

# Egypt's Reservations to the United Nations Convention on the Elimination of Discrimination Against Women and Women's Rights in Egypt

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“The object and use of lawyer's language is twofold: partly to prevent information being conveyed to certain descriptions of persons, partly to cause such information to be conveyed to them as shall be false, or at any rate, fallacious: to secure habitual ignorance, or produce occasional misconception.”

– Jeremy Bentham, *Rationale of Judicial Evidence*

## **Abstract**

This paper addresses the role that the Convention on the Elimination of Discrimination Against Women (CEDAW) can play to improve women's conditions and secure their rights in Egypt, in light of that country's religious-based reservations to the UN convention and its recent constitutional amendment making the Shari`ah its principle source of legislation. Specifically, it addresses Egypt's reservations to Article 16, which concerns the eradication of discrimination against women in cases of divorce, as this area has been the focus of recent legislative reform. The paper is limited to Egypt, because it is the leading Muslim state in providing women's rights in the area of family law.

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## Introduction

The hallmark of the second half of the twentieth century has been the noteworthy efforts to formulate human rights and secure their protection. What do we mean by human rights? Are all human rights universal, or are some cultural? Is there some minimal core of human rights, values, or norms to which the sensibilities of the entire human race can relate and accept? Finally, can international institutions expect and demand that states in violation of such rights conform to these international norms without offering them the opportunity to contribute in the rights-creation process?<sup>1</sup>

States' ratification of international instruments, such as the Convention on the Elimination of Discrimination Against Women (CEDAW), with apparent religious-based reservations raises these questions. Religious beliefs often define the boundaries and determine the content of individuals' understanding of what rights and obligations they have – *to whom and why*. The existence of religious-based reservations questions whether or not the present normative landscape of rights is truly universal, and whether universality can mean something beyond “authentic participation in the rights-creation process” by everyone expected to adhere to the ultimate product of that process.<sup>2</sup>

An example of a state that has ratified CEDAW with religious-based reservations is Egypt. The specific question addressed in this paper is how CEDAW can improve women's conditions and secure women's rights in Egypt, in light of that country's religious-based reservations to the UN convention and its recent constitutional amendment making the Shari`ah its principle source of legislation.

This paper addresses Egypt's reservations only to Article 16,<sup>3</sup> the central provision of the Women's Convention that requires states' parties to eradicate discrimination against women in matters involving marriage and family relations, for two reasons. First, as Jane Connors states, the “private sphere and family life are the fundamental sites of discrimination against women which, effectively, set the framework and opportunity for discrimination in public life.”<sup>4</sup> Second, because under Egypt's former legal system (Ottoman rule), only family law continued to be subject to the “personal religious law” of each of the country's principal religious communities, (in accordance with the Personal Status Law of 1929). In the case of Muslims, this meant that the Shari`ah governed legal matters affecting marriage and family relations.<sup>5</sup> More specifically, the paper dis-

cusses Egypt's divorce laws, the focus of recent legislative reform, given that Egypt is the leading Muslim state in providing women's rights in the area of family law.

## Background

### *CEDAW and Egypt's Reservations*

**CEDAW.** On December 18, 1979, the United Nations General Assembly unanimously adopted CEDAW.<sup>6</sup> Although this human rights convention was the first one to come into force most quickly, it did not do so without reservations.<sup>7</sup>

Reservations by states to international treaties are common. States ratify international treaties but reserve the right not to implement or comply with selective provisions. The Vienna Convention establishes a reservations regime, provided that they are not "incompatible with the object and purpose of the treaty,"<sup>8</sup> and states are free to withdraw their reservations in the future. However, a significant number of substantive reservations made to CEDAW, as one commentator has stated, "go to the heart of both values of universality and integrity" in international human rights law.<sup>9</sup> Various states either objected to or were relatively tolerant of those states that had attached reservations to CEDAW.<sup>10</sup>

Aside from formal objections, some states responded by asking the Secretary-General to seek views on what states' parties thought would be compatible reservations within the meaning of Article 28 (2)<sup>11</sup> and report those views to the forty-first session of the General Assembly.<sup>12</sup> At the 1986 session of the Economic and Social Council (ECOSOC), the discussions deteriorated into accusations of cultural insensitivity, first against Islamic states and subsequently against the Third World. As a result, the resolution on CEDAW adopted by the committee under the convention (hereinafter, CEDAW Committee) to monitor implementation failed to address the issue of reservations directly and only "emphasized the importance of strict compliance with the Convention."<sup>13</sup>

Similarly, attempts by the CEDAW Committee at its sixth meeting in 1987 to request states to reconsider their reservations and to ask the UN to "promote or undertake studies on the status of women under Islamic Law and customs – in particular, on the status and equality of women in the family ... [was met with similar allegations of] cultural imperialism and religious intolerance."<sup>14</sup> The possibility of addressing the question of reservations or getting such states as Bangladesh and Egypt, which had

made the broadest reservations, to clarify their positions as to the scope and necessity of their reservations, proved futile. In 1987, ECOSOC recommended that the General Assembly not take action on the CEDAW Committee's proposal to conduct studies on Muslim women, a recommendation which the General Assembly later accepted at its forty-second session.<sup>15</sup>

In March 1988, the question reemerged on the agenda of the fourth meeting of states parties (member states that had ratified CEDAW).<sup>16</sup> However, Egypt reiterated its earlier objection to the item's inclusion on the agenda. The session ended by adopting a two-clause decision, recalling the prior decision taken at the third meeting of states parties and noting the reports of the General Assembly, ECOSOC, and states parties during 1986 and 1987.<sup>17</sup> Despite staunch refusals to address the issue of reservations, the CEDAW Committee insisted that it would be useful to study the sources of Islamic law and practices, since Muslim states' reservations are largely based on references to these sources.<sup>18</sup> Consistent with its position, the committee amended its guidelines<sup>19</sup> for preparing the initial and periodic reports required by the convention<sup>20</sup> in order to include guidelines for states that had entered substantive reservations.<sup>21</sup> The committee made specific reference to states that had made broad reservations, stating that it considers such reservations to be incompatible with the object and purpose of Article 28 (2).<sup>22</sup>

**EGYPT'S RESERVATIONS.** Egypt was the first Muslim state to ratify CEDAW, on September 18, 1981,<sup>23</sup> a mere 2 weeks after the convention entered into force on September 3, 1981.<sup>24</sup> Like many other states, Egypt ratified the treaty with reservations to Article 29, paragraphs 1 and 2, which relate to dispute resolution and the scope of the consent to be bound by the convention.<sup>25</sup> It also made reservations to Articles 2, 9, and 16, which relate to women's rights in marriage and family relations.<sup>26</sup>

Egypt has several reservations to CEDAW. Its major one is to Article 16, which specifies that states "shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations," and shall ensure a number of rights concerning marriage, divorce, parenting, family planning, adoption, and ownership of property "on a basis of equality of men and women."<sup>27</sup>

The religious basis of Egypt's reservation was formulated from the Islamic tradition of *mahr*. Egypt justifies its reservation to Article 16 on the basis of its "respect for the sacrosanct nature of the firm religious beliefs that govern marital relations in Egypt and which may not be called into ques-

tion.”<sup>28</sup> Egypt further stipulates that an “equivalency of rights and duties” is central to ensuring “the complementarity” between spouses, which in turn “guarantees true equality.”<sup>29</sup> Egypt is referring to the Qur’anic injunction that requires a man to give a woman *mahr*<sup>30</sup> upon marriage.

However, Egypt’s analysis is flawed in two significant ways. First, *mahr* is a right independent of a woman’s subsequent decision to obtain a divorce and may be immediate or deferred; the bride may even refuse to accept it altogether.<sup>31</sup> Therefore, making any connection between giving *mahr* and restricting a woman’s rights to obtain a judicial divorce is implausible at worst, and attenuated at best. Second, Egypt’s assertion that “[t]he Sharia, restricts the wife’s rights to divorce by making it contingent on a judge’s ruling, whereas no restriction is laid in the case of the husband” is a misstatement of law. In fact, classical Islamic law provides at least three avenues of divorce: *talaq* (nonjudicial), *khul’* (settlement/negotiation) and *tafriq* (judicial).<sup>32</sup>

The Egyptian government’s non-recognition of these egalitarian forms of divorce that exist in traditional Islamic law, except for *tafriq*, imposes a severe limitation upon women seeking to exercise their right to divorce, especially if judges are partial to viewing matters in a patriarchal way. Egypt’s use of this Qur’anic injunction as a basis to deny a woman a unilateral right to divorce, even where the grounds for divorce may be abuse or violence, is inconsistent with both classical Islamic law and the spirit of the very Qur’anic verse regarding *mahr*, one idea behind which may be to provide a sort of social insurance or financial safety net for the divorced or widowed wife.

In the midst of ratifying CEDAW, subject to reservations, Egypt found itself in a distinct legal predicament domestically that would seemingly complicate its position as a party to the convention. In 1980, Egypt adopted an amendment to Article 2 of its constitution, thereby changing the article from reading “Islamic jurisprudence (Shari`ah) is a principle source of legislation” to “Islamic jurisprudence is the principle source of legislation.”<sup>33</sup> The impact of this amendment was, in effect, to subject all laws to conformity with the Shari`ah, whereas prior to the amendment, Egypt had applied the Shari`ah only to matters involving family law, (i.e., Personal Status Laws).<sup>34</sup> This constitutional amendment came after the United Nations General Assembly unanimously adopted CEDAW on December 18, 1979.<sup>35</sup>

Thus, when Egypt, as the first Muslim state to endorse the convention, ratified CEDAW on September 18, 1981,<sup>36</sup> a mere 2 weeks after

CEDAW entered into force on September 3, 1981,<sup>37</sup> it was aware that its own body of law, based upon the Shari`ah, may be incompatible with CEDAW's provisions. Presumably this is the reason why Egypt ratified the convention, subject to reservations to Articles 2, 9, and 16. Did Egypt take CEDAW seriously? Did Egypt intend to modify the Shari`ah in order to comply with CEDAW?

Some of Egypt's pre-convention involvement indicates that it did take CEDAW seriously and sought to be a sincere party to the convention. Preceding the Women's Convention was a Declaration on the Elimination of Discrimination Against Women.<sup>38</sup> Among the sponsors of a November 1963 resolution calling for the preparation of this declaration were six predominantly Muslim countries: Afghanistan, Algeria, Indonesia, Iran, Morocco, and Pakistan.<sup>39</sup> The resolution requested governments and NGOs to send comments and proposals to the Secretary-General regarding the drafting of such a declaration. Government respondents to the resolution also included states with predominantly Muslim populations, including Egypt.<sup>40</sup> Regarding equality in nationality and domicile, Egypt's responses emphasized "aid to widows and divorcees and educational campaigns to overcome discriminatory customs and traditions."<sup>41</sup>

On the home front, consistent with its international obligations, Egypt accorded treaty law of a human rights character the special status of a constitutional principle in a key 1992 decision of the Supreme Constitutional Court (SCC).<sup>42</sup> In Case No. 22, Judicial Year 8,<sup>43</sup>

the Supreme Constitutional Court held that human rights clauses of the Constitution had to be interpreted in accordance with those norms generally recognized and applied by democratic states, including international standards applicable in those states. The Court also declared that the legislature had to take international human rights treaty commitments of the State into account when passing legislation."<sup>44</sup>

Hence, in viewing the 1980 constitutional amendment together with Law No. 22, one could infer that Egypt believed that the Shari`ah was compatible with international human rights norms. Why, then, has Egypt made reservations to the convention?

Egypt submitted its first report on developments toward compliance with the convention in 1984, and its second report in 1990.<sup>45</sup> Upon review of the reports, the CEDAW Committee noted that its preference was to have Egypt withdraw its reservations. While the SCC has had a few occasions to consider the Shari`ah and human rights standards, Egypt has

taken the stance that it must await these matters to come before the court so that it may “continue to evolve a reconciliation between the requirements of the conventions, such as CEDAW, and the Shari`ah as the principle source of legislation” on a case-by-case basis.<sup>46</sup>

Thus far, the court’s approach has provided a superficially convenient mechanism for allowing judges to identify a broad – even abstract – social or public policy concern relating to a particular piece of domestic legislation. And, after no more than a cursory examination of Islamic legal sources, the court proclaims that such a policy is also manifest in past legal tradition – and so falls in the Shari`ah’s traditional domain. The court thus “proves” that domestic legislation is consistent with the Shari`ah.

*The Court’s Challenges in Applying the Shari`ah*

Since Egypt’s enactment of the 1980 amendment, the SCC<sup>47</sup> has had only a few occasions to consider the compatibility of Egypt’s existing laws with the Shari`ah. It is not surprising to note that, as pressure mounted in the 1980s from the Islamists, women activist groups, and male national elites over the reform of divorce laws, the court avoided “developing a workable definition of Shari`ah and determining the appropriate role for Constitutional Shari`ah” by dismissing, on procedural grounds, two cases in 1985 – the first dealing with a challenge to Law No. 44<sup>48</sup> (relating to divorce), and the second involving a challenge to a law that had been passed before the 1980 amendment requiring conformity with the Shari`ah.<sup>49</sup> Aware of the need to develop coherent principles, the People’s Assembly voted on May 4, 1985, to review Egypt’s legal code “gradually and scientifically” and to modify provisions that contradict the Shari`ah, although Parliament ruled out any immediate imposition of the Shari`ah.<sup>50</sup> In 1993, the court finally decided that the Shari`ah would “consist of all laws which conform to the broad legal principles (‘fundamental principles’) that were laid down in the Qur’an and which have been accepted by all Muslim Jurists over the years.”<sup>51</sup>

Clark Lombardi explains that “if legislation does not violate the fundamental principles of Islamic Law, it is in keeping with the Sharia, and does not violate Article 2”<sup>52</sup> – and is, therefore, constitutional. The court further designates these “fundamental principles” as those on which ijti-had (interpretation) is forbidden, stating that Egyptian legislation cannot violate these core principles.<sup>53</sup> The court does not provide much guidance on how these fundamental principles should be derived, thereby leaving

much discretion in the hands of civil court judges. According to the SCC, such judges need not have the traditional classical training.<sup>54</sup>

Islamist positions on the competence of civil court judges to administer the law vary from those who feel they could carry out the task, as long as they received the appropriate training, to others who argue that while the court can conduct the initial analysis, the decision must be reviewed by Islamic scholars and possibly even be subject to veto.<sup>55</sup> Rather than focusing on the actual legal analysis (methodology and reasoning) employed by the classical jurists, the SCC's method merely identifies issues on which past jurists espoused a consensus of thought and projects them into the present.

This incredibly broad understanding effectively whittles down centuries of exacting and nuanced jurisprudence derived through sophisticated legal analysis. Such a general approach runs the risk of being applied at a level of abstraction so broad as to lead to sanctioning intrinsically un-Islamic conduct. Lombardi argues that the SCC must recognize the gravity of these criticisms, as the consequences of even appearing to manipulate the word of God could be more detrimental than being perceived as simply ignoring the Islamists.<sup>56</sup> Additionally, although the court has so far taken a liberal approach in its jurisprudence, Lombardi notes that ultimately it must establish some standard of review to ensure uniformity in application and to prevent the imposition of reactionary laws.<sup>57</sup>

The court, having stated only in 1993 what is meant by the Shari`ah, has necessarily applied this understanding on an *ad hoc* basis. However, it remains to be determined whether the court is guided by sound methodological principles and comprehensive sources, or merely pragmatism and expediency. In the absence of coherent principles for deriving divine law, most legislative reforms of Egypt's divorce laws have been equally *ad hoc*. The resulting fragmentary progress has been slow to further the interest of improving women's rights.

### Analysis

CEDAW may be instrumental in advancing Egypt's attempt to reconcile its Islamic legal tradition with modern constitutionalism, since Egypt accepted CEDAW's obligations at a critical juncture in its constitutional and legislative reform. This critical juncture was, as already mentioned, Egypt's adoption of a new constitutional amendment making the Shari`ah *the* principle source of legislation after the UN adopted CEDAW in 1979. At first glance,

such a political move seems counter-intuitive and contradictory. Why would Egypt take a step “backward” by subjecting *all* of its laws to the Shari`ah, whereas previously only family law had been subjected to religious-based doctrine? And why would Egypt initiate such a measure when it signed and intended to ratify CEDAW, as the Shari`ah has acquired the reputation of treating women differently from men and of affording women less rights than those provided under international standards?

One might offer a plausible argument that Egypt was compelled to appease its extreme Islamist factions, as it had been straddling the fence between extreme Islamist forces and modern moderate religious revisionists for quite some time.<sup>58</sup> The politics surrounding Law No. 44's repeal in 1979 and the subsequent enactment of No. 100 in 1985 are examples of this volatile balance. Upon closer examination, such a political move by the Egyptian government may have inadvertently set the stage for legal reform on a monumental scale, but in an unexpected manner and direction.

One might expect that Egypt's 1980 constitutional amendment was simply rhetoric and that the government did not intend to follow through in ensuring that all subsequent legislation conformed to the Shari`ah. This may appear to be true, particularly in light of the SCC's attempts to resolve cases on solid Islamic grounds and through sound Islamic legal methodology. However, as Abdullahi An-Na'im and Ann Elizabeth Mayer note, and as practice is showing, legal reforms in Egypt are gaining popular acceptance and legitimacy only because they are Islamically justifiable.<sup>59</sup>

Therefore, the central questions concerning the future of Egypt's legislative and social reforms are twofold: First, what kind of sound interpretive Islamic methodology must be developed to sustain current reforms and inspire future ones; and second, how can Egypt and the international community ensure that the interpretive offspring of whatever sound methodology is developed is not some distortion of Islamic principles falsely packaged as Islamic reform? Consequently, these questions address our central concern: How can CEDAW, specifically, and the international community, more generally, be instrumental in advancing Egypt's attempt to reconcile its Islamic legal tradition with modern constitutionalism?

#### *What Do We Mean by Reconciling?*

**TOWARD A SOUND ISLAMIC INTERPRETIVE METHODOLOGY.** The challenge confronting Egypt and other Muslim states is that of reconciling their Islamic legal traditions with modern constitutionalism, the western

conception of equality upon which CEDAW is premised.<sup>60</sup> In other words, they will have to reexamine their Islamic legal traditions and rethink Islamic solutions in order to find ones compatible with modern democratic constitutionalism so that they can fulfill their international obligations or, alternatively, meaningfully contribute to the rights-creating and rights-defining process by offering other viable understandings of human rights and gender equality.

As an initial matter, Muslims (whether citizens, scholars, jurists, or political leaders) must reexamine exhaustively the traditional legal sources available to them: the Qur'an, the Sunnah (the Prophet's model, as embodied in his sayings and actions), *ijma`* (consensus of learned individuals and scholars), *qiyas* (analogical reasoning), *ijtihad* (independent juristic reasoning), *istislah* or *maSlahah* (public good), *darurah* (necessity), *`urf* (customary practice), and *naskh* (abrogation).<sup>61</sup> Additionally, they must reexamine the traditional legal tools available to them as stated in the discipline of *usul al-fiqh* (rules governing the derivation of Shari`ah principles from their sources). Both An-Na'im and Mayer have recommended approaches that Muslims might consider in formulating the modern application of these sources and tools.<sup>62</sup>

Both scholars believe that any redress of women's (human) rights violations must be Islamically justified. An-Na'im advocates a reconfiguration of the entire Shari`ah structure and implores Muslims to reformulate *usul al-fiqh* and exercise *ijtihad* "even in matters governed by clear and definite texts of the Qur'an and Sunnah, as long as the outcome of such *ijtihad* is consistent with the essential message of Islam."<sup>63</sup> He also suggests using the principle of *naskh*<sup>64</sup> to accomplish *ijtihad* in order to come up with a new law that is viable with modern standards. However, as An-Na'im himself notes, the principle of *naskh* had a "limited sense for some of the Companions of the Prophet,"<sup>65</sup> who took a subsequent, and seemingly contradictory, verse of the Qur'an as creating an exception to, particularizing a meaning of, or clarifying the earlier verse rather than totally abrogating it. Nonetheless, he argues that

the public law of Shar`iah was fully justified and consistent within its own historical context, but that given the concrete realities of the modern nation-state and present international order, these aspects of the public law of Shari`ah are no longer politically tenable.<sup>66</sup>

Similarly, Mayer argues that,

... [I]slamic human rights schemes should be offered only after the authors ha[ve] first identified the philosophical premises on which an Islamic approach to rights issues should be based and the methodology appropriate for developing coherent interpretations of the Islamic sources.<sup>67</sup>

However, she notes that the lack of a heritage that “celebrates individualism as a virtue” was not conducive to the “development of human rights concepts on an Islamic foundation.”<sup>68</sup> Mayer argues that Islamic human rights principles are “newly coined” imitations of western human rights concepts and that their authors largely ignore their indebtedness to western culture.<sup>69</sup> Mayer only acknowledges that “Islam is inherently [c]apable of *accommodating* principles of individualism.” Although a philosophy of individualism is absent, “Islamic heritage (even pre-modern) offers many other philosophical concepts, humanistic values, and moral principles that are well-adapted for use in constructing human rights principles”<sup>70</sup> (emphasis added).

However, where Mayer has been unable to find in Islam a heritage that celebrates individualism and possesses an Islamic concept of human rights, other scholars<sup>71</sup> who have conducted research on precisely Mayer’s claim that “Islamic civilization did not create an intellectual climate that was conducive to according priority to the protection of individual rights and freedoms,”<sup>72</sup> have found affirmative empirical evidence in primary Islamic sources indicating that an Islamic concept of universal human rights, as well as the protection of individual rights and freedoms, are inherent in Islam. In this fashion, such scholars are unearthing the foundational pillars of Mayer’s prescription that,

... [I]slamic human rights schemes should be offered only after the authors ha[ve] first identified the philosophical premises on which an Islamic approach to rights issues should be based and the methodology appropriate for developing coherent interpretations of the Islamic sources.<sup>73</sup>

Both An-Na’im and Mayer stress what most Islamic scholars would agree is the need for a cohesive methodology in fashioning Islamic human rights schemes (solutions) in order to determine the Shari`ah’s stance on human rights. In the absence of such a methodology and an understanding of the “historical evolution ... philosophical underpinnings, and the meaning of ‘rights’ in modern legal systems,”<sup>74</sup> modern Islamic human rights schemes will be little more than a patchwork of “[i]deas and terminology

drawn from two very different cultures without a rationale for these combinations or a way to reconcile the conflicting premises underlying them.”<sup>75</sup>

Egypt’s newest constitution is one example of this patchwork. The SCC acknowledges that the drafters of the Egyptian constitution were not only influenced by, but were also explicitly guided by, international conventions in their work.<sup>76</sup> One can see striking linguistic parallels between the texts of the Egyptian constitution, international covenants, and the Universal Declaration of Human Rights (UDHR). However, resemblance in form, without cohesion in substance, will not resolve potential contradictions in application or inconsistencies in rationale.

An-Na’im’s theory, while appealing in the short run, as it provides a guide seemingly embedded within the tradition to immediately address the insufficiency of legal reform in Egypt, may not be viable in the long run, as it is “inconsistent with the eternal validity of the Qur’an.”<sup>77</sup> For instance, if God is all just and wise and the Prophet is the conduit by which individuals first learn the dictates of that wisdom, it would not make sense for God to have intended for people to understand His wisdom later rather than sooner. In other words, God would not have sent the Qur’anic verses intending for humans to comprehend fully, right from the inception, the precepts governing human and moral relations.

Furthermore, a methodology that relies heavily on abrogating the word of God, whose message is intended to carry infinite wisdom and universal applicability, in order to reform human-produced judicial rulings derived therefrom belies the very nature and purpose of the “divine text” (Qur’an) that the methodology is meant to interpret.

It is in this vein that Mayer’s prescription is more persuasive. One would expect to go back to the traditional classical sources, to conduct a careful examination of whether there was an understanding of some equivalent concept of human rights or of equality, or even a precursor to these concepts, on which basis one could support such particular individual rights as a woman’s right to divorce her husband. This approach is Islamically more persuasive, because it is not only compatible with a view that the divine text is perfect and just, but that the human endeavor and wisdom to understand the divine dictates have been inadequate and prejudiced by external influences (i.e., a patriarchal order or self-interest), thereby resulting in un-Islamic interpretations. Ultimately, this approach has greater legitimacy and carries greater authority, because it builds on tradition while simultaneously recognizing the possible fallibility of individual effort.<sup>78</sup>

Under An-Na'im's approach, an inappropriately expansive principle of *naskh* could be derived and applied. This would create a danger that specific protections for humanity provided in the Qur'an would be rendered inoperative by individual predilections. Though it seems unimaginable today, what would happen if society were to regress in its understanding of human rights?

**PROCESS BEFORE SUBSTANCE?** Underlying the arguments put forward by An-Na'im and Mayer is the assumption that human rights are universal. However, such scholars as Richard Falk have argued that before we, as a global community, can reach this conclusion, we must first of all be actively engaged or represented in the rights-creating process.<sup>79</sup> Ultimately, we may agree that there is a core set of universal human rights; however, this set or its substantive formulation may be broader or narrower as a result of a more inclusive rights-creating process. For instance, Johan Galtung argues that "human rights as an institution are linked to a particular historical phase in the evolution of the West and of the modern state system."<sup>80</sup> He also argues that what is western about this construction of human rights generated by western history is not the content of the norms,<sup>81</sup> but the construction itself.<sup>82</sup> A different construction might yield a different understanding of rights or, at least, a difference in the weight accorded to such rights.

A variation of Galtung's argument on the current structure of human rights, which, in turn, defines their content, is Falk's argument that human identity may not necessarily form along territorial lines and that individuals may have a legitimate claim to civilizational identity.<sup>83</sup> Falk writes that,

... civilizational identity is sufficiently genuine for a sufficient portion of the more than one billion persons on the planet [spread across over 45 countries] who consider themselves Muslim to be treated as an essential category in evaluating the legitimacy of world order structure and processes.<sup>84</sup>

He argues that supporting this claim is the,

... increasingly articulate expression of grievances and demands on the part of those who affirm their Islamic identity, and those who increasingly adopt a critical stance of normative and emotional distance from imposed Western structures and processes of world order, while themselves affirming the quest for worldwide peace and justice.<sup>85</sup>

Falk argues that in the case of Islam, this increasing civilizational identity is the result of a “geopolitics of exclusion”<sup>86</sup> from rights-creating processes, which, in turn, leads to legitimate grievances.<sup>87</sup> He maintains that this neglect of civilizational participation for Islam has produced a series of partially deformed institutions, practices, and perceptions. The deterioration of discussions at the 1986 session of ECOSOC into accusations of cultural insensitivity and cultural imperialism against Islamic states, as well as Egypt’s resistance to withdrawing its reservations and its persistence in asserting the Shari`ah’s preeminence where it conflicts with the convention, may be a manifestation of this larger frustration with the “geopolitics of exclusion.”

Other western commentators have noted that,

... despite the fact that the most notorious reservations to the Convention have been made by countries who apply Shari`ah, there has been little analysis of the participation of those countries in the preparation and elaboration of the treaty [to which they are parties] and the meaning of their reservations.<sup>88</sup>

Where can a politics of inclusion take Egypt and the rest of the Muslim world?

#### *Divorce Law and Muslim Feminists?*

An examination of the basis of the Shari`ah by a prominent Egyptian judge and writer, Muhammad Sa`id al-Ashmawi, led him to argue that,

... the Qur’an contains relatively few direct legal commandments, and that the attempt by “fundamentalists” to prescribe action in every sphere, justified as required by the Shari`ah, is self-aggrandizing. This presumptuousness inevitably leads to distortions of Islam and limitations on individual liberties.<sup>89</sup>

The complexity of factors, including politics as well as patriarchic views of women, society and status, and gender roles that have petrified into gendered stereotypes, has led many men to interpret and enforce God’s “musts” (mandatory directives) upon them as “may-nots” for women.

**THE EVOLUTION OF DIVORCE LAW.** On the issue of divorce, one may view the Qur’anic provisions as God foreseeing the worst possible scenario or abuse committable by the party most likely to be able to inflict

the greater detrimental harm to the more vulnerable party and, therefore, providing protections against it. One can also detect a Qur'anic preference for preserving the union in marriage, as the reconciliation verses demonstrate, out of a concern for a morally, spiritually, and socially desirable structure for conjugal relations. This preference, however, does not stand in the face of fear or abuse, disenchantment, or even disinclination to remain in the marriage. Numerous complementary Qur'anic passages provide an ethical tone and texture to serve as a guide in effectuating the full purpose of the provisions pertaining to divorce. However, as history reveals, laws do not always adequately reflect existing realities and, to some extent, will always fail to effectuate legislative intent.<sup>90</sup>

In 1920, Egypt enacted, and in 1929 expanded, Law No. 25 by royal decree. The law recognized four grounds on which a woman could sue her husband for divorce: failure to provide maintenance, dangerous or contagious disease, desertion, and mistreatment.<sup>91</sup> Law No. 25 supplanted the specific legislation promulgated by the Hanafi school, in favor of the more liberal and equitable legislation of the Maliki school, through a classical Islamic doctrine known as *takhayyur* (selection).<sup>92</sup> This allows a woman to recover past maintenance<sup>93</sup> and to sue for divorce in cases where her husband is incapable or unwilling to provide maintenance.<sup>94</sup> Additionally, the law limited a husband's unilateral right under Hanafi law to divorce his wife by requiring intent, not merely utterance (i.e., when in jest or under drunkenness or compulsion) in order to give the divorce legal force. Finally, the form of divorce known as *talaq al-bid'ah* (three declarations of divorce declared at one time), which, although disfavored "had nevertheless been recognized as valid by classical law, was finally rendered ineffective."<sup>95</sup>

Although Law No. 25 ushered in many improvements in the legal rights of Egyptian women, it did not address all of those areas of marriage and divorce law in need of reform.<sup>96</sup> Additional reforms did not arrive until 1979, despite recommendations and draft legislation for additional reform from cabinet ministers and specially appointed committees.<sup>97</sup> In 1979, President Sadat enacted Law No. 44, which came to be known as Jihan's law, after Sadat's wife, because of her activism on women's issues, by unilateral presidential decree while Parliament was in recess so that it could not block its passage.<sup>98</sup> However, the Supreme Court of Egypt struck it down in 1985 on the grounds that it was unconstitutional because the presidential power to enact decrees was limited only to emergency situations; the enactment of Personal Status Law did not qualify as an emergency.<sup>99</sup>

However, commentators argue that the court gave in to reactionary pressure from opposition groups.<sup>100</sup> Due to immense counterpressure from activist women's groups, Parliament reinstated it that same year, albeit in a diminished form.<sup>101</sup> The rights afforded women under Law No. 100 (the reinstatement of Law No. 44) were the right to remain in her marital home until she remarried or lost custody of her children, an expansion of the entitlement to maintenance by her former husband, an extension of the children's age at which custody automatically reverted to their father, and the right to a court appeal against any attempt by the former husband to have his ex-wife forcibly returned to their marital home.<sup>102</sup>

Law No. 100 "removed a wife's automatic right to divorce on grounds that a second marriage harmed her, absent a judge's ruling that material or moral harm had occurred" and provided that the "burden of proving harm, physical or psychological, fell upon the wife."<sup>103</sup> While placing penalties<sup>104</sup> on the husband for noncompliance with the law, it also gave the husband the exclusive right to the marital home.<sup>105</sup>

The final stage of this evolution came in March 2000, when Egyptian women obtained the same unilateral right to divorce as their husbands, with or without their consent. In exchange, however, they had to return any money or property that they had received from their husband upon their marriage.<sup>106</sup> An additional amendment to the reform "requires that women give up the financial rights they would normally have in the case of divorce, namely maintenance during the waiting period and support for children in their custody," although they will have the "right to draw money from a special state bank in order to provide for their family"<sup>107</sup> should they need to do so.

Thus after decades of struggle and resistance, it is a sad irony that Egypt's present divorce law fails to guarantee as many rights as some schools of classical Islamic law did, such as, *khul'* (divorce by mutual agreement or settlement), the most liberal form of divorce accepted by all classical jurists. Indeed, under some schools of classical Islamic law, a woman would not have to forfeit *any* of her financial rights to maintenance.

Some commentators, among them Anna Janefsky, have argued that even the Personal Status Laws passed by the Egyptian government and which guarantee minimal women's rights were not based on real equality, but rather on the political motivation to appear before the international community as the most progressive state in the Middle East.<sup>108</sup> Janefsky notes that President Sadat enacted Law No. 44 only months before the UN General Assembly adopted the Women's Convention. She also argues

that Law No. 100, enacted by Parliament in 1985, was enacted a short while before the UN Decade for Women End-of-Decade Conference in Nairobi.<sup>109</sup>

**MUSLIM FEMINISTS.** Despite some strides in Egyptian Personal Status Law, scholars argue that what is crucial is the need to develop a coherent and comprehensive methodology based on Qur'anic principles and values, as well as all of the traditional legal sources mentioned earlier, in order to develop enduring political, economic, and legal models for society.<sup>110</sup> John Esposito notes that a "systematic Islamic rationale must be developed that in the long run can give consistency to substantive legal reform" and "that such rationale can be found in the sources of Islamic Jurisprudence that were originally responsible for the development of Islamic Law."<sup>111</sup> Esposito argues that traditional Muslim family law fails to reflect the Qur'anic verses that suggest a wider range of divorce options for the wife. For example: "And women have rights equal to what is incumbent upon them according to what is just."<sup>112</sup>

Returning to the original sources, such Muslim feminists as Azizah al-Hibri have made nonpatriarchal interpretations of the Qur'an and Sunnah that shed new light on these verses and show how even seemingly restrictive ones indeed are not. Al-Hibri argues that the "patriarchal stereotypes of women as irrational, dependent, and impulsive," influenced individual jurists to promulgate Muslim laws in a way that restricts women's rights.<sup>113</sup> Conducting a careful feminist exegesis of Islamic theology reveals strong grounds for equality between the sexes,<sup>114</sup> and that Qur'anic references to attributable differences between the sexes or individuals (i.e., in language, various affiliations, and so on) are intended to be understood as a "variety is the spice of life,"<sup>115</sup> sort of message. However, the moral of the verse is that we ought to respect these differences as a sign of God's mercy on us and as a test of our patience, not as a basis to subjugate others to unimaginable injustices.

Al-Hibri also examines the various schools' positions on the acceptability of different negotiable conditions<sup>116</sup> or promises vis-à-vis the marriage contract, which is the fundamental basis of marriage in Islam.<sup>117</sup> She finds that the paternalistic views of certain classical jurists limited or excluded perfectly legitimate conditions that a woman could negotiate and include in her marriage contract.<sup>118</sup>

So why has Egypt been reluctant to adopt the liberal feminist interpretations offered by such scholars as al-Hibri? A possible answer is that current patriarchal interests object to the implications of such interpreta-

tions on their authority. Gendered stereotypes of both men and women in Egyptian society are still prevalent. Government officials are not only carriers of these stereotypes themselves, but also must balance the pressures coming from other groups that espouse them. Victories in progressive legislation were few and far apart under King Farouk, Nasser, and Sadat. The decades between Law No. 25 and Law No. 44 were punctuated by a series of domestic and international political transformations for Egypt, not the least among which were WWII, the partition of Palestine, the 1952 Egyptian revolution, the 1956 nationalization of the Suez Canal and the ensuing war, the 1967 war, the 1969-71 union with Syria and its demise, the Arab oil embargo and the 1973 war, and, finally, the Camp David accords.

In reaction to these events, there has been some fundamentalist Islamic religious revival. For instance, while aware of the increasing strength of some Islamist groups, such as the Muslim Brotherhood,<sup>119</sup> commentators like Janefsky argue that Nasser overlooked the significance of this religious revival.<sup>120</sup> In fact, some of the Islamist solutions that appeal to many modern Egyptian Muslims today have their intellectual origins in the ideas of Muslim intellectuals, like Muhammad Abduh,<sup>121</sup> which grew out of the disappointment with Nasserist socialism. Thus, Janefsky argues that although both Abduh and Nasser,

... believed that a program of social reform would provide the most effective means of modernizing their nation, unlike Abduh, Nasser chose to base social reform on principles of secular nationalism and socialism, rather than Islam. This choice resulted in the stagnation of family law and women's marital rights.<sup>122</sup>

Throughout Egypt's volatile years of liberal and socialist reform, women of varying degrees of Islamist and feminist persuasion were active in the effort to achieve reforms. The views espoused by various activist women's groups during those decades were as fluid and diverse as the social and political transformations that accompanied them. Margot Badram notes that,

... the Muslim Women's Society (MWS) under Zainab Al-Ghazali<sup>123</sup> (women's fundamentalist leadership) favored an Islamic state with a theocratic ruler, while the Egyptian Feminists Union (EFU), under the leadership of Nawal El-Saadawi accepted the notion of a secular state whose legitimacy was grounded in the basic principles of Islam.<sup>124</sup>

Despite these differences, Badran notes that there was occasional cooperation between the two organizations, especially in nationalist action. Earlier women's activism, which centered on gaining political and civil rights as well as access to public spheres, resulted in women winning the right to vote in 1956.<sup>125</sup> After passing the 1962 Egyptian Charter (the precursor to the 1971 Constitution), which stated that "women must be regarded equal to men" and which "guaranteed equality of opportunity to all Egyptians," women's literacy increased significantly, as did the percent of unmarried women, as more women attended universities.<sup>126</sup>

These decades bore witness to a rare dynamism in Egyptian society. For example, women even entered the realm of formal scholarly religious discourse. As Badran states, Aisha 'Abd al-Rahman, known as Bint al-Shati, became a professor of Islamic thought at Cairo University, where she published numerous pieces on "the lives of the wives and female relatives of the Prophet, held up as paragons for the modern woman."<sup>127</sup> Similarly, Amina Sa'id, founder of *Eve*, a popular women's magazine, while spreading her "message of liberal feminism to the socialist state's 'gender neutral' agenda for the mobilization of its citizenry,"<sup>128</sup> used the experiences gained as vice-president of the Board of the Press Syndicate to later criticize the state's failure to eliminate the inequities in the Personal Status Laws.<sup>129</sup>

Since the 1973 war, Islamist groups have gained a great deal of popular support, especially among the lower middle-class and young educated professionals, for their provision of significant welfare measures that the state had failed to provide.<sup>130</sup> The rise in the use of the veil, as well as changes in the constitution emphasizing the Shari'ah's centrality, signaled the Islamists' increasing popular support and the government's need to respond. Badran notes that even the slate of women's issues espoused by Jihan Sadat and inspired by the UN "decade of women" (1975-85) was encouraged by the state; more radical secular feminists like Nawal Saadawi were restricted, at least in part to appease the growing conservative Islamist forces.<sup>131</sup> Such political tactics were similar to the former regime's imprisoning al-Ghazali (who, from the government's viewpoint, was conservative) while tolerating Bint al-Shati because her primary message of social and economic reform served the socialist national agenda.

The impact of conflicting pressures on the government were reflected as early as the creation of the new 1971 Constitution, which, as Badran notes, sought to "balance a woman's duties toward her family and her work in society and her equality with man in the political, social, and cul-

tural spheres, without violating the laws of the Islamic Shari`ah.”<sup>132</sup> With the advent of the 1980 constitutional amendment, some women activists even experienced a reorientation from more liberal stances to more conservative ones.<sup>133</sup> Whether inspired by their Islamic roots or a secular<sup>134</sup> vision for the future, what is most significant in all of this is that women were vocally and physically involved in presenting “women’s own responses to laws about them and their ability to organize on their behalf.”<sup>135</sup>

It is imperative to recognize the arguments of those scholars who emphasize the indoctrination of gender roles, to the extent that such notions have led to social decay.<sup>136</sup> But what about those individuals who, while vociferously opposing the abuse that may result from an exaggeration of such gender roles and opposing the stereotypes or paternalistic inferences derived from them, nonetheless choose to live under a moderate version of such gender roles out of a sincere religious and spiritual conviction? For instance, Debra Kaufman argues that such women tend to be “alienated from sexual liberation, individualism, and the secular worldview.”<sup>137</sup>

However, one might argue that while a culture may inform one’s understanding of space, time, knowledge, nature, persons, societies, and the transpersonal, the understanding itself must have a certain cognitive, pragmatic, or functional appeal irrespective of cultural justifications. For example, sexual liberation<sup>138</sup> in the context of Islam could be understood as directing sexual choices toward more purposeful or meaningful ends for the particular individual, rather than the western understanding of Islam as inhibiting sexual liberation. Likewise, an Islamic understanding of individualism<sup>139</sup> could be that of a direct and completely unfettered relationship with God, one that releases the individual from any dependency on or subordination to another, and further renders the individual self-sufficient by virtue of recognizing the power and primacy of God’s will. Indeed, feminist accounts by Muslim women suggest that they do not believe that there is any correlation between accepting certain gender roles<sup>140</sup> (i.e., veiling) and inequality.<sup>141</sup>

It is important not to confuse these variations<sup>142</sup> in individuals’ informed choices for themselves with an elite’s manipulation of religious sentiment to protect the political and social structures that serve them. For example, the number of women who attended universities rose dramatically in the 1980s, sparking a concurrent rise<sup>143</sup> in the age at which women first married. The male elite’s reaction was great. As Fatima Mernissi

argues, because the entire concept of patriarchal honor is built around the idea of female virginity, men could not comprehend the idea of mature unmarried women and necessarily identified this phenomenon with the potential for their corruption (i.e., seduction, or loss of female virginity, which, in turn, meant the loss of male honor).

Thus, one can argue that much of the resistance against reform in the area of divorce laws was tied up with this notion of male honor and, therefore, necessarily with male control over women. In a sense, divorce reform was at the other end of the control spectrum. Even as fewer women were marrying in the middle 1980s, women were seeking more rights to initiate divorce. Who would the men control? The perception that President Sadat's wife influenced the Law No. 44 in 1979, and that he enacted it through a procedural tactic only exasperated the perception – and perhaps the growing reality – that women no longer needed men. Indeed, this would explain the law's repeal in 1985 and its subsequent reenactment with provisions that were detrimental to women. For instance, one detrimental provision sought to force women seeking divorce on legitimate grounds back into their husbands' homes,<sup>144</sup> a condition that is un-Islamic even by the standards of classical Islamic law.

Finally, in attempting to answer why Egypt has not been forthcoming in reform in the area of divorce law, one can also understand this resistance as a function of “national elites or neo-patriarchal states, which raise the ‘woman question’ to divert attention from economic problems or political corruption.”<sup>145</sup> By extension, this motivation also leads national elites to exploit their citizens' legitimate grievances from a “geopolitics of exclusion”<sup>146</sup> in hopes of thwarting or slowing down compliance with international obligations. The existence of such popular grievances based on geopolitical exclusion, however, does not justify Egypt's exploitation of them.

#### *The International Community's Role in This Reconciliation*

**TOWARD A BETTER CEDAW.** Indeed, the international community's monitoring function is invaluable, for it serves as a check to enforcing states' compliance with international obligations. Recall that when the meeting of states convened in 1986, despite having reached a consensus to ask the Secretary-General to seek states' views on reservations that would come under Article 28 (2), there was no response by Egypt, other Muslim countries, or other states in general on “how that compatibility [was] to be

evaluated and whether the test for admissibility [should] consist of one element or two.”<sup>147</sup> Furthermore, recall how discussions reached an impasse, resulting in staunch assertions that the committee was espousing cultural imperialism and was anti-Islamic. Such assertions are not conducive to dialogue and do not espouse a good faith effort to reach a mutually acceptable agreement.

Egypt’s posture with respect to other international obligations also is questionable. Egypt acknowledges its poor record on reporting to the Human Rights Committee regarding its compliance with its responsibilities under international covenants (i.e., ICCPR), but attributes the delays to officials in various governmental departments who may be insufficiently trained in generating and presenting information in the form required by the committee.<sup>148</sup>

The ability of international conventions to enforce their provisions is critical to achieving the objectives and purposes of such instruments. Although the international effort to bring women’s rights issues to the forefront of states’ national priorities has been commendable, the committee established to implement CEDAW has extremely limited powers.<sup>149</sup> These limitations do not provide incentives to states to reach a speedy or systematic compliance. Rebecca Cook notes that according to the UN’s legal adviser, neither CEDAW nor the Secretary-General is empowered to judge the compatibility of reservations.<sup>150</sup> This is a significant impediment to implementing the convention. Other impediments to CEDAW’s successful implementation are limitations on its meeting time, its dependence on states’ self-reporting (which raises serious issues of uniformity and accuracy, as states may not discuss controversial issues and may include only favorable facts in their reports), its reluctance to adopt formal recommendations directed at individual states, its lack of power to interpret the convention’s substantive provisions, its inability to hear individual complaints,<sup>151</sup> and the committee’s inability to declare a violation or impose consequences for that violation.<sup>152</sup>

The critical juncture at which Egypt finds itself – on the one hand striving fully to implement CEDAW and interpret its constitution’s human rights clauses in light of international obligations, while, on the other, having amended its constitution to make the Shari`ah the principle source of legislation – presents the world community with a unique opportunity for broadening the participatory base in “international authority structures.” Taking advantage of this opportunity would not only serve as a catalyst for reaching a global consensus on what human

rights mean, but also would add legitimacy to these organizations and to the law that they create (particularly CEDAW<sup>153</sup>), in hopes of having as many states as possible accept and implement them.

The international community can embrace this opportunity in two ways. First, it and the CEDAW Committee can put greater pressure on Egypt to implement a more systematic and rigorous examination of its Islamic legal sources. For instance, this can be accomplished by instituting a procedure within CEDAW for formulating written comments on reports as well as a procedure for state-to-state complaints, which it currently lacks.<sup>154</sup> This measure could be particularly significant in the Muslim context, where some states have more progressive laws on certain issues<sup>155</sup> than others. As there is a sense among Muslims that Qur'anic values and the Sunnah should inform their laws at some level, even if their state is secular, the impact of criticism or persuasive encouragement from other Muslim states could be significant. The idea is somewhat akin to a theory of "spreading the wealth" or "car pooling" in an attempt to both share and benefit from the same resources (i.e., the progressive laws of other Muslim states).

Second, international structures and the CEDAW Committee can take up projects to train and educate judges on various legal systems, whether religious or civil,<sup>156</sup> so that states may look to these structures for judicial guidance in crafting creative solutions.<sup>157</sup> For instance, an independent international committee of experts and/or scholars on human rights in Islam would be of tremendous value to the international community. Not only would such a committee serve to inform interested parties impartially (e.g., the CEDAW Committee and the UN) on classical Islamic human rights law, but it would also be a catalyst in raising popular consciousness about the need for local reeducation.<sup>158</sup> Ultimately, it would create a new global consensus on a modern conception of Islamic human rights.

What these suggestions seek to illustrate is what Johan Galtung advocates: the production of more varied "norm-senders."<sup>159</sup> Since such new programs would operate only in the capacity as norm-senders, they should not affect state sovereignty, if at all.<sup>160</sup> By having international structures send more varied norms, one might conceivably create instances where the norm-sender bypasses the state (the traditional norm-receiver, which would ordinarily pass on the norm to the norm-objects: people) and send norms directly to individuals. Since the objective of such a structure would be to be as representative as possible of *individuals'* views as they identify themselves, such a structure would facilitate implementing a procedure to

strengthen CEDAW's optional protocol for the committee to hear individuals' complaints, as that protocol presently allows reservations (i.e., allows states to exempt themselves from the inquiry process). The committee's ability to hear individual complaints would galvanize civil society and, in turn, create internal pressure on states to pass legislation implementing CEDAW quicker and more fully.

Furthermore, in response to those who believe that all Islamists are the main obstacles to human rights reforms because they have a tendency to become "radicalized" due to a self-perception that they are "under attack from internal and external enemies" and because they see themselves as "a solution to the countries' cultural, political, and economic malaise, and to the crisis of national identity," this structure has the benefit of diffusing the state's despotic power, thereby easing the Islamists' self-perception and thus their radicalization – assuming that the self-perceptions and implications of such perceptions exist in the first place.<sup>161</sup> Additionally, it could help to foster a richer and more informed global civil society.

The suggestions above can be viewed as one model for realizing civil society's potential to "redress cultural imbalances" by unleashing the "restorative energies" within the "spiritual and humanistic core of civil society."<sup>162</sup> They also parallel the model suggested by Galtung about incorporating transnational corporations (TNCs) as norm-senders and as possible financial sponsors of international human rights projects.<sup>163</sup> A layered tapestry of diverse norms would necessarily shield against a single radicalized and separate perspective. Spill-over benefits would be greater awareness of the diversity of opinion within Islam and other religions, a development that would contribute to a more constructive cross-cultural dialogue.<sup>164</sup>

If, at the end of such a journey, we find that there still exists philosophically irreconcilable differences, then perhaps the lesson we will have learned is that a "true universality would acknowledge significant difference as well as sameness, in constituting a world order based on procedures and norms explicitly designed to ensure equitable participation by each major world civilization."<sup>165</sup>

**TOWARD A BETTER WORLD.** The "Enlightenment mind-set, include[ed] a confidence in the possibility of a rational, social and political order based on individual rights that over time could facilitate progress and happiness for humankind as a whole."<sup>166</sup> The approach to achieving this objective, which Muslims believe that God envisioned, encompasses this, the Qur'an, and the Prophet's insistence "upon the pursuit of learning, thinking, and dialogue."<sup>167</sup> A well-known hadith of the Prophet says that you must resist injustice with

action; that if such action is not possible through your body, you must use your voice; that if that is impossible, then use your mind; and that even when all else fails, you must resist with your heart. This hadith not only illustrates the conviction that silence in the face of injustice is inherently suspect, but also that as human beings, we have so many faculties, some of which we utilize better than others and perhaps some of which are unknown to us simply because of our failure to search for their existence. These attributes of our common humanity are universal. Some scholars have offered variations of this theme in writing that “the primary ground for ethical reflection no doubt remains a capacity to identify the intolerable.”<sup>168</sup> But the difficulty lies in a common vocabulary that appeals to and resonates with these universal aspects.

Culture is a barrier to reaching a more fundamental level of commonality. The solutions will come only if we sincerely and honestly look behind the particular forms and practices and articulate the concepts, the needs, the intolerables – *the rights*, that such forms seek to protect or for which they provide. Falk reflects this when he writes that “to be effective at the local and community levels, the imposition of the universal must be by way of an opening in the culture itself, not by external imposition on the culture.”<sup>169</sup> An-Na’im also reflects this when he writes of “the great importance to nurture cultural rethinking, reinterpretation, and internal dialogue.”<sup>170</sup> William Baker, in addressing the dangers of realist politics when combined with a monolithic view of Islam, also relates to this concept when he writes about how the West should recognize that the centrists (the “New Islamists,” as he calls them) are a positive force that ought to be supported, as they,

... call for a healthy, vibrant Islamic body that, in its own activities, will help create an open environment of tolerance, understanding, and, above all, dialogue that will yield a correct understanding of both Islam and the modern world and that can guide to renewal and change.<sup>171</sup>

## Conclusion

Until we recognize that a threshold right – the right to participate in global decision-making and law-creating structures – informs all other derivative rights, we can never fully arrive at our truest understanding of what this “good life” is. Existing international conventions like CEDAW can play a positive role in improving the material, psychological, and moral conditions of women and men by developing frameworks that broaden

the knowledge base of their implementing institutions. In this way, international institutions can be more receptive and responsive to those parties who may question their sincerity, while insisting that states equally prove their own sincerity to fulfill their international obligations.

## **Appendix**

### *The Full Text of Egypt's Reservation to Article 16*

Reservations to the text of Article 16 concerning the equality of men and women in all matters relating to marriage and family relations during the marriage and upon its dissolution, without prejudice to the Islamic Shari`ah's provision whereby women are accorded rights equivalent to those of their spouses so as to ensure a just balance between them. This is out of respect for the sacrosanct nature of the firm religious beliefs which govern marital relations in Egypt and which may not be called in [*sic*] question and in view of the fact that one of the most important bases of these relations is an equivalency of rights and duties so as to ensure complementarity which guarantees true equality between the spouses. The provisions of the Shari`ah lay down that the husband shall pay bridal money to the wife and maintain her fully and shall also make a payment to her upon divorce, whereas the wife retains full rights over property and is not obliged to spend anything on her keep. The Shari`ah, therefore, restricts the wife's rights to divorce by making it contingent on a judge's ruling, whereas no such restriction is laid down in the case of the husband.

### *The Definition of "Discrimination Against Women"*

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

## **Convention on the Elimination of Discrimination Against Women**

### *Article 2*

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

- (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;
- (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;
- (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;
- (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;
- (e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;
- (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women; and
- (g) To repeal all national penal provisions which constitute discrimination against women.

*Article 16*

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

- (a) The same right to enter into marriage;
- (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;
- (c) The same rights and responsibilities during marriage and at its dissolution;
- (d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;

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

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

*Article 23*

Nothing in this Convention shall affect any provisions that are more conducive to the achievement of equality between men and women which may be contained:

- (a) In the legislation of a State Party; or
- (b) In any other international convention, treaty or agreement in force for that State.

*Article 28*

1. The Secretary-General of the United Nations shall receive and circulate to all States the text of reservations made by States at the time of ratification or accession.
2. A reservation incompatible with the object and purpose of the present Convention shall not be permitted.
3. Reservations may be withdrawn at any time by notification to this effect addressed to the Secretary-General of the United Nations, who shall then inform all States thereof. Such notification shall take effect on the date on which it is received.

*Article 29*

1. Any dispute between two or more States Parties concerning the interpretation of application of the present Convention, which is not settled by negotiation, shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration, the parties are unable to agree on the organization of the arbitration any one of those parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

2. Each State Party may at the time of signature or ratification of this Convention or accession thereto declare that it does not consider itself bound by paragraph 1 of this article. The other State Parties shall not be bound by that paragraph with respect to any State Party, which has made such a reservation.

3. Any State Party, which has made a reservation in accordance with paragraph 2 of this article, may at any time withdraw that reservation by notification to the Secretary-General of the United Nations.

**Notes**

1. Richard Falk, *Human Rights Horizons* (New York: Rutledge, 2000), 152.
2. Ibid.
3. [www.un.org/womenwatch/daw/cedaw/econvention.htm](http://www.un.org/womenwatch/daw/cedaw/econvention.htm). G.A. Res. 34/180 (Dec. 18, 1979), 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981). [Hereinafter, Women's Convention.] See the appendix of this article, pp. 27-28, for the text of Article 16.
4. Jane Connors, "The Women's Convention in the Muslim World," *Feminism and Islam*, ed. Mai Yamani (New York: New York University Press, 1996), 354, 358. [A full week was spent on discussing Articles 15 and 16 during the drafting of the Convention.]
5. William Tetley, "Mixed Jurisdictions: Common Law v. Civil law (codified and uncoded)," *La L. Rev.* 60 (2000): 700. [The applicability of Islamic jurisprudence to areas beyond family law has only occurred as of 1980, with the passing of a new constitutional amendment now making Islamic jurisprudence the principal source of legislation in all areas.]
6. Women's Convention.
7. Connors, "The Women's Convention" at 352.
8. Vienna Convention, Article 19 (c). *International Human Rights in Context*, ed. Henry J. Steiner and Philip Alston (New York: Oxford University Press 2000), 1458-59.

9. Rebecca J. Cook, "Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women," *Virginia Journal of International Law* 30 (1990): 644.
10. For a comparative analysis of other states that entered reservations to the Convention (e.g., Bangladesh) and states' responses to these reservations (e.g., Sweden, Denmark, Mexico, Turkey, and France), see Belinda Clerk, "The Vienna Convention Reservations Regime and the Convention on Discrimination Against Women," *The American Journal of International Law* 85 (1991): 284-85. For a lengthier analysis of Egypt's, Bangladesh's, and Tunisia's reservations, see generally, Michael Brandt and Jeffrey A. Kaplan, "The Tension Between Women's Rights and Religious Rights: Reservations to CEDAW by Egypt, Bangladesh, and Tunisia," *J.L. & Religion* 12 (1995-1996).
11. Women's Convention. See the appendix of this article, pp. 28, for the text of Article 28.
12. Connors, "The Women's Convention," at 361. CEDAW/SP/10 (1986).
13. Clerk, "The Vienna Convention," at 287. GA Res. 41.108 (Dec. 4, 1986).
14. *Ibid.*, at 287 n. 47. General Recommendation 4, Report of the Committee of the Elimination of Discrimination Against Women, Sixth Session, 42 UN GAUR Supp. (no. 38), para. 583, UN Doc. A/42/38 (1987).
15. *Ibid.*, at 288 n. 49. ESC Res. 1987/3 (May 26, 1987).
16. *Ibid.*, at 288 n. 51. Report of the Third Meeting of the States' Parties to the Convention on the Elimination of All Forms of Discrimination Against Women, UN Doc. CEDAW/SP/10, at 4 (1986).
17. *Ibid.*, at 288 n. 52. Report of the Fourth Meeting of the States' Parties to the Convention on the Elimination of All Forms of Discrimination Against Women, UN Doc. CEDAW/SP/14, at 2 (1988).
18. Connors, "The Women's Convention," at 363 n. 41. Report of the Committee on the Elimination of Discrimination Against Women (Seventh Session), 43 UNGAOR Supp (No. 38) UN Doc A/43/38(1988), para. 61.
19. *Ibid.*, at 363 n. 43. [CEDAW has adopted general guidelines for the form and content of initial and periodic reports. These are described in Zagorka Ilic, "The Convention on the Elimination of All Forms of Discrimination Against Women," *Manual on Human Rights reporting*, United Nations HR/Pub, 91/1, 1991, pp. 153-75.
20. Women's Convention. [for Article 18].
21. Connors, "The Women's Convention," at 363. [States are asked to "report specifically with regard to their reservations, why they consider them to be necessary, their precise effect in national law and policy and whether they have entered similar reservations to other human rights treaties which guarantee similar rights. Such states are also required to indicate plans they might have to limit the effect of the reservations or withdraw them."]

22. Ibid., at 363, n. 45. Committee on the Elimination of Discrimination Against Women, 13th Session, New York, 17 January-4 February 1994, Reports of Working Group 1, CEDAW/C/1994/WG.1/Rev.1, 31 January 1994.
23. Ibid., at 351.
24. Women's Convention.
25. Ibid. See the appendix of this article, pp. 29, for the text of Article 29.
26. Women's Convention [for Articles 2, 9, and 16].
27. Ibid.
28. [www.un.org/woemnwatch/das/cedaw/29sees.htm](http://www.un.org/woemnwatch/das/cedaw/29sees.htm). Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 1990, at 165 [hereinafter Multilateral Treaties] See appendix for the full text of Egypt's reservation.
29. Ibid.
30. *Mahr* is explained in the Qur'anic injunction that states: "And give unto women their marriage portions in the spirit of a gift; but if they of their own accord, give up unto you aught thereof, then enjoy it with pleasure and good cheer" (4:4). The term *mahr* is often confused with the term *dower*. Unlike giving dower (bride-price or a gift given to a woman upon marriage), which is optional although traditionally customary, giving *mahr* is a fundamental right to which a woman is entitled from a man upon marriage. Note that only this English rendition of the Qur'anic verses cited in this article come from the Muhammad Asad translation, published as *The Message of the Qur'an* (Gibraltar: Dar al-Andalus, 1980).
31. *Mahr* is obligatory, unless the bride does not want it. (See Asad's explanation in *The Message of the Qur'an*: [A]s the verse signifies, maher involves "the giving of something willingly of one's own accord, without expecting a return for it. It is to be noted that the amount of the marriage-portion which the bridegroom has to give to the bride has not been circumscribed by the Law: it depends entirely upon the agreement of the two parties, and may consist of anything, even a mere token. According to several authentic Traditions recorded in most of the compilations, the Prophet made it clear that "even an iron ring" may be enough if the bride is willing to accept it, or, short of that, even: "the imparting to thy bride of a verse of the Qur'an." Indeed, a hadith of the Prophet notes how one of his own daughters did not accept her maher, except to the extent that it was a token of sentiment (i.e., only a few pennies).
32. See Asad, *Qur'an*: 65:1-12. See also, Urfan Khaliq, "Beyond The Veil?: An Analysis of the Provision of the Women's Convention in the Law as Stipulated in Shari`ah," 2 *Buff. Jour. Int'l L.* 1 (1995).  
Divorce by way of talaq means to untie and remove a spiritual and moral (as opposed to material) bond. There are three forms of talaq: talaq al-hasan, talaq al-hasan, and talaq *al-bid'ah*. The number of times and how far

apart the spouse declares that he or she wants a divorce determine the differences between these three forms. Either spouse can declare that he or she wants a divorce only twice before the divorce becomes irrevocable. Upon the third declaration, the divorce is complete and irrevocable by a mere utterance indicating the intent not to divorce or by resuming conjugal relations. In order for the parties to marry a third time, the wife must first consummate a marriage with another man.

In divorce by *talaq*, the (up to three) rights of divorce rest, by default, with the man. However, a woman can negotiate to have one or all three of the rights when drafting her marriage contract. Thus, if the wife asks for *talaq*, the divorce is known as *khul`* (divorce by settlement or negotiation). In exchange for the divorce, the husband may ask for the return of the *mahr*, but no more; however, the wife is not obligated to give it if she no longer has it or if the husband was at fault for the failure of the marriage. If *talaq* is agreed to by mutual consent, it is known as *mubarah*. And if a clause is inserted to stipulate that if certain conditions are violated the wife can exercise her right to request *talaq*, then a woman has a delegated right to divorce known as *talaq al-tawfid*.

In *talaq al-ahsan*, which means “the best or most preferable form,” either spouse makes a single declaration that he or she no longer wishes to remain married. This declaration must be made during a period of *tuhr* (while the wife is not menstruating). Once made, the parties completely abstain from conjugal relations for three menstrual cycles (*iddah*) and the divorce is final and irrevocable. (However, up to any time before the completion of the *iddah*, the divorce is revocable if both parties desire reconciliation.)

In *talaq al-ahsan*, which means “a good or preferable form,” either spouse makes a similar declaration; however, the couple subsequently resumes conjugal relations. As this act signifies a negation of the intent to divorce, the spouse who made the declaration of divorce must utter a second pronouncement of divorce (e.g., I divorce you) during the next period of *tuhr* if he or she still wishes to divorce. This is deemed as the last revocable pronouncement. If they reconcile again and a third pronouncement is made during the next *tuhr*, the divorce becomes irrevocable.

In *talaq al-bid`ah*, which means “the uncannical way” (that is, the way, that does not follow the Prophet’s *Sunnah*), the three pronouncements of divorce are made consecutively (in one sitting). This last form, although considered valid, is considered sinful. It is actually a pre-Islamic Arabic custom that has embedded itself in Islamic tradition. No provision for it exists for it in either the *Qur’an* or the *Sunnah*.

Finally, divorce by way of *tafriq* (judicial divorce) involves obtaining divorce through the court’s intervention. Either spouse may seek judicial intervention to help resolve a marital problem. Under this avenue, both par-

- ties consent to accept the judge's decision. Some of the accepted grounds for divorce (by a wife) in classical Islamic law have been: cruelty toward the wife, the husband's refusal or inability to support the wife, desertion of the wife by the husband, any grounds that would make any continuation of the marriage harmful to the wife's interests, and the husband suffers from a serious disease or ailment that would make continuing the marriage harmful to the wife's health. See also, *Mavsili's El-Ihtiyar: Iman-A'Zamin Ictihat ve Gorusleri*, trans. Celal Yeniceri (Istanbul: 1978).
33. The 1980 Constitution of the Arab Republic of Egypt, Article 2. The State Information Service, (Cairo) 11. [Hereinafter, Egyptian constitution].
  34. *Ibid.*
  35. Women's Convention.
  36. Connors, "The Women's Convention," at 351.
  37. Women's Convention.
  38. Connors, "The Women's Convention," at 352.
  39. *Ibid.*, at 353, n. 7; United Nations, Report of the Economic and Social Council A/5606, 15 November, 1963, 26, [The sponsors of the resolution were Afghanistan, Algeria, Argentina, Austria, Cameroon, Chile, Colombia, Czechoslovakia, Gabon, Indonesia, Iran, Mali, Mexico, Mongolia, Morocco, Pakistan, Panama, the Philippines, Poland, Togo, and Venezuela.]
  40. *Ibid.*, at 353, n. 8; United Nations, Draft Declaration on the Elimination of Discrimination Against Women, Memorandum by the Secretary-General (E/CN.6/426) 30 October 1964. [The Muslim countries included Afghanistan, Iraq, Morocco, Sudan, Syria, Turkey, and the United Arab Republic (Egypt).]
  41. *Ibid.*, at 353.
  42. Kevin Boyle, "Human Rights in Egypt: International Commitments," *Human Rights and Democracy: The Role of the Supreme Constitutional of Egypt*. ed. Kevin Bolye and Adel Omar Sherif (London: Kluwer Law International, 1996), 89.
  43. *Ibid.*, at 89 n. 6. [Case No. 22, Judicial Year 8, decided on January 4 1992, SCCDC, vol. 5, part 1, p. 89. The case concerned the dismissal of an officer from the Egyptian army for alleged cowardice in action in Yemen and the application of retrospective penal sanctions contrary to the Article 187 of the Constitution.]
  44. *Ibid.*, at 89.
  45. *Ibid.*, at 110, n. 69. [Initial Report of Egypt, CEDAW/C/5/ Add.10, considered, 30 March and 3 April 1984; CEDAW/C/SR.34 and 39. Second Report CEDAW/C/13/Add/2. And Amend 1 considered 31 January 1990; CEDAW/C/SR.164 and 165.]
  46. *Ibid.*, at 111.
  47. Dr. Hatem Aly Labibi Gabr, "The Interpretation of Article Two of the Egyptian Constitution By the Supreme Constitutional Court," *Human Rights*

- and Democracy*, 218. [The Supreme Constitutional Court is viewed as protecting human rights. This role is based on the rulings of an eminent classical Islamic jurist Shams al-Din al-Sarakhsi (fl. eleventh century CE) who wrote in his epic 30-volume *Al-Mabsut* about the need to protect people from any encroachments on their rights by their ruler. See al-Sarakhsi, *Al-Mabsut*, vol. 23 (Cairo: 1906-12), as quoted in "Introduction on Islam and Democracy," *Islam and Public Law*, ed. Chibli Mallat (London/Dordrecht/Boston: Graham and Trotman/Kluwer, 1993), 5.]
48. Law No. 44, which governs divorce rights, is also known as Jihan's Law. See *infra*, section on Evolution of Divorce Laws.
  49. Clark Benner Lombardi, "Islamic Law as a Source of Constitutional Law in Egypt: The Constitutionalization of the Sharia in a Modern Arab State," *Colum. J. Transnat. 'l L.* 37 (1998): 88-90.
  50. Egyptian Constitution, at 3.
  51. Lombardi, "Islamic Law," at 91.
  52. *Ibid.*
  53. *Ibid.*, at 97.
  54. *Ibid.*, at 96. [Noting further that not only do civil judges lack the competence to administer the law, but also are not sufficiently independent of the government.] See also n. 62. [Traditional jurists' training included studying the historical context of the Qur'anic verses, the doctrine of abrogation (*naskh*), and the competing interpretations of Qur'anic passages (*tafsir*). Additionally they all engaged in extremely detailed studies of classical Arabic grammar and philology, as well as the complex science of hadith criticism, in order to evaluate the authenticity of the particular hadith.]
  55. *Ibid.*, at 116.
  56. *Ibid.*, at 117.
  57. *Ibid.*, at 118.
  58. See generally, Raymond William Baker, "Invidious Comparisons: Realism, Postmodern Globalism, and Centrist Islamic Movements in Egypt," *Political Islam*, ed. John L. Esposito (Boulder, Lynne Rienner Publishers, Inc., 1997).
  59. Abdullahi An-Na'im and Ann Elizabeth Mayer discuss how human rights reforms must be justifiable on grounds within the Islamic tradition. Indeed, in this light, it is interesting to see how Egypt's most recent changes in divorce laws (January 28, 2000) are finding popular support through Islamically grounded authority. See, *New York Times*, article on March 1, 2000, or online at [www.library.cornell.edu/colldev/mideast.egwmndiv.htm](http://www.library.cornell.edu/colldev/mideast.egwmndiv.htm).
  60. Abdullahi Ahmed An-Na'im, *Toward an Islamic Reformation* (New York: Syracuse University Press, 1990), 72. [Stating that modern constitutionalism is that concept of constitutionalism predicated upon the "principle of the equal-

- ity of all citizens before the law, without discrimination on grounds such as race, color, gender, language, religion, or political, or other opinion.” Basically, the golden rule of do unto others as you would have done onto you.]
61. Ibid., at 19-29. [Aside from the Qur’an and the Sunnah, there are different opinions as to the extent to which, and the context in which, other legal principles should be used.]
  62. It should be noted, however, that the views of these scholars, although accepted in western circles, might carry little or no influence on the Muslim world, as they might not represent the Muslim view in general.
  63. An-Na’im, *Islamic Reformation*, at 28-29. [Noting that ijtiḥād has traditionally been applied narrowly and restricted to “[m]atters not governed by the clear and definite texts of the Qur’an or Sunnah and not possible even in a matter not settled by ijma’.” An-Na’im recommends modifying these restrictions and cites early Islamic precedent to support his claim that “policy considerations may justify applying a rule derived through ijtiḥād even if it means overriding clear and definite texts of the Qur’an and Sunnah.” An-Na’im does not expressly state what he believes is the essential message of Islam, though one can infer that it is probably some understanding of peace, harmony, and justice.]
  64. Ibid., at 57. [Referring to the form of *naskh* that abrogates the ruling but not the wording of the text. In other words, the text remains part of the Qur’an but is deemed inoperative for legal purposes.]
  65. A possible reason for this could be the potential for abuse of this approach, since it does not necessarily safeguard against policy considerations that are influenced or based on improper or unjust motivations.]
  66. An-Na’im, *Islamic Reformation*, at 59-60 [An-Na’im relies on the reconciliatory approach taken by the Muslim writer Ustadh Mahmoud, whose rationale of abrogation was that “it was not intended to be final and conclusive, but rather a shifting from one text that served its purpose and was exhausted to another text that was postponed until its time came.” Mahmoud’s criteria for deciding which verses ought to be implemented today and why is whether the verse “is closer to the understanding of the people and more relevant to their time than the postponed verse.” Mahmoud derives these criteria from his interpretation of 2:106: “Whenever We abrogate any verse or postpone it, We bring a better verse, or a similar one. Do you not know that God is capable of everything?”]
  67. Ann Elizabeth Mayer, *Islam and Human Rights, Tradition and Politics* (Boulder: Westview Press, 1991), 53. [Noting that “creating a human rights scheme in this fashion would entail real confidence in the appeal and viability of the Islamic tradition on rights questions and the suitability of Islamic sources.”]
  68. Ibid., at 47-48. [Noting that a “[v]ariety of historical factors as well as the political ascendancy of an orthodox philosophy and theology that were hos-

tile to humanism and rationalism – and, ultimately, hostile also to the liberal ideals associated with human rights – kept the Muslim exponents of such values and principles in a generally weak and defensive position over much of the history of Islamic civilization. [Despite] their minority position, the views of rationalist and humanistic Muslim thinkers are definitely anchored in the Islamic tradition.”]

69. Ibid., at 55, 57.
70. Ibid., at 47-48.
71. Recep Senturk [Forthcoming paper on the concept of personhood under the Hanafi school of Islamic thought, as espousing an understanding of the equality of all humans and thus, of an equal claim, by all humans, to the same privileges.]
72. Mayer, *Islam and Human Rights*, at 47.
73. Ibid., at 53
74. Ibid., at 57.
75. Ibid., at 54.
76. Boyle, “Human Rights in Egypt,” at 89. [See, for example, the statement of Mr. Khalil, member of the Egyptian delegation, to the Human Rights Committee, CCPR/C/SR.1244, p.47 June 1994.]
77. An-Na’im, *Islamic Reformation*, at 63. [An-Na’im appears to shift in his meaning of the Shari`ah, at times referring to the body of law derived by classical jurists from the Qur’an and Sunnah, and at other times using it as if to refer to the actual text of the Qur’an. In this context, if he means it to be the former, then his approach to *naskh* is viable, as the classical jurists may not have given full effect to the Qur’anic verses due to their narrow or limited interpretation of the verses’ application. This claim would necessarily be premised on the belief that Qur’anic verses are not inherently inegalitarian.]
78. Even so, it should be noted that the rationale offered by this author is only one understanding toward crafting a sound Islamic interpretive methodology. It also should be noted that both An-Na’im and Mayer operate within a particular conception of Islamic law: They assume that there is one homogeneous Islamic law, which is inconsistent with the existence of four schools of law in Sunni Islam and many other schools within Shi`ah Islam. Great care must be taken not to be reductionist in any analysis, especially that of Islamic law, where disregarding the plurality of Islamic experience from Morocco to Malaysia over 15 centuries, as well as the diversity of Islamic opinion, would be a critical omission. Indeed, the proliferation of Islamic law with its many schools of thought, its implementation over a vast geographical area, and its endurance over so long a period of time proves that it has enough flexibility to adapt itself to changing human conditions and needs. Viewing the ever-evolving and expanding concept of modern human rights as an eternal, faultless yardstick by which to judge Islamic

- law, particularly when based on a reductionist and narrow definition of it, would fail to account for the tremendous reserve of successful human experience in crafting a blueprint for individual conduct and social relations.
79. Falk, *Human Rights Horizons*, at 152.
  80. Johan Galtung, *Human Rights in Another Key* (Cambridge: Polity Press, 1994), 11. [Galtung argues that “human rights are linked to a strong and central state with considerable resources at its disposal” that bestows rights while demanding duties in exchange, such that “[o]ne day total freedoms, in the shape of rights, have made us totally unfree, trapped by duties. And not only in bondage to the state, but to an organization of states that bestows legitimacy on the state that bestows rights on its citizens in return for accountability and duties.”]
  81. *Ibid.*, at 2-3. [Galtung conceives “a human right as a norm, concerning and protecting, the rock bottom of human existence,” arguing that human rights are supposed to serve basic human needs.]
  82. *Ibid.*, at 12-13 [Galtung hypothesizes about the particular posture taken by western civilization along seven dimension: space, time, knowledge, nature, persons, societies, and the transpersonal (i.e., God). He then explores the extent to which human rights can be seen as an exemplification of that particular civilizational posture.]
  83. Falk, *Human Rights Horizons*, at 147-49. [Falk notes “that the emergent importance at this historical moment of civilizational identity as a potent political, moral, and psychological force is an aspect of a more multifaceted challenge to the hegemonic, almost monopolistic dominance of statist identity.”]
  84. *Ibid.*, at 150 n. 6.
  85. *Ibid.*
  86. *Ibid.*, at 152.
  87. *Ibid.*, at 156-162. [Falk lists the grievances under the following headings: Participation in the UN system, double standards, a discriminatory nonproliferation regime for nuclear arms, punitive peace, policymaking and participation in the world economy, responses to terrorist incidents, stigmatization of states as “outlaw” or “rogue,” the right to democratic governance, and the unevenness of compassion.] For specific grievances and their analysis, see, 156-62.
  88. Connors, “The Women’s Convention,” at 352. [Noting that, “in contrast to the participation of Muslim states in the preparation of the Declaration, the preparation of the actual Convention – particularly the text of the Convention – was prepared by working groups within the Commission on the Status of Women.”]
  89. Dale F. Eickelman and James Piscatori, *Muslim Politics* (Princeton: Princeton University Press, 1996), 54.
  90. The Legislator (Shari`) being God and the Prophet here and the Legislation being the Qur’an.
  91. John L. Esposito, *Women in Muslim Family Law* (New York: Syracuse University Press, 2001), 51.

92. This doctrine was based on two fundamental rationales: First, no law should create hardship for people. Second, since faith is ultimately a matter of personal choice, one should be free to select the legislation that best effectuates a person's understanding of God's Will (as conveyed in the Qur'an) on a particular issue affecting their lives. This classical Islamic doctrine signifies the respect (among jurists) for the diversity of opinion espoused in classical jurisprudence and celebrates the effort of any qualified (knowledgeable) individual to carry out *ijtihad*.
93. Esposito, *Women*, at 51. [Maintenance (*nafaqah*) is usually money or accommodations that the wife is entitled to from her husband during her *'iddah* (a period of abstinence, usually 3 menstrual cycles, during which she remains unmarried after a revocable divorce. The purpose of this is twofold: first, to determine paternity and pregnancy, and second, to provide an opportunity for reconciliation. For instance, if the couple engages in conjugal relations or cohabitation during this period, the divorce is deemed revoked and void). The right to maintenance continues if she is pregnant until the child's birth. Furthermore, if the divorced wife has a young child, the husband must maintain both mother and child through the end of the nursing.]
94. *Ibid.*, at 52.
95. *Ibid.*, at 57.
96. *Ibid.*, at 57-58
97. *Ibid.*, at 58.
98. Bharathi Anandhi Venkatraman, "Islamic States and the United Nations Convention on the Elimination of All Forms of Discrimination Against Women: Are the Shari'ah and the Convention Compatible," *Am. U.L. Rev.* 44 (1995): 1988.
99. Anna Janefsky, "Permissibility of Egypt's Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women," *Md. J. Int.'l L. & Trade* 15 (1991): 219.
100. Valentine M. Moghadam, *Modernizing Women, Gender and Social Change in the Middle East* (Boulder: Lynne Rienner Publishers, 1993), 144.
101. Brandt and Kaplan, "Tension Between Women's Rights and Religious Rights," at 113.
102. Esposito, *Women*, at 59-60.
103. Brandt and Kaplan, "Tension Between Women's Rights and Religious Rights," at 113.
104. Esposito, *Women*, at 61. [Noting that penalties on men were light.]
105. Brandt and Kaplan, "Tension Between Women's Rights and Religious Rights," at 113. [This provision was added despite that fact that "scores of women were evicted from their homes having lost the right to remain until remarried, when Law. No. 44 was nullified by the Supreme Court of Egypt."]

106. Esposito, *Women*, at 60.
107. *Ibid.*
108. Janefsky, "Permissibility of Egypt's Reservations," at 225.
109. *Ibid.*, at 226.
110. Esposito, *Women*, at 163.
111. *Ibid.*, at 121. [Noting that Egyptian leaders were very concerned that the changes they instituted not be viewed as the product of *ijtihad* (reinterpretation). Thus, they limited themselves to such legal tools as *siyasah shar'iyah* (Shari'ah rule), *takhayyur* (selection, preference), and *talfiq* (combing various schools or jurists to form single rule) so as to taper reactionary pressure from opposition groups. Also noting that even as Egyptian leaders limited themselves, they misapplied these techniques in an effort to give the appearance of following past legal doctrine.]
112. Qur'an 2:228. See Esposito, *Women*, at 32.
113. Azizah al-Hibri, "Islam, Law and Custom: Redefining Muslim Women's Rights," *Am. U. J. Int'l L. & Pol'y* 12 (1997): 16. [Noting that whereas, Abu Hanifah recognized a mature women's right to contract in financial matters or her own marriage without interference from anyone, his view of a suitable husband's eligibility followed the "[c]lassic customs of the time so as to include lineage, financial condition, and skill or profession" – criteria other than those used by the Prophet to define eligibility, (e.g., faith and piety).]
114. *Ibid.*, at 26-27 n. 120-24; Qur'an 4:1, 6:98, 7:189, 49:13, and 30:21.
115. Al-Hibri, "Islam, Law and Custom," at 26.
116. *Ibid.*, at 23. [Noting that the Prophet viewed promises (conditions) in the marriage contract as ranking highest among all types of promises and urged their fulfillment.]
117. Moghadam, *Modernizing Women*, at 107. [See Germaine Tillion, *The Republic of Cousins: Women's Oppressions in Mediterranean Society* (London: Al Saqi Books, 1983), especially chapter 6, for evidence that "Qur'anic reforms provided women with certain legal rights absent in Judaism and Christianity and also corrected many injustices in pre-Islamic Arabian society ... For example, the right to contract their marriage, receive dower, retain control of wealth, and receive maintenance and shares in inheritance ...," and for a social-structural and developmental analysis of the origins of oppression in Muslim societies, which, as Tillion argues, had "nothing to do with Islam but rather [could be] traced to ancient times and the beginnings of patrilineal society (endogamy), itself the product of the agricultural revolution, which kept property within in the lineage and protected the economic and political interests of men." See also, Eleanore Doumato, "Hearing Other Voices: Christian Women and the Coming of Islam," *International Journal of Middle East Studies* 23, no. 2 (May 1991): 177-99, for evidence that "Muslim family law is not uniquely Muslim, but that elements were adopted from Christian and Roman law and custom." Moghadam, *Modernizing Women*, at 272.

118. Al-Hibri, "Islam, Law and Custom," at 18-24. [Noting that a woman's right to divorce without judicial consent, or requiring the husband to obtain judicial consent, eliminating his duty to support his wife, or prohibiting him from taking another wife, are all conditions that a marriage contract could include, depending on the individual views of the governing parties and/or the state. Al-Hibri cites, for instance, that the Prophet's granddaughter Sukaynah, in her third marriage, contracted the conditions that "her husband may not prohibit her from doing what she wanted, that he may not contradict her wishes, and that he may not touch another woman while married to her."] at 18-24 n. 88-90.
119. Eickelman & Piscatori, *Muslim Politics*, at 119. [Noting that the "Free Officers who planned the 1952 revolution were acutely aware of the Brotherhood's strength and made a tactical alliance with it (el Sadat 1957:79-81) only to be suppressed later "as dangerous to the state" (Kandiyoti 1991: 215).]
120. Janefsky, "Permissibility of Egypt's Reservations," at 223.
121. Margot Badran, "Competing Agenda: Feminists, Islam and the State in Nineteenth- and Twentieth-Century," *Women, Islam and the State*, ed. Deniz Kandiyoti (Philadelphia: Temple University Press, 1991) 204. [Muhammad Abduh, a scholar from al-Azhar, criticized the patriarchal excesses committed in the name of Islam and implored Muslims to conduct their own *ijtihad* (independent inquiry) by going directly to the Qur'an and the Sunnah.]
122. Janefsky, "Permissibility of Egypt's Reservations," at 223.
123. Badran, "Competing Agenda," at 210. [The reformist al-Ghazali, although working for women's liberation within the framework of Islam, extolled the absolute equality of men and women in Islam.]
124. *Ibid.*, at 210-11. [Noting that "although fundamentalist women called feminism secular, implying it was outside the bound of Islam, Egyptian Muslim women distinguished their feminism which they based on Islamic principles from the secular basis of Turkish feminism."]
125. *Ibid.*, at 217.
126. *Ibid.*, at 218.
127. *Ibid.*, at 219.
128. *Ibid.*, at 219. [Badran notes that Sa'id was an exception to the general suppression of feminists by the government because her feminism coincided with the socialist state's agenda.]
129. *Ibid.*, at 220.
130. Moghadam, *Modernizing Women*, at 136, 139.
131. Badran, "Competing Agenda," at 222.
132. *Ibid.*, at 223. [Citing the 1971 Constitution.]
133. *Ibid.*, at 221. [Noting, the case of Safinaz Kasim who, after studying journalism at Cairo University, went to the United States and lived in New York

- between 1960-66, where she received an MA while living and working in Greenwich Village as a theater critic. Badran notes that Kasim, inspired by the Muslim intellectual Sayid Qutb, took up Islamic dress and joined al-Ghazali's ranks 6 years after her return from the US, shifting from her previously leftist position to the right.]
134. Though the two are not mutually exclusive. As Egypt's history reflects, there are women feminists of various extraction. For instance, more moderate conservative Islamists, such as Bint al-Shati, look back to their Islamic roots to find support for a liberal understanding of equality to be implemented within a secular state, thereby advocating an Islamic society but not necessarily an Islamic state. As Badran notes, the Egyptian government appears to favor these groups, while "women like Zainab Al-Ghazali and Safinaz Kazim who call for an Islamic state and women like Nawal Al-Saadawi, who advocate an end to patriarchal and class oppression, make the state very wary." (Kandiyoti: 1991, 227).]
  135. Moghadam, *Modernizing Women*, at 132.
  136. Lama Abu-Odeh, "Crimes of Honor and the Construction of Gender in Arab Societies," *Feminism and Islam*, ed. Mai Yamani (New York: New York University Press, 1996) 187-88. [Discussing the various sexual typologies of Arab women and men under nationalist patriarchy and their effect on the commission and societal sanctioning of honor crimes, noting how judges are engaged by such cultural stereotypes as they condone this social malady even as they are confronted with victims of violence, which are by and large poor urban working-class or peasant women (i.e., those most vulnerable and those whose murders will not "change or control the sexual mores of other women").]
  137. Moghadam, *Modernizing Women*, at 148.
  138. Galtung, *Human Rights*. The notion of sexual liberation could be analyzed under Galtung's "persons" dimension.
  139. The notion of an Islamic individualism could be analyzed either under Galtung's "persons" dimension, or under his "transpersonal" dimension. Personally, I think analyzing it under a joint version of both dimensions is more useful to discussing it with respect to Islam. In this sense, a notion of Islamic individualism would be a "guardianship" or trusteeship over the body by the individual, rather than, as Galtung states, "an ownership of the body." By extension, this conceptual difference would inform the permissible or desirable boundaries to which Muslims see themselves using their bodies.
  140. By gender roles, I do not mean believing that women are psychologically or essentially predisposed to do domestic activity (i.e., cooking, cleaning, etc.) and child rearing. Nor am I referring to those who believe that women are irrational, emotional, and intellectually limited. Rather, I am referring to those women who, while they recognize that men can be equally impulsive

and sensitive, nonetheless believe that there is a biological difference between men and women, which to some extent informs and induces distinct experiential realities. While these realities are not a justification for thwarting equal opportunities for women, they are realities that may inspire certain women to fully partake in and realize their potential in certain distinct biological and social experiences.

141. Moghadam, *Modernizing Women*, at 102-3 [Noting the Iranian Islamist intellectual, Fereshteh Hashemi who wrote: "Women have the heavy responsibility of procreation and rearing a generation: this is a divine art, because it creates, it gives birth; and it is a Prophetic art, because it guides, it educates. God, therefore, absolves the woman from all economic responsibilities so that she can engage herself in this Prophetic and divine act with peace in mind. Therefore, he makes it the duty of the man to provide all economic means for this woman so as there shall not be an economic vacuum in her life ... and in exchange for this heavy financial responsibility, what is he entitled to expect of the woman? Except for expecting her companionship and courtship, he cannot demand anything else from the woman; according to theological sources, he cannot even demand that she bring him a glass of water, much less expect her to clean and cook." See also, al-Hibri on the concept of *ta`ah*, often misunderstood as "obedience to the husband," which is actually more akin to "consultation," "self-discipline," and "advice." See also, Qur'an 30:21, which extols the virtues of male-female companionship as follows: "And one of His marvels is that He created mates for you from yourselves, that you may find rest in them. And he created love and compassion between you," and Qur'an 4:1, which extols a principle of equality and situates this equality in the most fundamental aspect of a human – their life (existence).
142. Johan D. van der Vyer, "Universality and Relativity of the Human Rights: American Relativism," *Buff. Hm. Rts. L. Rev.* 43, no. 9 (1998): 65. [Citing Jack Donnelly, who in trying to reconcile the universality-relativity debate, offers a variation on this theme, by "proclaiming a rebuttable presumption that rights and freedoms enunciated in the Universal Declaration of Human Rights apply universally." This presumption may be rebutted by demonstrating: "(1) that violation of the concerned right is not standard in society seeking rebuttal, (2) that the right is not considered basic, or (3) that the right is protected by other mechanisms."]
143. Moghadam, *Modernizing Women*, 127. [Noting that the number of women marrying before the age of 20 dropped from a majority of women in the 1960s and 1970s to 22% in the middle of the 1980s.]
144. *Ibid.*, at 144. [Noting that Egyptian women lost the right to remain in the marital home, while the husband had to find other provisions, after a divorce.]
145. *Ibid.*, at 112. [Citing Susan Marshall: "The elite defense of the family, religion, and culture demonstrated by the reactivation of patriarchal traditions, may serve as evidence of unswerving national loyalty."]

146. Falk, *Human Rights Horizons*, at 148. [Noting that this need not imply an intentional exclusion, but can be merely a product of false universalism.]
147. Clerk, "The Vienna Convention," at 306. [Discussing two approaches to acceptability of reservations. A one-tier approach, which is also the most common view, where it is simply not open for a state to "accept" reservations incompatible with the object and purpose of the treaty. Or, a two-tier approach comprised of permissibility (which is strictly an interpretative issue) and opposability (which is a matter of policy).
148. Boyle, "Human Rights in Egypt," at 96. [Noting that Egypt was 4 years late in providing its second report to the Human Rights Committee, and that the report lacked empirical and statistical information when Egypt finally submitted it. Furthermore, in lieu of following reporting guidelines issued for such reports, the report was a linguistic exercise in matching corresponding rights, for it contained a long and detailed appendix, which merely listed the rights and freedoms in the covenant and the equivalent provisions in the Egyptian constitution, despite the fact that guidelines for such reports are conveniently published in the CCPR/C/20/Rev.1]
149. Julie A. Minor, "An Analysis of Structural Weaknesses in the Convention on the Elimination of All Forms of Discrimination Against Women," *Ga. J. Int'l & Comp. L.* 24 (1994): 148.
150. Cook, "Reservations to the Convention," at 697-92.
151. Minor, "An Analysis," at 148.
152. *Ibid.*, at 151.
153. As many commentators have noted that the incredibly high number of reservations made to the convention's two central provisions (Article 2 and Article 16) suggested that CEDAW was viewed as a "lesser" convention because women's rights may still not be viewed by some as human rights.
154. Minor, "An Analysis," at 150. [Noting that the Race Convention and Civil and Political Rights Covenant and the Torture Convention all have this.]
155. For example, Tunisia has more progressive laws on polygamy than Egypt, whereas Egypt has more progressive laws on divorce than Bangladesh.
156. I include religious law because it is often a central and potent source in forming (or an impediment to reforming) one's practices and a state's laws. In theory, any cultural influence that carries centrality in the way individuals perceive how their lives should be conducted and their laws shaped would qualify as a subject of examination under this model.
157. Funding problems might conceivably be resolved by contributions from private charitable foundations, if the UN structure accommodated such a measure.
158. Al-Hibri, "Islam, Law and Custom," at 21 (noting the need "[t]o inform Muslims about the corruption of Islam by authoritarian/patriarchal cultural

- influences and the need for their religious re-education so that they may know what is the proper Islamic position with respect to the status of women.” Also noting, the efficacy of such a program if it is “synchronized with a plan to raise popular consciousness and create a new consensus.”)
159. Galtung, *Human Rights*, at 2.
160. This is not an argument to undermine sovereignty, but rather, at least in some cases, to override it. Note Falk: “... that in the face of such wide-scale atrocities, there is an evolving transcivilizational commitment to override the pretension of sovereignty [at least] in the face of genocide.” Falk, *Human Rights Horizons*, at 164.
161. Moghadam, *Modernizing Women*, at 135. In connection with Moghadam, see also Baker, “Invidious Comparisons: at 131 n. 8, where Baker cites Kamal Aboul Megd to support his argument that such premises as Moghadam’s are realist views and often reflect a western bias that “Islam is the antithesis of such values as justice, peace, freedom and respect for human rights; that Arabs and Muslims are strangers to [a] common humanitarian heritage and therefore, an obstacle, intellectually and historically, on the road of this emerging humanitarian culture.” (Megd : Cairo, 1991) 13.
162. Richard Falk, “Cultural Foundations for the Protection of International Human Rights,” *Human Rights in Cross-Cultural Perspectives*, ed. Abdullahi An-Na’im (Philadelphia: University of Pennsylvania Press, 1992), 57.
163. Galtung, *Human Rights*, at 20.
164. Bill Moyers, “NOW,” May 26, 2002, PBS. [Conversation with John L. Esposito regarding how, especially after 9/11, American legislators are realizing how little they know about Islamic doctrine and the incredible diversity of opinion in Muslim states, including Indonesia, Malaysia, Pakistan, and China, and how they feel the need to know more. See also, Conors, supra note 5, at 352. [Noting that “very few commentators have examined the question of whether the reservations made by these countries are, in fact required by Sharia,” or Islamic values.]
165. Falk, *Human Rights Horizons*, at 149.
166. Falk, “Cultural Foundations,” at 45.
167. Najla Hamadeh, “Islamic Family Legislation,” *Feminism and Islam*, ed. Mai Yamani (New York: New York University Press, 1996) 331.
168. Falk, “Cultural Foundations,” at 49. [Citing R. B. J. Walker for an elaboration of the elements Walker associates with the intolerable: “... the devotion of resources to the extermination of the human species in whole or in part; forms of economic development that bring extreme wealth to some while threatening the very survival of others; rapacious destruction of the planet for progress or profit; flagrant abuse of established human rights.”
169. *Ibid.*, at 49.

170. Ibid., at 49. [Referring to An-Na'im's writings and philosophy in general.]
171. Baker, "Invidious Comparisons," at 127. [Arguing further that the lens of realist politics leads the West to mistakenly view Islam as a threat (in need of containing), which, in turn, leads policy makers to believe, in the case of Egypt, for instance, that "[I]slamic moderates mouth slogans of pluralism and democracy, only to undertake the subversion of civil society, hoping to reach power through the ballot box so that the election that brought them to power will be the last." Baker implies that while "Americans are 'forced' to curtail their enthusiasm for the democratic experiment, reluctantly diverting funds from programs to support effective "governance and democracy" to incentives for the officer corps to ensure their loyalty to Mubarek" we are, in effect, acting to our own detriment. at 118.]