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## International Human Rights: Islam's Friend or Foe? Algeria as an Example of the Compatibility of International Human Rights Regarding Women's Equality and Islamic Law

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# International Human Rights: Islam's Friend or Foe? Algeria as an Example of the Compatibility of International Human Rights Regarding Women's Equality and Islamic Law

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## **Abstract**

Part I of this Note briefly discusses the development of International Human Rights Law as embodied in international covenants today. Part I also discusses Islamic law, the traditional role of women under Islamic law and culture, Algeria's Constitution and Family Code, and other dynamics specific to Algeria that have hindered women's obtainment of equal rights in the modern era. Part II presents the debate between conservative Islamists who argue that international principles of human rights law are incompatible with Islamic law and the scholars who assert that the two are compatible. Part III, by focusing on fundamental principles underlying the provisions in both the international human rights doctrine and Islamic law, argues that international human rights provisions granting women equal status with men comport with Islamic law principles as much as do legal documents that the Algerian Government has drafted. This Note concludes that the deprivation of women's equal rights based on the claim of conflict with Islamic law is unjustified and that the example of Algeria proves that Islamic countries can and should protect human rights without regard to gender.

## NOTES

### INTERNATIONAL HUMAN RIGHTS: ISLAM'S FRIEND OR FOE?

#### Algeria as an Example of the Compatibility of International Human Rights Regarding Women's Equality and Islamic Law

Joëlle Entelis\*

#### INTRODUCTION

Recently, Islamic countries,<sup>1</sup> among others,<sup>2</sup> have voiced objections to the international community holding them to human rights principles,<sup>3</sup> such as women's equality,<sup>4</sup> which Islamic

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1. See FRED HALLIDAY, *ISLAM & THE MYTH OF CONFRONTATION* 16 n.5 (1995) (defining imprecise term Middle East to refer to Iran, Turkey, Israel, and 17 members of Arab League including Morocco, Algeria, Tunisia, Libya, Sudan, Egypt, Syria, Lebanon, Jordan, Iraq, Kuwait, Bahrain, Qatar, the United Arab Emirates, Oman, Yemen, and Saudi Arabia). The Arab League has five other members, but four of those, Mauritania, Jibuti, Somalia, and Comoro Islands, are not Arab states in that the majority of their people do not speak Arabic, and the fifth, the Palestine Liberation Organization, although representative of an Arab majority, does not have a state. *Id.* This Note uses the term Islamic countries to cover the same states Halliday defines as the Middle East. *But see* Ann E. Mayer, *Universal Versus Islamic Human Rights: A Clash of Cultures or a Clash with A Construct?* 15 *MICH. J. INT'L L.* 307, 321 (1994) (arguing that it is confusing to use Islamic and Muslim interchangeably). Mayer prefers to use the term Islamic to designate religious matters and Muslim to designate adherents of the Islamic religion. *Id.* There is also a distinction between what all Muslims accept as Islamic and what only certain groups of Muslims term Islamic. *Id.* For example, while both the ruling political regimes in Iran and Saudi Arabia proclaim their states to be Islamic, neither recognizes the other as such. *Id.* Mayer, thus, concludes that it is confusing to use the term Islamic to refer to secular countries. *Id.*

2. See Christina M. Cerna, *Universality of Human Rights and Cultural Diversity: Implementation of Human Rights in Different Socio-Cultural Contexts*, 16 *HUM. RTS. Q.* 740 (1994) (stating that China, Columbia, and Cuba are among countries arguing that international human rights are not universal). Asian countries, however, recently have been the strongest advocates of the position that human rights are not universal. *Id.*

3. See ANN E. MAYER, *ISLAM AND HUMAN RIGHTS: TRADITION AND POLITICS* 38 (1995) (defining principles underlying human rights as individualism, humanism, rationalism, and legal principles safeguarding individual rights from government); *see also*, Hilary

countries argue are not universal.<sup>5</sup> The moral ideals embodied in international documents,<sup>6</sup> such as the International Bill of Human Rights,<sup>7</sup> are notions that originated in the West.<sup>8</sup> Is-

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Charlesworth, *What are "Women's International Human Rights"?*, in HUMAN RIGHTS OF WOMEN 58, 58-59 (Rebecca J. Cook ed., 1994) (describing development of human rights in terms of three categories including civil and political rights, economic, social and cultural rights, and group or people's rights).

4. See Charlesworth, *supra* note 3, at 63-68 (examining relationship between women and international human rights system). Sexual equality is a principle embodied within the ideals of equal treatment and nondiscrimination. *Id.* at 63-64.

5. Adamantia Pollis, *Cultural Relativism Revisited: Through a State Prism*, 18 HUM. RTS. Q. 316 (1996); Cerna, *supra* note 2, at 740; see Urfan Khaliq, *Beyond the Veil?: An Analysis of the Provisions of the Women's Convention In the Law As Stipulated in Shari'ah*, 2 BUFF. J. INT'L L. 1, 3-4 (1995) (explaining that rise of fundamentalism encroached on international arena after 1979 and rendered Western ideals unpopular); Deniz Kandiyoti, *Reflections on the Politics of Gender in Muslim Societies: From Nairobi to Beijing*, in FAITH & FREEDOM, WOMEN'S HUMAN RIGHTS IN THE MUSLIM WORLD 19, 20 (Mahnaz Afkhami ed., 1995) [hereinafter FAITH & FREEDOM] (noting Muslim countries' criticism of universal doctrine of human rights); see also Azizah al-Hibri, *Islam, Law and Custom: Redefining Muslim Women's Rights*, 12 AM. U. J. INT'L L. & POL'Y (forthcoming 1997) (manuscript at 4, on file with the *Fordham International Law Journal*) (arguing that Muslim women are suspicious of Western women's plight and do not want same status); Kimberly Y. Schooley, *Cultural Sovereignty, Islam, and Human Rights-Toward A Communitarian Revision*, 25 CUMB. L. REV. 651, 698 (1995) (arguing that true desires of Muslim women are to obtain economic freedom and equality but not in ways that violate Islamic law, culture, or religion). *But see* Ann E. Mayer, *Reform of Personal Status Laws in North Africa: A Problem of Islamic or Mediterranean Laws?* 49 MIDDLE E. J. 432, 445 (1995) (arguing that Maghrib states are beginning to implement international norm of equality).

6. See, e.g., Declaration on the Elimination of Discrimination Against Women, G.A. Res. 2263, U.N. GAOR, 22d Sess., pmbl., U.N. Doc. A/6880 (1967) [hereinafter Women's Convention] (reaffirming faith in ideals such as dignity and worth of human beings, equal rights of men and women, and impermissibility of discrimination).

7. See MAYER, *supra* note 3, at 19 (defining International Bill of Human Rights "International Bill" as four separate covenants). The International Bill is comprised of (1) the Universal Declaration of Human Rights, Dec. 10, 1948, U.N. G.A. Res. 217 [hereinafter UDHR], reproduced in INTERNATIONAL LAW SELECTED DOCUMENTS 381 (Barry E. Carter & Phillip R. Trimble, eds., 1995); (2) the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR], reproduced in INTERNATIONAL LAW SELECTED DOCUMENTS 387 (Barry E. Carter & Phillip R. Trimble, eds., 1995); (3) the International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3. [hereinafter ICESCR], reproduced in INTERNATIONAL LAW SELECTED DOCUMENTS 410 (Barry E. Carter & Phillip R. Trimble, eds., 1995); and (4) the Optional Protocol to International Covenant on Civil and Political Rights, 1967, 999 U.N.T.S. 171, reproduced in INTERNATIONAL LAW SELECTED DOCUMENTS 407 (Barry E. Carter & Phillip R. Trimble, eds., 1995). *Id.* This Note does not discuss the Optional Protocol to the ICCPR, thus, all references to the International Bill refer only to the UDHR, ICCPR, and ICESCR.

8. Bassam Tibi, *Islamic Law/Shari'a, Human Rights, Universal Morality and International Relations*, 16 HUM. RTS. Q. 277, 278 (1994); see MAYER, *supra* note 3, at 39-40 (explaining that Western legal development in area of human rights occurred before

Islamic nations claim that cultural differences make adhering to these standards, without violating Islamic law,<sup>9</sup> impossible.<sup>10</sup> While some conservative Islamists<sup>11</sup> have attempted to redefine human rights within an Islamic framework, other conservative Islamists perceive international human rights and Islamic law as incompatible and advocate a retreat from international human rights and other Western ideals.<sup>12</sup> Because Islamic states often refuse to honor the equality provisions of international documents,<sup>13</sup> women's human rights are in the forefront of this de-

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Islamic legal development in that area). Mayer attributes the peculiarity of many Islamic human rights schemes to the fact that Islamic countries artificially imitated Western ideas regarding human rights without a full examination of the underlying tenets of those rights. *Id.*

9. See Tibi, *supra*, note 8, at 278 (describing Islamic *shari'a*, or holy law, as exclusive basis for legal rule acceptable to Muslims). Muslims view the Qur'an, the book of God's revelation to the Prophet Muhammad, as the source of the *shari'a* system. Schooley, *supra* note 5, at 661. The Qur'an does not however provide Muslims with a full legal code because many of the principles the Qur'an expresses are too general to govern all relationships between people. *Id.* at 661-62. Muslims use the *sunnah*, or example of the Prophet Muhammad's life and actions, to fashion more narrow principles that are in keeping with Qur'anic principles. *Id.* at 662.

10. Mayer, *supra* note 1, at 322; see Donna E. Arzt, *The Application of International Human Rights in Islamic States*, 12 HUM. RTS. Q. 202, 205 (1990) (noting that individual freedom in Islam is difficult to relate to modern idea of freedom); Tibi, *supra* note 8, at 278 (stating that Muslims believe that *shari'a* law is exclusive basis for acceptable legal rule). *But see* Max M. Kampelman, *Entering New Worlds: A Challenge*, 32 COLUM. J. TRANSNAT'L L. 457, 462 (1995) (concluding that only differences between Western human rights and those of other countries is that other countries fear spread of freedom).

11. See Heiner Bielefeldt, *Muslim Voices in the Human Rights Debate*, 17 HUM. RTS. Q. 587, 601, 603 (1995) (explaining that some conservative Islamists outrightly reject concept of human rights as alien to Islamic tradition, while other conservatives stress redefining human rights within Islamic framework). Liberal Muslim reformers believe that tensions do exist between traditional Islamic law and human rights, however, they emphasize a reevaluation of *shari'a's* underlying principles to try to reconcile competing norms. *Id.* at 606-07.

12. *Id.* at 602-05; see Mayer, *supra* note 1, at 313 (attributing Islamic anti-Western sentiment to view that West uses double standard to condemn Islamic countries' actions); Samuel P. Huntington, *The Clash of Civilizations?* FOREIGN AFF., Summer 1993, at 40-41 (arguing that Western efforts to promote universality of human rights only fuels reaffirmation of indigenous values).

13. See, e.g., UDHR, *supra* note 7, arts. 1, 2, 7, at 381-82 (declaring all humans equal in rights and before law without discrimination based on sex); ICCPR, *supra* note 7, art. 3 (undertaking to ensure that all states party to covenant uphold equal rights of men and women in civil and political fields); ICESCR, *supra* note 7, art. 3, at 412 (undertaking to ensure that all states party to covenant uphold equal rights of men and women in economic, social, and cultural fields). See also, MAYER, *supra* note 3, at 117 (recognizing that Islamic states' different approaches to women's equal rights illustrate "an absence of any willingness to recognize women as full, equal human beings who

bate.<sup>14</sup>

Many scholars are skeptical of the claims that Muslim interpretations of Islamic law, as found in the Qur'an, the Islamic sacred text,<sup>15</sup> are a barrier to women's equal rights.<sup>16</sup> Many of these scholars, including Muslim feminists, argue that patriarchal attitudes and misreadings of Islamic sources, not Islamic doctrine itself, are at the root of discrimination against women in Islamic countries.<sup>17</sup> These scholars draw support for this argument from the development of Islamic law,<sup>18</sup> the political history of Muslim countries,<sup>19</sup> and the texts of Islamic sources.<sup>20</sup> They argue that the Qur'an embodies the same basic principles as

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deserve the same rights and freedoms as men"). The Universal Islamic Declaration of Human Rights (hereinafter UIDHR) is an example of an Islamic approach to human rights which refuses to grant women equality with men in rights and freedom. *Id.* at 102-09. Countries such as Egypt, Pakistan, and Saudi Arabia presented the UIDHR to the United Nations Educational, Scientific and Cultural Organization, UNESCO, in 1981. *Id.* at 22. Mayer argues that the UIDHR's treatment of women is purposefully vague and convoluted in order to deter international criticism. *Id.* at 102. Nonetheless, her careful analysis of the text of the UIDHR concludes that women are still subject to *shari'a* law and all its constraints on women's freedoms. *Id.*

14. See al-Hibri, *supra* note 5, at 2 (explaining that secular feminists blame Islam for laws in Muslim countries which are burdensome to women); Arzt, *supra* note 10, at 219 (noting that almost all Islamic states made reservations to Article Two of Women's Convention); Khaliq, *supra* note 5, at 2-3 (noting Islamic states' reservations to Women's Convention).

15. See Khaliq, *supra* note 5, at 8 (explaining Qur'an as primary source of Islamic law). The Archangel Gabriel revealed the Qur'anic text to the Prophet Muhammad over a span of 22 years to respond to the various needs of arising circumstances. *Id.*

16. See *id.* at 2-3 (arguing that Islamic states making reservations to Women's Convention used *shari'a* as excuse to continue subjection of women); Mayer, *supra* note 1, at 320 (arguing that Islamic beliefs are not barrier to Islamic states adopting international human rights); Abdullahi A. An-Na'im, *Religious Minorities Under Islamic Law and the Limits of Cultural Relativism*, 9 HUM. RTS. Q. 1, 2 (1987) (stating that Islamic sovereignty is not valid rebuttal to charges of human rights violations).

17. Mayer, *supra* note 1, at 323; see PETER R. KNAUSS, *THE PERSISTENCE OF PATRIARCHY: CLASS, GENDER, AND IDEOLOGY IN TWENTIETH CENTURY ALGERIA* 124 (1987) (arguing that Algerian males use Islam as rationale for persistence of patriarchy); al-Hibri, *supra* note 5, at 6 (explaining effect of patriarchy in Muslim countries as reduction of women's status in society).

18. See Khaliq, *supra* note 5, at 47 (explaining that when Prophet Muhammad received Qur'an, idea was to give women certain rights towards equality).

19. See Peter R. Knauss, *Algerian Women Since Independence, in STATE AND SOCIETY IN ALGERIA* 151-55 (John P. Entelis & Phillip C. Naylor, eds., 1992) [hereinafter *STATE AND SOCIETY*] (attributing strong Algerian nationalist consensus for women to remain at home to colonial period and successive governments); See also, KNAUSS, *supra* note 17, at 18-29, 69-124 (documenting persistence of patriarchy in Algeria).

20. See al-Hibri *supra* note 5, at 32-46 (giving in-depth textual analysis of certain Qur'anic phrases addressing gender equality).

many international documents on human rights, and, therefore, that Islamic law is not a barrier to the implementation of equal rights for women.<sup>21</sup>

By comparing provisions regarding women's status in the International Bill of Human Rights,<sup>22</sup> Algeria's Personal Status Code,<sup>23</sup> and the 1989 Algerian Constitution<sup>24</sup> with Islamic jurisprudence, or *shari'a*, as set forth in the Qur'an, and as interpreted by religious scholars,<sup>25</sup> this Note argues that international human rights principles are at least as compatible with Islamic law as are Algeria's personal status code and the Algerian Constitution.<sup>26</sup> The legal texts regarding women's status that Islamic countries put forth illustrate which principles are truly incompatible with Islam and which principles Muslims simply purport are incompatible.<sup>27</sup> Algeria's Family Code and Constitution are

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21. Khaliq, *supra* note 5, at 47; see al-Hibri *supra* note 5, at 34-35 (explaining that Qur'an teaches that God created men and women from same soul and both are equal before God).

22. See UDHR, *supra* note 7; ICCPR, *supra* note 7; ICESCR, *supra* note 7.

23. Portant Code de la Famille, mardi 12 juin 1984, Loi No. 84-11, Journal Officiel De La Republique Algerienne (Alg.) [hereinafter Family Code]. All quotations to the Family Code are translations by the Author.

24. PROJET DE REVISION CONSTITUTIONNELLE [Constitution] (Alg.). Unless otherwise noted, all references to the Algerian Constitution throughout both the text and the footnotes will be to the 1989 Constitution, a revision by national referendum of the 1976 Constitution. All quotations to the Algerian Constitution are from translations found in CONSTITUTIONS OF THE WORLD: ALGERIA (Gisbert H. Flanz ed., 1995) [hereinafter CONSTITUTIONS]. The Algerian Government issued a new Constitution in 1996 in order to better protect the voting process, but the government did not change or add any new provisions concerning women's rights to equality and privileges. REPUBLIQUE ALGERIENNE DEMOCRATIQUE ET POPULAIRE DU 28 NOVEMBRE 1996 [Constitution] (Alg.).

25. See C.G. WEERAMANTRY, ISLAMIC JURISPRUDENCE AN INTERNATIONAL PERSPECTIVE 1-13, 39-45 (1988) (explaining origins of Islamic law and its sources); Khaliq, *supra* note 5, at 6-13 (giving brief history of Islam); al-Hibri, *supra* note 5, at 5-9 (explaining role of religious and cultural components of Islamic law); ABDULLAHI A. AN-NA'IM, TOWARD AN ISLAMIC REFORMATION, CIVIL LIBERTIES, HUMAN RIGHTS, AND INTERNATIONAL LAW 11-33 (1990) (recounting development of *shari'a*).

26. See Mayer, *supra* note 1, at 320 (disputing that Islamic culture prevents adoption of international human rights); Khaliq, *supra* note 5, at 46 (finding Islamic law consistent with principles of international human rights).

27. See al-Hibri, *supra* note 5, at 3 (focusing on personal status codes of several Muslim countries to provide critique of jurisprudence leading to their adoption); Mayer, *supra* note 1, at 347-50 (concluding that Cairo Declaration does not truly represent beliefs of many Muslim states who have ratified it); MAYER, *supra* note 3, at 20 (1991) (noting that treatment of human rights in Islamic constitutions is indicative of how willing drafters are to make national rights provisions conform with international standards).

fairly-recently promulgated, national documents,<sup>28</sup> and as such reflect Algeria's modern stance on the rights and privileges afforded women.<sup>29</sup>

Part I of this Note briefly discusses the development of International Human Rights Law as embodied in international covenants today. Part I also discusses Islamic law, the traditional role of women under Islamic law and culture, Algeria's Constitution and Family Code, and other dynamics specific to Algeria that have hindered women's obtainment of equal rights in the modern era. Part II presents the debate between conservative Islamists who argue that international principles of human rights law are incompatible with Islamic law and the scholars who assert that the two are compatible. Part III, by focusing on fundamental principles underlying the provisions in both the international human rights doctrine and Islamic law, argues that international human rights provisions granting women equal status with men comport with Islamic law principles as much as do legal documents that the Algerian Government has drafted. This Note concludes that the deprivation of women's equal rights based on the claim of conflict with Islamic law is unjustified and that the example of Algeria proves that Islamic countries can and should protect human rights without regard to gender.

I. *INTERNATIONAL HUMAN RIGHTS FOR WOMEN,  
TRADITIONAL ISLAMIC LAW, AND THE ALGERIAN  
EXAMPLE: AN EXAMINATION OF  
RELEVANT TEXTS*

In Islamic countries, the concept of women's human rights is somewhat different from the idea of women's human rights as

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28. Family Code, *supra* note 23; PROJET DE REVISION CONSTITUTIONELLE (Alg.). The Algerian Government passed the Personal Status Code in 1984 and revised the Algerian Constitution as recently as 1989. *Id.*

29. See PROJET DE REVISION CONSTITUTIONELLE arts. 28, 30 (Alg.) (giving all citizens equal rights); Family Code, *supra* note 23, bk. 1, tit. 1, ch.4, art. 39(1) (requiring wife "to obey her husband"). This Note focuses on the Maghreb states, particularly Algeria. See JOHN P. ENTELIS, *ALGERIA: THE REVOLUTION INSTITUTIONALIZED* 3 (1986) (describing Maghreb as northwestern Africa); Mayer, *supra* note 5, at 433 (identifying Morocco, Algeria, and Tunisia as Maghrib states). Furthermore, this Note does not purport to be a full textual analysis of the Qur'an, but seeks rather to give a more general understanding of some of the fundamental Islamic beliefs. See Khaliq, *supra* note 5, at 6-15 (giving brief overview of Islamic law); WEERAMANTRY, *supra* note 26, at 59-92 (examining basic Islamic legal ideas); al-Hibri, *supra* note 5, at 32-46 (providing detailed analysis of several Qur'anic verses).



developed in the West after World War II and set forth in international covenants such as the United Nations Charter<sup>30</sup> and the International Bill of Human Rights.<sup>31</sup> The primary sources of Islamic law and religion are the Qur'an, the sacred text of Islam, and the *sunnah*, the example of the Prophet Muhammad.<sup>32</sup> Muslim scholars further interpret the Qur'an by means of *qiyas* (analogy), *ijma* (consensus), and *ijtihad* (intellectual striving).<sup>33</sup> Algeria has promulgated a Constitution protecting equal rights for women, while simultaneously requiring adherence to the Algerian Family Code of 1984, which subjects women to male dominance.<sup>34</sup> Algerian legislation, therefore, codifies contradictory ideals and values regarding women's roles in society.<sup>35</sup>

A. *International Law and Human Rights: The U.N. Charter and Subsequent Covenants*

Western countries have codified ideas about individual rights, which originated in European natural law philosophy,<sup>36</sup> as legal standards.<sup>37</sup> The international community established the United Nations in response to states' concerns for human

30. U.N. CHARTER pmbl. The U.N. Charter, signed at San Francisco on June 26, 1945, established the international organization known as the United Nations. *Id.* As of November 20, 1994, there were 186 parties to the Charter and Member States of the United Nations. BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW SELECTED DOCUMENTS 1 (1995).

31. See Arzi, *supra* note 10, at 203 (explaining connection between Islamic law and religion); MAYER, *supra* note 3, at 37-38 (tracing development of human rights in West); CENTER FOR PHILOSOPHY AND PUBLIC POLICY, HUMAN RIGHTS AND U.S. FOREIGN POLICY, 115 (Peter G. Brown & Douglas MacLean, eds., 1979) [hereinafter HUMAN RIGHTS AND U.S. FOREIGN POLICY] (discussing U.N. Charter and subsequent documents).

32. al-Hibri, *supra* note 5, at 7; see Khaliq, *supra* note 5, at 8 (discussing history and structure of Qur'an); WEERAMANTRY, *supra* note 25, at 34 (discussing history of Prophet Muhammad and function of *sunnah*).

33. Khaliq, *supra* note 5, at 11-12; WEERAMANTRY, *supra* note 25, at 40-41.

34. Mayer, *supra* note 5, at 435.

35. Compare, PROJET DE REVISION CONSTITUTIONELLE art. 28 (Alg.) (stating "all citizens are equal before the law.") with Family Code, *supra* note 23, Bk. 1, Tit. 1, Ch. 4, art. 39 (requiring wives to obey their husbands).

36. See HUMAN RIGHTS AND U.S. FOREIGN POLICY, *supra* note 31, at 54 (explaining natural rights, as propounded by English philosopher John Locke, as individual's rights not to be harmed in life, health, liberty, or possessions). "[N]either fellow citizens, rulers, nor any other persons, may permissibly infringe" on these Lockean rights. *Id.*

37. Tibi, *supra* note 8, at 278. "Common to the British and French philosophies that contributed to the production of rights doctrines was the idea that the rights of the individual should be of paramount importance in a political system." MAYER, *supra* note 3, at 37.

rights which, for the first time, reached an international scale after the atrocities of World War II.<sup>38</sup> The United Nations addressed human rights issues in documents such as the International Bill of Human Rights.<sup>39</sup> Prior to World War II, states had regarded these human rights issues as private issues between a state and its subjects.<sup>40</sup> States, therefore, did not view international law as the proper vehicle through which to address individual human rights issues.<sup>41</sup>

### 1. The Development of Human Rights: The U.N. Charter

Human rights are individual privileges that developed from modern European thought on natural law.<sup>42</sup> During the European Enlightenment,<sup>43</sup> philosophers, as well as lay persons, accepted the transformation of natural law from the idea of a universal order controlled by God's sovereign will into the notion of a guarantee of individual rights and a basis for political equality.<sup>44</sup> A common idea in British and French philosophy was that

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38. See HUMAN RIGHTS AND U.S. FOREIGN POLICY, *supra* note 31, at 15 (recounting that World War II experience prompted U.N. Charter, with preamble that recognizes human rights); SUSAN E. WALTZ, HUMAN RIGHTS AND REFORM: CHANGING THE FACE OF NORTH AFRICAN POLITICS 15 (1995) (stating that modern human rights documents were drafted in aftermath of Nazi holocaust).

39. International Bill, *supra* note 7.

40. HUMAN RIGHTS AND U.S. FOREIGN POLICY, *supra* note 31, at 15; see WEERAMANTRY, *supra* note 25, at 114 (noting that true subjects of international law were originally states and individuals were merely its objects). Islamic attitudes towards human rights are in accordance with the more modern trend of recognizing individuals as the subjects of international law. *Id.*

41. HUMAN RIGHTS AND U.S. FOREIGN POLICY, *supra* note 31, at 15.

42. Tibi, *supra* note 8, at 278; see MAYER, *supra* note 3, at 37 (classifying human rights principles, such as individualism, humanism, rationalism, and legal principles safeguarding individual rights from government, as recent and Western); see also HUMAN RIGHTS AND U.S. FOREIGN POLICY, *supra* note 31, at 54 (stating that human rights doctrine is philosophical successor of natural rights doctrine).

43. See MAYER, *supra* note 3, at 37 (stating that in 18th century Europe philosophers became preoccupied with individual's rights). The Enlightenment was "a philosophic movement of the eighteenth century marked by a rejection of traditional social, religious, and political ideas and an emphasis on rationalism." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 413 (1987).

44. PAUL E. SIGMUND, NATURAL LAW IN POLITICAL THOUGHT 88-89 (1971). While natural law theory has influenced the writers of international law, the theory in its most basic form is probably too vague to be useful in modern society. *Id.* at 206-07. The definition of human rights is itself not a concrete one. William N. Nelson, *Human Rights and Human Obligations*, in AMERICAN SOCIETY FOR POLITICAL AND LEGAL PHILOSOPHY AND AMERICAN POLITICAL SCIENCE ASSOCIATION, HUMAN RIGHTS: NOMOS 23 281, 281-83, 293 (J. Roland Pennock & John W. Chapman, eds. 1981) [hereinafter HUMAN

individual rights should be of the utmost importance in a political system.<sup>45</sup> Drafters of international human rights documents thus grounded their ideas on these Western principles of individualism and protection of individual rights.<sup>46</sup>

The international community created the U.N. Charter in response to the German atrocities of the 1930s and 1940s.<sup>47</sup> The purpose of creating the United Nations was to avoid future world wars, reaffirm the fundamental dignity and equality of human persons, promote social progress and tolerance, and unite the strength of members to maintain international peace.<sup>48</sup> The preamble to the U.N. Charter recognizes fundamental human rights,<sup>49</sup> the inherent dignity of all persons,<sup>50</sup> and equal rights of women and men.<sup>51</sup> The U.N. General Assembly reaffirmed and expanded on the principal of individual human rights in subsequent documents such as the 1948 Universal Declaration of Human Rights ("UDHR"),<sup>52</sup> the International Covenant on Civil and Political Rights ("ICCPR"),<sup>53</sup> and the International Covenant on Economic, Social and Cultural Rights ("ICESCR").<sup>54</sup> This combination of the U.N. Charter, the UDHR,<sup>55</sup> and the succeeding U.N. covenants<sup>56</sup> brought the rights of individual persons to the forefront of international

RIGHTS]. The importance of human rights, however, is that everyone possesses them and that human rights provide a standard for states to assess social, political, and economic establishments. *Id.*

45. MAYER, *supra* note 3, at 37. According to J. Roland Pennock, a scholar in the human rights field, this shift from concern for law to concern for rights is due to the fact that rights are individualistic and focused on claims of a part rather than the whole. J. Roland Pennock, *Rights, Natural Rights, and Human Rights - A General View*, in HUMAN RIGHTS, *supra* note 44, at 1. Persons, thus, have used the concept of rights to make claims on their own behalf or on behalf of others with whom they identify. *Id.*

46. See MAYER, *supra* note 3, at 38 (explaining that traditions of humanism and rationalism also served as basis for modern human rights).

47. See HUMAN RIGHTS AND U.S. FOREIGN POLICY, *supra* note 31, at 15 (explaining that U.N. Charter developed out of experience of World War II).

48. U.N. CHARTER pmbl.

49. *Id.* (stating goal "to reaffirm faith in fundamental human rights . . .").

50. *Id.* (reaffirming "the dignity and worth of the human person . . .").

51. *Id.* ("We the peoples of the United Nations determined . . . to reaffirm faith in . . . the equal rights of men and women . . .")

52. UDHR, *supra* note 7, arts. 1-30 at 381-97. This document identifies human rights as the right to "life, liberty, and the security of person." *Id.*, art. 3.

53. ICCPR, *supra* note 7, pmbl., arts. 1-12, 14-27 at 388-92.

54. ICESCR, *supra* note 7, pmbl., arts. 1-15 at 411-16.

55. UDHR, *supra* note 7.

56. ICCPR, *supra* note 7; ICESCR, *supra* note 7.

law.<sup>57</sup>

## 2. The International Bill of Human Rights

The International Bill of Human Rights, which includes the UDHR, the ICCPR, and the ICESCR,<sup>58</sup> supplied meaning to vague terms written into the preamble of the U.N. Charter.<sup>59</sup> The goal of the UDHR is to secure observance of rights for all peoples regardless of gender, race, or nationality.<sup>60</sup> The ICCPR<sup>61</sup> and the ICESCR<sup>62</sup> expand principles of equality in the areas of civil, political, economic, social, and cultural rights.<sup>63</sup>

The UDHR proclaims as its goal the securing of universal observance of certain enumerated rights and freedoms set out in the document.<sup>64</sup> That all humans are free and equal is among those enumerated rights.<sup>65</sup> Furthermore, all rights and freedoms in the declaration belong to both sexes,<sup>66</sup> and states are to recognize everyone as equal persons before the law.<sup>67</sup> Rights in marriage include that both men and women of legal age may marry and are entitled to equal rights in marriage.<sup>68</sup> Finally, eve-

57. See HUMAN RIGHTS AND FOREIGN POLICY, *supra* note 31, at 15 (stating that human rights now has foothold in international affairs).

58. Mayer, *supra* note 3, at 19.

59. HUMAN RIGHTS AND FOREIGN POLICY, *supra* note 31, at 115.

60. UDHR, *supra* note 7, pmb1, at 381 (proclaiming UDHR "as a common standard of achievement for all peoples and all nations . . . to promote respect for these rights and freedoms and . . . to secure their . . . effective recognition and observance . . . among the peoples of territories under their jurisdiction.").

61. See ICCPR, *supra* note 7, pmb1., at 387 (recognizing "the ideal of free human beings . . . can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social, and cultural rights.").

62. See ICESCR, *supra* note 7, pmb1., at 410 (recognizing "the ideal of free human beings . . . can only be achieved if conditions are created whereby everyone may enjoy his economic, social, and cultural rights, as well as his civil and political rights.").

63. ICCPR, *supra* note 7, arts. 3, 23, 26, at 389, 395-96; ICESCR, *supra* note 7, arts. 3, 6, 13, at 412, 415.

64. UDHR, *supra* note 7, pmb1., at 381. Among these rights and freedoms are the right to life, liberty, the security of person, equal protection, employment, education, and freedom of thought, conscience and religion. *Id.* arts. 3, 7, 18, 23, 26, at 381-85.

65. UDHR, *supra* note 7, art.1, at 381 ("All human beings are born free and equal in dignity and rights.").

66. *Id.* art. 2., at 381 ("Everyone is entitled to all the rights and freedoms set forth in this declaration, without discrimination of any kind, such as . . . sex . . .").

67. *Id.* arts. 6, 7, at 382 (stating "[e]veryone has the right to recognition everywhere as a person before the law," and "[is] entitled without any discrimination to equal protection of the law.")

68. *Id.* art. 16(1), at 383. ("Men and women of full age, without any limitation due

ryone has the right to work,<sup>69</sup> to earn equal pay for equal work,<sup>70</sup> and to obtain an education.<sup>71</sup>

Passed in conjunction with one another and in accordance with the principles set out in the UDHR,<sup>72</sup> the ICCPR and the ICESCR further enumerate provisions for equality among all people.<sup>73</sup> Starting with the premise that to meet the UDHR ideal of free individuals, states must create conditions whereby everyone may enjoy civil and political rights,<sup>74</sup> the ICCPR mandates that all states ensure that men and women enjoy these rights equally.<sup>75</sup> The ICCPR reinforces the principle of equality before the law<sup>76</sup> and requires states to take active steps to guarantee equality of spousal rights and responsibilities during marriage and at its dissolution.<sup>77</sup> Similarly, the ICESCR requires that states protect the equal rights of men and women to enjoy economic, social, and cultural rights.<sup>78</sup> This covenant emphasizes and expands on the universal rights to employment<sup>79</sup> and education<sup>80</sup> set forth in the UDHR.<sup>81</sup> Likewise, the family, as the fun-

to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.")

69. *Id.* art 23(1), at 384 (stating "[e]veryone has the right to work").

70. *Id.* art 23(2), at 384 (stating "[e]veryone, without any discrimination, has the right to equal pay for equal work").

71. *Id.* art. 26(1), at 385 (declaring "[e]veryone has the right to education").

72. *See id.* arts. 1-30, at 381-86 (enumerating many rights such as those to life, liberty, equality, education, and employment).

73. *See* ICCPR, *supra* note 7, pmb., at 387-88 (undertaking to ensure equal rights of men and women to enjoy all civil and political rights recognized in ICCPR); ICESCR, *supra* note 7, pmb., at 410-11 (undertaking to ensure equal rights of men and women to enjoy all economic, social, and cultural rights in Covenant).

74. ICCPR, *supra* note 7, pmb., at 387-88 (recognizing "ideal of free human beings enjoying civil and political freedom . . . can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights").

75. *Id.* art. 3., at 389 ("The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant").

76. *Id.* art. 26, at 396 (providing that law "shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination").

77. *Id.* art. 23(4), at 395 ("States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution").

78. ICESCR, *supra* note 7, art. 3, at 412 (undertaking "to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth" therein).

79. *Id.* art 6, at 412. Article 6(2) sets out specific steps a state must take in order to fully realize the right to work. *Id.* art. 6(2), at 412. Among these steps are "technical and vocational guidance and training programmes, policies and techniques." *Id.*

80. *Id.* art. 13, at 415. Article 13 details what levels of schooling will be compulsory

damental group of society, receives special protection.<sup>82</sup>

### B. *Islamic Law and Human Rights*

The religion of Islam is the basis of Islamic law.<sup>83</sup> Even after many Muslim countries experienced modernization,<sup>84</sup> they continued to formulate human rights in Islamic terms.<sup>85</sup> Any discussion of women's human rights in Islamic countries must, therefore, begin with an understanding of Islam as both a religion and a legal system.<sup>86</sup> The primary source of Islamic law is the Qur'an.<sup>87</sup> The teaching and example of the Prophet Muhammad, collectively known in Islamic law as the *sunnah*, is the second primary source of Islamic jurisprudence.<sup>88</sup> Islamic jurists use sources other than the Qur'an and the *sunnah* to develop

and accords parents certain liberties in making decisions on behalf of their children's education. *Id.*

81. UDHR, *supra* note 7, arts. 23, 26, at 384-85.

82. ICESCR, *supra* note 7, art. 10(1), at 414 ("The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society . . . [and] [m]arriage must be entered into with the free consent of the intending spouses.").

83. WEERAMANTRY, *supra* note 25, at 1.

84. MAYER, *supra* note 3, at 1. Traditional Middle Eastern societies are moving toward modern attitudes and aspirations which embrace hopes for greater freedom. *Id.* All Muslim countries have undergone this modernization process. *Id.* During the transitional periods of modernization, however, Islam has always retained a strong influence in the Muslim world. *Id.* The debate concerning the relationship between Islam and human rights has gained more practical significance since the consistent move toward secularization abruptly ceased after the Arab-Israeli war of 1967 and Muslim countries underwent an Islamic resurgence which influenced both private and public attitudes in an anti-Western direction. *Id.*

85. See MAYER, *supra* note 3, at 1. In the "Right of Equality" section of the Arabic version of the UDHR, the document states that persons will be distinguished in merit by God in the afterlife. *Id.* at 89.

86. See Karima Bennoune, *As-Salamu Alaykum? Humanitarian Law in Islamic Jurisprudence*, 15 MICH. J. INT'L L. 605, 613 (1994) (positing "the starting point for a discussion of Islamic humanitarian law is an enumeration of the sources of that law."); see also Arzt, *supra* note 10, at 203 (explaining that Islamic law is similar to Jewish law in that it is branch of religious system rather than independent body of information); ASIAN PERSPECTIVES ON HUMAN RIGHTS 31 (Claude E. Welch and Virginia Leary eds., 1990) (arguing that international human rights must have cultural legitimacy for state governments to implement them).

87. al-Hibri, *supra* note 5, at 7; see Khaliq, *supra* note 5, at 8 (stating that Qur'an contains 114 *Surahs*, or chapters, with a total of 6666 verses). Muslims believe that the sacred text of Islam, the Qur'an, is the literal word of God conveyed to the Prophet Muhammad through the Archangel Gabriel during the period 644-656 A.D. which the Muslims recorded about two to three centuries later. *Id.* at 6.

88. WEERAMANTRY, *supra* note 25, at 34.

legal rules.<sup>89</sup> While the Qur'an teaches that women and men are equal in their relationship with God,<sup>90</sup> differences arise between the sexes in the social context of the family.<sup>91</sup> In traditional Islamic societies, women occupied the private domain, while men functioned in the public arena.<sup>92</sup> In many areas of Islamic law, women do not have rights equal to those of their male counterparts.<sup>93</sup> Nonetheless, many Islamic states have ratified international human rights treaties, including those aimed specifically at giving women equality.<sup>94</sup>

### 1. Sources of Islamic Law

The Qur'an is the leading source of Islamic law.<sup>95</sup> The second chief source of Islamic jurisprudence is the *sunnah*.<sup>96</sup> The

89. *Id.* at 39; see WALTZ, *supra* note 38, at 19 (classifying secondary sources in terms of techniques Islamic jurists employed to develop legal rules based on Qur'an and *sunnah*).

90. *E.g.*, QUR'AN 16:97 ("Whoever works righteousness, [m]an or women, and has Faith, [v]erily, to him will We give [a] new Life, and life [t]hat is good and pure, and We [w]ill bestow on such their reward [a]ccording to the best [o]f their actions."); QUR'AN 4:1. The Qur'an states:

O mankind! reverence [y]our Guardian-Lord, [w]ho created you [f]rom a single Person, [c]reated, of like nature, [h]is mate, and from them twain [s]cattered (like seeds) [c]ountless men and women. Fear Allah, through Whom [y]e demand your mutual (rights), [a]nd (reverence) the wombs ([t]hat bore you): for Allah [e]ver watches over you.

*Id.* See Khaliq, *supra* note 5, at 13 (stating that in Islam "absolutely no difference between men and women as far as their relationship with God" exists); ABDUR RAHMAN I. DOI, WOMEN IN SHARI'AH, 4 (1989) (explaining that both men and women will receive same reward or punishment based on their conduct).

91. Khaliq, *supra* note 5, at 13. It is a commonly held belief in Islamic societies that women's primary function in society is to have children and be subservient to their husbands. *Id.* at 13-14. Men are to act as the financial maintainers of their wives. QUR'AN 4:34 ("Men are the . . . maintainers of women . . . and because [t]hey support [women] . . . the righteous women [a]re devoutly obedient").

92. Schooley, *supra* note 5, at 675-76.

93. See Khaliq, *supra* note 5, at 14-15 (concluding that principle of guardianship of women established by verse 4:34 of Qur'an is reason for discrimination). *But see* Schooley, *supra* note 5, at 669 (stating "[i]t is assumed that due to their physiological characteristics and maternal capacity, women are granted different, not unequal, rights in the community.").

94. See Arzt, *supra* note 10, at 214-21 (examining Arab states ratification of international human rights agreements).

95. al-Hibri, *supra* note 5, at 7.

96. WEERAMANTRY, *supra* note 25, at 34.

*sunnah* enhances the Qur'an's moral directives.<sup>97</sup> Islamic jurists also use other sources and methods such as, Qiyas, Ijma, and Ijtihad,<sup>98</sup> to develop legal rules.<sup>99</sup>

#### a. Primary Sources

The primary source of Islamic law is the Qur'an.<sup>100</sup> According to Muslim tradition, the Archangel Gabriel<sup>101</sup> revealed the text of the Qur'an to the Prophet Muhammad<sup>102</sup> as the circumstances and situations so demanded.<sup>103</sup> While the Qur'an contains some verses concerned with legal matters that serve as the basic principles of *shari'a*,<sup>104</sup> in many areas the Qur'an only expresses general principles of moral behavior.<sup>105</sup> For example,

97. Khaliq, *supra* note 5, at 9; see al-Hibri, *supra* note 5, at 7 (noting that Muslims use *sunnah* for further clarification of Islamic principles).

98. Khaliq, *supra* note 5, at 10-12; WEERAMANTRY, *supra* note 25, at 40-41.

99. WEERAMANTRY, *supra* note 25, at 39; see WALTZ, *supra* note 38, at 19 (classifying secondary sources of Islamic law).

100. al-Hibri, *supra* note 5, at 7; see Khaliq, *supra* note 5, at 8 (stating that Qur'an contains 114 *Surahs*, or chapters, with a total of 6666 verses).

101. See Khaliq, *supra* note 5, at 6 (describing the Archangel Gabriel as conveyor of God's message to Prophet Muhammad); see also, WEERAMANTRY, *supra* note 25, at 4 (describing Prophet Muhammad's first admission that Archangel Gabriel had appeared to him commanding him to restore faith in one powerful God).

102. See WEERAMANTRY, *supra* note 25, at 3-4 (recounting Prophet Muhammad's history). The Prophet Muhammad was born in Mecca in 570 A.D. *Id.* at 3. He was raised by his grandfather and his uncle because he was orphaned at the age of five. *Id.* At the age of 25, the Prophet Muhammad was an illiterate, trustworthy caravan manager. *Id.* at 3-4. After the Archangel Gabriel appeared to him, the Prophet Muhammad began preaching publicly, around 613 A.D., about submission to God, a faith later called Islam. *Id.* at 4.

103. Khaliq, *supra* note 5, at 8 (stating that revelation extended over 22 year period).

104. *Id.* at 9. Although disputed as to number, anywhere from 80 to 500, some verses in the Qur'an amount to true legal injunctions. Compare *Id.* at 8 n.32 (stating 500 is most widely accepted number) with HALLIDAY, *supra* note 1, at 148 (stating that only about 80 versus in Qur'an are specific legal injunctions and they mostly relate to marriage, inheritance, and punishment). Another legal injunction on guardianship states "those who unjustly [e]at up the property [o]f orphans eat up [a] fire into their own [b]odies: they will soon [b]e enduring a blazing fire." QUR'AN 4:10. Furthermore, specific legal categories differentiate between types of conducts:

Fard (a compulsory duty, which is punishable if it is omitted); Haram (an unlawful or forbidden action, which is punishable); Mukruh (a disliked and disapproved action but one which carries no penalty); Jaiz (a permitted action, but one which is legally indifferent); and Maidub (an action which is rewarded, but whose omission is not punishable).

Khaliq, *supra* note 5, at 9.

105. Khaliq, *supra* note 5, at 9; see Schooley, *supra* note 5, at 662 (reasoning that Qur'an basically sought to change Arab tribal laws); see also Abdullahi An-Na'im, *The*



one specific legal injunction on trusteeship requires Muslims to return trusts to whom they are due.<sup>106</sup> The verse which states that God is supreme and unequal, however, is more typical in that it does not mandate any particular legal action but instead puts forth a general principle of Islamic law.<sup>107</sup>

The teaching and example of the Prophet Muhammad, collectively known in Islamic law as the *sunnah*, literally the "rule of conduct,"<sup>108</sup> is the second primary source of Islamic jurisprudence.<sup>109</sup> When Muslims apply this meaning to the life of the Prophet Muhammad, the term *sunnah* means the rule of law deduced from the Prophet Muhammad's sayings and actions.<sup>110</sup> The *sunnah* supplements and gives further explanation to the Qur'an's moral directives.<sup>111</sup> The term *hadith* refers to the recorded sayings of the Prophet Muhammad which clarify injunctions found in the Qur'an.<sup>112</sup> The meanings of the terms *hadith* and *sunnah* differ in that *hadith* refers to a report of a certain occurrence, while *sunnah* refers to the rule of law inferred from a certain occurrence.<sup>113</sup> Muslims do not consider the *sunnah* to

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*Dichotomy Between Religious and Secular Discourse in Islamic Societies*, in FAITH & FREEDOM *supra* note 5, at 57 (noting that *shari'a* established rights for women which significantly improved their status not only from regional pre-Islamic societies, but also in comparison to most other religious and legal systems in existence until recent times); see generally ENTELIS, *supra* note 29, at 6-67 (detailing history of Islam's development in Algeria). Examples of general principles include Qur'anic exhortations to Muslims to increase their knowledge and to Muslim men and women to live in tranquillity with one another. QUR'AN 20: 114, 30:21.

106. QUR'AN 4:58 ("Allah doth command you [t]o render back your Trusts [t]o those whom they are due . . ."); see WEERAMANTRY, *supra* note 25, at 33 (providing examples of Qur'anic verses on testamentary law, guardianship, trusteeship, and treaties).

107. QUR'AN 62:1 ("Whatever is [i]n the heavens and [o]n earth, doth declare [t]he Praises and Glory [o]f Allah-the Sovereign, The Holy One, the Exalted [i]n Might, the Wise."); see WEERAMANTRY, *supra* note 25, at 8 (emphasizing importance of general principle of verse 62:1 to Islamic belief).

108. WEERAMANTRY, *supra* note 25, at 34.

109. *Id.*

110. *Id.* at 34-35.

111. Khaliq, *supra* note 5, at 9; see al-Hibri, *supra* note 5, at 7 (noting that Muslims use *sunnah* for further clarification of Islamic principles).

112. *Id.* Muslim scholars have collected the writings of all individuals who compiled *hadith*, and they determine the authenticity of each recorded incident by the repetition of that incident in the work of the compilers. *Id.* at 10. Most scholars believe the Canonical Collection, Shah Sittah, is the most authentic. *Id.*

113. WEERAMANTRY, *supra* note 25, at 34.

be the word of God.<sup>114</sup> The *sunnah*, therefore, is only supplementary in nature to the Qur'an, and Muslims will discard it if it contradicts a verse in the Qur'an.<sup>115</sup>

b. Secondary Sources of Islamic Law: *Qiyas*, *Ijma*, and *Ijtihad*

Islamic jurists use sources other than the Qur'an or the *sunnah* to develop legal rules.<sup>116</sup> One of the principal means by which jurists derive an appropriate rule is through *qiyas*, which means analogy or analogical deduction.<sup>117</sup> Where the primary sources of *shari'a* do not address a particular problem, Islamic jurists employ *qiyas* to reach logical conclusions.<sup>118</sup> By analogizing to existing laws related to specific issues of Muslim well-being, jurists attempt to resolve problems in a manner consistent with the Qur'an and the *sunnah*.<sup>119</sup>

The logic behind the *qiyas* analogy must be based on the Qur'an, the *sunnah*, or the consensus of legal scholars, known as *ijma*.<sup>120</sup> Muslims frequently use *qiyas* today to apply Islamic principles to modern-day problems.<sup>121</sup> One example is the outlawing of marijuana based on the Qur'an's prohibition of alcohol even though the Qur'an does not specifically refer to marijuana.<sup>122</sup>

*Qiyas* is a form of *ijtihad*, which is an intellectual striving to arrive at one's own judgment.<sup>123</sup> *Ijtihad* is a process by which

114. *See id.* (explaining *sunnah* as example of Prophet that Muslims use for guidance when Qur'an is silent on particular matter).

115. Khaliq, *supra* note 5, at 9. Discrepancies in some reported *hadith* existed because scholars did not record the *sunnah* as a whole until approximately three centuries after the death of the Prophet Muhammad. *Id.* at 9-10. Thus, while most Muslims consider the *hadith* to be fairly accurate in its recorded sayings of the Prophet Muhammad, the risk of mistakes still exists. *Id.* at 10.

116. WEERAMANTRY, *supra* note 25, at 39; *see* WALTZ, *supra* note 38, at 19 (classifying secondary sources in terms of techniques Islamic jurists employed to develop legal rules based on Qur'an and *sunnah*).

117. *See* Khaliq, *supra* note 5, at 11 (defining *qiyas*).

118. *Id.* at 11-12.

119. *See id.* (explaining *qiyas* as legal principle that enables jurists to derive logical conclusions).

120. *Id.* at 12; *see* WALTZ, *supra* note 38, at 19 (describing effect of *ijma*). Most Muslims view resolutions to legal problems that scholars later ratify by *ijma* as definitive. *Id.*

121. Khaliq, *supra* note 5, at 12 (noting that despite frequent use of *qiyas*, not all scholars agree with principle).

122. *Id.* Because marijuana has the same intoxicating effect as alcohol and the Qur'an outlaws alcohol, scholars make the analogy that Muslims are prohibited from using marijuana and other intoxicating substances. *Id.*

123. *Id.* at 10; *see* Schooley, *supra* note 5, at 663-64 (defining *ijtihad* as "to strive or

well-trained scholars adapt Islamic law to changing societies.<sup>124</sup> Historically, jurists often used *ijtihad* during the earlier stages of the development of *shari'a*.<sup>125</sup> Somewhere between the ninth and twelfth centuries A.D., scholars became increasingly reluctant to apply human reasoning to the divine word of the Qur'an and instead began to rely on the founding jurists' establishment of generally accepted principles and rules based on the Qur'an and the *sunnah*.<sup>126</sup>

## 2. Islam and Women's Rights

Islamic law proceeds on the basic principle of unconditional submission to God<sup>127</sup> and is more than a legal system in that it touches aspects of thought, life, and conduct in a deeper way than a pure legal system does.<sup>128</sup> Differences arise between men

struggle intellectually"); see also al-Hibri, *supra* note 5, at 7-8 (discussing formation of many different Islamic schools of thought based on disagreement between legal scholars in their *ijtihad*).

124. WEERAMANTRY, *supra* note 25, at 40-41. The process of *ijtihad* was similar to "the English lawyer seeking to extract the general principle underlying a decision from the particular facts of the case and applying it to the analogous case that arises later." *Id.*

125. Khaliq, *supra* note 5, at 11; see Schooley, *supra* note 5, at 664 (noting that *ijtihad* was supposed to stop after ninth century A.D.); see also, Ann E. Mayer, *Islam and the State*, 12 CARDOZO L. REV. 1015, 1022 (stating that historically governing leader was not interpreter of sources). Expert religious scholars known as '*ulama* had the task of interpreting and applying the divine law of the Qur'an and the *sunnah* to new problems. *Id.* When these scholars were working as jurists they were known as *fuqaha*, and their works of *fiqh*, juristic treatises, were the authoritative statements of Islamic law. *Id.* at 1022-23

126. WEERAMANTRY, *supra* note 25, at 41. Not all scholars accept the idea that the door of *ijtihad* has closed. *Id.* at 42. For example, jurists in Egypt, India, and, most recently, in Saudi Arabia have argued, with varying degrees of success, that scholars must continue to make fresh interpretations of the Qur'an in light of an expanding society. *Id.* at 42-43. From the innovative thinking of jurists who believe that *ijtihad* is necessary in an age of technology and radical lifestyle changes has come much legal reform. *Id.* For example, Tunisian legal scholars viewed the Qur'anic mandate that husbands must treat all co-wives with impartiality as an impossibility given a modern society and economy. *Id.* at 43. As a result, the 1957 Tunisian Law of Personal Status outlawed polygamy. Personal Status Code Decree, 13 Aug., 1956, as amended 1993 [hereinafter Tunisian Code]; see also, WEERAMANTRY, *supra* note 25, at 43 (giving examples of *ijtihad's* persistence in modern society).

127. WEERAMANTRY, *supra* note 25, at 1. Unconditional submission to God is likewise the fundamental tenet of Islamic religion. *Id.*

128. *Id.* at 1; see Schooley, *supra* note 5, at 661 (explaining that because Islam demands obedience in everyday life to *shari'a*, when foreign nations advocate change in any of these basic tenets, Islamists risk spiritual damnation).

and women in the social context of the family.<sup>129</sup> In traditional Islamic societies, women occupied the private domain, while men functioned in the public arena.<sup>130</sup> In many areas of Islamic law, women do not have rights equal to those of their male counterparts.<sup>131</sup> Notwithstanding, numerous Islamic states have ratified international human rights treaties which give women equality.<sup>132</sup>

#### a. The Pervasiveness of Islamic Law in Islamic Life

The religion of Islam is the basis of Islamic law.<sup>133</sup> The principle of the separation between Church and State is foreign to Islamic societies.<sup>134</sup> Islamic law proceeds on the basic principle of unconditional submission to God.<sup>135</sup> Islamic men and women must pursue obedience and submission to God's will.<sup>136</sup> God's will embraces all aspects of Muslim life, and thus, *shari'a* provides a chance for righteous action in every situation.<sup>137</sup> The will of this transcendent God is a path that guides Muslims.<sup>138</sup> According to Islam, God reveals that path, known as *shari'a*, through the Prophet Muhammad as law intended to govern every detail of Muslim life.<sup>139</sup>

In Islam, *shari'a* is more than just a legal system in that it

129. Khaliq, *supra* note 5, at 13.

130. Schooley, *supra* note 5, at 675.

131. See Khaliq, *supra* note 5, at 14-15 (concluding that principle of guardianship of women established by verse 4:34 of Qur'an is justification for discrimination). *But see* Schooley, *supra* note 5, at 669 (stating "[i]t is assumed that due to their physiological characteristics and maternal capacity, women are granted different, not unequal, rights in the community").

132. See Arzt, *supra* note 10, at 214-21 (examining Arab states ratification of international human rights agreements).

133. WEERAMANTRY, *supra* note 25, at 1.

134. Khaliq, *supra* note 5, at 7; Schooley, *supra* note 5, at 660. Under Islamic law, religion is in essence inextricable from the rest of life. *Id.* This differs greatly from the Western notion that, generally, religion is detached from everyday life. *Id.*

135. WEERAMANTRY, *supra* note 25, at 1. Unconditional submission to God is likewise the fundamental tenet of Islamic religion. *Id.*

136. See Schooley, *supra* note 5, at 660 (noting that duty to submit to God's will requires personal action and communal duty); Khaliq, *supra* note 5, at 7 (following God's path encompasses Muslims' "whole duty of mankind").

137. Schooley, *supra* note 5, at 661; see Khaliq, *supra* note 5, at 7 (describing Islamic law as imposing on every area of Muslims' lives).

138. WEERAMANTRY, *supra* note 25, at 1; Schooley, *supra* note 5, at 660; Khaliq, *supra* note 5, at 7.

139. Schooley, *supra* note 5, at 660; see WEERAMANTRY, *supra* note 25, at 1 (explaining meaning of *shari'a*). *Shari'a* literally means track or road. *Id.* It governs the lives of

touches aspects of thought, life, and conduct in a much deeper way than a pure legal system could.<sup>140</sup> Muslims view *shari'a* as extending beyond a mere framework for life's conduct to an assertion of divine truth.<sup>141</sup> Muslims believe that the legal system comes directly from God, and, thus, compliance with *shari'a* is the foundation for Islam.<sup>142</sup>

#### b. Women's Role in Traditional Islamic Law

The Western concept of inalienable rights is foreign to Islamic law.<sup>143</sup> Rather, individual human rights in Islam exist only in relation to obligations to God, other individuals, and nature.<sup>144</sup> While the Qur'an teaches that women and men are equal in their relationship with God,<sup>145</sup> differences arise between the sexes in the social context of the family.<sup>146</sup> In traditional Islam, the family is the cornerstone of society and is of vital significance to the conditioning of future Muslim generations.<sup>147</sup> All people within this society have a specified communal, rather than individual, role, and for women, child bearing is the pri-

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millions of Muslims in dozens of countries and has been influential for more than thirteen and a half centuries. *Id.*

140. WEERAMANTRY, *supra* note 25, at 1; see Schooley note 5, at 661 (explaining that because Islam demands obedience in everyday life to *shari'a*, when foreign nations advocate change in any of these basic tenets, Islamists risk spiritual damnation).

141. Schooley, *supra* note 5, at 661.

142. *Id.*

143. Arzt, *supra* note 10, at 205. The only parallel to inalienable rights of the West are those rights belonging to God and to the state. *Id.* at 206.

144. *Id.*

145. *E.g.*, QUR'AN 16:97 ("Whoever works righteousness, [m]an or woman, and has Faith, [v]erily, to him will We give [a] new Life, and life [t]hat is good and pure, and We [w]ill bestow on such their reward [a]ccording to the best [o]f their actions."); QUR'AN 4:1. The Qur'an states:

O mankind! reverence [y]our Guardian-Lord, [w]ho created you [f]rom a single Person, [c]reated, of like nature, [h]is mate, and from them twain [s]cattered (like seeds) [c]ountless men and women. Fear Allah, through Whom [y]e demand your mutual (rights), [a]nd (reverence) the wombs ([t]hat bore you): for Allah [e]ver watches over you.

*Id.* See Khaliq, *supra* note 5, at 13 (stating that in Islam "absolutely no difference between men and women as far as their relationship with God" exists); ABDUR RAHMAN I. DOI, WOMEN IN SHARI'AH, 4 (1989) (explaining that both men and women will receive same reward or punishment based on their conduct).

146. Khaliq, *supra* note 5, at 13.

147. See Khaliq, *supra* note 5, at 13 (classifying Islamic perspective on society as functionalist).

mary role.<sup>148</sup>

In traditional Islamic societies, women occupied the private domain, while men functioned in the public arena.<sup>149</sup> Traditional houses in middle and upper class societies generally had two parts, the *biruni*, meaning outside, and referring to the man's principal domain, and the *andaruni*, or inside, designating the woman's principle domain.<sup>150</sup> While men could seek comforts such as food, sleep, warmth, and affection in *andaruni*,<sup>151</sup> women could not enter *biruni*, regarded as the place of business, except to clean.<sup>152</sup>

In many areas of Islamic law, women do not have rights equal to those of their male counterparts.<sup>153</sup> For example, one female is not legally sufficient to act as a witness in a court of law while one male is sufficient.<sup>154</sup> In the area of marriage, Islamic law prohibits women from marrying non-Muslim men,<sup>155</sup> while Muslim men may marry up to four Muslim, Jewish, or Christian women simultaneously.<sup>156</sup> Upon divorce, women retain custody over their sons only until age seven and over their daughters only until age nine, at which times a child's father or his paternal relatives receive permanent custody.<sup>157</sup> In Muslim society, unequal treatment permeates almost every area of women's lives.<sup>158</sup>

148. *Id.*; see Arzt, *supra* note 10, at 206 (discussing how Islam does not view lack of individualism as negative aspect).

149. Schooley, *supra* note 5, at 675-76.

150. *Id.* at 676.

151. *Id.*

152. *Id.*

153. See Khaliq, *supra* note 5, at 14-15 (concluding that principle of guardianship of women established by verse 4:34 of Qur'an is reason for discrimination). *But see* Schooley, *supra* note 5, at 669 (stating "it is assumed that due to their physiological characteristics and maternal capacity, women are granted different, not unequal, rights in the community.").

154. See Schooley, *supra* note 5, at 670 (noting that two female witnesses equal one male witness in Islamic law); Khaliq, *supra* note 5, at 27-28 (arguing that although Qur'an mandates two female witnesses only for business transactions, male jurists have determined that two female witnesses equal one male witness at all times).

155. QUR'AN 60:10 ("They are not lawful (wives) [f]or the Unbelievers, nor are the (Unbelievers) lawful (husbands) for them.").

156. QUR'AN 4:3 ("Marry women of your choice, [t]wo or three or four."); see Schooley, *supra* note 5, at 671 (noting that Qur'an advises men to take up to four wives only if he can treat them equally).

157. See Schooley, *supra* note 5, at 674 (explaining that father still provides for children while they are under mother's care).

158. See *id.* at 670-76 (providing examples of unequal treatment of men and women in areas of inheritance and veiling of women).

c. Islamic Women's Role and Modern Human Rights Principles

Many Islamic states have ratified international human rights treaties, including those aimed specifically at giving women equality.<sup>159</sup> These states, however, have entered substantial reservations to their ratifications of these agreements.<sup>160</sup> Where their own codes of conduct conflict with international human rights schemes, Islamic states have not implemented those agreements.<sup>161</sup> Women's status is one area of Islamic culture that has

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159. See Arzt, *supra* note 10, at 214-21 (examining Arab states ratification of international human rights agreements). The Muslim states have given the most support to the International Convention on the Elimination of All Forms of Racial Discrimination and the least support to the Optional Protocol to the International Covenant on Civil and Political Rights. *Id.* at 218; see International Convention on the Elimination of All Forms of Racial Discrimination, Jan. 7, 1966, 5 I.L.M. 352 (undertaking to pursue policy of eliminating all racial discrimination); Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (creating Committee to receive communications from individuals claiming to be victims of violations of ICCPR). Furthermore, many Islamic states have ratified either the Women's Convention, the Convention on the Political Rights of Women, the Convention on the Nationality of Married Women, or the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages. Arzt, *supra* note 10, at 218-19; see Women's Convention, *supra* note 6, pmbl. (adopting measures required for elimination of discrimination against women); Convention on the Political Rights of Women, Mar. 31, 1953, 27 U.S.T. 1909, 193 U.N.T.S. 135 (affirming women's right to vote and women's eligibility for positions in public office); Convention on the Nationality of Married Women, Feb. 20, 1957, 309 U.N.T.S. 65 (providing for retention of women's nationality despite marriage, divorce, or husband's change in nationality); Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, Dec. 10, 1962, 521 U.N.T.S. 231 (reaffirming marriage as consensual and requiring that law establish minimum age for marriage and marriage registration).

160. Arzt, *supra* note 10, at 219. When Egypt ratified the Women's Convention, its reservation stated that it would comply with Article 2, which condemns discrimination against women, only insofar as such compliance was not in conflict with *shari'a*. MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL (STATUS AS OF 31 Dec. 1995), at 169 [hereinafter MULTILATERAL TREATIES]. Bangladesh definitively stated that Article 2 was not binding because of the conflict with the Qur'an and *sunnah*. *Id.*; see Bharathi Anandhi Venkatraman, *Islamic States and the United Nations Convention on the Elimination of All Forms of Discrimination Against Women: Are the Shari'a and the Convention Compatible?* 44 AM. U. L. REV. 1949, 1951-52 (1995) (stating that at least 12 of 132 States that ratified Women's Convention have Muslim majority).

161. See Cerna, *supra* note 2, at 749 (giving examples of many Islamic states invoking *shari'a* law as obstacle to full implementation of Convention on the Rights of the Child). Kuwait, Afghanistan, Egypt, Iran, Jordan, the Maldives, Pakistan, and Qatar evoked *shari'a* law as an impediment to total fulfillment of the provisions of the Convention on the Rights of the Child. MULTILATERAL TREATIES, *supra* note 160, at 199-206; Cerna, *supra* note 2, at 749.

always been subject to *shari'a* law.<sup>162</sup> Consequently, Islamic women's status has changed little despite modern developments in other areas of Islamic states.<sup>163</sup>

### C. *The Algerian Example*

Algeria's Constitution and Family Code reflect Algeria's modern stance on the rights and privileges afforded women.<sup>164</sup> The Constitution contains a mix of both secular and Islamic references,<sup>165</sup> while *shari'a* law is the only basis of the Family Code.<sup>166</sup> The two documents appear to set forth conflicting ideas on what position women occupy in society.<sup>167</sup>

162. See Venkatraman *supra* note 160, at 1971-73 (explaining that where *shari'a* governs private law, reconciliation with inconsistent international norms is difficult). *Shari'a* governs both public and private life. *Id.* at 1971. While the distinction between the two is not always clear, generally, the public domain includes constitutional, criminal, and human rights law, while the private sphere governs religion and personal life. *Id.* Many Islamic countries have applied secular norms to the public law sphere, while simultaneously refusing to do so in the private law realm. *Id.* at 1971-72; FATIMA MERNISSI, *BEYOND THE VEIL* 22 (1987) (identifying subject matters that today remain within realm of private law as religious duties, marriage, divorce, maintenance, inheritance law, and law of endowments for religious institutions).

163. See MERNISSI, *supra* note 162, at 19-22 (discussing family structure as unchangeable due to close connection with religion). Muslim societies have not indiscriminately rejected all changes. *Id.* at xvii. For example, such countries have embraced technological advances. *Id.* Muslim countries, however, consistently have rejected innovations dealing with free choice as an insupportable societal change. *Id.* at xviii. Women's repeated requests to discard the traditional veil is one such innovation that some men have always opposed as unbearable to society's makeup. *Id.* at xvii-xviii; see also Karima Bennoune, *S.O.S. Algeria: Women's Human Rights Under Siege, in FATH & FREEDOM*, *supra* note 5, at 187 (describing fundamentalists' campaign to force women to veil as relentless). But see Knauss, *supra* note 19, at 159-60 (discussing increase in women's education). Algeria has increasingly promoted education for women, and, furthermore, the Algerian Government committed itself in a five-year plan, 1985-1989, to creating more new jobs for women. *Id.* In 1977, the total enrollment of Algerian women attending schools and universities was 1,344,728, more than double the number in 1966. *Id.* at 159. Other factors that contributed to this increase were the establishment of sixteen as the minimum marrying age for women, as well as the desirability of having a wife who had primary and secondary schooling. *Id.*

164. See PROJET DE REVISION CONSTITUTIONNELLE arts. 28, 30 (Alg.) (giving all citizens equal rights); Family Code, *supra* note 23, bk. 1, tit. 1, ch.4, art. 39 (mandating wife's obedience to husband).

165. See PROJET DE REVISION CONSTITUTIONNELLE pmbl., arts. 2, 6 (Alg.) (containing reference to Allah and Islam as well as establishing people as source of power).

166. See MERNISSI, *supra* note 162, at 22 (listing family law as one area subject exclusively to *shari'a*).

167. See Mayer, *supra* note 125, at 1034 (noting that terms of 1984 Family Code appear to violate rights provisions in Algerian Constitution); Compare PROJET DE REVISION CONSTITUTIONNELLE art. 28 (Alg.) (asserting equality of citizens), with Family



### 1. The 1989 Algerian Constitution

The Algerian Government promulgated the 1989 Algerian Constitution in response to general public unhappiness, which the people manifested by rioting in 1988, with an authoritarian socialist regime.<sup>168</sup> The Government sought to placate the populist demands of its citizens by granting more respect for Islam and for human rights in the Constitution,<sup>169</sup> while simultaneously incorporating many secular references that purported to give citizens both sovereign power and equality.<sup>170</sup> Algeria's increased concern that domestic laws correspond to international legal norms in the realm of human rights is not peculiar to Algeria, but rather reflects a recent trend throughout the Muslim world.<sup>171</sup>

#### a. Islamic References in the Constitutional Text

Although religious references distinguish the Algerian Constitution from a secular state's constitution,<sup>172</sup> the text refers

Code, *supra* note 23, Bk. 1, Tit. 1, Ch. 4, art. 39, (asserting women's obligation to obey husband).

168. Mayer, *supra* note 125, at 1032. A substantial rise in food prices precipitated Algeria's October 1988 riots. Will D. Swearingen, *Agricultural Policies and the Growing Food Security Crisis*, in *STATE AND SOCIETY*, *supra* note 19, at 148. This crisis had its roots in colonial rule as well as in agriculture policies that the Government followed after independence from France in 1962. *Id.* While the Government took certain measures to pacify its citizens, such as allocating funds for goods that had otherwise been unavailable and passing the Constitution, there are future problems, such as a rapidly increasing population and a decreasing supply of hydrocarbon deposits, that only a change in Government policies will help. *Id.*

169. See Mayer, *supra* note 125, at 1032 (noting that increased constitutional safeguards for individual rights in Algerian Constitution reflects recent popular demands by some in Muslim world for observance of human rights norms).

170. See, e.g., PROJET DE REVISION CONSTITUTIONNELLE, art. 6 (Alg.) ("The people is the source of all power. National sovereignty belongs to the people."). "The citizens are equal before the law without any possible discrimination on the basis of birth, race, gender (sex), opinion or all other conditions or personal or social circumstance." *Id.* art. 28.

171. See Mayer, *supra* note 125, at 1032 (arguing that trend towards Islamic countries recognizing need for state human rights laws to comport with international laws could eventually mandate recasting of pre-modern *shari'a* rules, thereby paving way for equality of all citizens).

172. *Id.* at 1020. For example, Turkey, under the leader known as Kemal Ataturk, became a completely secular state when Ataturk made Islamic religion into a private matter banned from the political arena. *Id.* Turkey's constitution establishes Turkey as "a democratic, secular, and social State." *TURKIYE CUMHURİYETİ ANAYASASI* (Constitution) art. 2 (Turkey), translated in *CONSTITUTIONS*, *supra* note 24; see Mayer, *supra* note 125, at 1020, 1056 n.16 (explaining how Turkey became secular state). Turkey was able

seldomly to Islam and not at all to *shari'a* law.<sup>173</sup> The Preamble begins with references to Allah, God,<sup>174</sup> and towards the end speaks of Algeria as a land of Islam.<sup>175</sup> Article 2 establishes Islam as the state religion,<sup>176</sup> and Article 9 prohibits practices contrary to Islamic morality.<sup>177</sup>

The other significant references to Islam found in the text refer to the office of the President of Algeria.<sup>178</sup> Article 70 requires that the President be Muslim,<sup>179</sup> and Article 73 mandates that in the oath of office the President must swear by Allah to respect and glorify the Islamic religion.<sup>180</sup> Finally, Article 161 requires the President to institute a High Islamic Council<sup>181</sup> comprised of eleven religious persons to consult the President.<sup>182</sup>

#### b. Secular References in the Constitution

Most of the Islamic-related articles,<sup>183</sup> with the exception of Article 70,<sup>184</sup> are fairly vague, and, therefore, the Constitution leaves Islamic law's role in the government largely undefined.<sup>185</sup> The wording of the Constitution leaves room for secular legisla-

to become a secular state because of Turkey's disillusionment with the Ottoman dynasty and Ottoman Caliphate, who Muslims revered as representative of the idea of unity between religion and politics. *Id.*

173. PROJET DE REVISION CONSTITUTIONELLE pmb. arts. 2, 9, 70, 73, 161 (Alg.).

174. *See id.* pmb. ("In the name of Allah, the Merciful, the Clement.").

175. *Id.* pmb. ("Algeria, land of Islam.").

176. *Id.* art. 2. ("Islam is the religion of the State.") The formulation of Article 2 is vague and does not define the role that Islam should play in Algerian law. Mayer, *supra* note 125, at 1033.

177. PROJET DE REVISION CONSTITUTIONELLE art. 9 (Alg.) ("The institutions forbid . . . practices contrary to Islamic morals."). Also prohibited are feudal, regionalist, and nepotist practices. *Id.*

178. *Id.* arts. 70, 73.

179. *Id.* art. 70.

180. *Id.* art. 73. The oath states, "I swear upon God All Mighty to respect and glorify the Islamic religion." *Id.*

181. *Id.* art. 161. "Next to the President of the Republic, a High Islamic Council is established. The High Islamic Council is composed of eleven members selected by the President of the Republic from among the religious personalities." *Id.*

182. *Id.* art. 161. The High Council acts as a consultant on Islamic matters. *See id.* (entitling chapter 2 "The Consultative Institutions").

183. *Id.* arts. 2, 9, 73, 161.

184. *Id.* art. 70 (requiring Muslim President).

185. *See* Mayer, *supra* note 125, at 1033 (noting that future governments will have considerable leeway in deciding policies concerning Islamic religion).

tion.<sup>186</sup> Article 6 proclaims that the people are the source of all power and that national sovereignty belongs to them.<sup>187</sup> In the area of human rights, Article 28 asserts that citizens are equal before the law without discrimination based on gender.<sup>188</sup> Article 30 ensures equality in the rights and duties of all citizens;<sup>189</sup> Articles 31<sup>190</sup> and 32<sup>191</sup> guarantee fundamental liberties, human rights, and protection of human rights advocacy.<sup>192</sup>

## 2. The Family Code of 1984

Algeria gained independence in 1962,<sup>193</sup> but the Algerian Government did not promulgate the Algerian Family Code until 1984.<sup>194</sup> This delay was due to the struggle between feminists and men in both the Government and the religious sectors over the preservation of Algeria's patriarchal family and societal structure.<sup>195</sup> The Family Code was a clear victory for conservatives<sup>196</sup> in that it relegated women to an inferior position to men with

186. PROJET DE REVISION CONSTITUTIONELLE pmb. (Alg.) (stating "the Constitution is, above all, the fundamental law which guarantees the rights and the individual and collective liberties . . .").

187. *Id.* art. 6. "The people is the source of all power. National sovereignty belongs to the people." *Id.* The people is to exercise this power through institutions, referendums, and elected representatives. *Id.* art. 7.

188. *Id.* art. 28. (stating "the citizens are equal before the law without any possible discrimination on the basis of birth, race, gender (sex), opinion or all other conditions or personal or social circumstance.").

189. *Id.* art. 30. ("The institutions seek to assure the equality of rights and duties of all citizens (*citoyens et citoyennes*) in suppressing the obstacles, which obstruct the development of the human personality and impede the effective participation of all in the political, economic, social and cultural life.").

190. *Id.* art. 31 (stating "the fundamental liberties and the Rights of Man and of the citizen are guaranteed.").

191. *Id.* art. 32. ("The individual and associative defense of the fundamental Rights of Man and of individual and collective liberties is guaranteed.").

192. *Id.*

193. See ENTELIS, *supra* note 29, at 56 (recounting cease fire agreement between Algeria and France in March 1962 in Evian, France which led to Algeria's independence on July 5, 1962).

194. See Mayer, *supra* note 5, at 435 (noting that Government had put forth, but rejected, many earlier drafts); see also KNAUSS, *supra* note 17, at 134-35. (discussing Government's decision in 1982 to withdraw Family Code for further study).

195. See Mayer, *supra* note 5, at 435 (discussing feminists' hopes that Family Code would be progressive); see also KNAUSS, *supra* note 7, at 135 (noting that 1984 Family Code was regression compared with 1981 Code put forth but not enacted). In response to the 1981 draft of the Family Code, a women's movement took the unprecedented step of staging three major demonstrations, publicly humiliating the Government, and delaying the Code's promulgation. *Id.* at 130-31. There was no such response to the issuance of the 1984 Family Code. See *id.* at 125-40 (comparing 1981 and 1984 codes

regard to rights and duties.<sup>197</sup> For example, the Family Code furnishes more legal opportunities for polygamous marriages,<sup>198</sup> more allowances for the male guardian to prevent marriages that he personally dislikes,<sup>199</sup> and less opportunity for a woman to obtain a divorce.<sup>200</sup> The Government upheld this regressive status given to women as consistent with *shari'a* law.<sup>201</sup> *Shari'a* law was to be the source of all interpretations of the text in cases of ambiguity.<sup>202</sup>

#### a. Provisions of the Family Code on Marriage

Under the Family Code, the legal age for marriage of women is eighteen and for men is twenty-one.<sup>203</sup> While women may only marry Muslim men, men may marry non-Muslim women.<sup>204</sup> Fur-

and Algerian women's reactions to each); Knauss, *supra* note 19, at 161-67 (giving history of Family Code).

196. See Mayer, *supra* note 5, at 435 (noting that men in Government and Islamic religious establishment, who were determined to protect patriarchal family, successfully opposed feminists' attempts at making Family Code vehicle of progress).

197. See KNAUSS, *supra* note 17, at 135 (noting effect of Family Code on women's legal status was to relegate them to position of permanent minors as compared to Algerian men).

198. See *id.* at 126-27 (noting that 1984 Family Code eliminates provisions in 1981 draft that required husband to obtain separate housing for separate wives and wife to exclude polygamy in marriage contract).

199. See *id.* (describing 1984 Family Code's provision on guardian's ability to disallow marriage as slightly broader than 1981 draft).

200. See *id.* at 128-29 (stating change from divorce by mutual consent in 1981 draft to divorce as exclusive right of husband or at demand of wife in certain circumstances in 1984 Family Code).

201. *Id.* at 135-36.

202. *Id.* The Judicial Commission which drafted the 1984 Family Code gave the following explanation of the motivation behind the document:

Since the arrival of Islam in Algeria, our people have always applied the prescriptions of the *Shari'a* in matters referring to personal status. We have never departed from that, even during the dark periods of our history, notably the period of foreign occupation.

On July 5, 1975, Algerianization of national legislation took place which abrogated existing foreign laws. This current law concerning personal status proposes to fill the juridical void in this area.

*Id.* at 135-36 (citing Helene Vandeveld, *Où en est le problème du Code de la famille en Algérie*, MACHREB-MACHREK, no. 97, July-Aug.-Sept., at 39).

203. Family Code, *supra* note 23, bk. 1, tit. 1, ch. 1, art. 7. The previous legal age for women to marry was 16. See KNAUSS, *supra* note 17, at 137 (characterizing change as modest gain for women prompted by Government's desire to decrease birth rate); Knauss, *supra* note 19, at 165 (arguing that raising men's age to marry from 18 to 21 undercut any improvement obtained by raising women's marrying age from 16 to 18, thus perpetuating inequality).

204. Family Code, *supra* note 23, bk. 1, tit. 1, ch. 2, art. 31.

thermore, a *wali*,<sup>205</sup> or guardian, must contract a woman's marriage on her behalf.<sup>206</sup> The *wali* is usually the woman's father, and has the power to prohibit a marriage if he deems prohibition to be in his daughter's best interest.<sup>207</sup> Women cannot legally exclude polygamy from the marriage contract,<sup>208</sup> and there is no requirement that the male maintain separate housing for each wife.<sup>209</sup> Finally, Article 39 specifies the obligations of a wife to her husband.<sup>210</sup> According to Article 39, a wife must obey her husband, regard him as the head of the family, and respect his parents and relations.<sup>211</sup>

#### b. Provisions of the Family Code on Divorce and Custody

Generally, under the Family Code the right to divorce belongs to the husband.<sup>212</sup> The wife may obtain a judicial divorce only under certain circumstances such as insanity and abuse.<sup>213</sup> A wife may also obtain a divorce by paying her husband a monetary reparation.<sup>214</sup> These requirements for divorce do not apply

205. al-Hibri, *supra* note 5, at 13 (explaining role of *wali*).

206. Family Code, *supra* note 23, bk. 1, tit. 1, ch. 1, art. 12.

207. *Id.*; see al-Hibri, note 5, at 13-14 (noting similarity of requirement to Western tradition of father "giving away" bride but emphasizing that in Algeria it is legal requirement); KNAUSS, *supra* note 17, at 137 (claiming that 1984 Code gives *wali* more opportunities to prevent marriage than 1981 draft); Knauss, *supra* note 19, at 165 (giving example of reason *wali* could disallow marriage as spouse being unworthy of honor of family).

208. Family Code, *supra* note 23, bk. 1, tit. 1, ch. 1, art. 8 (stating permissibility "to contract marriage with more than one wife within the limits of *shari'a*"); See Knauss, *supra* note 19, at 165 (describing loss of woman's right to exclude polygamy from marriage contract).

209. See Knauss, *supra* note 19, at 165 (noting that advocates of changes in women's status lost right in revised version of Family Code to require separate housing in cases of husband having two or more wives).

210. Family Code, *supra* note 23, bk. 1, tit. 1, ch. 4, art. 39 (stating that the wife is required to "obey her husband and accord him considerations in his position as head of the family, to bring forth his offspring . . . , [and] to respect the her husband's parents and relations.").

211. *Id.*; see Mayer, *supra* note 5, at 439-40 (noting that while requirements in Article 39 that wife obey her husband and defer to him in his capacity as head of family resemble Article 213 of Code Napoléon, idea that wife has legal duty to respect husband's relatives was Algerian innovation).

212. Family Code, *supra* note 23, bk. 1, tit. 1, ch. 4, art. 37; see al-Hibri, *supra* note 5, at 16 (stating husband's right to divorce as general rule).

213. Family Code, *supra* note 23, bk. 1, tit. 2, ch. 2, art. 59; see al-Hibri, *supra* note 5, at 16-17. Other reasons for judicial divorce include, "prolonged absence, sexual abandonment, cessation of maintenance and imprisonment of the husband." *Id.* at 17.

214. See al-Hibri, *supra* note 5, at 31 (explaining name of monetary payment for

to the husband.<sup>215</sup>

Under the Family Code, the father is the guardian of his minor children.<sup>216</sup> If the father dies, the widow gains custody.<sup>217</sup> A court, however, might place the children in the custody of a guardian provided for by the father's will if someone legally establishes the mother's incapacity.<sup>218</sup>

### c. Provisions in the Family Code on Other Rights and Duties

The Family Code does not refer to a woman's right to obtain employment outside the home.<sup>219</sup> Therefore, her husband, whom she must obey, has complete discretion over her ability to seek employment.<sup>220</sup> The Family Code limits a woman's ability to leave the house without the permission of her husband, with the expressly recognized customary exception of performing legitimate, moral work.<sup>221</sup> *Ta'ah*, a wife's duty of obedience to her husband, includes a wife's duty to seek permission from the husband before leaving the home.<sup>222</sup> Aside from the explicit textual references to this duty of obedience, the Algerian code, as well as family codes of other North African countries also imply *Ta'ah*, and jurists of various schools have accepted the duty of

divorce as "*khul'*"). This method now generally requires the woman to pay more than the original dowry, although it began as an equitable solution which required the woman to give back the dowry in exchange for breaking her end of the contract. *Id.* at 32.  
215. *Id.* at 31.

216. Family Code, *supra* note 23, bk. 2, ch. 2, art. 87 ("The father is guardian of his minor children.").

217. *Id.* ch. 3, art. 92 (stating "minor child may be placed under the administration of a testamentary guardian by his father or grandfather . . . if the incapacity of [the mother] is legally established.").

218. *Id.* In both cases of guardianship, the guardian must be "Muslim, sane, have attained puberty, capable, honest, and a good administrator of the home." *Id.* art. 93.

219. KNAUSS, *supra* note 17, at 127.

220. *See id.* (contrasting 1984 Family Code with 1981 Family Code which to limited extent allowed women to work outside home). "The legal status of women [after revised Family Code] became that of permanent minors compared with the rights and duties of Algerian men." *Id.* at 135.

221. *See* al-Hibri, *supra* note 5, at 15 (discussing exception allowing women to leave home to visit family); *see also*, Family Code, *supra* note 23, bk. 1, tit. 2, ch. 4, art. 38 (noting Algerian Family Code exception to visit family). Recently, the family Codes of other Muslim countries have incorporated an exception for the wife to leave the home without her husband's permission to perform legitimate, moral work. *See, e.g.*, Egyptian Code, Law No. 25 (1920) (amended 1985), bk. 1, ch. 1, art. 1 and Kuwaiti Code, Part 1, bk.1, tit. 3, art. 89; *see also* al-Hibri, *supra* note 5, at 15 (noting that Jordanian Code classifies domestic abuse as legitimate reason for wife to leave home).

222. al-Hibri, *supra* note 5, at 14-15.

obedience.<sup>223</sup> If the wife is obedient to her husband, her husband must provide for her maintenance.<sup>224</sup>

## II. ARGUMENTS ADDRESSING WHETHER INTERNATIONAL HUMAN RIGHTS ARE CONSISTENT WITH ISLAMIC LAW

Scholars have not settled the debate over whether international human rights are compatible with Islamic law, and this question has recently resurfaced.<sup>225</sup> The view that the two are compatible argues that other issues, such as the persistence of patriarchy, keep Islamic countries from honoring international covenants on human rights.<sup>226</sup> Many scholars have also turned to the texts of Islam to prove that its basic postulates found within those texts are compatible with the underlying principles of international human rights law.<sup>227</sup> On the other side of the argument, Islamic nations insist that their cultural background, inextricably bound up with the religion of Islam, is incompatible with Western notions of the individual and human rights.<sup>228</sup> One such position advocates redefining human rights within an Islamic framework,<sup>229</sup> while an even more conservative approach advocates a retreat from the Western imposition of human rights

223. *Id.*

224. See Schooley, *supra* note 5, at 671-72 (stating that husbands provide maintenance if wife is obedient, submits to husband's power, and has valid marriage contract). Maintenance includes:

The right of the wife to be provided at the husband's expense, and at a scale suitable to his means, with food, clothing, housing, toilet necessities, medicine, doctors' and surgeons' fees, baths, and also the necessary servants where the wife is of a social position which does not permit her to dispense with such services, or when she is sick.

JAMAL NASIR, *THE ISLAMIC LAW OF PERSONAL STATUS* 102 (1990).

225. See Cerna, *supra* note 2, at 741 (noting that debate over compatibility of international human rights and Islamic law was center stage at second U.N. World Conference on Human Rights in 1993 in Vienna, Austria); Tibi, *supra* note 8, at 277-78 (recounting how states like Iran and Sudan were emphasizing their culture against claim of universality of human rights at U.N. World Conference); Pollis, *supra* note 5, at 316 (noting that passage of time has not lessened the salience of early claim that human rights do not reflect many societies' world view).

226. WALTZ, *supra* note 38, at 41; see KNAUSS, *supra* note 17 at 18-29, 69-124 (documenting persistence of patriarchy in twentieth century Algeria).

227. al-Hibri, *supra* note 5, at 32-46; Khaliq, *supra* note 5, at 47.

228. Tibi, *supra* note 8, at 281; Cerna, *supra* note 2, at 740.

229. Bielefeldt, *supra* note 11, at 603.

principles.<sup>230</sup>

*A. Islamic Law Regarding Women's Rights Is Consistent With International Law*

Some scholars argue that international women's human rights are necessary, fundamental rights not diametrically opposed to Islamic law.<sup>231</sup> Historical and political developments in the Islamic world as well as scholars' interpretations of the primary and secondary sources of Islamic law form the basis for the arguments that international women's human rights are not opposed to Islamic law.<sup>232</sup> Scholars suggest that women's unequal status in Islamic cultures, and specifically in the Mahgreb, is not due to inherent inconsistencies between *shari'a* and international human rights norms, but instead is due to the patriarchal structure of Islamic societies.<sup>233</sup> Scholars contend that the basic principles of Islam and international human rights are the same.<sup>234</sup> This argument concludes that Islamic jurists must reinterpret the Qur'an and examples of the Prophet Muhammad in light of a modern-day society.<sup>235</sup>

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230. Reza Afshari, *An Essay on Islamic Cultural Relativism in the Discourse of Human Rights*, 16 *HUM. RTS. Q.* 235, 246-47, 253 (1994).

231. See Khaliq, *supra* note 5, at 46-47 (noting that underlying principles of *shari'a* are consistent with international human rights norms); Mayer *supra* note 5, at 442 (noting that women in Maghrib support eliminating personal status laws that are not in keeping with modern ideals); WEERAMANTRY, *supra* note 25, at 113 (arguing that human rights are logical development from basic principles of Islamic law). *But see* Huntington, *supra* note 12, at 22 (asserting that because Western concepts are fundamentally different from those in Middle East, promotion of human rights only fuels anti-Western sentiment and forms the basis for fundamental movements).

232. See al-Hibri, *supra* note 5, at 35-44 (interpreting meaning of several Qur'anic phrases and determining compatibility with international human rights principles such as equality); MAYER, *supra* note 3, at 94 (concluding that Qur'an intended to improve women's status); WEERAMANTRY, *supra* note 25, at 69 (stating that Prophet Muhammad taught respect for women as one of fundamental precepts).

233. al-Hibri, *supra* note 5, at 5-6; see KNAUSS, *supra* note 17, at 124 (stating "Islam may be seen . . . as . . . a psychic balm for a grievous sense of having been exploited and a lack of identity in the modern social order; a surrogate for a lack of community; and a rationale for the defense of patriarchy."); *see also* MAYER, *supra* note 3, at 95-96 (noting that elite classes of Muslims have gradually accepted idea of equal rights for women but conservative Muslims have forcefully opposed these ideas halting progress of women gaining equality).

234. Khaliq, *supra* note 5, at 47; *see, e.g.*, al-Hibri, *supra* note 5, at 32-35 (explaining that according to proper Qur'anic interpretation there exists no hierarchical structure between men and women).

235. al-Hibri, *supra* note 5, at 57; Khaliq, *supra* note 5, at 46-47.



## 1. Text Is Consistent With International Law

Proponents of equality argue that the general principles in the Qur'an are similar to the principles which serve as the basis of international human rights.<sup>236</sup> They explain that much of Qur'anic reasoning derives from ideas such as tolerance, autonomy, justice, freedom, consultation, and equality.<sup>237</sup> Concerning gender relations, the Qur'an states that God created men and women from the same soul to give one another tranquillity, affection, and mercy.<sup>238</sup> Although Qur'anic verse 4:34, which establishes men as the protectors of women,<sup>239</sup> appears to conflict with the idea of men and women as equals, at least one scholar has interpreted the verse as a proviso that Muslims should apply in certain situations but should not override the more general equality principle.<sup>240</sup>

## 2. Islamic Law Obligates Adherents to Reinterpret Law as Times Change

According to Islamic belief, God revealed the Qur'anic

236. Khaliq, *supra* note 5, at 47; see WEERAMANTRY, *supra* note 25, at 113, 120, 122 (stating that economic and social rights derive from Islamic principles). "Among [the principles underlying Islamic law] will be found . . . the principles of human dignity, the unity of mankind, the protection of minorities, collective obligation for the public welfare, the sanctity of life, the promotion of knowledge and responsibility towards future generations." *Id.* at 120; compare QUR'AN 30:21 (stating "He created [f]or you mates from among [y]ourselves, that ye may [d]well in tranquillity with them.") with UDHR, *supra* note 7, art. 1 (stating "all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.").

237. Khaliq, *supra* note 5, at 47; see QUR'AN 6:151 (recognizing general Islamic right to life); QUR'AN 2:256 (recognizing general Islamic right to freedom); QUR'AN 24:27-28 (recognizing general Islamic right to privacy); WEERAMANTRY, *supra* note 25, at 120 (describing Islamic rights to life, freedom, and privacy); al-Hibri, *supra* note 5, at 35 (identifying Qur'anic verse 30:21 as "Equality Principle").

238. QUR'AN 30:21; al-Hibri, *supra* note 5, at 35.

239. QUR'AN 4:34; see *supra* note 146 and accompanying text (discussing verse 4:34).

240. al-Hibri, *supra* note 5, at 39. al-Hibri's analysis states:

[T]he Qur'anic phrase which articulates the Equality Principle is clearly general. It has no qualifiers, provisos or carve-outs. It is also repeated several other times in the Qur'an. . . . [Verse 4:34] is totally different in structure. In stating what appears to be a general statement . . . the phrase immediately provides an explanation. The explanation acts as a limitation upon the apparently general statement, by specifying the reasons . . . or circumstances . . . that would entitle a male to be [a protector].

*Id.*

verses to the Prophet Muhammad as the need for them occurred.<sup>241</sup> The revelations address certain societal circumstances peculiar to a particular time, and, thus, religious and legal scholars were not to attach fixed meanings to the interpretations.<sup>242</sup> Each generation was to contemplate the verses anew, rather than blindly accepting the previous interpretations.<sup>243</sup>

*Shari'a* was largely a product of human interpretation of general principles.<sup>244</sup> The legal jurists of the second and third centuries looked to the Qur'an and *sunnah* for guidance in accordance with their own comprehension of those sources,<sup>245</sup> but they were not engaged in developing a comprehensive jurisprudence to be followed from thereon in.<sup>246</sup> Historically, not only have subsequent generations of Islamic religious scholars and jurists rendered different interpretations of Qur'anic verses,<sup>247</sup> but also jurists of the same generation, yet from different cultures, have come to greatly varying decisions on the same issues by each engaging in their own interpretations.<sup>248</sup> Proponents of

241. Khaliq, *supra* note 5, at 46.

242. *Id.*; see al-Hibri, *supra* note 5, at 57 (stating basic jurisprudential rule to be that laws change with changing societies).

243. *E.g.* QUR'AN 6:164 ("Every soul draws the meed [o]f its acts on none [b]ut itself: no bearer [o]f burdens can bear [t]he burden of another. Your goal in the end [i]s towards Allah: He will tell [y]ou the truth of the things [w]herein ye disputed."); see Khaliq, *supra* note 5, at 46 (submitting that Qur'an cannot excuse individual who accepts interpretation without pondering first).

244. See An-Na'im, *supra* note 105, at 58 (explaining that earliest Muslims took guidance from Qur'an and *sunnah* according to their own spontaneous understanding of sources without concern for developing comprehensive legal system).

245. *Id.*

246. *Id.*; HALLIDAY, *supra* note 1, at 148. "[I]t is this humanly evolved and variously codified body of legal material that has come to prevail in Muslim society under the . . . term *shari'a*. Thus, what is today invoked as an unchangeable and sacred body of text is, even in Islamic terms, nothing of the sort." *Id.*; Khaliq, *supra* note 5, at 46 (arguing that Qur'an mandates that each individual interpret verses according to one's own era, rather than simply accepting interpretations handed down through generations).

247. See Khaliq, *supra* note 5, at 46 (noting that some states have practiced individual interpretation in past); see also, Schooley, *supra* note 5, at 663-64 (explaining concept of individual striving for correct interpretation); al-Hibri, *supra* note 5, at 7-8 (discussing formation of numerous different Islamic schools of thought based on disagreement between legal scholars in their *ijtihad*). The Qur'an expressly allows slavery, nonetheless, firm supporters of supposedly true *shari'a*, like Saudi Arabians, have nullified the Qur'anic verses on slavery. Khaliq, *supra* note 5, at 46-47.

248. Mayer, *supra* note 125, at 1023-24. Pre-modern Islam had significant tolerance for widely varying interpretations of the Islamic sources offered by numerous schools of law. *Id.* at 1023. The departures in the doctrines of the different schools were large enough that quintessential law cases would produce greatly varying outcomes depending on which school's doctrine scholars used. *Id.* at 1023-24. Generally,

equality argue that more recently some scholars have wrongly regarded recorded *hadith* as the immutable explanations of the primary sources of *shari'a*,<sup>249</sup> instead of understanding those interpretations as products of a particular era and particular needs.<sup>250</sup>

Also evident is that the arrival of Islam marked a notable change in the status of women.<sup>251</sup> From a pre-Islamic Arabian culture that treated women as mere chattel,<sup>252</sup> Islam expanded women's rights to the extent possible.<sup>253</sup> The Prophet Muhammad did not preach the notion of women's equality<sup>254</sup> because society could not then accommodate that notion.<sup>255</sup> Scholars contend that the Qur'an, nevertheless, provided for the basic principles on which Muslims could establish women's equality if

Muslims were free to chose for themselves which school of law to follow. *Id.* The number of schools in existence today has decreased dramatically and their primary influence remains only in the area of family law. *Id.* at 1027; see al-Hibri, *supra* note 5, at 9 (identifying remaining schools as *Hanafi*, *Maliki*, *Shafi'i*, *Hanbali*, and *Ja'fari*). Furthermore, individuals now generally accept the legal school of thought formally adopted by their respective countries: almost all Algerians follow the Maliki school of Sunni Islam. See al-Hibri, *supra* note 5, at 9 (explaining that Maliki school was established by famous scholar/jurist Imam Malik Ibn Anas); ENTELIS, *supra* note 29, at 4 (identifying almost all Algerians as Sunni Muslims of Maliki sect).

249. See Khaliq, *supra* note 5, at 47 (arguing that when sociological conditions change scholars must change their attitudes regarding recorded *hadith*).

250. See An-Na'im, *supra* note 105, at 58 (stating that founding jurists were responding only to immediate communal needs); WEERAMANTRY, *supra* note 25, at 70 (noting that contemporary societies must attune earlier concepts of respect and equal opportunities for women to needs of modern world). "If any of [contemporary jurists] have failed [to attune earlier concepts to contemporary society] the blame needs to be laid at their door rather than on the teachings of Islam." *Id.*

251. DOI, *supra* note 145, at 5; see Khaliq, *supra* note 5, at 47 (noting that when Prophet Muhammad received Qur'an, intention was to improve women's rights).

252. See DOI, *supra* note 145, at 5 (noting revolutionary teachings of Qur'an to pagan Arabs who, for instance, buried female children alive); MAYER, *supra* note 3, at 94 (noting that Qur'an introduced prohibitions against female infanticide).

253. See Khaliq, *supra* note 5, at 47 (stating that society could accommodate only some women's rights at time Prophet Muhammad recorded Qur'an). *But see* MAYER, *supra* note 3, at 94 (stating that in seventh century Qur'an conferred rights on women that allowed them to get full legal status, to own property, and to obtain divorce easily).

254. Khaliq, *supra* note 5, at 47; see WEERAMANTRY, *supra* note 25, at 69 (noting essential teaching of the Prophet Muhammad as respect for women)

255. See Khaliq, *supra* note 5, at 47 (stating that Prophet Muhammad clearly intended to guarantee women some rights, but not to guarantee them equality with men due to inability of society to accept such novelty). Although the Prophet Muhammad did not preach of complete equality between men and women, women living at the time of the Prophet Muhammad often participated in many of society's prominent professions alongside men. See al-Hibri, *supra* note 5, at 6 (giving examples of professions Islamic women entered during Muhammad's life).

and when society was ready to accommodate such a development.<sup>256</sup>

### 3. Patriarchal Structure Is Not Mandated by Islam

Scholars point to the patriarchal system, which existed in North Africa throughout the first half of this century and was predominately a male-dominated familial system of authority, as the root of the present patriarchal societies in the Maghreb.<sup>257</sup> They argue that the native Arab tribes, whose traditional society was patriarchal, put this system into place.<sup>258</sup> The family was a social, political, and economic unit that the oldest male ruled.<sup>259</sup> Women's value existed in their powers to reproduce, and males would only accept them in public roles as they matured and lost their reproductive abilities.<sup>260</sup> Proponents of this view claim that men learned to dominate, to command, and to desire, while women learned to find small compensations for their inferior position.<sup>261</sup>

Scholars argue that various political practices have transferred these patriarchal norms of micro-society to political behavior.<sup>262</sup> One practice is to legitimize the monarchy through Islam by claims to familial ties to the Prophet Muhammad.<sup>263</sup> The king, thus, becomes both the secular and religious leader and

256. See Khaliq, *supra* note 5, at 47 (listing those principles as "tolerance, autonomy, justice, freedom, consultation and equality"); see also WEERAMANTRY, *supra* note 25, at 1 (discussing basic Qur'anic principle of submission only to one God); Boutheina Cheriet, *Islamism and Feminism: Algeria's "Rites of Passage" to Democracy*, in STATE AND SOCIETY, *supra* note 19, at 171, 196 (arguing that Muslim adherence to universalistic allegiance to God should have resulted in equality in family structure).

257. WALTZ, *supra* note 38, at 41.

258. See KNAUSS, *supra* note 17, at 1-4 (discussing tribes in precolonial Algeria).

259. WALTZ, *supra* note 38, at 41.

260. *Id.*

261. *Id.* (citing Tunisian sociologist Abdelwahab Boudhiba in A LA RECHERCHE DES NORMES PERDUES 173 (1973)).

262. *Id.* at 44. Waltz describes this movement as one from patriarchy to patrimonialism. *Id.* The definition of Patrimonialism is "patriarchal logic on a much larger scale." *Id.* at 40, n.5; see Mayer, *supra* note 125, at 1025-26 (explaining how leaders of new nation-states used Islam to legitimize and increase their control).

263. WALTZ, *supra* note 38, at 44-45. Morocco's monarchs use Islam to legitimize the monarchy by claiming blood ties to the Prophet Muhammad. *Id.* at 44. Such claims serve to establish the king as secular, as well as religious leader of Morocco. *Id.* Another means by which the Moroccan monarch renews its citizens' allegiance is by engaging in cultural rites rooted in Islamic tradition. *Id.* at 45. The Moroccan king, for example, appropriates the important Islamic rite of slaughtering a ram on the Feast of the Great Sacrifice. *Id.* By performing this rite, which Muslims engage in to overcome

may easily manipulate social order due to preexisting parameters of an individual's role within society.<sup>264</sup> Another method states employ to transfer patriarchal norms of micro-society to political behavior is to analogize the nation to the family with the ruler as the father.<sup>265</sup> Because Muslim women teach their children to be respectful and obedient to their fathers, a national leader, as father-figure, may achieve his political goals using either benevolence or fear.<sup>266</sup>

Proponents of the view that Islam itself does not mandate patriarchy note that the transition from patriarchy to political structure has developed somewhat differently among the North African countries and among the countries in the greater Islamic world because of varying national histories.<sup>267</sup> Scholars argue that pre-Islamic Arab tribes established Algeria's patriarchal system and extreme French colonial rule, lasting 124 years, perpetuated that system.<sup>268</sup> Proponents of this view believe that women's role as inferior to that of men's is such a fundamental social structure that Muslims are unaware that the structure emanates from a non-religious source.<sup>269</sup> Scholars conclude that this patriarchal model of the family and society is so pervasive not only in Algeria, but in the entire Muslim world, that it has taken centuries for women to even attempt to challenge it.<sup>270</sup>

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earthly limits, the king effectively integrates its citizens into the political order. *Id.* at 46.

264. *Id.* at 45. Social norms found in a patriarchal society impose an acceptance of a hierarchical nature of order with little questioning of authority. *Id.*

265. *Id.* at 46. "[E]ven revolutionary regimes have taken up the language of patriarchy, replacing the idea of class and class conflict with the 'ideology of national unity and harmonious coexistence between classes under the benevolent rule of the Leader (father, patriarch).'" *Id.* (citing HISHAM SHARABI, NEOPATRIARCHY: A THEORY OF DISTORTED CHANGE IN ARAB SOCIETY, 132 (1988)).

266. *Id.* Fear works well because children were severely punished for disobeying their fathers, who were also known as *sidi*, my lord. *Id.*

267. *Id.* at 48. For example, the French effectively colonized Morocco for only thirty years, leaving it fairly immune from external influence, while seven different cultures influenced Tunisia. *Id.*

268. ENTELIS, *supra* note 29, at 1; See Knauss, *supra* note 19, at 152-53 (characterizing French attempts to dismantle Islam in Algeria as much more severe than in other Maghrib states). The emancipation of women was one device by which the French tried to acculturate Algerian women to French mores. *Id.* at 152. Algerian nationalists saw this as a device to deprive Algerians of their Arab-Islamic culture, and this, thus, strengthened the linkage of Islamic values with the status of women. *Id.* at 152-53.

269. See al-Hibri, *supra* note 5, at 5 (explaining that medieval Islamic jurisprudence has both religious and cultural components).

270. *Id.* at 6.

Proponents of women's equality note that women living during the Prophet Muhammad's life, unlike Muslim women today, were involved in all aspects of society.<sup>271</sup> They argue that society did not perceive them as dependent individuals.<sup>272</sup> Instead, women acted in areas such as business, literature, law, religion, and warfare.<sup>273</sup>

By contrast, scholars state that after Algeria gained its independence,<sup>274</sup> the prevailing national theme was the return of women to their place in the home.<sup>275</sup> This argument proceeds to assert that Algerian nationalists viewed French attempts at the emancipation of women as a device to deprive Algerians of their Arab-Islamic culture.<sup>276</sup> Algerians, scholars claim, thus forged a strong link between Islamic values and the status of women.<sup>277</sup> The restorationist mood in Algeria<sup>278</sup> signified a return of Algeria to its people and culture,<sup>279</sup> and this theme essentially man-

271. *Id.* At the time of the Prophet Muhammad, women participated in business, law, religion, and war. *Id.*

272. *Id.* Patriarchal attitudes have attempted to diminish women's status to that of dependent beings without rights of complete citizens. *Id.*

273. *Id.*; see Leila P. Sayeh & Adriaen M. Morse, Jr., *Islam and the Treatment of Women: An Incomplete Understanding of Gradualism*, 30 *TEX. INT'L L.J.* 311, 322-24 (1995) (recounting women in public positions at time of Prophet Muhammad). While women did have a more equal status in society, the Prophet Muhammad did not preach of complete equality between men and women. See *Khalid*, *supra* note 5, at 47 (explaining that society was not yet ready for equality between sexes).

274. See Knauss, *supra* note 19, at 151 (commenting that despite fact that more than 10,000 women participated in war for Algerian liberation, thus exercising rights well beyond those traditional Islamic society prescribe, improvement in women's legal status has been exceedingly slow and has faced significant setbacks).

275. See *id.* at 154 (recounting negative response Mohamed Khider, head of National Liberation Front ("FLN"), made to woman freedom fighter Djamila Boupacha who advocated change in women's roles). This same phenomenon occurred in the United States and other Western European countries after World War II ended. *Id.*

276. *Id.* at 152-54 (arguing that system of male dominance over females in Algeria, which began in precolonial times, has continued mainly because of nationalist movement that arose when French tried to undermine Islam). "To most nationalists Islam was the most important issue in the preservation of national identity." *Id.* at 154. Algerian conservatives viewed women as the guardians of Islamic morality and the backbone of the family. *Id.*; see Cheriet, *supra* note 256, at 186 (arguing that women's current segregated status in Algeria is result of both old and new forms of patriarchy).

277. Knauss, *supra* note 19, at 154; see Bennoune, *supra* note 163, at 198 (relating argument that fundamentalist violence against Algerian women is inevitable consequence of Algerian society raising men on misogyny).

278. See Knauss, *supra* note 19, at 153, 155 (explaining restorationist mood as desire to expel French and to restore Algerian land, culture, and sovereignty to people).

279. See *id.* at 153-54 (explaining that Islam was single, unifying theme in Algeria's post-war society). Khider expressed this view in 1963 in stating, "[t]he way of life of

dated that women stay out of the public sector.<sup>280</sup>

B. *Islamic Law Regarding Women's Rights Is Not Consistent With International Law*

Some scholars who maintain that Islamic law is not consistent with international law assert that one of the sources of conflict between the two is the fact that the International Bill of Human Rights does not reflect Islamic religious ideals.<sup>281</sup> Many Muslim countries' governments do not accept human rights principles as universal principles because, these governments claim, Islamic religion mandates unequal treatment for women.<sup>282</sup> Other scholars who argue that international human rights and Islamic law are incompatible focus on the position that people coming from different cultural backgrounds have divergent world views.<sup>283</sup> The most conservative Islamists defend a communalism that adheres to the view that different cultures construct what is essential to that culture in completely different ways.<sup>284</sup> These conservative Islamists reject the notion that the UDHR is universally applicable.<sup>285</sup> Another different conservative approach does not reject human rights altogether, but instead tries to redefine these rights within an Islamic context.<sup>286</sup>

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European women is incompatible with our traditions and our culture. We can only live by the Islamic morality." *Id.* at 154 (citing FADELA M'RABET, *LES ALGÉRIENNES* 17 (1967)).

280. *See id.* at 154 (recounting how women were urged to return to hearth); *see generally*, ENTELIS, *supra* note 29, at 1-68 (providing detailed account of Algeria's history).

281. *See* Mayer, *supra* note 1, at 314-16 (recounting argument that international human rights norms are not compatible with Islamic heritage).

282. *Id.* at 315-20 (reviewing reasons given by government's of Iran and Saudi Arabia).

283. Tibi, *supra* note 8, at 280-81. Cultural relativists believe that individuals are completely socialized in accordance with the values of their culture. An-Na'im, *supra* note 16, at 4. This enculturation is necessary for individual and collective development. *Id.* Ethnocentricity, the belief that one's own way of life is best, results from enculturation and often degenerates into hostility to foreign cultures. *Id.* at 4-5.

284. Afshari, *supra* note 230, at 246.

285. *See id.* (noting that such rejection is either explicit or implicit); *see also* Bielefeldt, *supra* note 11, at 602-03 (noting that Saudi Arabia's abstention from UDHR reflects reluctance to endorse foreign concept viewed as deleterious to Islamic tradition).

286. Bielefeldt, *supra* note 11, at 603. A leading representative of this view is Abu l-A'la Mawdudi, a Pakistani author, who is influential in international fundamentalist movements. *Id.*

### 1. Religious Practice Compels Unequal Treatment

Governments of various Muslim countries reject the universality of human rights principles on the basis that Islamic religion compels unequal treatment for women and that the International Bill of Human Rights does not reflect Islamic religious ideals.<sup>287</sup> For example, in 1983, the U.N. Ambassador to Iran, Sa'id Raja'i Khorasani, speaking as a representative of an Islamic state, stated that the UDHR exemplified secular understanding of the Judeo-Christian culture and thus, could not be implemented by Muslims.<sup>288</sup> Furthermore, Ambassador Khorasani indicated that the Declaration did not comport with Iran's system of values and, thus, Iran would not follow the Declaration where it conflicted with the divine law of the country.<sup>289</sup> Khorasani maintained that Islam did protect human rights, but according to its own, divinely-fixed values, which he presented as superior to international human rights schemes.<sup>290</sup>

In a similar vein, in 1992, an Iranian journalist published an article claiming that the Islamic resurgence<sup>291</sup> was a rejection of modern civilization in favor of a superseding, religious culture.<sup>292</sup> The journalist noted the distinctiveness of Islamic values when he asserted that freedom does not have a universal meaning, but rather has only a definition within a specific culture.<sup>293</sup> Within an Islamic country, religion does not deny freedom, but

287. See Mayer, *supra* note 1, at 315-320 (explaining that Iran and Saudi Arabia are two countries rejecting notion of universality of human rights).

288. U.N. Doc. A/C.3/39/SR.65, at 95 (1984); see Mayer, *supra* note 1, at 315-316 (providing content of Iranian Ambassador's statement).

289. U.N. Doc. A/C.3/39/SR.65, at 95 (1984); see Mayer, *supra* note 1, at 316 (paraphrasing Iranian Ambassador's statement).

290. U.N. Doc. A/C.3/39/SR.65, at 95 (1984); see Mayer, *supra* note 1, at 316 (commenting on Iranian Ambassador's statement).

291. Mayer, *supra* note 1, at 317. The Islamic resurgence began after the Arab-Israeli war of 1967. MAYER, *supra* note 3, at 1. The resurgence entailed a dramatic departure from Islamic countries' movement toward secular legal systems. *Id.* In an effort to create Islamic legal models, Islamic countries rejected Western legal models, and in doing so, adversely affected the protection of human rights. *Id.* at 1-2.

292. Untitled essay by Shahriar Zarshenaz, in *INSIDE IRAN: A SPECIAL SURVEY, INDEX ON CENSORSHIP* 10 (1992); see Mayer, *supra* note 1, at 316-17 (explaining that although newspaper article dealt with press censorship, it had broader relevance in terms of attitudes towards rights). The Islamic resurgence has taken on many different forms in different countries, but one common element is the focus on the disorganized community, which Muslim's attributed to the departure from true Islamic belief and practice. AN-NA'IM, *supra* note 25, at 3-4.

293. Zarshenaz, *supra* note 292, at 10; Mayer, *supra* note 1, at 317.



freedom begins with man's servitude to God.<sup>294</sup> He concluded that Muslims must interpret freedom within the scope of *shari'a* and Islamic values.<sup>295</sup>

## 2. International Human Rights Are Not Universal

Scholars who maintain that Islamic law is not consistent with international law assert that one of the sources of conflict between the two is the fact that people coming from different cultural backgrounds have divergent world views.<sup>296</sup> Some Islamic nations argue that principles in doctrines such as the UDHR reflect only secular Western values.<sup>297</sup> These states believe that because social and cultural differences exist, the international community should not expect non-Western states to uphold the same standards.<sup>298</sup> They argue that matters that form the foundation of Islamic cultures, which political regimes often reinforce, such as the nature of man and woman,<sup>299</sup> her and his identity,<sup>300</sup> and the individual's relatedness to others and to society,<sup>301</sup> differ drastically from those of the West.<sup>302</sup> For instance, the Islamic concept of rights and of the individual are distinct

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294. Mayer, *supra* note 1, at 317.

295. *Id.*

296. Tibi, *supra* note 8, at 281. Cultural relativists believe that individuals are completely socialized in accordance with the values of their culture. An-Na'im, *supra* note 16, at 4. This enculturation is necessary for individual and collective development. *Id.* Ethnocentricity, the belief that one's own way of life is best, results from enculturation and often degenerates into hostility to foreign cultures. *Id.* at 4-5.

297. See Cerna, *supra* note 2, at 740 (stating that such countries as Iran, Iraq, Libya, Pakistan, and several Asian states use argument that international documents reflect only Western ideals); Mayer, *supra* note 1, at 310 (noting that some Western values that differ from those in other civilizations include concepts such as "individualism, liberalism, constitutionalism, human rights, equality, liberty, the rule of law, democracy, free markets, and the separation of Church and State").

298. Cerna, *supra* note 2, at 740.

299. See Khaliq, *supra* note 5, at 13 (explaining equality of women and men before God); *supra* notes 143-148 and accompanying text (explaining women and men as equals before God).

300. See Doi, *supra* note 146, at 4 (discussing similar rewards and punishments for women and men based on conduct); *supra* notes 143-148, 153 and accompanying text (explaining identity of men and women in terms of God and relationships within society and nature).

301. Khaliq, *supra* note 5, at 13; see *supra* notes 143-152 and accompanying text (explaining role of women and men in society).

302. See Pollis, *supra* note 5, at 316 (explaining that Middle Eastern societies often articulate many societal beliefs, values, and concepts in nontranslatable words signifying fact that concepts are nontransferable).

from their Western counterparts.<sup>303</sup> In Islam, rights are the equivalent of duties owed to God and to others.<sup>304</sup> Human rights, thus, exist only in regard to human duties, which *shari'a* prescribes.<sup>305</sup> Individuals may obtain rights only by meeting such obligations.<sup>306</sup>

The Saudi Arabian Government is one such state that has asserted that Islamic human rights and international human rights are incompatible due to Saudi Arabia's non-Western cultural structure.<sup>307</sup> In responding to reports of human rights abuses in 1993, Prince Nayef, Minister of the Interior, reasserted Saudi Arabia's commitment to human rights and defended its human rights record by appealing to Islamic principles.<sup>308</sup> These comments were similar to those of King Fahd of Saudi Arabia<sup>309</sup> in 1992 when he issued the new Basic Law.<sup>310</sup> In explaining why the newly adopted constitution afforded none of the usual constitutional rights, the King defended the lack of democratic principles with an appeal to Islamic beliefs.<sup>311</sup> By asserting the unique qualities of his people and noting that other countries could not import their methods into a fully-integrated Islamic system, he rejected democracy as unsuitable for Saudi Arabia.<sup>312</sup>

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303. Arzt, *supra* note 10, at 205.

304. *Id.*

305. *Id.* at 205-06 (citing HUMAN RIGHTS: CULTURAL AND IDEOLOGICAL PERSPECTIVES 92 (A. Pollis & P. Schwab eds. 1980)).

306. *Id.*

307. See Mayer, *supra* note 1, at 319 (noting that because of Saudi Arabia's ties to United States, Saudi Arabia's attack on U.S. human rights policies was less forthright than Iran's).

308. *Id.*

309. *Id.* King Fahd is the King of Saudi Arabia who issued the new Basic Law in March 1992. *Id.*

310. *Saudi Arabia — The New Constitution*, 8 ARAB L. QTLY. 258 (1993). In response to the Saudi Arabians resistance to authority, the Iraqi invasion of Kuwait, and the Gulf War, the Saudi Royal family, seeking reform, issued a Basic Law of Government, a Shura Council Decree, and a Decree on Provinces. Mayer, *supra* note 1, at 353. Although these acts suggested a move towards the Saudi family's recognition of limited constitutionalism, King Fahd denied that there had been any break with tradition, and he reaffirmed Islamic jurisprudence as the official law in Saudi Arabia. *Id.* at 351-53.

311. Mayer, *supra* note 1, at 319-20.

312. *Id.* at 319-20. King Fahd's statement was as follows:

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

The most conservative Islamists are among those who defend a communalism that adheres to the view that different cultures construct what is essential to the culture in completely different ways.<sup>313</sup> Those advocating this argument seek recognition of internal cultural values and respect for the subjective desires and needs of the governing men in the community.<sup>314</sup> These ideas, they argue, are not compatible with human rights standards which create dividing, individual effects in the community.<sup>315</sup>

Conservative Islamists advance the position that, with the exception of the West, "international human rights" principles do not embody the ideal of the world's ethical systems.<sup>316</sup> Instead, they argue, local cultural traditions such as religion, politics, and law should resolve the existence and parameters of individuals' civil and political rights within a given society.<sup>317</sup> Accordingly, these states do not want to promote human rights if doing so will affect their most cherished ethical value, their culture.<sup>318</sup>

Conservative Islamists reject the notion that the UDHR is universally applicable.<sup>319</sup> Rather than focusing on individual's legal rights, proponents of this view look to cultural autonomy and, more specifically, autonomy from the imposition of Western cultural ideals.<sup>320</sup> These critics transform the whole notion of an individual's right against the state into a state's right

have our Islamic beliefs that constitute a complete and fully-integrated system

.....

In my view, Western democracies may be suitable in their own countries but they do not suit other countries.

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

313. Afshari, *supra* note 230, at 246.

314. *Id.*

315. *Id.*

316. *Id.*

317. Rhoda E. Howard, *Cultural Absolutism and the Nostalgia for Community*, 15 HUM. RRS. Q. 315, 319 (1993); see Afshari, *supra* note 230, at 246 (labeling this position "most uncompromising").

318. Howard, *supra* note 317, at 319; Afshari, *supra* note 230, at 246 (noting that this is cultural relativist position with which most conservative Islamists agree).

319. See Afshari, *supra* note 230, at 246 (noting that such rejection is either explicit or implicit); see also Bielefeldt, *supra* note 11, at 603 (noting that Saudi Arabia's abstention from UDHR reflects reluctance to endorse foreign concept viewed as deleterious to Islamic tradition).

320. See Afshari, *supra* note 230, at 246.

against the West.<sup>321</sup>

One means by which Islamic countries reassert their cultural authenticity is by forcing women to adopt Islamic dress, the *hijab*.<sup>322</sup> Such countries regard veiling as a manner by which women may obey the Qur'an's demand for modesty.<sup>323</sup> Muslims argue that veiling signifies that women are more comfortable in public in clothing agreeable to the culture of provincial villages where they have lived before moving to big cities.<sup>324</sup> Women wear the *hijab*, this argument asserts, to regain their female autonomy and display their chastity, dignity, and modesty.<sup>325</sup> In essence, some scholars conclude that women affirm themselves as females in Islamic terms, while simultaneously contributing to the national struggle by affirming Muslim men's authenticity against Western cultural imperialism.<sup>326</sup>

### 3. International Human Rights Need to be Redefined to Reflect Islamic Principles

A different conservative approach does not reject international human rights altogether, but instead tries to redefine these rights exclusively within an Islamic context.<sup>327</sup> This view labels the West as arrogant and erroneous in its belief that human rights have an exclusively Occidental origin.<sup>328</sup> Instead,

321. *Id.* at 246-47.

322. See Bennoune, *supra* note 163, at 187 (identifying Islamic dress as *hijab*, or headscarf, and noting that women's adoption of Islamic dress is expression of cultural conformity); see also Afshari, *supra* note 230, at 252-53 (noting that recently observers have argued that women's adoption of Islamic dress is affirmation of traditional Islamic customs). Algerian women have historically worn the *haik*, a white silk wrap over the head with a lace scarf over the lower part of the face. Bennoune, *supra* note 163, at 188. Fundamentalists have only recently sought to impose on women the *hijab* and *jilbab*, full robes, which arrived in Algerian culture in the late 1970s. *Id.* Furthermore, Algerian peasant women have never veiled, but instead have worn a kerchief tied over some of their hair. *Id.*

323. QUR'AN 24:31. The Qur'an states, "[d]raw their veils over [t]heir bosoms and not display [t]heir beauty except [t]o their husbands . . ." *Id.*; cf. DOI, *supra* note 145, at 12-13 (stating that modesty rule applies to men as well as to women).

324. Afshari, *supra* note 230, at 252.

325. *Id.* at 252-53.

326. *Id.* at 253. It is difficult to make generalizations about Islamic countries because their societies are distinct and their political make-up and state developments are extremely diverse. HALLIDAY, *supra* note 1, at 16. For example, in Iran, Islamist women have reframed the issue of the *hijab* in terms of gender inequality and violations of women's rights rather than cultural authenticity. Afshari, *supra* note 230, at 255.

327. Bielefeldt, *supra* note 11, at 603.

328. See *id.* (discussing Mawdudi's ideas about Western beliefs). "The people in

these conservatives suggest that human rights form an inherent part of the Islamic tradition.<sup>329</sup>

Within this Islamic human rights scheme exists a view of equality that is more restricted than the view states espouse in the international human rights documents and that does not require Muslim countries to cease discrimination against women and religious minorities.<sup>330</sup> For instance, one argument holds that a women's right to marry a man regardless of whether or not he is Muslim, a right that Article 16 of the UDHR guarantees, is illegitimate because it is not in keeping with *shari'a* law.<sup>331</sup> This argument puts itself forth as compatible with an Islamic human rights scheme by claiming that a non-Muslim husband would not give his Muslim wife sufficient respect for her religious beliefs.<sup>332</sup>

The authors of the Cairo Declaration on Human Rights in Islam ("Declaration")<sup>333</sup> likewise adopted a scheme of Islamizing human rights.<sup>334</sup> The Declaration maintains that fundamental rights and freedoms are integral to Islamic religion<sup>335</sup> and affirms the equal dignity of all persons.<sup>336</sup> Nonetheless, all rights

the west have the habit of attributing every good thing to themselves and try to prove that it is because of them that the world got this blessing, otherwise the world was steeped in ignorance and completely unaware of all these benefits." *Id.* (citing ABU L-A'LA MAWDUDI, *HUMAN RIGHTS IN ISLAM* 13 (1976)).

329. *Id.* One example of Mawdudi's argument that human rights are inherent in Islamic tradition is with regard to religious liberty. *Id.* at 604. He rests this argument on Qur'anic verse 2:256 which prohibits compulsion in matters of faith. QUR'AN 2:256 (stating "[l]et there be no compulsion [i]n religion"); Bielefeldt, *supra* note 11, at 604.

330. See Bielefeldt, *supra* note 11, at 603-04 (noting that in Mawdudi's section on equality, he does not mention discrimination based on gender and religion).

331. *Id.* at 604 (citing Ahmad Farrag, *Human Rights and Liberties in Islam*, in *HUMAN RIGHTS IN A PLURALIST WORLD: INDIVIDUALS AND COLLECTIVITIES* 141 (Jan Berting et al. eds., 1990)).

332. See Bielefeldt, *supra* note 11, at 604 (explaining that this ban extends to marriages between all Muslims and polytheists as well).

333. The Cairo Declaration on Human Rights in Islam, reproduced in *INTERNATIONAL HUMAN RIGHTS, DOCUMENTS AND INTRODUCTORY NOTES* 324 (Felix Ermacora, et al. eds., 1993). [hereinafter Cairo Declaration]. The Organization of the Islamic Conference ("OIC"), an organization founded in 1973 to which all Muslim countries belong, adopted the Cairo Declaration on Human Rights in Islam in 1990. Mayer, *supra* note 1, at 327.

334. Bielefeldt, *supra* note 11, at 605.

335. Cairo Declaration, *supra* note 333, pmbl. at 324; see Mayer *supra* note 1, at 328 (stating that central feature of Cairo Declaration is to use Islamic criteria to restrict international human rights in civil and political arenas).

336. Cairo Declaration, *supra* note 333, art. 1, at 324-25.

in the Declaration are subject to *shari'a* law,<sup>337</sup> and *shari'a* is the only source of reference in clarifying its provisions.<sup>338</sup>

### III. INTERNATIONAL HUMAN RIGHTS LAW IS COMPATIBLE WITH ISLAMIC LAW

Islamic law is compatible with international human rights norms as they are expressed in the International Bill of Human Rights.<sup>339</sup> The basic postulates of Islamic law are similar to human rights principles.<sup>340</sup> The Qur'an itself sufficiently establishes many human rights principles having international status today.<sup>341</sup> In Algeria, the Government seems to have acknowledged the compatibility of human rights ideas with Qur'anic principles by promulgating a Constitution which gives men and women equal rights.<sup>342</sup> The claim that Islamic culture, as influenced by *shari'a* law, cannot accommodate modern human rights doctrine is simply a means by which conservative Islamists in Government strive to preserve the patriarchal societies in place<sup>343</sup> and to rally its citizens around the common cause of rejecting Western influence and returning to their conception

337. *Id.* art. 25, at 327. "The Islamic *shari'ah* is the only source of reference for the explanation or clarification of any of the articles of this Declaration." *Id.*

338. Mayer, *supra* note 1, at 329; see Bielefeldt, *supra* note 11, at 605 (noting that last article in Cairo Declaration cites *shari'a* as only source of reference for clarification of articles of Declaration).

339. See Khaliq, *supra* note 5, at 46 (stating "not only can Shari'ah accommodate and effectively implement international human rights standards, but the principles upon which Shari'ah is based, are entirely consistent with international human rights standards.").

340. See *supra* notes 237, 256 and accompanying text (reviewing basic Islamic rights to life, freedom, and privacy and Islamic principles such as tolerance and equality).

341. WEERAMANTRY, *supra* note 25, at 113-14.

Those Eastern thinkers of the ninth century laid down, on the basis of their theology, the principle of the Rights of Man, in those very terms, comprehending the rights of individual liberty, and of inviolability of person and property; described the supreme power in Islam . . . as based on a contract . . . elaborated a Law of War of which the humane . . . prescriptions would have put to the blush certain belligerents in the Great War; expounded a doctrine of toleration of non-Moslem creeds so liberal that our West had to wait a thousand years before seeing equivalent principles adopted.

*Id.* (citing COUNT LEON OSTROROG, THE ANGORA REFORM 30-31 (1927)).

342. See *supra* notes 189-93 and accompanying text (discussing equality provisions of Algerian Constitution).

343. See *supra* notes 266-71 and accompanying text (explaining how patriarchal norms were transferred to political societies).

of a traditional Islamic nation.<sup>344</sup> Likewise, the practice of redefining human rights within supposedly Islamic terms<sup>345</sup> essentially leaves women without equal rights.

*A. Islam Does Not Compel Unequal Treatment of Women Because Interpretation of Basic Qur'anic Principles Provides For Women's Equal Rights as Outlined in the International Bill of Human Rights*

Muslims may not blindly follow earlier interpretations of the Qur'an without violating the Qur'an's mandate for each generation to reinterpret verses for themselves.<sup>346</sup> This mandate for reinterpretation requires Muslim scholars to accommodate modern-day developments in light of basic Islamic teachings.<sup>347</sup> Muslim scholars must strive to interpret all phrases in accordance with the most basic Islamic principles,<sup>348</sup> despite that several specific verses in the Qur'an appear inconsistent with many of the more general verses.<sup>349</sup> A consistent reading of the Qur'an as a whole must treat the general equality principles as controlling.<sup>350</sup> The grant of equality to men and women in Algeria's Constitution indicates that the Algerian Government was able to reconcile Islamic law with the international norm of equality. The Algerian Family Code, however, by relegating women to an inferior position to men, signifies Algeria's reluctance to overturn the established patriarchal structure and uses Islam as its justification of adherence to this male-dominated society.<sup>351</sup>

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344. See *supra* notes 275-80, 322-26 and accompanying text (portraying link between women and traditional Islamic values).

345. See *supra* notes 327-38 and accompanying text (discussing Islamization of human rights).

346. See *supra* notes 245-48 and accompanying text (describing continuing process of interpretation in Islamic law).

347. See *supra* notes 116-26 and accompanying text (explaining how human interpretation of primary Islamic sources helps solve new problems).

348. See *supra* note 237 and accompanying text (describing basic Islamic principles as tolerance, autonomy, justice, freedom, consultation, and equity).

349. See *supra* notes 104-07, 236-302 and accompanying text (examining difference between basic Qur'anic principles and more specific ones).

350. See *supra* notes 237-40 and accompanying text (explaining that general Qur'anic mandates and human rights principles are compatible).

351. See *supra* notes 197-225, 258-81 and accompanying text (discussing Muslim women's status under Algerian Family Code and development and perpetuation of patriarchy in Algeria).

## 1. The International Bill of Rights Is Compatible With Qur'anic Principles

The International Bill of Human Rights guarantee of fundamental rights, civil, political, economic, social, and cultural rights<sup>352</sup> has its counterpart in Islamic law,<sup>353</sup> and, consequently, Muslims cannot rely on the argument that Islamic law does not recognize the fundamental principles that underlie international human rights documents, such as the International Bill of Human Rights.<sup>354</sup> Like the UDHR, the Qur'an recognizes basic rights of both women and men, such as the right to life,<sup>355</sup> freedom,<sup>356</sup> and privacy.<sup>357</sup> Like the ICCPR and ICESCR, the Qur'an addresses freedoms for men and women in areas such as politics and society.<sup>358</sup> For example, many Qur'anic verses emphasize the need to increase one's knowledge.<sup>359</sup> Both the text and history indicate that God wanted men and women alike to obtain an education and to fulfill similar religious duties.<sup>360</sup> The Qur'an likewise recognizes the general right to earn a living.<sup>361</sup>

It is not sufficient for Muslims to point to specific verses that

352. See *supra* notes 64-82 and accompanying text (reviewing and discussing equality provisions found in International Bill of Rights).

353. See WEERAMANTRY, *supra* note 25, at 113, 120, 122-24 (stating that from basic Islamic postulates, human rights doctrine was logical development).

354. See *supra* notes 296-306 and accompanying text (discussing argument that human rights are not universal).

355. See *supra* note 237 and accompanying text (reviewing general right to life found in Qur'an).

356. See *supra* note 237 and accompanying text (discussing general right to freedom found in Qur'an).

357. See *supra* note 237 and accompanying text (recognizing general Islamic right to privacy found in Qur'an).

358. See *supra* note 236 and accompanying text (reviewing similarities between fundamental Islamic principles and international human rights documents).

359. See, e.g., QUR'AN 96:1-5, 20:114 (directing all believers to ask Lord to increase one's knowledge); al-Hibri, *supra* note 5, at 47-50 (noting that first divine word revealed to Prophet Muhammad was "Read" and that Islam places importance on education and knowledge).

360. al-Hibri, *supra* note 5, at 51-53. The Qur'an has several stories about women participating in religious, political, and social aspects of life. *Id.* One such woman was the Prophet Muhammad's wife A'isha who in addition to being a primary source of *hadith* after the Prophet Muhammad's death, was also actively involved in the political community. *Id.* at 52-53.

361. See QUR'AN 31:34, n. 3526 (explaining that one meaning of "earn" in verse 31:34 is "to earn one's livelihood"); WEERAMANTRY, *supra* note 25, at 120 (noting one author's grouping of general rights of individual according to Qur'an).



appear to conflict with the basic premise of the Qur'an,<sup>362</sup> and hold those verses out as controlling. Muslim scholars have interpreted verse 4:34, for example, as subjecting women to their husbands' authority.<sup>363</sup> This interpretation violates the fundamental tenet of Islamic law that requires men and women to submit only to one God, not to other human beings.<sup>364</sup> To interpret such narrow verses as controlling in all situations also violates the Qur'anic structure. Structured with numerous general mandates, the Qur'an has only a handful of specific ones.<sup>365</sup> Where a conflict exists, the more general principles should control the narrower ideas.<sup>366</sup> This is because the narrower ideas cannot be tailored to many later situations to which the Qur'an envisioned Muslim scholars applying Islamic principles to reach solutions.<sup>367</sup>

## 2. Algeria's Constitution Allows For Women's Equality as Found in the International Bill

The principles in both the Algerian Constitution and the International Bill of Human Rights are consistent with the idea found in the Qur'an that men and women are equal with regard to rights and freedoms.<sup>368</sup> The Qur'an's basic principle that men and women, created from a single soul, owe equal reverence to one God,<sup>369</sup> the Supreme Judge, and are similarly equal in their relationship with God<sup>370</sup> is compatible with the idea that

362. See *supra* note 127 and accompanying text (explaining basic premise of Qur'an as submission by all persons to one God).

363. See *supra* note 146 and accompanying text (citing verse 4:34 of Qur'an).

364. See *supra* note 129 and accompanying text (discussing fundamental tenet of Islamic law).

365. See *supra* notes 104-05 and accompanying text (discussing number of Qur'anic verses amounting to legal injunctions).

366. See *supra* notes 239-40 (reviewing al-Hibri's argument that general statements prevail over specific ones).

367. See *supra* notes 116-29 and accompanying text (explaining role of human interpretation to solve modern problems).

368. See al-Hibri, *supra* note 5, at 35 (finding "Equality Principle" in verse 30:21 of Qur'an); see also Cheriet, *supra* note 256, at 196 (noting that Algerian women do not enjoy equality despite fact that Islam allows for women's equality).

369. See *supra* note 145 and accompanying text (explaining that men and women are equals before God).

370. See *supra* note 145 and accompanying text (describing Qur'anic principle of equality); QUR'AN 4:1 (stating that men and women have mutual rights); see also, QUR'AN 49:10 (stating "believers are but [a] single Brotherhood. So make peace and [r]econciliation between your [t]wo (contending) brothers, [a]nd fear Allah, that ye

all persons are equal before the law.<sup>371</sup> The frequent use of the phrase “men and women” in the Qur’an<sup>372</sup> emphasizes equality in their respective duties, rights, and virtues,<sup>373</sup> similar to the equality guaranteed by Article 30 in the Algerian Constitution<sup>374</sup> and by several articles in the International Bill of Rights.<sup>375</sup> Furthermore, the Qur’an’s cautioning against the oppressing treatment of women<sup>376</sup> is consistent with the idea that societies should not discriminate based on gender.<sup>377</sup>

By proclaiming Islam the state religion and prohibiting actions contrary to Islamic morality,<sup>378</sup> the Algerian Constitution clearly accepts Islamic law within the realm of government.<sup>379</sup> Indeed, the Constitution recognizes both Islamic and secular principles by which Algerians are to live.<sup>380</sup> This recognition reflects the fact that the Algerian Government did not itself perceive the Constitution as inconsistent with Islamic law.<sup>381</sup>

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[m]ay receive mercy.”); QUR’AN 9:24 (warning that all persons who love worldly possessions more than Allah will be poorer spiritually); Doi, *supra* note 145, at 5-6 (contrasting Islam with other religions which regard women as inherently sinful); al-Hibri, *supra* note 5, at 34 (noting that individual vanity and arrogance whether for gender-related reasons or otherwise are not in accordance with God’s ideas).

371. See Khaliq, *supra* note 5, at 13 (noting that differences between men and women are in social, rather than divine, context). Equality before God can be analogized to equality before the law because in Islam God is the source of the *shari’a*. See *supra* notes 83-86, 100-115 (explaining development and sources of Islamic law).

372. See, e.g., QUR’AN 33:35 (consistently using phrase “men and women” rather than just using word “man” to refer to all of mankind).

373. See, e.g., QUR’AN 33:35, 33:36 (referring to men and women who surrender to God, believe, obey, speak truthfully, act humbly, give alms, and conform with other Islamic duties); see Doi, *supra* note 145, at 4 (explaining that women have souls in same way men do).

374. See *supra* note 189 and accompanying text (explaining principle of equality found in Article 30 of Algerian Constitution).

375. See *supra* notes 64-82 and accompanying text (reviewing equality provisions of International Bill of Rights).

376. QUR’AN 4:19 (stating “O ye who believe! Ye are forbidden to inherit [w]omen against their will. Nor should ye treat them [w]ith harshness, that ye may [t]ake away part of the dower [y]e have given them . . . [o]n the contrary live with them [o]n a footing of kindness and equity.”).

377. See *supra* note 188 and accompanying text (asserting in Article 28 of Algerian Constitution that all persons are equal before law).

378. See *supra* notes 176-77 and accompanying text (explaining Articles 2 and 9 of Algerian Constitution).

379. See *supra* notes 176-77 and accompanying text (explaining Articles 2 and 9 of Algerian Constitution).

380. See *supra* notes 172-92 and accompanying text (reviewing both Islamic and secular references in Algerian Constitution).

381. See Cheriet, *supra* note 256, at 182 (noting that 1989 Constitution legitimized

The equality provisions in the Constitution, despite the Government's frequent failure to uphold them, are probably the most significant signs of the Government's acknowledgment that reinterpreting Islamic law regarding the role of women is not a violation of that law.<sup>382</sup> That the Constitution both declares Islam as the national religion and declares women and men equal in front of the law shows a resistance to adopting a government free from Islamic influence,<sup>383</sup> while simultaneously expressing a belief that Islam and equality of women are not mutually exclusive. Once Islamic jurists have accepted that women's equality is possible within the Islamic law framework, they must take the next step to reevaluate Islamic jurisprudence without the patriarchal gloss that has permeated society over the centuries.<sup>384</sup> Such a reinterpretation is directly in keeping with the example of the Prophet Muhammad's<sup>385</sup> establishment of an entirely novel concept of rights and respect toward women.<sup>386</sup>

### 3. The Algerian Family Code: Islam As Justifier of Patriarchy

The Family Code is inconsistent with the Qur'anic notion of equality and respect for women,<sup>387</sup> but is nonetheless consistent with other, narrower Qur'anic verses<sup>388</sup> because of the role of human interpretation in discerning *shari'a* law.<sup>389</sup> Male Muslim scholars based the Family Code on the verses in the Qur'an that

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Islamism and secularism). Both Islamists and secularists, however, question the legitimacy of the prevailing political regime. *Id.* It may be that neither trend is consistent with the Constitution because the Constitution does not permit political association on either religious or ethnic and regional grounds. *Id.*

382. *See supra* notes 188-92 and accompanying text (discussing equality provisions of Algerian Constitution).

383. *See supra* notes 174, 188 and accompanying text (discussing Preamble and Article 28 of Constitution).

384. *See supra* notes 257-80 and accompanying text (explaining structure and development of patriarchal societies in North Africa).

385. *See supra* notes 108-15 (explaining importance of *sunnah*, Prophet Muhammad's example, in development of Islamic law); note 251 (discussing Prophet Muhammad's expansion of women's rights).

386. *See supra* note 251 and accompanying text (recounting Islam's initial improvement of women's rights).

387. *See supra* note 197 and accompanying text (explaining women's inferior status according to Family Code).

388. *See, e.g.*, QUR'AN 4:34 (stating that men are protectors of women).

389. *See supra* notes 118-28 and accompanying text (discussing role of human interpretation in Islamic law).

appear to give men a superior status to women.<sup>390</sup> An interpretation made by males that focuses on the particular rather than the general,<sup>391</sup> subjects women to male dominance,<sup>392</sup> and is not mandated by the Qur'an or *sunnah*<sup>393</sup> appears to be perpetuating the patriarchal structure of many Islamic countries<sup>394</sup> under the guise of Islam. Accordingly, Islamists who deny women equal rights are simply using Islamic law as a scapegoat and are not engaged in an honest interpretation of the Qur'an or of the other sources of Islamic law.<sup>395</sup>

*B. International Human Rights Do Not Reflect Ideals That Islamic Countries Must Reject Due to Cultural Differences*

Patriarchal societies have so heavily influenced the Maghreb states that Muslims now have difficulty differentiating which aspects of life are mandated by true interpretations of the Qur'an and which have resulted from the persistence of a male-dominated structure.<sup>396</sup> Islamic Governments, rather than Islam, are the true obstacles to women gaining equality in the public domain. By using Islam as the scapegoat for disregarding equality provisions in international documents, governments are able to both maintain the status quo in the all-important arena of familial relationships<sup>397</sup> and to give Muslims a common ground to outrightly reject Western-imposed ideals.<sup>398</sup>

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390. See *supra* notes 236-40 and accompanying text (classifying Qur'an verse 4:34 as proviso that should not override more general equality principle).

391. See *supra* note 240 and accompanying text (discussing importance of general statements in Qur'an).

392. See *supra* notes 203-24 and accompanying text (discussing provisions of Family Code).

393. See *supra* notes 244-56 and accompanying text (reviewing Islam's initial betterment of women's position in society and subsequent interpretations of women's status by male jurists).

394. See *supra* notes 233, 257-70 and accompanying text (addressing patriarchal societies of North Africa).

395. See *supra* notes 237-57 and accompanying text (reviewing scholars' arguments that Qur'an is consistent with international human rights principles and mandates that each generation reinterpret its verses anew).

396. See *supra* notes 257-80 and accompanying text (tracing roots and consequences of patriarchy).

397. See *supra* notes 147-48 and accompanying text (commenting on Islam's emphasis on family group).

398. See *supra* notes 268, 274-80 and accompanying text (documenting Algerian rejection of French ideals after independence).

### 1. Women's Equal Rights May Be Barred By A Patriarchal Society But They Are Not Barred By Islam

Islam itself does not mandate that women take an inferior position to men in society.<sup>399</sup> Rather, the patriarchal society of Algeria influenced traditional jurists engaged in *ijtihad*.<sup>400</sup> Muslim scholars have interpreted many verses in the Qur'an so as to perpetuate inequalities,<sup>401</sup> despite that Islamic teachings regarding women were dramatic and far-reaching against the background of the previous era.<sup>402</sup> For example, the passage in the Qur'an which allows men to marry as many as four women, but which advises marrying only one if a man will not be able to treat all his wives justly, provides a basis for polygamy in the Family Code.<sup>403</sup> In other Islamic countries, notably Tunisia, however, the corresponding verse proclaiming that men are not capable of treating more than one wife equitably,<sup>404</sup> has been the basis for the Government's adoption of a rule prohibiting polygamy.<sup>405</sup> Between two possible interpretations, Algerian jurists,

399. See *supra* notes 90, 271-73 (describing equal rights for women at time of Prophet Muhammad).

400. See al-Hibri, *supra* note 5, at 57 (noting that for centuries patriarchal ideas have influenced Islamic jurisprudence); KNAUSS, *supra* note 17, at 1, 24 (detailing influence of patriarchy on Algerian women). Precolonial Algeria began with the patrilineal, patrilocal extended family of the Berber and Arab tribes. *Id.* at 1. With the arrival of the French in 1830, the make-up of the family changed from extended to nuclear, resulting in less security for women. *Id.* at 24. Algerian women became in effect victims of both French colonialism and the new patriarchal nuclear family. *Id.* Furthermore, many men deemed women who may have wanted to protest this structure as culturally disloyal. *Id.*; Cheriet, *supra* note 256, at 187 (positing "it will be argued here that the Algerian neopatriarchal polity has not adopted the sharia as an Islamic scripturalist tradition but rather in a moribund form in conformity with its eclectic reflexes. The result is . . . establishing mysogyny [sic] as a legal system.").

401. See WEERAMANTRY, *supra* note 25, at 69 (noting argument that Qur'anic law actually sought to move away from polygamy toward monogamy in marriage).

402. *Id.* at 68:

But the Teacher, who, . . . in a country where the birth of a daughter was considered a calamity, secured to the sex rights which are only unwillingly, and under pressure, being conceded to them in the nineteenth century . . . deserves the gratitude of humanity. If Mohammad had done nothing more, his claim to be benefactor of mankind would have been indisputable.

*Id.* at 70 (citing S.A. ALI, THE LEGAL POSITION OF WOMEN IN ISLAM 41-42 (1912)); cf KNAUSS, *supra* note 17, at 14-17 (noting scholarly disagreement as to status of pre-Islamic women and several different opinions on whether Islam created, perpetuated, or in no way effected Algeria's patriarchal society).

403. QUR'AN 4:3; see *supra* note 156 and accompanying text (discussing verse 4:3).

404. QUR'AN 4:129.

405. WEERAMANTRY, *supra* note 25, at 69.

influenced by patriarchal customs, chose polygamy.<sup>406</sup> Islam did not mandate it.

## 2. Women's Equal Rights May Be Barred By Politics, But They Are Not Barred By Islam

The political atmosphere in Algeria when the Government adopted the Family Code, and later the Constitution, was more of an influence than Islam was on the Government's maintaining of women's status as unequal to men.<sup>407</sup> The struggle between the Muslim feminists and conservatives over the provisions of the draft of the Family Code<sup>408</sup> clearly demonstrated that not all Muslims believe that Islam mandates confinement of women to the private sector with limited legal rights as compared to Muslim men.<sup>409</sup> Furthermore, the Islamic resurgence, characterized by Islamic countries rejecting the imposition of Western ideals in favor of Islamic ones, affected Algeria.<sup>410</sup> The best means of rejecting Western ideals was a claim that Islam simply could not support ideas of equality for women.<sup>411</sup>

The strong effect of political influence manifested itself again in 1989 when the Government promulgated a Constitution stating that men and women are equal.<sup>412</sup> Different pressures, such as popular support for international human rights

406. See KNAUSS, *supra* note 17, at 124, 142 (giving reasons for persistence of patriarchy in Algeria such as unemployment and fear of cultural disloyalty).

Islam may be seen, therefore, as serving similar needs for the poor and the uncertified in postwar Algeria as it provided the colonized in colonial Algeria: a psychic balm for a grievous sense of having been exploited and a lack of identity in the modern social order; a surrogate for a lack of community; and a rationale for the defense of patriarchy.

*Id.* at 124.

407. See *supra* notes 168-71, 193-97 and accompanying text (reviewing briefly political mood preceding Government's promulgation of Family Code and Algerian Constitution).

408. See *supra* notes 193-95 and accompanying text (discussing struggle between feminists and conservatives over status of women).

409. See *supra* notes 197-224 and accompanying text (discussing women's status according to Family Code).

410. See *supra* note 84 and accompanying text (explaining modernization of Islamic states and their subsequent rejection of Western ideals in wake of Arab-Israeli War of 1967).

411. See *supra* notes 13, 159-60 and accompanying text (explaining Islamic countries' reservations to several international human rights documents and their promulgation of UIDHR, a separate human rights document).

412. See *supra* notes 188-92 and accompanying text (discussing equality provisions of constitution).

principles,<sup>413</sup> swayed the Government to adopt a Constitution that was consistent with the ideals of the international community and directly opposed to the Family Code adopted just five years earlier.<sup>414</sup> Islamic law apparently was neither an impetus nor a barrier to the Government's adoption of two conflicting views on women's status. The claim that Islam is the insurmountable obstacle to granting women equal rights seems to be convenient when reacting to Western influence in the human rights field, but irrelevant when Islamic Governments promulgate their own laws.

C. *Redefinition of Human Rights Within an Islamic Scheme Only Denies Women Equal Rights*

Redefinition of women's human rights within the correct Islamic framework will not guarantee Muslim women any more rights than they presently have<sup>415</sup> if *shari'a* law is to govern these Islamic human rights principles. As long as the current male interpretation of Islamic law in the area of gender relations exists, any human rights principles will have to be subordinated to the traditional notion of women as inferior to men.<sup>416</sup> For this reason, the Cairo Declaration, despite its grant of equal dignity to all persons,<sup>417</sup> has failed to give Muslim women equal status.<sup>418</sup> The Declaration is an example of an Islamic model of human rights which is and will necessarily always be at odds with the International Bill of Human Rights.<sup>419</sup>

D. *Signs That Algeria is Ready for Reinterpretation of Islamic Law in Light of Modern Societal Developments*

Changes within Algeria as well as within the international

413. See *supra* notes 168-71 and accompanying text (explaining politics surrounding Algeria's adoption of 1989 Constitution).

414. See *supra* notes 193-224 and accompanying text (reviewing Government's passing of Family Code and provisions denying women's equality).

415. See *supra* notes 165-66, 194-225 and accompanying text (discussing rights Muslim women, particularly Algerians, presently have).

416. See *supra* notes 143-58 and accompanying text (reviewing women's role in traditional Islamic societies).

417. See *supra* note 336 and accompanying text (citing Article 1 of Cairo Declaration).

418. See *supra* notes 337-38 and accompanying text (explaining how Cairo Declaration is subject to *shari'a* law).

419. Mayer, *supra* note 1, at 327.

community signal that it is time to reinterpret women's status in Algeria.<sup>420</sup> As mere products of their culture, Algerians have consistently interpreted their jurisprudence in light of the strong custom of patriarchy.<sup>421</sup> While Algeria is still largely a patriarchal country, the expansion of national women's rights movements is proof that not all Algerians believe in this custom.<sup>422</sup> Furthermore, if Islamists wish to adhere to the Qur'anic mandate that requires one to reinterpret the verses within the context of modern society, any future interpretations of the text of the Qur'an must reflect this new era of the international community and the prominent place women's rights have within that community.<sup>423</sup>

Government actions also evidence the changing Algerian society, which now requires new textual interpretations of Islamic law. Despite the 1984 Family Code, Algeria has been slowly moving towards greater rights for women.<sup>424</sup> In addition to promulgating a Constitution which declares women legally equivalent to men, Algeria has increasingly promoted education for women.<sup>425</sup> Furthermore, in the mid 1980s, the Algerian Government committed itself in a five-year plan to creating more new jobs for women.<sup>426</sup> These small changes in women's status serve as evidence of a Government that may be increasingly receptive to a more equal role for the Algerian woman.<sup>427</sup>

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420. See al-Hibri, *supra* note 5, at 57 (arguing that patriarchal view of women on which jurisprudence has been based is erroneous and that reinterpretation free from such error would be more true to Qur'anic principles).

421. *Id.*; see *supra* notes 400-06 and accompanying text (discussing persistence of patriarchy in Algeria).

422. See Cheriet, *supra* note 256, at 200 (stating that in 1992 there were at least fifteen feminist associations registered with the Ministry of the Interior). Education and the professionalization of the female labor force are probably the two factors that have most influenced this increase in women's organizations. *Id.* at 200-01.

423. See al-Hibri, *supra* note 5, at 57 (noting that new law must be based on recognition of patriarchal stereotype of women as erroneous).

424. See Knauss, *supra* note 19, at 166-69 (noting increased rights in area of women's education).

425. See *supra* note 163 and accompanying text (discussing small improvements of women's status in Algeria).

426. See *supra* note 163 and accompanying text (discussing five-year plan as small improvement for women); see also Knauss, *supra* note 19, at 166-67 (noting unrealistic nature of goal of creating more jobs for women in light of declining economy and already high unemployment).

427. Knauss, *supra* note 19, at 167. Algeria's Government today is in a precarious political situation, and any tolerance for women's equality is likely to disappear if conservative Islamic fundamentalists, who are generally not receptive to the idea of wo-



### CONCLUSION

The Western notion of human rights is not inherently and irreconcilably at odds with Islamic law. Human rights principles regarding women as expressed in the International Bill of Human Rights are more consistent with the fundamental tenets of Islamic law than are principles found in Algeria's 1989 Constitution and 1984 Family Code. To reach such a conclusion, one must look closely not only at the text of the Qur'an, but also at the tradition of interpreting that text. Such interpretation necessarily encompasses cultural and societal norms. The only means to avoid an artificial interpretation of Islamic law is by taking all such components into consideration. Relying heavily on the undeniable principles expressed in the Qur'an, such as freedom, justice, equality, and Divinity represents a more accurate interpretation of Islamic law, than does relying on several phrases interpreted in light of a patriarchal society which longs to perpetuate itself. Accordingly, Islamic scholars should cease pointing to Islamic law as the barrier to their accepting international human rights norms and instead engage in a true reinterpretation of the sources of that law to grant women rights equal to those of men.

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men's equality, come to power. *Id.* at 167; Bennoune, *supra* note 163, at 197 (stating "[n]o group of women was as reviled by fundamentalist ideologues . . . as the women activists."). *But see* Peter A. Samuelson, *Pluralism Betrayed: The Battle Between Secularism and Islam in Algeria's Quest For Democracy*, 20 YALE J. INT'L L. 309, 348-53 (1995) (arguing that if fundamentalists comes to power its policies will be no more incompatible with democratic principles than those of current regime).