiled attempts to block criticism for their own internal practices by demonstrating an adherence to the Shari'ah came under intense scrutiny when such overbroad reservations contradicted the object and purpose of the Convention. The Vienna Convention defines a reservation as "a unilateral statement, however phrased or named, made by a State, when signing [or] ratifying . . . a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State."<sup>(87)</sup> Under Article 19(a) and (b) of the Vienna Convention, a country can make reservations to a treaty at the time of signing or ratifying it so long as the treaty does not prohibit formulation of reservations or limit types of reservations that may be made. Mere compliance with these two subsections, however, does not automatically render a reservation valid. Article 19(c) of the Vienna Convention prohibits reservations incompatible with a treaty's object and purpose.<sup>(88)</sup>

The international response to the Islamic states was especially harsh. For the first time, a community of nations summarily refused to accept the reservations as a matter of internal social concerns to Islamic states.<sup>(89)</sup> For the Reformist and most of the global community, it was difficult to accept a reservation that devised by an obscure standard as excuse to block international law. Today, with the fifty-year anniversary of the Universal Declaration of Human Rights passed and the end of the Cold War, simple acquiescence to reservations is no longer an acceptable practice. The international debate requires that Islamic states provide a clear and legitimate response to the challenges posed by the Convention.

Although the reservations increased global hostility to the Shari'ah reservations, such worldwide hostility further incensed Revivalists. Luckily, a multitude of nations quickly attacked the Revivalist concerns about the "unfair intrusiveness" of the international community arguing that upholding international standards was not a question of cultural

relativism: international agreements aim for higher standards.(90) Despite the criticism of Islamic reservations, the debate did emphasize the growing international status of Islamic states. The Convention's deliberations took place among equals in a general debate about tradition and theology. The hope remains that increased implementation of parallel laws will follow on a municipal level once scholars empirically and theologically dismiss weak and overbroad Islamic legal excuses.

Because of early intransigence, at the outset only five Islamic states had adopted the treaty by 1981.(91) By 1994, twelve Islamic states had ratified the Treaty. Importantly, no Islamic nations filed a reservation to Article VII and Article VIII dealing with political equality among the sexes.(92) Even more remarkable, Tunisia, Pakistan, and Bangladesh have implemented laws following in the Convention's path.

Buoyed by treaty and popular support, Tunisia began to implement a series of women's rights modifications cleverly using previously dismissed religious doctrine to justify municipal legal changes. Due to a strong, but uncertain Reformist movement, Tunisia produced redefined Qur'anic principles in order to adhere to broader Convention provisions. By 1981, Tunisia gave divorced women the right to a level of maintenance to which she was accustomed while married, a debt that continues until the husband's death or until the former wife's economic condition improves.(93) In 1992, stepping from the harsh and intransigent policy that women could not divorce men despite abuse or deprivation, Tunisia modified divorce so that it cannot be pronounced until after a family magistrate has attempted to reconcile the spouses. If there are minor children, at least three reconciliation hearings must be held, no less than 30 days apart between each. During divorce proceedings, family magistrates are empowered to issue orders, where urgent, regarding spousal residences, alimony, custody of children and visitation rights.(94) In addition, Tunisia has already legalized abortion for years and provides free abortions when performed in public facilities and uncovered by medical insurance.(95) Tunisia's re-interpretation of Islamic law according to the Hanafi view, permitted abortions before the soul was formed deemed to be up to four months after conception.(96) By 1993, the Tunisian government vowed to endow women with new rights, including the suppression of domestic violence.(97)

Some states, taking their cue from the Treaty language, not only controverted basic Shari'ah, but also directly controverted a well-established *hadith*. The Convention furthers women's political rights in Art VII & VIII by laying down provisions ensuring that women not only have the right to vote, but also the right to stand for election in all publicly elected bodies

and to hold public office in any area concerned with the public and political life of the country. In addition, the right to represent government in the international sphere is specifically provided for in Article VIII.(98) Although no Islamic states entered a reservation, there is an obvious *conflict* between Shari'ah and treaty provisions.

The main source of prejudice in Shari'ah against women entering the political sphere, emanates from a *hadith* recorded by Abu Bakr (the Prophet's closest friend) who claims when the Prophet Muhammad was told of a woman leader being appointed in Persia, he commented, "A nation will never prosper if it is led by a woman." (99) Islamic states summarily rejected the inequitable interpretation of the Shari'ah, by essentially abolishing the *hadith*! Specially, Egypt, Bangladesh, and Pakistan have extended specific guarantees the franchise to women in politics, with Bangladesh having women retain a certain number of seats in its parliament. In particular, Bangladesh and Pakistan have had women at the highest levels of political leadership.(100)

The Convention allowed policymakers and international legal scholars to bring attention to women's rights concerns. In response to pressure from the West and the half-century celebration of the Universal Declaration of Human Rights, the nations of the Organization of the Islamic Conference produced the Cairo Declaration on Human Rights of Islam in 1990 proving to be an unequivocal of example of Islamic international collectivism since the time of the Prophet. The Declaration's merits, nevertheless, has been criticized as shortsighted. However, the Declaration represents two significant representations of Islamic internationalism. First, the entire Organization of Islamic Conference formulated the Declaration (Appendix I). Second, it is a uniquely *Islamic* response.

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).(101)

An evaluation of the following articles has been deeply criticized as a failure to uphold women's rights including the robust criticism of the eminent scholar Ann Elizabeth Mayer.(102) However the criticism, the Declarations hybridization of Islamic and international standards should be seen a positive indication of Islamic attempts to define their own legal legacy.

At the outset of the Declaration, international standards are invoked: "[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."(103) In addition, one

of the Declaration's critics, Mayer concedes the significance of the Islamic declaration as a blending of Islamic and modern international principle representing a departure from the canons of the Shari'ah:

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 (emphasis added). (104)

Specifically, Article 1 of the Declaration states "human beings" (the neutral term of *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." (105) Although there is great ambiguity in the phraseology used, the article represents a forthright effort to stay the course of treating women as equals with expansionary language allowing for state departures to institute their more progressive policies than those outlined in the declaration.

Article 2 states "[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." (106) The main criticism is the fact that the word "entitled" is not a guarantee and the words "such as" may act as either limitation or an expansionary clause. In addition, 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. Although the Declaration does not guarantee the freedom to marry the partner of one's choice, there is a presumptive permission within the Qur'an.(107) The Declaration regrettably accommodates yet another artificial ban labeled "Islamic." Specifically, Muslim women may not marry outside the faith, as well as the rule that Muslim men may marry only Muslims, Christians, and Jews. As with many Islamic human rights provisions, the discriminatory potential of Article 5 will only be apparent to scholars familiar enough with the principles of Islamic law to appreciate the significance of the failure to incorporate a right to marry regardless of religion. (108)

However Article 6 further worries Reformists, "a woman has rights to enjoy as well as *duties to perform*," which implies that notions of equality have been quietly subverted since the document states few further rights.(109) 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.”(110)

The same article also requires women to care for the family and for the husband. A male’s duty is to provide maintenance, (*nafaqa*).<sup>(111)</sup> The husband’s duty to support the wife correlates with the husband’s legal prerogative vis-à-vis the wife, including his right to demand obedience.<sup>(112)</sup> In imposing one-sided support obligations, the Cairo Declaration effectively calls for the perpetuation of the traditional pattern of inequality in the husband-wife relationship in which the husband is the master and provider.<sup>(113)</sup> Article 12 also is worrisome since it further restricts women’s rights. It begins: “Every man shall have the right, within the framework of the Shari’ah, to free movement...”<sup>(114)</sup> This reference to the Shari’ah as a framework opens the door to further restrictions on women’s movements. Such restrictions viewed in light of strict Islamic law, effectively states that wives cannot leave home without their husbands’ permission and women cannot travel unless chaperoned by male relatives.

Finally, Article 13 promises that work is “a right guaranteed by the State and Society for each person able to work.”<sup>(115)</sup> The article also provides that men and women are entitled to fair wages “without discrimination.” The Article makes an important departure from previous allocations that women simply take a subservient role. Instead, Article 13, in its broadest reading may allow ways to undercut readings set forth in Article 6. Women as Mayer points out, under the Cairo Declaration and even to a point under CEDAW, do not enjoy complete equality. There is an implicit *Islamic* duty under current international treaties and conventions recognized in religion and in law to protect women from persecution.<sup>(116)</sup> Furthermore, the international legal regime has an additional duty to ensure that Islamic states utilize the Shari’ah as means to effectively allow women the same rights entrusted to men.

Although feminists and scholars point out that the Declaration does not go far enough, it does represent a step in the right direction. The language in the Declaration is thought to be the basic rights enjoined by men and women in Muslim states that allows for a more expansionary reading. For the first time, Islamic states were forced to articulate a response because of increasing demands that Islam evolve. The Declaration forced states to consider their blanket and overbroad reservations to CEDAW, and account for individual practices formulated on the basis for Islamic consensus. Clearly, the declaration’s approval does not

excuse Islamic nations from pursuing the continued promotion of equality. Therein lies the admonition that Reformists and other nations must help preserve Islamic principle without compromising on international norms. In fact, Islamic states, taking their cue from the Qur'anic example, are encouraged to be more religiously expansive.

Women have fundamental freedoms within Islam, and all the goals of equality espoused by the West can be achieved by applying the notion of gradualism inherent in the religion. Thus, the best way to solve this problem may not lie in dictating from the outside what standards must be met by the culture, but rather in encouraging a liberalization of the interpretation of the religion by Islamic scholars themselves.(117)

The Islamic engagement produced three important distinctions: first, a common responsiveness must be generated when Islamic states begin to consider entry into major treaties covenants involving human rights or other *erga omnes* standards. Second, use of broad reservations using the Shari'ah should be avoided altogether. Third, by providing for a general awareness and a predisposition not to block international treaties, it allows Muslim states to create domestic laws which execute treaty obligations in a free and concerted way.

A distinction from this line of thinking came in the form of the 1995 Beijing Conference on Women forcing Islamic states to assert Islamic law, however this situation signaled a validation of personal religious practice. The United Nations' Fourth World Conference on Women in Beijing was one of the latest attempts to determine whether there are internationally accepted women's rights.(118) The Conference ended with all attending states approving the adoption of the Conference's final document, the Platform for Action and Beijing Declaration.(119) Although the objectives stated in the Platform are not binding legal obligations of the participating states, the Platform serves as a guideline for the development of women's human rights, especially focusing on the economic and social empowerment of women.(120)

It identified twelve critical areas of concern for women: (1) women and poverty; (2) education and training of women; (3) women and health; (4) violence against women; (5) women and armed conflict; (6) women and the economy; (7) women in power and decision-making; (8) institutional mechanisms for the advancement of women; (9) the human rights of women; (10) women and the media; (11) women and the environment; and (12) issues surrounding the female child. Thus, the topics that the Platform covered were varied, including educational, health, and economic issues.(121)

However, the fight fought in Beijing was concerning Art. 96's maintenance of women's reproductive freedoms. Again, like previous conventions and platforms, Islamic states united in their opposition to the Platform for Action and filed a purely religious reservation.(122) "Because of their importance and intransigence, objections based in religious beliefs pose a substantial hurdle to the ultimate development of a proposed rule into international law."(123) Although the Shari'ah of the 10<sup>th</sup> century, however, made no rule condemning early abortions, many Islamic states objected to the matter on religious grounds as an act of murder.(124) Many national delegations, save the United States, did not voice dissent to the religious contention. The Islamic front was more a testament to religious faith as evidenced by concurring reservations put forth by the Vatican and heavily populated Catholic states.

In fact, there is scant proof that the majority of Islamic states will alter their view of abortion as a purely religious principle:

In the religious world of the three great monotheistic religions of Judaism, Christianity, and Islam that dominate much of the world today, unrestricted abortion could never amount to an international human right. To assert such a thing implies a universalism of abortion as a necessary good that does not, and has never, existed, other than in the feminist imagination.(125)

The Islamic dissent in Beijing represents a reminder to the international community: the religion of the Prophet Muhammad will remain. Islam will not turn itself to the West's religious faith constituting: "a harsh mixture of classicism, impiety, and science washed down with a heavy dose of the belief that 'free will' equals intelligence and religious belief indicates stupidity and superstition."(126) Islamic states are distinctive actors but they remain *religious* states perhaps more theocratic than democratic where the Word of God has retained its vitality. Within the borders of these states, Muslims may live their lives faithfully, as Islam embraces every aspect of their daily being. It is this aspect of Islam--its all-pervasiveness--that alarms some in the West. The international community and especially Western actors must accept the vitality of religion as a greater supranational force.

## **Conclusion**

Today's Muslims, living in the shadow of the Prophet, are the heirs to an astounding religious and political legacy. Many live in a difficult time where their social and political institutions offer little or no true Islamic identity and little in terms of material wealth. In fact,

the disillusionment of many Muslims has led to the growth of a burgeoning Revivalist movement.

The Revivalists are attempting to invoke a religious solution fourteen centuries in the past to solve once again the problems of everyday people. The problem is that process and the antiquity of such a solution may do more harm than good. By instituting Islamic law, it seeks to legitimate failed human attempts at discerning God's reason and apply it to everyday life. In the past, struggle to discover Divine morality led to a premature legal exhaustion that still affects the present state of law.

On the opposite side of the religious spectrum, Reformists identifying Islam as a progressive faith attempt to meet modern expectations of faith by sidestepping the poor, uneducated, and tyrannical and seeking international aid to remedy ossified Islamic law. As Reformists seek to demolish the old law by restoring a principled international discussion aimed at a sweeping revision to earlier held religious concepts, the Revivalist beckons the illiterate to follow their path to salvation. However, the age of disconcerted empires has ended and, like it or not, Islamic nation-states have evolved in a state of flux and historical animosity.

The post-Cold War world will be defined by how civilizations interact, but more important, the stasis following decades of intense hostility have given Islamic states renewed identity as equal members in the family of nations. This time, according to the Reformist, is a unique opportunity to end mistrust among religions and put forth substantive solutions to common concerns. For the zealot Revivalist, this is a time of anticipation and fear. The Cold War's end has left Islamic states susceptible to the machinations of the international legal system.

International law stands to witness what may be a defining moment in Islamic international law at stake is municipal change and the path is treacherous yet promising. The Convention on the Elimination of All Forms of Discrimination Against Women and her progeny has given a prime example of how the current flux of Islamic law depends on the vigilance of the present international system. With regard to Islamic law, nothing is written, and truly, nothing is written unless they write it.

## Notes

1. The Koran, (N.J. Dawood trans., Penguin Books 8<sup>th</sup> ed. 1995) (1956) [hereinafter the Koran]
2. See generally, Karen, Armstrong, Muhammad: A Biography of the Prophet (1993) (An in-depth biography of the Prophet which neither includes effusive renderings of the Prophet common to most Muslim writers or banality of most Western biographers)



3. *Chronological Table of the Main Events in the Life of Muhammad, in The Koran*, 7 (N.J. Dawood trans., Penguin Books 8<sup>th</sup> ed. 1995) (1956) [hereinafter *The Koran*]
4. “We have revealed Our will to you, as We revealed it to Noah and the prophets who came after him; as We revealed it to Abraham, Ishmael, Isaac, Jacob and the Tribes, to Jesus, Job, Jonah, Aaron and Solomon, and to David to whom We gave the Psalms. Of some apostles We have already told you, but there are others of whom We have not yet spoken.” *The Koran* 4:163ff
5. Caesar Farah, *E. Islam: Beliefs and Observances* 82 (5th ed. 1994)
6. N.J. Dawood *supra* note 1
7. Leila P. Sayeh and Adriaen M. Morse, Jr. *Islam and the Treatment of Women: An Incomplete Understanding of Gradualism*, 30 *Tex. Int'l L.J.* 311 at 315 (1995)
8. “This day I have perfected your religion for you and completed My favor to you. I have chosen Islam to be your faith.” *The Koran* 5:3 *supra* note 1
9. *See* Dawood *supra* note 1 at 8
10. David A. Westbrook, *Islamic International Law and Public International Law: Separate Expressions of World Order* 33 *Va. J. Int'l L.* 819 at 825 (1993)
11. *Id.* at 827
12. Wael Hallaq, *A History of Islamic Legal Theories* 11 (1999)
13. *Cf. Id.* at 3 There are no said agreement on the number of verses that constitute a legal principle or rule. Hallaq argues that there are over 100 such versus, some scholars put the number at nearly 500.
14. Hamid Enayat, *Modern Islamic Political Thought* 13 (1988).
15. *See* Hallaq *supra* note 12 at 7
16. *See* Hallaq *supra* note 12 at 18
17. *Id.*
18. *Id.*
19. *See* Hallaq *supra* note 12 at 32
20. *See* Hallaq *supra* note 12 at 21-35
21. *See* Hallaq *supra* note 12 at 22
22. *See* Westbrook *supra* note 10 at 826
23. *See* Hallaq *supra* note 12 at 32
24. *Id.*
25. Javaid Saeed, *Islam, and Modernization: A Comparative Analysis of Pakistan, Egypt, and Turkey*, 69 (1994)
26. “The major schools of law are located in different parts of the world: the Hanafi in the Arab Middle East and South Asia; the Maliki in North, Central, and West Africa; the Shafi’i in East Africa, Southern Arabia, and Southern Asia; and the Hanbali in Saudi Arabia.” Sayeh and Morse, Jr. *supra* note 7 at 316
27. *See* Hallaq *supra* note 12 at 32
28. Frank E. Vogel, *Islamic Law and Legal System: Studies of Saudi Arabia* 75-76 (1993) (unpublished Ph.D. dissertation, Harvard University) *See also* Norman Calder, (*Ikhtilaf and Ijma in Shafi’i Risala*) *Studies in Early Muslim Jurisprudence* *Studia Islamica* 58 (1984)

29. Westbrook *supra* note 10 at 827
30. See Hallaq *supra* note 12 at 38
31. See Hallaq *supra* note 12 at 28
32. Id.
33. See Ali Asghar, *The Rights of Women in Islam* 49 (1996)
34. Some examples of this of the disparate rule of the Empire after the Rightly Guided Caliphate (633-661 CE), included the Umayyad Dynasty (661-750 CE), 'Abbasid Empire (747- 945) the Caliphate of Cordoba (Spain) (661-1030 CE), the Ghaznavids in Central Asia, the Seljuqs of Turkey, the Faṭimids of North Africa, the Buṣyids (successors to the Abbasids), An-Naṣir Caliphate (1180-1225) See Joseph Schacht *infra* at note 35
35. Joseph Schacht. *Law and Justice* The Cambridge Encyclopaedia of Islam, vol. II, pt. VIII/chpt. 4, 539ff.
36. Westbrook *supra* note 10 at 855, See generally Perwez Ahmad, *Asbab-e Zawal-e Ummat (Causes of the Downfall of the Community of Muslim Peoples)*, (4<sup>th</sup> ed. 1966) (1957)
37. Viorst, Milton, *In the Shadow of the Prophet: The Struggle for the Soul of Islam* at 6 (1998)
38. Bernard Lewis, *The Muslim Discovery of Europe* 139 (1982),
39. See John Knox, *The Case of the Missing Paradigm*, 32 Tex. Int'l L.J. 355 at 356 (1997) (reviewing Samuel Huntington, *The Clash of Civilizations and the Remaking of the World Order* (1996) See also Ahmad S. Moussalli, *Introduction to Islamic Fundamentalism: Realities Ideologies, and International Politics*, in *Islamic Fundamentalism: Myths and Realities* (Ahmad S. Moussalli, ed., 1998)
40. Hilton, Seth, *American Conceptions of the Middle East*, 1 U.C. Davis J. Int'l L. & Pol'y 355 (1995)
41. See John L. Esposito, *Political Islam and U.S. Foreign Policy*, 20-SPG Fletcher F. World Aff. 119 (1996)
42. Id.
43. John Esposito, *Islamic Fundamentalism*, Encyclopædia Britannica Online <http://members.eb.com/bol/topic?eu=125388&sctn=1>
44. See e.g. re-institution of Islamic law from the former common law system in Pakistan. Evan Gottesman, *The Reemergence of the Qisas and the Diyat in Pakistan*, 23 Colum. Hum. Rts. L. Rev. 433 (1996)
45. Esposito *supra* note 41 at 33
46. See John Esposito, *The Islamic Threat: Myth or Reality?* 175 (1992)
47. Abdullahi An-Na'im, *Remarks of Abdullahi An-Na'im* 44 Am. U. L. Rev. 1384 (1995)
48. Abdulhamid A. Abusulyman, *The Islamic Theory of International Relations: New Directions for Islamic Methodology and Thought* 79 (1987)
49. Abdullahi An-Na'im, *Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law (Contemporary Issues in the Middle East)* 3 (1996)
50. See e.g. Sayeh and Morse, Jr. *supra* note 7
51. Saeed *supra* note 25 at 57
52. See T. S. Twibell, *Implementation of the United Nations Conventions on Contracts for the Sale of International Goods under the Shari'ah (Islamic Law): Will Article 78 of the CISG be Enforced When the Forum is an Islamic State?* 9 Int'l Legal Persp. 25 at 88 (1997)
53. See Ann Elizabeth Mayer, *Islam, and the State: Religious Law and Legal Pluralism* 12 Cardozo L. Rev. 1015 at 1035 (1991)

54. See Karima Bennoune, Note, *As-Salamu 'Alakum? Humanitarian Law in Islamic Jurisprudence* 15 Mich. J. Int'l L. 605 at 612 (1994)
55. See Frank E. Vogel, Detlev Vagts 83 Am. J. Int'l L. 227 (1988) (reviewing Hasan Moinuddin The Charter of the Islamic Conference and the Legal Framework of Economic Cooperation Among its Member States (1987))
56. See Westbrook *supra* note 10 at 831-832
57. See Westbrook *supra* note 10 at 828
58. See Hallaq *supra* note 12 at 236
59. See Hallaq *supra* note 12 at 237-238
60. See Ann E. Mayer, War and Peace in the Islamic Tradition of International Law, in Just War and Jihad, at 197 (1991).
61. Christopher A. Ford, *Siyar-ization and its Discontents: International Law and Islam's Constitutional Crisis* 30 Tex. Int'l L.J. 499 at 500 (1995)
62. See Karima Bennoune, *As-Salamu 'Alakum? Humanitarian Law in Islamic Jurisprudence* 15 Mich. J. Int'l L. 605, at 616 (1994)
63. See Esposito *supra* note 46 at 33
64. See Westbrook *supra* note 10 at 833 See generally Ervin, I.J. Rosenthal, Islam, and the Modern National State (1965)
65. Westbrook *supra* note 10 at 834
66. See Ford *supra* note 61 at 506
67. See Mayer, *supra* note 53 at 1020
68. "The idea of an Islamicized nationalism was, thus, wholly new: It has only been in modern times, especially under the pressure of modern material civilization and culture, that the observance of law has been attached to people in relation to the territory they live in rather than in relation to the group they belong to." Ford *supra* note 61 at 510
69. See The Central Intelligence Agency, The World Factbook (1999) <http://www.cia.gov/cia/publications/factbook/>
70. See discussion in *supra* note 26, See also William Samuel Dickson Cravens, *The Future of Islamic Legal Arguments in International Boundary Disputes Between Islamic States*. 55 Wash. & Lee L. Rev. 529 (1998)
71. Sohail H. Hashmi, *The Power of Religion in International Society and its Islamic Malcontents* 20-SPG Fletcher F. World Aff. 18 (1996)
72. Art. 38, *Statute of the International Court of Justice*, 59 Stat.1031, T.S. No 993
73. Majid Khadduri, War and Peace In the Law of Islam, 204 (1979).
74. See *Id.* at 49
75. See Ford *supra* note 61 at 519
76. See The Central Intelligence Agency, *supra* note 69
77. See Majid Khadduri, *Islam and the Modern Law of Nations*, 50 Am J. Int'l L. 358 (1956)
78. For purposes of space, I have neglected other areas of international trade law and Islamic states. However, a new an evolving area of Islamic responses to international law may be found in contract

formation. See Twibell *supra* note at 52 See also Paul E. Pompeo, *East Meets West: A Comparison of Government Contract Dispute Resolution in the Common Law and Islamic Countries*. 14 Loy L.A. Int'l & Comp. L.J. 815 (1992)

79. John L. Esposito, *Islam: the Straight Path* 79 (1991)

80. Sayeh and Morse, Jr. *supra* note 7 at 318

81. See generally, Kristein E. Wolff, *New New Orientalism: Political Islam and Social Movement Theory*, in *Islamic Fundamentalism: Myths and Realities* 43 (Ahmad S. Moussalli, (ed., 1998)

82. See generally, Ann Elizabeth Mayer, *Universal Versus Islamic Human Rights: A Clash of Cultures or a Clash With a Construct?* 15 Mich. J. Int'l L. 327 at 328 (1994)

83. Rebecca Cook, *Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women*, 30 VA.J. Int'l. L. 643 (1990).

84. G.A. Res. 2263, U.N.GAOR, 22d Sess., U.N. Doc. A/6880 (1967), reprinted in 1 United Nations, *Human Rights: A Compilation of International Instruments* 145 (1993) [hereinafter CEDAW]

85. *Id.* Art XVI

86. See Bharathi Anandhi Venkatraman, *Islamic States and the United Nations Convention on the Elimination of All Forms of Discrimination: Are the Shari'a and the Convention Compatible?* 44 Am. U. L. Rev. 1949 at 1960 (1995)

87. *Id.* at 1960

88. Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331 at 333-336 [hereinafter Vienna Convention].

89. See generally, Venkatraman at *supra* note 86

90. *Id.*

91. *Id.*

92. See generally, Cook at *supra* note 83

93. See Personal Status Code of Egypt n 127 (1976) *construed in* Michele Brandt and Jeffrey Kaplan, *The Tension Between Women's Rights and Religious Rights: Reservations to CEDAW, by Egypt, Bangladesh and Tunisia* 12 J.L. & Religion 105 (1995-1996)

94. See Amending Certain Articles of the Personal Status Code, Article 67 Act No 93-74) *construed in* *Id.*

95. See CEDAW, *Consideration of Reports Submitted by States Parties Under Article 18 of the Convention: Combined initial and second reports of state parties-TUNISIA*, at 19, CEDAW/C/TUN/1-2, 12 April 1994 *construed in* *Id.*

96. See Azizah al- Hibri, *Marriage Laws in Syrian, Moroccan and Tunisian Marriage*, 4 Intl Rev of Compar Pub Pol'y 227, 240 (1992). See also Azizah al-Hibri, *Family Planning and Islamic Jurisprudence, Religious and Ethical Perspectives on Population Issues* 6-7 (Relig Consult on Population, Reproductive Health & Ethics, 1993)

97. See CEDAW Country Reports 32 (1995) *construed in* *Id.*

98. See CEDAW Art. 7 & 8

99. Fatima Mernissi, *A Feminist Interpretation of Women's Rights in Islam*, in *Liberal Islam* at 113-114 (Charles Kurzman ed., 1998)

100. Prime Minister Sheikh Hasina of Bangladesh and former Prime Minister Benazir Bhutto of Pakistan *See* Urfan Khaliq, *Beyond the Veil?: An Analysis of the Provisions of the Women's Convention as Stipulated in the Shari'ah* 2 Buff. J. Int'l L. 1 at 22 (1995)
101. Mayer *supra* note 82 at 327
102. I borrow heavily from her view views in order to demonstrate the Declaration's significance of changes in the Shari'ah. Id.
103. Mayer *supra* note 82 at 327
104. Mayer *supra* note 82 at 328
105. The Cairo Declaration on Human Rights in Islam, 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].
106. Id.
107. There is no explicit prohibition beyond marriage with a Christian, Muslim, or Jew for women as well as men. *See* The Koran 2:221, 5:5, 60:11
108. *See, e.g.*, Jamal J. Nasir, *The Status of Women Under Islamic Law and Under Modern Legislation*, 27-28 (1990).
109. *Art. 6*, in Contribution of the OIC, *supra* note 105, at 5
110. Id.
111. *See* Nasir *supra* note 108 at 59-60
112. Mayer *supra* note 82 at 328
113. *Art. 12*, in Contribution of the OIC, *supra* note 105, at 5
114. *Art. 13*, in Contribution of the OIC, *supra* note 105, at 5
115. Id.
116. *See generally*, Abdullahi An-Na'im, *The Rights of Women and International Law in the Muslim Context*, 9 Whittier L. Rev. 491 (1987)
117. Sayeh and Morse, Jr. *supra* note 7 at 332
118. *Report of the Fourth World Conference on Women*, at 138, U.N. Doc. A/ CONF.177/20 (1995)
119. Id.
120. Valerie A. Dormady, *Women's Rights in International Law: A Prediction Concerning the Legal Impact to the United Nations Fourth World Conference on Women* 30 Vand. J. Transnat'l L. 97 at 106 (1997)
121. *See Report of the Fourth World Conference on Women supra* note 118 at 138
122. Dormandy *supra* note 120 at 97
123. Dormandy *supra* note 120 at 120
124. Iraq, Kuwait, Libya, Mauritania, Morocco, Iran, Malaysia, Tunisia, Yemen, Sudan, the United Arab Republic, Lebanon, Djibouti, Syria, Pakistan, Jordan, and Maldives. *See* Dormandy *supra* note 120 at 120
125. Sarah A. Ramage, *Resisting the West: The Clinton Administration's Promotion of Abortion at 1994 Cairo Conference and the Strength of the Islamic Response* 27 Cal. W. Int'l L.J. 1 (1996)
126. Id.