

2008

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Repository Citation

Warren, Christie S., "Lifting the Veil: Women and Islamic Law" (2008). *Faculty Publications*. 99.
<https://scholarship.law.wm.edu/facpubs/99>

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LIFTING THE VEIL: WOMEN AND ISLAMIC LAW

CHRISTIE S. WARREN*

“Treat your women well and be kind to them for they are your partners and committed helpers.”

*From the Farewell Address of the Holy Prophet Muhammad*¹

I. INTRODUCTION

By the end of February 632 and at the age of sixty-three, the Prophet Muhammad believed that his days on earth were coming to an end.² He announced to his followers that he would lead the *haji*, the annual pilgrimage to Mecca, himself that year.³ On March 3, the Prophet delivered his farewell sermon near Mount Arafat.⁴ Among the limited number of topics he chose to include in his last public speech, he encouraged his followers to deal justly with one another and treat women well.⁵

In the modern era, the rights of women under Islamic law have come under heightened scrutiny. Some commentators find the Prophet’s farewell speech to be inconsistent with the way women are treated in some areas of the Muslim world. In Saudi Arabia, for example, women may neither drive nor vote.⁶ In post-Taliban

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¹ The Prophet Muhammad, Prophet Muhammad’s Last Sermon (Islam The Modern Religion), http://www.themodernreligion.com/prophet/prophet_lastsermon.htm (last visited Oct. 18, 2008).

² *Id.* “The Prophet stated, ‘O People, listen well to my words, for I do not know whether, after this year, I shall ever be amongst you again.’” *Id.*

³ See KAREN ARMSTRONG, MUHAMMAD: A BIOGRAPHY OF THE PROPHET 252 (HarperSanFrancisco 1992); see also TAMARA SONN, A BRIEF HISTORY OF ISLAM 21 (Blackwell 2004). The *haji* is one of the five pillars of Islam. See *id.* Muslims are obligated to make the pilgrimage at least once in their lifetime if they are physically and financially able. See *id.*

⁴ See ARMSTRONG, *supra* note 3, at 254.

⁵ *Id.*

⁶ See Raid Qusti, *Women Driving Cars is a Sinful Thing: Al Qarni*, ARAB NEWS, Jan. 25, 2004, available at <http://www.arabnews.com/?page=1§ion=0&article=38586&d=25&m=1&y=2004>; *Saudi Women Barred from Voting*, BBC NEWS, Oct. 11, 2004, available at http://news.bbc.co.uk/2/hi/middle_east/3734420.stm. However, a group of Saudi Arabian women recently presented a petition to King Abdallah Bin Abd Al-Aziz Al Saud demanding the restoration of the right to free movement, “a right that was enjoyed by our mothers and grandmothers in complete freedom, through the means of transportation available.” Terri Judd, *Saudi Women to Put Their Foot Down on Driving Ban*, THE INDEPENDENT, Sept. 14, 2007, available at

Afghanistan, many women are still afraid to relinquish their burkhas.⁷ In June 2007, an Iranian woman and her partner were sentenced to death by stoning for committing adultery and bearing a child out of wedlock.⁸ In post-Saddam Iraq, women report that many freedoms enjoyed during the pre-war era have disappeared: attendance by women at schools and universities has declined and many are afraid to appear in public without covering their heads.⁹

Can the position of women under Islamic law be reconciled with the Prophet's apparent respect and care for them? Does Islam consider and support women as equal partners, or does it discriminate against them, undermine their position in legal proceedings and prevent them from fully participating in public life? These questions trouble people both within and outside the Muslim world, for Islam, practiced by 1.3 billion people, is the fastest-growing religion.¹⁰

These questions are also complex, for while many secular feminists criticize patriarchal laws that are justified by religion in Muslim countries, many Muslim women defend Islam as the guarantor *par excellence* of women's rights. This article will explore whether the position of women under Islamic law can be reconciled with the Prophet Muhammad's apparent care for them.

II. ISLAM AS FAITH, ISLAM AS LAW: *USUL AL-FIQH*

Islam is not only a religion: it is one of the oldest and most well-developed legal systems in the world. Islamic law originates from two major sources, divine revelation and human reasoning, and consists of two different components, *Shari'ah* and *fiqh*.¹¹ Whereas *Shari'ah* is closely related to divine revelation, *fiqh* is mainly the product of human reasoning.¹² *Shari'ah*, which is translated as "the right path," indicates the path to righteousness.¹³ *Fiqh* involves rational endeavor,

http://news.independent.co.uk/world/middle_east/article2961300.ece.

⁷ See Jill Colgan, *Afghanistan - Beauty School*, FOREIGN CORRESPONDENT, Sept. 30, 2003, available at <http://www.abc.net.au/foreign/stories/s957804.htm>; see also Corinne Fowler, *Journalists in Feminist Clothing: Men and Women Reporting Afghan Women During Operation Enduring Freedom*, 2001, 8 J. INT'L WOMEN'S STUD. 4, 16 (2007).

⁸ Fariba Sahraei & Teenaz Javat, *Iran . . . Back to the Stone Age*, THE HAMILTON SPECTATOR, Aug. 7, 2007, available at <http://www.thespec.com/article/230458>.

⁹ Eve Conant et al., *Iraq's Hidden War*, NEWSWEEK, Oct. 16, 2007, available at <http://www.msnbc.msn.com/id/7038038/site/newsweek>.

¹⁰ See Kathleen A. Portuán Miller, *The Other Side of the Coin: A Look at Islamic Law as Compared to Anglo-American Law - Do Muslim Women Really Have Fewer Rights than American Women?*, 16 N.Y. INT'L L. REV. 65, 65 (2003); see also Hamid M. Khan, *Nothing is Written: Fundamentalism, Revivalism, Reformism and the Fate of Islamic Law*, 24 MICH. J. INT'L L. 273, 276 (2002).

¹¹ Mohammad Hashim Kamali, *Law and Society: The Interplay of Revelation and Reason in the Shariah*, in THE OXFORD HISTORY OF ISLAM 107-108 (John L. Esposito ed., 1999).

¹² *Id.*

¹³ *Id.*

largely the product of human reasoning, and commands a lesser degree of authority than *Shari'ah*.¹⁴ The scope of *Shari'ah* encompasses not only *fiqh* but also theology and moral teachings. *Fiqh*, more akin to positive law, is concerned with practical legal rules relating to the conduct of individuals. The conceptual distinction between *Shari'ah* and *fiqh* is the product of a recognition of the inevitable failures of human efforts at understanding the purposes and intentions of God. Although jurists state that human beings do not possess the ability to understand and implement God's great wisdom, *fiqh* is justified as a rational technique bringing humans closer to an understanding of God's will.¹⁵ In this way, Islamic law is often characterized as having a dual nature, both divine and human.

Although Islam, as both faith and law, is one indivisible system meant to be followed in its entirety, this paper will analyze its issues only from a legal perspective. Therefore, it is useful to begin with an explanation of the basic tenets of Islamic jurisprudence, or *usul al-fiqh*.¹⁶

A. Hierarchy of Legal Sources¹⁷

The legal sources of Islamic law and their hierarchy are set forth in the *Qur'an*.¹⁸ The main passage outlining the principal legal sources occurs in *sura al-Nisa* 4:58 – 59: "O you believers! Obey God and obey the Messenger and those of you who are in charge of affairs. If you have a dispute concerning any matter, refer it to God and to the Messenger."¹⁹ In this verse, "Obey God" references the *Qur'an* and "Obey the Messenger" relates to the *Sunnah*.²⁰ "Those of you who are in charge of affairs" refers to legal scholars and lays the ground for the use of *ijma*, or consensus of scholars, as legal authority.²¹ The final section of the verse, "refer it to God and to the Messenger," authorizes the use of *qiyas*, a form of analogical analysis.²²

¹⁴ *Id.*

¹⁵ KHALED ABOU EL FADL, SPEAKING IN GOD'S NAME: ISLAMIC LAW, AUTHORITY, AND WOMEN 32 (Oneworld 2001).

¹⁶ See MOHAMMAD HASHIM KAMALI, PRINCIPLES OF ISLAMIC JURISPRUDENCE vii (3d ed., Islamic Texts Society 2003) ("[U]sul al-fiqh embodies the study of the sources of Islamic law and the methodology for its development.").

¹⁷ *Id.* at 16.

¹⁸ See *id.* at 11-12.

¹⁹ *Id.* at 11.

²⁰ *Id.* at 12.

²¹ KAMALI, *supra* note 16, at 12.

²² *Id.*

*B. Sources of Law**Qur'an*

The word '*Qur'an*' means reading or recitation.²³ The *Qur'an* is the most authoritative guide for Muslims and the first source of *Shari'ah* law. The *Qur'an*, which consists of the verbatim words of God, was revealed to the Prophet Muhammad over a period of twenty-three years and contains 114 *suras*, or chapters, and 6235 *ayat*, or verses, of unequal length.²⁴ Out of the total number of verses in the *Qur'an*, only approximately 600, or fewer than one tenth, provide legal rules or address legal issues.²⁵

Both the order of the *ayat* within each *sura* and the sequence of the *suras* themselves were rearranged and put into final form by the Prophet in the last year of his life.²⁶ The contents of the *Qur'an* are not arranged according to subject and appear in no particular order, consistent with the belief that Islam is one indivisible system that is to be lived and practiced in its entirety.²⁷ The *Qur'an* was communicated by God to Muhammad through the Angel Gabriel while Muhammad was awake;²⁸ thus, all of the revelation is manifest, and no part originated through internal inspiration or dream. The *Qur'an* is not considered exclusively a law book or code; it is meant to be treated as a broad guide for humanity, with details left for other legislation and rules.²⁹

Sunnah

The word *Sunnah* means trodden path.³⁰ In the context of Islamic law, the *Sunnah* is the highest source of law next to the *Qur'an*.³¹ The term is also used to imply normative practice, or an established course of conduct.³² In pre-Islamic Arabia, for example, Arabs used the word *Sunnah* in reference to the ancient and continuous practices of the community they inherited from their forefathers.³³ The

²³ *Id.* at 16.

²⁴ *Id.* at 17.

²⁵ *Id.* at 25-26. Kamali states that "[The Quran's] ideas of economic and social justice, including its legal contents, are on the whole subsidiary to its religious call." *Id.* at 26. See also DAVID SMOCK, U.S. INST. OF PEACE, Special Report No. 125, *ITIHAD: REINTERPRETING ISLAMIC PRINCIPLES FOR THE TWENTY-FIRST CENTURY* 3 (2004).

²⁶ KAMALI, *supra* note 16, at 17.

²⁷ *Id.* at 18.

²⁸ *Id.*

²⁹ MOHAMMAD HASHIM KAMALI, *A TEXTBOOK OF HADITH STUDIES* 56 (The Islamic Foundation 2005).

³⁰ KAMALI, *supra* note 16, at 58.

³¹ *Id.* at 61.

³² *Id.* at 58.

³³ *Id.*

opposite of *Sunnah* is *bidah*, or innovation, which is characterized by lack of precedent and continuity with the past.³⁴

To Islamic practitioners, *Sunnah* refers to all that was narrated, practiced and approved by the Prophet.³⁵ The contents of the *Sunnah* are set forth in a series of *hadith*, or reports.³⁶ Although the most authoritative bodies of *hadith* are those compiled by Muhammad ibn Ismail al-Bukhari, who lived between 810 and 870, and Abu'l Hussain Muslim bin al-Hajjaj al-Nisapuri, who lived between 817 and 875³⁷ the most respected collection of legal *hadith*, totaling 4,800 altogether, was compiled by Ash'ath al-Sijistani, also known as Abu Dawud.³⁸

Ijma

Ijma, or consensus of opinion, is a third source of Islamic law.³⁹ As a source of law, *ijma* differs from the *Qur'an* and *Sunnah* in that it is not itself revealed but instead is the product of rational proof and reason rooted in divine revelation.⁴⁰ *Ijma* is defined as the universal consensus of scholars, or of the Muslim community, during a given period.⁴¹ By definition it excludes the opinion or consensus of laymen.⁴² Since the various schools of Islam employ different interpretations and juristic techniques, *ijma* has traditionally been considered very difficult to achieve.⁴³

Qiyas

Qiyas, or analogical reasoning, literally means measuring or ascertaining the length.⁴⁴ In the juristic context, it means analogizing or extending a *Shari'ah* value or idea to a new situation.⁴⁵ Recourse to analogy is only warranted when the solution to a new legal problem cannot be found in the *Qur'an*, *Sunnah* or consensus of legal scholars.⁴⁶ Since *qiyas* involves the extension of existing laws to new situations, it is not considered innovation, which is viewed negatively by

³⁴ *Id.*

³⁵ KAMALI, *supra* note 16, at 58.

³⁶ WAEL B. HALLAQ, *ISLAMIC LEGAL THEORIES* 14 (Cambridge 1997). See also KAMALI, *supra* note 29, at 57. "Hadith . . . is the verbal embodiment and vehicle of *Sunna*." *Id.*

³⁷ N. J. COULSON, *A HISTORY OF ISLAMIC LAW* 64 (Edinburgh 1964); KAMALI, *supra* note 29, at 32-3.

³⁸ KAMALI, *supra* note 29, at 38.

³⁹ KAMALI, *supra* note 16, at 228.

⁴⁰ *Id.*

⁴¹ *Id.* at 230.

⁴² *Id.*

⁴³ *Id.* at 228.

⁴⁴ *Id.* at 264.

⁴⁵ *Id.*

⁴⁶ *Id.*

some Muslim scholars.⁴⁷ The texts to which new situations are analogized are always the *Qur'an* and *Sunnah*.⁴⁸

Urf

Urf, or custom, may be considered a fifth source of law in the absence of other law and is defined as “recurring practices that are acceptable to people of sound nature.”⁴⁹ *Urf* denotes the collective practice of a large number of people, as opposed to individual custom.⁵⁰ *Urf* is considered a valid tool to interpret the meaning of and gaps in Qur’anic language.⁵¹ For example, although the *Qur'an* specifies that husbands must provide for their wives, the amount of maintenance is not specified.⁵² Thus, *urf* is used to clarify the amount that must be provided.⁵³

Ijtihad

Ijtihad, or personal reasoning,⁵⁴ is the subject of some controversy in Islamic jurisprudence. The root of the word, *jahada*, means striving or self-exertion.⁵⁵ The practice of *ijtihad* involves analyzing the original textual sources for the solution to a new problem and, in the event that they do not provide an answer, using *ijtihad* to extend the principles contained in those sources to the new situation.⁵⁶ Only qualified *mujtahids*, Islamic legal scholars, have traditionally been authorized to practice *ijtihad*.⁵⁷ Requirements to attain the status of *mujtahid* include being a Muslim, having a sound mind and intellectual competence, possessing a knowledge of Arabic sufficient to read the original texts in that language, and having sufficient familiarity with the *Qur'an* and *Sunnah* to be able to understand and interpret both their language and purpose, as well as distinguish weak from strong *hadith*.⁵⁸

It is generally believed that the practice of *ijtihad* stopped in the tenth century—corresponding to the fourth century of the Islamic calendar.⁵⁹ Reasons suggested by scholars for the end of the practice of *ijtihad* range from the belief that all essential legal issues had been discussed and settled by that time⁶⁰ to the

⁴⁷ See SMOCK, *supra* note 25.

⁴⁸ KAMALI, *supra* note 16, at 268.

⁴⁹ *Id.* at 369.

⁵⁰ *Id.* at 369.

⁵¹ *Id.* at 371.

⁵² *Id.*

⁵³ KAMALI, *supra* note 16, at 371.

⁵⁴ *Id.* at 468.

⁵⁵ *Id.* at 469.

⁵⁶ COULSON, *supra* note 37, at 76. See also KAMALI, *supra* note 16, at 468, 496.

⁵⁷ KAMALI, *supra* note 16, at 469-70.

⁵⁸ *Id.* at 477-9. See also G.F. Haddad, *What is the Definition of a Mujtahid Mutlaq, and Are There Any Today*, LIVING ISLAM, June 16, 2001, http://www.livingislam.org/fiqhi/fiqha_e60.html.

⁵⁹ See JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW 70-1 (Oxford Univ. Press 1964).

⁶⁰ *Id.*

idea that tensions between independent religious scholars, who had always enjoyed great power in Muslim societies, became too great a threat to governing *caliphs*, who therefore created the post of governmental *mufti* as a method of diluting the scholars' independence.⁶¹ As a result, the vigorous debate that had previously nourished and sustained the development of Islamic jurisprudence ceased, and scholastic practice atrophied.⁶²

Taqlid

Once independent interpretation, or *ijtihad*, was no longer practiced, jurists were left with the doctrine of *taqlid*, or imitation, to solve new problems.⁶³ *Taqlid* can be translated as implicit acceptance of existing example;⁶⁴ it reduced jurists to simply following legal doctrines that had already been recorded in manuals generated by the various schools of Islam.⁶⁵ Scholars who lament the "closing of the door of *ijtihad*" argue that adherence to the principle of *taqlid* has left Islamic law unable to cope with changing conditions of society.⁶⁶

III. ISLAM AND WOMEN

In recent years, a number of legal issues regarding the rights of women under certain areas of Islamic law, including inheritance, marriage and divorce rights, as well as laws relating to women's position in judicial proceedings, have come under scrutiny. There is much confusion about what Islamic law actually says about women. This section sets forth what the *Qur'an*, and in the case of its silence, the *Sunnah* states with respect to the rights of women in some of the areas of greatest controversy.⁶⁷

Marriage

Marriage is a contractual, not a sacramental, relationship. A woman cannot be married without giving her consent.⁶⁸

⁶¹ JOHN MAKDISI, *ISLAMIC PROPERTY LAW* 5 - 6 (California Academic Press 2005), quoting GEORGE MAKDISI, *THE RISE OF COLLEGES: INSTITUTIONS OF LEARNING IN ISLAM AND THE WEST* 290 - 91 (1981).

⁶² *Id.*

⁶³ SCHACHT, *supra* note 59, at 71.

⁶⁴ Khan, *supra* note 10, at 295.

⁶⁵ *Id.*

⁶⁶ KAMALI, *supra* note 16, at xxi.

⁶⁷ For an excellent discussion of the meaning of these rights and the context in which the laws emerged, see Tamara Sonn, *Conventional Expectation Versus This Religious Tradition: What Do Husbands and Wives Owe One Another?*, in *ETHICS OF FAMILY LIFE* 67-84 (Jacob Neusner ed., Wadsworth 2001); see also JOHN L. ESPOSITO, *WOMEN IN MUSLIM FAMILY LAW* (Syracuse Univ. Press, 2001) (1982) (explaining coverage of family law reforms and their interpretations in Muslim family law).

⁶⁸ See ABDULLAH YUSUF ALI, *THE MEANING OF THE HOLY QUR'AN* 4:19 (Amana Publications

Dowry

The *Qur'an* states that dowry must be given to the wife herself and not to her family.⁶⁹

Polygamy

The *Qur'an* permits a man to marry up to four wives unless "ye fear that ye shall not be able to deal justly (with them), then [take] only one"⁷⁰ The Prophet Muhammad said, "[h]e who has two wives and does not demonstrate justice, fairness, and equality amongst them will come on the Day of Resurrection with one of his sides hanging down [paralyzed]."⁷¹

Discipline

The *Qur'an* states that if a husband fears disloyalty or ill-conduct from his wife, he should first admonish her, then refuse to share her bed, and lastly chastise, discipline or beat her lightly.⁷²

Divorce

The *Qur'an* permits both husbands and wives to initiate divorce.⁷³

Hijab

The *Qur'an* counsels women to cast their outer garments over their persons when they are outside so they will not be molested.⁷⁴

Inheritance

Inheritance law is quite complex, but in general, the *Qur'an* states that the share of a son is equal to that of two daughters.⁷⁵

11th ed. 2004) [hereinafter QUR'AN]; see also MUHAMMAD MUHSIN KHAN, THE TRANSLATION OF THE MEANINGS OF SAHIH AL-BUKHARI 9:82:101 (Kazi Publications 3d ed. 1979) [hereinafter BUKHARI].

⁶⁹ See QUR'AN, *supra* note 68, at 4:4.

⁷⁰ *Id.* at 4:3.

⁷¹ Portuán Miller, *supra* note 10, at 85.

⁷² See QUR'AN, *supra* note 68, at 4:34. Some *hadith*, however, report that the Prophet told the Companions that they should not beat their wives, even if they are insolent. See BUKHARI, *supra* note 68, at 8:42:68; see also UNIVERSITY OF SOUTHERN CALIFORNIA COMPENDIUM OF MUSLIM TEXTS, PARTIAL TRANSLATION OF SUNAN ABU-DAWUD 1:0142, 11:2138 (Ahmad Hassan trans., MSU) <http://www.usc.edu/dept/MSA/fundamentals/hadithsunnah/abudawud> [hereinafter ABU DAWUD]. In Abu Dawud 12:2220, the Prophet ordered a man to grant his wife a divorce when he discovered that the man had beaten his wife.

⁷³ See QUR'AN, *supra* note 68, at 2:228, 2:229, 2:231, 4:128.

⁷⁴ *Id.* at 33:59. The same message is contained in *hadith*. See BUKHARI, *supra* note 68, at 7:270:375, 6:267:282; ABU DAWUD, *supra* note 72, at 32:4092.

⁷⁵ See QUR'AN, *supra* note 68, at 4:11 – 4:12.

Legal proceedings

The *Qur'an* states that two male witnesses should testify in a legal proceeding.⁷⁶ If two men are not available, a man and two women should testify “so that if one of [the women] errs, the other can remind her.”⁷⁷ According to the opinions of several scholars, including *al-Bukhari*, a woman may not serve in the post of *qadi*, or judge, for the same reason—women are susceptible to forgetfulness.⁷⁸

Adultery

The *Qur'an* states that a woman or man found guilty of adultery or fornication should be punished with one hundred lashes.⁷⁹ However, several *hadith* report that the Prophet recommended and carried out stoning in these cases.⁸⁰

IV. TREAT YOUR WOMEN WELL: MAKING SENSE OF THE LAW

Can the language of the *Qur'an* and *Sunnah* be reconciled with interpretations that do not discriminate against women? The answer to this question is partly found through an analysis of the context in which the *Qur'an* was revealed, women's historical position in the larger world, and the particular nature of scholarly interpretation of Islamic law.

A. The Context of the Revelation

As is the case in other legal systems, understanding the meaning of legal language requires an examination of the context in which the law emerged and the intent of the original drafters.⁸¹ This is an exercise not unfamiliar to lawyers:

⁷⁶ *Id.* at 2:282.

⁷⁷ *Id.* This rule is also set forth in several *hadith*: See BUKHARI, *supra* note 68, at 1:181:301, 3:502:826; see also UNIVERSITY OF SOUTHERN CALIFORNIA COMPENDIUM OF MUSLIM TEXTS, TRANSLATION OF SAHIH MUSLIM 1:142 (Abdul Hammid Siddiqui trans., MSU) <http://www.usc.edu/dept/MSA/fundamentals/hadithsunnah/muslim/> [hereinafter SAHIH MUSLIM].

⁷⁸ See GHULAM MURTAZA AZAD, JUDICIAL SYSTEM OF ISLAM 15 (Islamic Research Institute 1987).

⁷⁹ See QUR'AN, *supra* note 68, at 24:2.

⁸⁰ See BUKHARI, *supra* note 68, at 8:536:816, 8:527:804, 8:527:805, 8:528:806, 8:529:807, 8:529:808, 8:529:809, 8:531:810, 8:409:629, 5:119:188, 4:532:829; see also SAHIH MUSLIM, *supra* note 77, at 008:3437, 017:4192. However, the sequence of these *hadith* creates questions as to whether the Prophet changed his opinion later in his life and recommended against stoning in cases of adultery. For a discussion of the theory of gradualism, see *infra* Section V, subsection B, paragraph 5.

⁸¹ See generally Harry First, *Antitrust in Japan: The Original Intent*, 9 PAC. RIM L. & POL'Y J. 1 (2000) (addressing original intent in Japanese law); Stephen A. James, *Original Intent: The Judicial Uses of History and Constitutional Interpretation in Australia and the United States*, 12 IN PUB. INTEREST 23 (1992) (discussing original intent under Australian law); Timothy Kearley, *Regulation of Preventive and Preemptive Force in the United Nations Charter: A Search for Original Intent*, 3 WYO. L. REV. 663 (2003) (evaluating the role of original intent in international law).

questions of context and original intent are significant in understanding and interpreting many laws, not just those in the Islamic legal system.⁸²

At the time the *Qur'an* was revealed to the Prophet, the Arabian peninsula was populated by a patriarchal, tribal, polytheistic desert society that believed in many gods and goddesses who resided in trees, stones, bodies of water and other inanimate objects.⁸³ Customs of this era, known as *Jahiliyyah*, or the period of ignorance, included female infanticide, selling young girls into slavery, and committing very young girls to marriage.⁸⁴ Women had no human or legal rights: they were considered chattel and were cruelly treated.⁸⁵ Men were permitted to take as many wives as they wanted.⁸⁶ Inheritance rights gave women no power or influence, and men sometimes married women simply to gain control of whatever resources they did have.⁸⁷

The *Qur'an's* protection of girls and women was revolutionary and departed significantly from previous tribal practices.⁸⁸ Islam was the first religion in the world to honor women and outline legislation stipulating that women should be treated as independent human beings.⁸⁹ The *Qur'an* banned female infanticide; it also granted women the rights to inherit, divorce and maintain their dowries.⁹⁰ Women were granted the same property ownership rights that men had, and men were not permitted to manage women's finances without their permission.⁹¹ Women were also given the right to refuse marriage.⁹²

As a result of their new rights and improved status, women attained important positions in early Muslim society.⁹³ During the Prophet's life, women played prominent roles in religious, political, educational, legal, moral, economic and

⁸² See generally Constitutional Topic: Constitutional Interpretation, http://www.usconstitution.net/consttop_intr.html (last modified Mar. 15, 2006) (addressing the thriving discussions currently taking place in the United States about the original intent doctrine in the context of constitutional interpretation); Asifa Quraishi, *Interpreting the Qur'an and the Constitution: Similarities in the Use of Text, Tradition, and Reason in Islamic and American Jurisprudence*, 28 CARDOZO L. REV. 67 (2006) (providing an overview of plain meaning literalism, historical understanding, originalism and reference to underlying purpose and spirit of Islamic law).

⁸³ Leila P. Sayeh & Adriaen M. Morse, Jr., *Islam and the Treatment of Women: An Incomplete Understanding of Gradualism*, 30 TEX. INT'L L. J. 311, 314 (1995).

⁸⁴ See ARMSTRONG, *supra* note 3, at 60. See also SONN, *supra* note 3, at 10; Sonn, *supra* note 67, at 77.

⁸⁵ See ARMSTRONG, *supra* note 3, at 60.

⁸⁶ See ESPOSITO, *supra* note 67, at 14.

⁸⁷ See ARMSTRONG, *supra* note 3, at 60.

⁸⁸ See Sonn, *supra* note 67, at 73, 77; see also Brooke D. Rodgers-Miller, *Out of Jahiliyya: Historic and Modern Incarnations of Polygamy in the Islamic World*, 11 WM. & MARY J. WOMEN & L. 541, 541 (2005).

⁸⁹ Khan, *supra* note 10, at 330.

⁹⁰ *Id.*

⁹¹ *Id.* at 330-331.

⁹² *Id.*

⁹³ *Id.* at 331.

military arenas,⁹⁴ and the wives and daughters of the Prophet were instrumental in assisting him as he established the new religion.⁹⁵ The Prophet reportedly sought the counsel of his wives on many important matters.⁹⁶

As will be seen below, the ascension of women to positions of public and political prominence was a temporary phenomenon that ended with the death of the Prophet. In fact, attempts by the Prophet to change the way women were treated may well have backfired: the possibility is real that most of the misogynistic traditions and interpretations of Islamic law arose as a form of male resistance to the power and active public roles of women during the early years of the religion.⁹⁷

B. Women's Place in the World at Large

Even so, the unequal treatment of women under Islamic law is not historically anomalous. Traditions and laws subordinating women are deeply rooted in patriarchy. Defined as the institutionalized rule of men, patriarchy has existed in the majority of legal systems around the world.⁹⁸ The institutionalization of patriarchal practices in the post-Prophet years of the Muslim Arab world was greatly influenced by values and customs in neighboring Byzantine and Persian empires.⁹⁹ The development of women's rights under Islamic law should be viewed in the historical context of the evolution of women's rights in those and other geographic locations.

Women in virtually all societies have historically been considered to be naturally inferior to men, both physically and intellectually. Even in ancient western cultures, women of all classes, regardless of their status, were subordinate to the authority of men and were considered property in the eyes of the law.¹⁰⁰ In Gratian's twelfth century *Decretum*, the first systematic treatise of early Christian law, the rule of husbands was justified by the rationale that women—in the form of Eve—had brought about the fall of mankind.¹⁰¹ Therefore, it was considered right that he who had been led into wrongdoing should control the one who had caused the sin, so that the wrongdoing should not happen again.¹⁰²

Under fifth century English law, any member of a family who interrupted domestic peace was subject to correction, either verbal or physical.¹⁰³ In 1782, Sir

⁹⁴ Khan, *supra* note 10, at 331.

⁹⁵ *Id.* at 329-330.

⁹⁶ *Id.* at 341.

⁹⁷ EL FADL, *supra* note 15, at 230.

⁹⁸ Susan Lentz, *Revisiting the Rule of Thumb: An Overview of the History of Wife Abuse*, 10 WOMEN & CRIM. JUST. 2, 9-10 (1999).

⁹⁹ Azizah al-Hibri, *Islam, Law, and Custom: Redefining Muslim Women's Rights*, 12 AM. U. J. INT'L L. & POL'Y 1, 5 (1997).

¹⁰⁰ Lentz, *supra* note 98, at 10.

¹⁰¹ *Id.* at 10-11.

¹⁰² *Id.* at 11.

¹⁰³ *Id.*

Francis Buller, an English jurist, reportedly coined the infamous rule of thumb, which permitted husbands to chastise their wives, but only with a stick the width of a thumb.¹⁰⁴ The rule later entered the jurisprudence of a number of states in the United States.¹⁰⁵

In Israel, the status of women in family law even today is regarded as the major barrier to progress toward equality between men and women.¹⁰⁶ Jews in Israel, whether observant or secular, can only be granted a divorce by a rabbinical court.¹⁰⁷ Rabbinical courts apply religious law, which is perceived to strongly favor husbands.¹⁰⁸ For example, there is a fundamental disparity between men and women regarding their need for a bill of divorce, known as a *get*. A husband's voluntary provision of the *get* is an absolute prerequisite to divorce, without which a divorce is invalid.¹⁰⁹ In a number of situations, a man is permitted to remarry without having secured a divorce, but women are never accorded this right.¹¹⁰ Further, if a woman who has not secured a *get* has a child from a relationship with another man, the child is stigmatized as a bastard, a sanction that carries a number of consequences within the Jewish community.¹¹¹ However, the children of a man who is not properly divorced do not suffer the same stigma.¹¹² Finally, grounds for divorce are very different for men and women in Israel. "[A] single case of adultery by a wife constitutes an immediate, obligatory and irrevocable ground for divorce, whereas only prolonged extra-marital relationships by a man provide grounds for divorce and only in the opinion of some authorities."¹¹³

Inequalities between men and women continue to exist today in a majority of legal systems. Within the past ten years, the Supreme Court of Zimbabwe refused to allow constitutional review of a customary law prohibiting a woman from receiving a share of her deceased father's estate when there is a living son.¹¹⁴ Even in the United States, where the women's suffrage movement lasted a century and a half before women were granted a constitutional right to vote in 1920,¹¹⁵ a

¹⁰⁴ *Id.* at 17.

¹⁰⁵ Lentz, *supra* note 98, at 17-18.

¹⁰⁶ See Bryna Bogoch & Ruth Halperin-Kaddari, *Divorce Israeli Style: Professional Perceptions of Gender and Power in Mediated and Lawyer-Negotiated Divorces*, 28 L. & SOCIAL POL'Y 2, 137-138 (2006).

¹⁰⁷ *Id.* at 139.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 139-140.

¹¹⁰ *Id.* at 140.

¹¹¹ Bogoch & Halperin-Kaddari, *supra* note 106, at 140.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ Madhavi Sunder, *Piercing the Veil*, 112 YALE L. J. 1399, 1430-1431 (2003).

¹¹⁵ Timeline of Women's Suffrage in the United States, <http://www.dpsinfo.com/women/history/timeline.html> (last visited April 2, 2008).

constitutional amendment granting women full equality, first proposed in 1923, has still not been ratified.¹¹⁶

C. Interpretation of the Law and Male Hegemony

Traditionally, law has been the domain of men.¹¹⁷ In the United States, the first woman did not graduate from law school until 1870,¹¹⁸ and even today, weekly salaries for women in the legal profession are only 77.5% of those for men in comparable positions.¹¹⁹ A recent analysis of the French judiciary found that the French judicial profession was traditionally male dominated and that male attributes were an integral part of the definition of the functions of authority assumed by judges.¹²⁰ In Asia, it has been asserted that Confucianism continues to enforce patriarchal systems, resulting in an emphasis on the roles of virtue, maternity and family for women and the subordination of their status in the legal and other professions.¹²¹

Even so, the role of women in Islam has perhaps been more restricted than in other legal systems. Despite their early contributions to the development of the law, Muslim women were removed from public and political life soon after the death of the Prophet.¹²² Male societal domination, firmly in place before the revelation of the *Qur'an*, resumed with a vengeance after the Prophet died, and advances that had been made in the area of women's rights began to erode.¹²³ Men assumed sole responsibility for interpreting the *Qur'an*, and although various

¹¹⁶ The Equal Rights Amendment, <http://www.equalrightsamendment.org/> (last visited April 2, 2008).

¹¹⁷ See, e.g., Elena Kagan, Dean, Harvard Law School, Leslie H. Arps Memorial Lecture at the Association of the Bar of the City of New York (Nov. 17, 2005), <http://www.law.harvard.edu/news/abnyspeech>. Dean Kagan stated:

There was Columbia's denial of admission to several women in 1890, when one board member reportedly said: "No woman shall degrade herself by practicing law in New York especially if I can save her. . . ." Or consider a 1911 student resolution, widely supported—though ultimately defeated—at the University of Pennsylvania Law School: a resolution that would have introduced a twenty-five cents per week penalty on students without mustaches. Or the words of Harvard University's president, when asked how the Law School was faring during World War II. His reported response: That it wasn't as bad as he'd expected—"We have 75 students, and we haven't had to admit any women." *Id.*

¹¹⁸ Infoplease, *Famous Firsts by American Women*, <http://www.infoplease.com/spot/womensfirsts1.html> (last visited Aug. 19, 2008).

¹¹⁹ See, ABA COMMISSION ON WOMEN IN THE PROFESSION, A CURRENT GLANCE AT WOMEN IN THE LAW, 2006, <http://www.abanet.org/women/CurrentGlanceStatistics2006.pdf>.

¹²⁰ Anne Boigeol, *Male Strategies in the Face of the Feminisation of a Profession: the Case of the French Judiciary*, in WOMEN IN THE WORLD'S LEGAL PROFESSIONS 400, 409 (Ulrike Schultz & Gisela Shaw eds., 2003).

¹²¹ See Shu-Chin Grace Kuo, *Rethinking the Masculine Character of the Legal Profession: A Case Study of Female Legal Professionals and Their Gendered Life in Taiwan*, 13 AM. U. J. GENDER SOC. POL'Y & L. 25, 45 (2005) (The author argues that women in Mainland China were liberated from traditional constraints due to the Communist Party's revolutionary ideology which questioned and protested women's traditional gender roles).

¹²² See al Hibri, *supra* note 99, at 5-8.

¹²³ Sayeh & Morse, *supra* note 83, at 321.

schools of interpretation developed, all included a patriarchal value system.¹²⁴ Since the patriarchal value system did not allow the participation of women in public life, Qur'anic scholarship and the interpretation of Islamic law became the exclusive province of men.¹²⁵ The resulting impact on women's legal rights was severe and predictable.¹²⁶ In applying principles of Islamic jurisprudence, all-male scholars and judges tended to define critical ideas and analyze fundamental concepts in terms that reflected not only a purely male perspective but also the perspectives of the male political authorities.¹²⁷ Male scholars, even when discussing issues regarding women generally, spoke only in a representational capacity and imported their own patriarchal interpretations and biases.¹²⁸

Exclusion of women from the public domain, and in particular, from any position having the potential to impact the development of the law may well have been deliberate. For instance, *Ibn 'Umar*, the son of the second *Caliph* and a prominent authority in *hadith* and law, reportedly commented, "When the Prophet was alive we were cautious when speaking and dealing with our women in fear that a revelation would come [from God] concerning our behavior. But when the Prophet died we were able to speak and deal with them [more freely]."¹²⁹ As one scholar noted, "[t]his [comment] reflects a rare admission that there was social resistance to early Islamic reforms regarding women."¹³⁰ It is also consistent with many reports recounting widespread opposition, especially among Meccan men, to the presence of women in public forums even during the Prophet's life, which compelled the Prophet, for example, to specifically command men not to prevent women from attending prayers in mosques.¹³¹ Despite this explicit command, men continued to allow women to attend prayers only in the morning, but not at night, which in turn led the Prophet to specify that his command covered attending prayers at night as well.¹³²

¹²⁴ See *id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ See al-Hibri, *supra* note 99, at 5-8.

¹²⁸ See Khan, *supra* note 10, at 341.

¹²⁹ EL FADL, *supra* note 15, at 223.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* It should be noted that the practice of excluding women from praying at mosques is still reported. A 2005 study conducted by the Women and Islam and Islamic Social Services Associations found that seventy-five percent of regular participants in mosque activities were men and that nineteen percent of mosques reported that they did not offer any programs for women. Thirty-one percent of mosques stated that they prohibited women from serving on their executive boards. Further, the practice of compelling women to pray behind a curtain or in another room of the mosque has increased. In 1994, fifty-two percent of mosques reported that women prayed separately from men, either behind a partition or in another room whereas this practice had been adopted by sixty-six percent of mosques in 2000. Many of the Muslim women surveyed stated that they believed that cultural biases and mindsets, rather than principles of Islam, were at the root of how they were treated at mosques and community centers. ISLAMIC SOC. SERVICES ASS'N & WOMEN IN ISLAM, INC., WOMEN FRIENDLY MOSQUES AND

In summary, in spite of strong historical indications that Islam accorded women greater rights than they had previously had on the Arabian peninsula, true gender equality never fully materialized within Islamic law.¹³³ Most of the progress that had been made during the life of the Prophet ended at his death.¹³⁴ The majority of religious scholars no longer extended the bare protections and privileges enumerated in the *Qur'an*, and to the present day, men and women remain unequal under Islamic law.¹³⁵

D. The Ascendance of Secular Law in the Muslim World

Islamic law has not developed evenly and consistently over time. However, the slow pace of development of Islamic law in later stages was not necessarily attributable to any fault of the Muslim world itself.

Scholars describe the development of Islamic law as taking place in essentially six stages.¹³⁶ The first four stages saw the law develop without many outside impediments. In the first stage, which is referred to as the prophetic period and which lasted just over two decades, the revelation of the *Qur'an* to the Prophet and the Prophet's missions in Mecca and Medina occurred.¹³⁷ The basic elements of *fiqh* were laid down during this period.¹³⁸ During the second and third phases, important interpretation and supplementation of the original texts were carried out. During these two phases, the Prophet's Companions sought to understand and interpret the laws that had emerged during the life of the Prophet, and the territorial reach of Islam spread rapidly.¹³⁹ During the fourth stage, known as the era of independent reasoning, the major schools of Islam that exist today emerged.¹⁴⁰ Discourse centered around theories and interpretations espoused by Traditionalist and Rationalist groups.¹⁴¹

The fifth phase lasted almost nine centuries and witnessed the downfall of Islamic empires and the expansion of military and political powers of the west.¹⁴² As part of their colonizing efforts, colonial powers propagated their own doctrines and legal codes in most areas of the law.¹⁴³ Consequently, the growth and

COMMUNITY CENTERS (2005), available at www.ildc.net/womens-involvement/WomenAndMosquesBooklet.pdf (last visited Oct. 18, 2008).

¹³³ Khan, *supra* note 10, at 331.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ Kamali, *supra* note 11, at 111.

¹³⁷ *Id.*

¹³⁸ *Id.* at 110.

¹³⁹ *Id.* at 111-12.

¹⁴⁰ *Id.* at 112.

¹⁴¹ Kamali, *supra* note 11, at 113-14.

¹⁴² *Id.* at 115.

¹⁴³ *Id.* at 115. See also Wael B. Hallaq, *The Quest for Origins or Doctrine? Islamic Legal Studies as Colonialist Discourse*, 2 UCLA J. ISLAMIC & NEAR E. L. 1, 15 (2003). Hallaq argues that it was necessary for colonialists to (erroneously) believe that Islamic law was experiencing "structural

development of *fiqh* ceased almost completely, and a sustained period of stagnation began.¹⁴⁴ Original thinking and direct analysis of the sources of *Shari'ah* were discouraged, and instead, interpretations by early jurists of the original texts—both the *Qur'an* and the *Sunnah*—prevailed.¹⁴⁵ Thus, *taqlid*, or imitation of precedent, became the predominant method of solving legal problems.¹⁴⁶

Colonization brought the domination of western law over almost every aspect of the law and legal systems in colonized countries. *Shari'ah* courts were almost completely abolished; where they survived, their jurisdiction was almost always limited to family law.¹⁴⁷ The impact on the development of the law was lasting, and the law itself changed.¹⁴⁸ The foundational instruments of civil law systems, which rely on centralized hierarchical structures, are systematic codes that articulate general principles of law.¹⁴⁹ In the modern era, a large number of Middle Eastern scholars have been trained in civil code systems, either in their own countries or abroad.¹⁵⁰ These scholars have tended to impose upon the Islamic legal tradition systematic conceptual frameworks consistent with their civil code training and to reconstruct and distill Islamic traditions into a set of clear and precise rules that mirrored civil codes.¹⁵¹ These scholars have exercised a subtle, but clearly discernable, impact upon the development of Islamic law.¹⁵²

Although in recent decades, the revival of *Shari'ah* law has been attempted in a number of Muslim countries, Muslim jurists are often criticized for having lost contact with the changing conditions of contemporary life and being powerless to relate the *Shari'ah* to modern government processes.¹⁵³ Similar criticism is leveled against governments in Islamic countries for failing to internalize *usul al-fiqh* in legislative practices.¹⁵⁴ The introduction of statutory legislation as a legal tool replacing the practice of *ijtihad* is charged to have eroded jurists' incentives to participate in the legislative process. "[T]he 'wholesale importation of foreign legal concepts and institutions into Islamic countries, and the uneasy combinations that this has brought about in legal education and judicial practice' are among factors that are considered partially accountable for the Islamic fundamental

difficulties in accommodating itself to the ever-changing social, economic and other realities" as a justification for introducing western-inspired modern reforms that eventually systematically demolished *Shari'ah* law. He states, "In a nutshell, then, the colonialist enterprise could not have been successfully effected without postulating the 'decline' and 'stagnation' of the shari'a."

¹⁴⁴ Kamali, *supra* note 11, at 115.

¹⁴⁵ *Id.* at 115.

¹⁴⁶ See COULSON, *supra* note 37, at 80.

¹⁴⁷ See SONN, *supra* note 3, at 42.

¹⁴⁸ EL FADL, *supra* note 15, at 5-6.

¹⁴⁹ *Id.* at 5.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.* at 6.

¹⁵³ See KAMALI, *supra* note 16, at xxi.

¹⁵⁴ *Id.*

revivalism which many Muslim societies are currently experiencing.”¹⁵⁵

In the context of women’s rights, the precedence of secular law over Islamic law in former colonies has produced a variety of results, some of which are, not surprisingly, more liberal than traditional Islamic interpretations.¹⁵⁶ However, this is not necessarily the case. In Saudi Arabia, where the strict *Hanbali* school of Islam is followed, women are legally prohibited from working outside the home,¹⁵⁷ even though some scholars argue that traditional Islamic law gives women the right to work.¹⁵⁸

V. FORECASTING WOMEN’S FUTURE

The world of today’s Muslims is very different from the world into which Islam was born.¹⁵⁹ What will the future hold for Islamic law and Muslim women? Will legal interpretations seek to remain faithful to original circumstances, or will they enter a new era in which increased flexibility will allow the law to meet new challenges, including with respect to the status of women?

The following are a few of the changes that may be seen in the next era of development in Islamic law.

A. Increased Availability of Legal Texts

Historically, Islamic law has been relatively inaccessible to all but a select group of scholars and, therefore, difficult for others to study. Nearly all of the law is contained in long unindexed texts, almost all of them in Arabic. As one scholar states:

[p]oor access to Islamic law has been one of the problems that have hampered efforts toward the revival of rational and independent reasoning. The bulk of scholastic Islamic law is contained in voluminous works of medieval origin in Arabic, which are poorly classified and difficult to use; this scholarship tends toward scholastic exclusivism and isolation.¹⁶⁰

It was not until 1951 that an Islamic Law Conference held in Paris called for the first time for the compilation of a comprehensive encyclopedia of *fiqh*.¹⁶¹

¹⁵⁵ *Id.*

¹⁵⁶ See FREEDOM HOUSE, WOMEN’S RIGHTS IN THE MIDDLE EAST AND NORTH AFRICA: CITIZENSHIP AND JUSTICE (2005), <http://www.freedomhouse.org/template.cfm?page=383&report=56&group=1> (follow “Country Reports” hyperlink).

¹⁵⁷ *Id.*

¹⁵⁸ See, e.g., Fatima Akaddaf, *Application of the United Nations Convention on Contracts for the International Sale of Goods (CISG) To Arab Islamic Countries: Is the CISG Compatible With Islamic Law Principles?*, 13 PACE INT’L L. REV. 1, 9 (2001) (asserting that Islam gives women power to conduct business transactions without the approval of their husbands); Portuán Miller, *supra* note 10, at 125.

¹⁵⁹ See Khan, *supra* note 10, at 274.

¹⁶⁰ Kamali, *supra* note 11, at 149-50.

¹⁶¹ *Id.* at 150.

Thereafter, several projects were undertaken by the University of Damascus and the governments of Egypt and Kuwait.¹⁶² The resulting collections were designed to consolidate rather than reform existing Islamic law and were intended to catalogue and make accessible for the first time the basic tenets of Islamic law.¹⁶³

In the last five years, global events have significantly raised the profile of Islam and interest in Islamic law in the world community. For example, a recent study of accredited law school curricula in the United States found that 66 out of 166 law schools listed in the Association of American Law Schools Directory of Law Teachers, or nearly 40 percent of all such schools, have offered one or more courses on Islamic law in the last five years.¹⁶⁴ The author of this study concludes that Islamic law has entered the mainstream of American legal education.¹⁶⁵

B. The Inherent Versatility of Islamic Law

Some scholars believe that Islamic law benefits from a number of inherently flexible devices¹⁶⁶ that could allow Islamic jurisprudence to take its place among the most modern and important legal systems in the world today. They state that *Shari'ah*, as set forth in the *Qur'an* and *Sunnah*, allows new interpretations of existing precedent in at least three situations: (1) in cases of "necessity or public interest;" (2) when there is a "change in the facts which gave rise to the original law;" and (3) when there is a "change in the custom or usage on which a particular law was based."¹⁶⁷ If any one of these three conditions is present, the scholars argue that a jurist may adapt existing law to the new situation, provided the adaptation does not contradict the *Qur'an*.¹⁶⁸

Examples of a few of the flexible doctrines that form an inherent part of Islamic jurisprudence are discussed in the following section.

1. Shari'ah's Guiding Values

The *Qur'an* establishes basic principles and values according to which particular practices are measured. In the Islamic view, the purpose of human

¹⁶² *Id.*

¹⁶³ *See id.* Although it may seem that the benefits of recording and organizing laws need no explanation, these activities are in fact quite controversial since the law thereby becomes more accessible to laypersons, threatening the exclusive domain of elites. *See generally* Anthony Allott, *The Hunting of the Snark or the Quest for the Holy Grail? The Search for Customary Law*, in *COMPARATIVE LAW IN GLOBAL PERSPECTIVE: ESSAYS IN CELEBRATION OF THE FIFTIETH ANNIVERSARY OF THE FOUNDING OF THE SOAS LAW DEPARTMENT* 79 (Ian Edge ed., 2000) (discussing recording and organizing of customary law).

¹⁶⁴ John Makdisi, *A Survey of AALS Law Schools Teaching Islamic Law*, 55 J. LEGAL EDUC. 583, 583 (2005).

¹⁶⁵ *Id.* at 588.

¹⁶⁶ *See, e.g.*, Sayeh & Morse, *supra* note 83, at 317.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

existence is to do the will of God and create a social order that reflects the equality and dignity of all human beings.¹⁶⁹ To the extent that a practice fosters the well-being of society, it is Islamic. If a practice results in suffering or oppression, it cannot be considered to be in accordance with Islamic principles.¹⁷⁰ Taken together, the single divine purpose of *Shari'ah* is to ensure the public good.¹⁷¹

Principles of *usul al-fiqh* include a number of ameliorating doctrines that are designed to ensure fairness and conscience in the application of the law. *Istihsan*, like its approximate common law counterpart, equity, is inspired by principles of fairness and conscience.¹⁷² If strict enforcement of a law would lead to a hardship or an unfair result, *istihsan* permits that the rule be abandoned.¹⁷³ *Istislah*, also known as *maslahah mursala*, or consideration of public interest, ensures that the application of the law is harmonious with the overall objectives of *Shari'ah*—religion, life, intellect, lineage and property.¹⁷⁴ Juristic devices such as these aim to allow the application of “*Shari'ah*-oriented polic[ies] . . . that bring people close to well-being and move them further away from corruption.”¹⁷⁵

These types of juristic devices, which are inherent in Islamic jurisprudence, may prove to be of assistance to scholars who seek to “re-examine traditional jurisprudential principles . . . and purge from [Islamic law] all patriarchal cultural biases” so that Qur’anic principles of equity and fairness are more closely followed.¹⁷⁶

2. Changes in Custom

As stated earlier, *urf*, or custom, is used in Islamic law to interpret the original sources when they are silent on specific details.¹⁷⁷ Since some rules of *fiqh* have historically been formulated in light of prevailing custom, some scholars consider it permissible to change those rules if the underlying custom changes.¹⁷⁸ They believe that denying *fiqh* the ability to progress and develop in this way would create hardship for Muslims and is therefore prohibited by *Shari'ah*.¹⁷⁹

Opponents of this theory state that allowing *fiqh* to progress and develop would create instability in *Shari'ah*.¹⁸⁰ They also fear that relying on custom as a basis of law is not sound in any event since custom is difficult to define with any

¹⁶⁹ Sonn, *supra* note 67, at 74.

¹⁷⁰ *Id.*

¹⁷¹ Quraishi, *supra* note 82, at 103.

¹⁷² KAMALI, *supra* note 16, at 323.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 351.

¹⁷⁵ *Id.* at 355.

¹⁷⁶ Al-Hibri, *supra* note 99, at 43.

¹⁷⁷ KAMALI, *supra* note 16, at 371.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *See id.* at 380.

precision.¹⁸¹ In current eras, custom is especially vulnerable to instability due to the “accelerated pace of social change . . . [which] undermine[s] the stability of social customs and organizations.”¹⁸² However, other scholars argue that customs relating to women that existed at the time of the revelation and during the early years of Islam have changed and that, to the extent that *urf* serves as one of the bases of Islamic law, the law should change to reflect more modern customs.¹⁸³

3. Flexibility among the Schools of Islam

As described above, the main Sunni schools of Islam emerged during the fourth phase of the development of Islamic law. Although the jurisprudence of each of the major schools is, in many ways similar, variations exist due to the “cultural, political and socio-economic contexts in which [the schools] developed and the philosophy of reasoning that was accepted” by their founders.¹⁸⁴ Although Muslims usually follow the tenets of the school to which they belong, they have significant flexibility to abandon the jurisprudence of their primary school and follow an opinion of another major school if the second point of view is deemed superior or more helpful than the first in resolving a particular legal question.¹⁸⁵

In the area of women’s rights, there is often a diversity of interpretation of *Shari’ah* law among the schools. For example, the *Hanafi* school requires neither women nor men to have a marriage guardian, while in the *Maliki* school, fathers have the right to choose their daughters’ husbands.¹⁸⁶ The right of women to initiate divorce varies among the schools, as does the impact of pregnancy outside of marriage as proof of adultery.¹⁸⁷ Thus, the flexibility to adopt a preferred interpretation of law from another school represents a doctrine of inherent versatility and can provide alternative rules relating to women’s rights.

¹⁸¹ *Id.*

¹⁸² KAMALI, *supra* note 16, at 380.

¹⁸³ See Al-Hibri, *supra* note 99, at 5, 8, 42, 43 (discussing custom as one of the bases of Islamic law and arguing that continuing patriarchal influences, despite changes in circumstances, is contrary to jurisprudential principles of Islam).

¹⁸⁴ Ayesha Imam, Keynote Address at the Woodrow Wilson International Center Women, Islam, and Human Rights Forum: Women, Muslim Laws and Human Rights in Nigeria (Sept. 17, 2003) in AFRICA PROGRAMS OCCASIONAL PAPER SERIES NO. 2, 1-2 (Feb. 2004), available at http://www.wilsoncenter.org/index.cfm?topic_id=1417&categoryid=09B6BF65-65BF-E7DC40F567F157F96E15&fuseaction=topics.newsitem_topics&news_id=44660. See also Kamali, *supra* note 10, at 110-18 (discussing history and sources of Islamic law).

¹⁸⁵ Al-Hibri, *supra* note 99, at 9. See also Ihsan Yilmaz, *Inter-Madhab Surfing, Neo-Ijtihad, and Faith-Based Movement Leaders*, in THE ISLAMIC SCHOOL OF LAW: EVOLUTION, DEVOLUTION, AND PROGRESS (Peri Bearman et al. eds., 2005).

¹⁸⁶ Imam, *supra* note 184.

¹⁸⁷ See generally LALEH BAKHTIAR & KEVIN REINHART, ENCYCLOPEDIA OF ISLAMIC LAW: A COMPENDIUM OF THE MAJOR SCHOOLS (1996) (comparing the jurisprudence of the major schools).

4. *Ijtihad*

Ijtihad as a tool to address and modernize women's rights is advocated by scholars who argue that there are no indications in the *Qur'an* that its tenets were meant to remain frozen in time as of the date of its revelation.¹⁸⁸ These scholars state that the closing of the door to *ijtihad* is one of the main factors responsible for gaps between the law and its sources and the changing conditions of society, and they believe that the revival of *ijtihad* represents the single best hope for modernizing Islamic law and rendering it relevant to the modern era.¹⁸⁹ According to these scholars, the revival of *ijtihad* would allow Islamic jurists to fully exercise the flexibility that Islam provides to carry it beyond its misogynistic past and address issues of current importance to the Muslim community.¹⁹⁰

Some scholars believe that the revival per se of *ijtihad* may not be required in order to exercise the flexibility of Islamic law because they do not agree with the view that the door to its practice was ever shut.¹⁹¹ They state that the practice of *ijtihad* remains "a collective obligation of the Muslim community . . . to exert themselves in order to find solutions to new problems and to provide necessary guidance in matters of law and religion."¹⁹² These scholars also cite a respected *hadith* stating that any error in practicing *ijtihad* is not only acceptable but will be rewarded.¹⁹³

The one who performs *ijtihad* and reaches the right answer will receive two rewards [from God], and the one who performs *ijtihad* and reaches the wrong answer will receive one reward [from God].¹⁹⁴

Other scholars find support for the practice of *ijtihad* in the *Qur'an* itself in the example of *Da'ud* and his son *Sulayman*, who arrived at variant verdicts in a case in which a group of sheep strayed into a field at night.¹⁹⁵ The scholars argue that the Qur'anic authorization for *ijtihad* means that its practice should never have been questioned.¹⁹⁶

However, still other scholars believe that *ijtihad* should not be encouraged because it provides an excuse for careless jurisprudence and offers no improvement on traditional methodologies of *usul al-fiqh*.¹⁹⁷ They characterize modern users of *ijtihad* as nothing more than "disingenuous result-oriented" practitioners whose

¹⁸⁸ Sayeh & Morse, *supra* note 83, at 330; see also SMOCK, *supra* note 25, at 5 ("Many issues facing Muslims today require *ijtihad*, and the following ones . . . require urgent attention: *The role of women*." (emphasis in original)).

¹⁸⁹ See Sayeh & Morse, *supra* note 83, at 330; see generally SMOCK, *supra* note 25.

¹⁹⁰ See *id.*

¹⁹¹ See Wael B. Hallaq, *Was the Gate of Ijtihad Closed?*, 16 INT'L J. MIDDLE E. STUD. 3 (1984).

¹⁹² KAMALI, *supra* note 16, at xxi – xxii.

¹⁹³ See Quraishi, *supra* note 82, at 71. See also HALLAQ, *supra* note 36, at 120.

¹⁹⁴ SAHIH MUSLIM, *supra* note 77, at Hadith No. 4261.

¹⁹⁵ Hamid Algar, *A Qur'anic Basis for Ijtihad?*, 4 J. QUR'ANIC STUDIES 1 (2002).

¹⁹⁶ *Id.* (stating that "*ijtihad* has Qur'anic roots and was practiced by the prophets themselves.").

¹⁹⁷ EL FADL, *supra* note 15, at 172.

practices “deny Islamic law any sense of integrity, seriousness, or viability in the modern age.”¹⁹⁸

Whether reviving the individual practice of *ijtihad* would be sufficient in itself to carry out reforms in a period in which Islamic religion and the state are often closely intertwined is another issue of controversy. Some believe that Islamic legal thought may have traveled too far in its individualist orientation to offer easy options in an era in which the nation-state and its legal machinery have become increasingly collectivist and representative.¹⁹⁹ They believe that the practice of *ijtihad* by private jurists alone is no longer a realistic alternative unless reformist measures are introduced to make independent reasoning an issue of importance to legislative assemblies and parliaments.²⁰⁰

The future of Sunni–Shi’a relations and the comparative prominence of these two branches of Islam also have the potential to impact the practice of *ijtihad* in the future.²⁰¹ Whereas the use of *ijtihad* in Sunni schools is considered by many to have ceased in the tenth century,²⁰² it never stopped in the Shi’a branch of Islam.²⁰³ Shi’a believers have been continuously permitted to exercise *ijtihad* provided they follow certain guidelines.²⁰⁴

Some scholars believe that the Sunni–Shi’a conflict is the most significant issue that will impact Islam in the next decades and characterize it as a struggle for the soul of Islam itself.²⁰⁵ If this prediction is borne out, the status of *ijtihad* may

¹⁹⁸ *Id.*

¹⁹⁹ See KAMALI, *supra* note 16, at 495 (quoting the scholar al-Tamawi, who stated that *ijtihad* is “no longer suitable to modern conditions.”).

²⁰⁰ See Kamali, *supra* note 11, at 152. In the area of polygamy, creative use of *ijtihad* has been undertaken by the legislative branches in Algeria, Tunisia and Morocco. In Tunisia, the legislature decided as a matter of public policy that since it is impossible to treat more than one wife fairly, polygamy should be outlawed. See Yakaré-Oulé Jansen, *Muslim Brides and the Ghost of Shari’a: Have the Recent Law Reforms in Egypt, Tunisia and Morocco Improved Women’s Position in Marriage and Divorce, and Can Religious Moderates Bring Reform and Make it Stick?*, 5 NW. U. J. INT’L HUM. RTS. 181, 12 (2007). In Algeria, a man may marry more than one wife if he can justify the reason for doing so and notifies his existing wife of his intention. Any co-wife may petition for divorce on grounds of harm if her consent was not obtained. See Press Release WOM/1079, U.N. Women’s Anti-Discrimination Comm., Algeria Resolved to Adopt Progressive Approach to Restoration of Rights to Algerian Women, Women’s Anti-Discrimination Committee Told (Jan. 21, 1999), <http://www.un.org/News/Press/docs/1999/19990121.wom1079.html>. Recent revisions to the Morocco Family Code strictly control the practice of polygamy, requiring a man who wants more than one wife to prove to a judge that he can support two families and that he has an objective and exceptional reason for doing so; the judge can only grant the request if both the first and second wife approve. See Global Rights Morocco Forum, *The Status of Moroccan Women*, (July 20, 2005), http://www.globalrights.org/site/DocServer/MoroccoForum_July20_05.pdf?docID=2923.

²⁰¹ H. PATRICK GLENN, *LEGAL TRADITIONS OF THE WORLD* 197-98 (2d ed., 2004) (discussing the role of *ijtihad* in the Shi’a branch of Islam and calling Shi’ism “perhaps the most vibrant and affirmative group within islams.”).

²⁰² See *supra* Section II.B.

²⁰³ KAMALI, *supra* note 16, at 491; see also Kamali, *supra* note 11, at 116-17.

²⁰⁴ KAMALI, *supra* note 16, at 491.

²⁰⁵ See VALI NASR, *THE SHIA REVIVAL: HOW CONFLICTS WITHIN ISLAM WILL SHAPE THE FUTURE* 20 (2006).

become one of the most significant tools in the development of Islamic jurisprudence.

5. A Theory of Gradualism

Some scholars believe that the development of Islamic law has always followed a path of gradualism and that the *Qur'an* itself supports such a theory.²⁰⁶ They state that some provisions of the *Qur'an*, such as the prohibition against usury, were meant to be absolute and unchangeable from the beginning.²⁰⁷ However, other provisions, such as the prohibition against drinking alcohol, emerged slowly over time and underwent a significant change before the final rule was ultimately announced.²⁰⁸ Those scholars believe that sufficient examples of the gradual evolution of law exist to prove that the *Qur'an* always envisioned a theory of gradualism.²⁰⁹ When taken together, the *Qur'an's* revelations concerning women and the changes made during the life of the Prophet with respect to their treatment indicate that Islamic law was always meant to evolve; thus, the legal treatment of women was meant to evolve as well.²¹⁰

C. Increased Prominence of Women Scholars

Women were not always marginalized in Islamic legal discourse. Early literature is replete with stories of women who engaged in dialogues with men about proper Islamic practices or the preferred interpretations of Islamic texts.²¹¹ Women were also major reporters of *hadith*,²¹² prominent scholars, physicians and politicians in the years of the Prophet's life and immediately thereafter.²¹³

However, marginalization of women from Islamic public, political and academic arenas after the death of the Prophet resulted in the dominance of male values and interpretations of legal texts.²¹⁴ A number of scholars, both male and female, now believe that the longstanding patriarchal dominance of classical Islamic law, which resulted in patriarchal cultural domination, can only be reversed

²⁰⁶ Sayeh & Morse, *supra* note 83, at 318.

²⁰⁷ *Id.* at 319.

²⁰⁸ *Id.* at 320.

²⁰⁹ *Id.*

²¹⁰ *Id.* at 321.

²¹¹ Al-Hibri, *supra* note 99, at 40.

²¹² See Muhammad Zubayr Siddiqi, Women Scholars of Hadith, <http://www.islamfortoday.com/womenscholars.htm>.

²¹³ *Id.* See also Al-Hibri, *supra* note 99, at 40. (The list of early prominent, respected professional Muslim women includes, "Sukaynah bint al-Hussayn, the granddaughter of the Prophet, A'isha bint Talha and Walladah bint al-Mustakfi . . . Zainab physician of the tribe of bani Awd and Um al-Hassan, daughter of Judge Abu Ja'far al-Tanjali . . . Hind bint Yazid al-Ansariyah, [Fatima al-Fudayliya] 'Akrashah bint al-Utroush; Shajarat al-Durr of Eghpt and Queen Arwa of Yemen."). See also WIEBKE WALTHER, WOMEN IN ISLAM: FROM MEDIEVAL TO MODERN TIMES 109-10 (1995).

²¹⁴ See Khan, *supra* note 10, at 331-32.

through the active participation of Muslim women themselves.²¹⁵ Although some success has been made at reforming Islamic law by using an international platform, a number of scholars believe that real success can only be achieved when women actively participate in interpreting the most pressing legal and ethical issues that affect them.²¹⁶ Without the direct participation of Muslim women, they argue, it would be extremely difficult to improve women's legal status, since male reformists tend to perpetuate patriarchal values when they act in a representational capacity.²¹⁷ Fortunately, there is no reason to believe that legal and scholarly contributions by women will decrease in coming years. The general nature of the *Qu'ran's* guidelines and the need for scholarly interpretation of its text creates a natural space for increased participation by women.²¹⁸

Participation by women in the field of Islamic legal scholarship is growing. Today, some of the most important work is being done by female Islamic scholars, including Asifa Quraishi, Azizah al-Hibri, and Madhavi Sunder.²¹⁹ The work of scholars such as these is critically important to ensure permanent progress in non-patriarchal interpretations of Islamic law. As Professor al-Hibri stated:

The majority of Muslim women who are attached to their religion will not be liberated through the use of a secular approach imposed from the outside by international bodies or from above by undemocratic governments. The only way to resolve the conflicts of these women and remove their fear of pursuing rich and fruitful lives is to build a solid Muslim feminist jurisprudential basis which clearly shows that Islam not only does not deprive them of their rights, but in fact demands these rights for them.²²⁰

²¹⁵ *Id.* at 341.

²¹⁶ *Id.* at 330.

²¹⁷ *Id.* at 341.

²¹⁸ See Conant et al., *supra* note 9 (arguing that the wording of the new Iraqi constitution, as well as control over its interpretation by male clerics, could result in a substantial restriction of women's rights. The United States Institute of Peace has argued that "integrated and sustainable strategies to confront religious extremism in the Muslim world" should include "providing special scholarships to women studying religious topics," a prerequisite for attaining positions as clerics). See also ABDESLAM M. MAGHRAOUI, U.S. INSTITUTE OF PEACE, Special Report No. 164, AMERICAN FOREIGN POLICY AND ISLAMIC RENEWAL 11 (June 2006), <http://www.usip.org/pubs/specialreports/sr164.pdf>.

²¹⁹ Sunder, a 2006 Carnegie Scholar, studies the work of women activists in the Muslim world who confront problems with formal laws that give privileged viewpoints and interpretations to traditionalists and patriarchs. Her work focuses on Muslim women who are working to reform their religion from within. Sunder states, "I want to show everybody these are real women risking their lives." See generally Julia Ann Easley, *Legal Scholar Studies Muslim Women Reforming from Within*, U.C. DAVIS NEWS SERVICE, Nov. 29, 2006, <http://www.ucdavis.edu/spotlight/0806/sunder.html> (discussing Madhavi Sunder of the School of Law). The risks are not exaggerated. In February 2006, Dr. Wafa Sultan, a Syrian-American psychiatrist living in California, gave an interview on Al Jazeera television, in which she criticized Muslim clerics and political leaders who, she stated, "have distorted the teachings of Muhammad and the [Qur'an] for 14 centuries." In response, clerics throughout the Muslim world condemned her, labeling her a "heretic and infidel who deserves to die." John M. Broder, *For Muslim Who Says Violence Destroys Islam, Violent Threats*, N.Y. TIMES, Mar. 11, 2006, at A1.

²²⁰ Al-Hibri, *supra* note 99, at 3.

Muslim women are regaining positions of leadership in areas outside of academia as well. For example, in 2006, the Islamic Society of North America, the largest religious organization representing Muslims in North America, elected Dr. Ingrid Mattson as its president.²²¹ Dr. Mattson, a professor of Islamic Studies at Hartford Seminary, is the first woman to head the organization.²²²

D. Change From Within: Social and Political Movements

Social and political movements within Islam are slowly bringing about changes in women's rights. Some of the most significant inroads are being made by civil society groups engaged in women's issues. These "bottom-up" strategies tend to give little deference to hierarchical and patriarchal models. Women activists in the Muslim world are confronting fundamentalist approaches to religion and law by refusing to follow traditional paradigms that force women to choose between religion and rights.²²³ They reject the law's deference to religious leaders and demand the right to construct an identity not only outside their religious and cultural communities but also within them.²²⁴ In these efforts, Muslim women activists are seeking to apply concepts of justice, equality and democracy not only in the public sphere but also within the family, culture, and religion—areas traditionally defined in western law as private and therefore beyond the reach of regulation.²²⁵

Activist organizations promoting change for women from within Islam include Sisters in Islam, in Malaysia,²²⁶ the League of Demanders of Women's Right to Drive Cars, in Saudi Arabia,²²⁷ and the Women's Aid Collective²²⁸ and BAOBAB²²⁹—the last two in Nigeria.

Sisters in Islam is comprised of a group of Muslim women studying and researching the status of women in Islam to advocate for the rights they claim were granted to them by Islam.²³⁰ They state that Islam, from its outset, was a liberating religion that uplifted the status of women and gave them rights that were

²²¹ Islamic Society of North America (INSA), Dr. Ingrid Mattson Elected First Female President of the Islamic Society of North America (INSA), <http://www.isna.net/articles/Press-Releases/DR-INGRID-MATTSON-ELECTED-FIRST-FEMALE-PRESIDENT-OF-THE-ISLAMIC-SOCIETY-OF-NORTH-AMERICA.aspx> (last visited Oct. 18, 2008).

²²² *Id.*

²²³ Sunder, *supra* note 114, at 1406.

²²⁴ *Id.* at 1412.

²²⁵ *Id.* at 1459.

²²⁶ Sisters In Islam, <http://www.sistersinislam.org.my/> (last visited Apr. 2, 2008).

²²⁷ See Judd, *supra* note 6.

²²⁸ WomenAid Collective, <http://www.wacolnigeria.org> (last visited Apr. 2, 2008).

²²⁹ BAOBAB for Women's Human Rights, <http://www.baobabwomen.org> (last visited Apr. 2, 2008).

²³⁰ See Sisters In Islam, <http://www.sistersinislam.org.my/> (follow "About SIS" hyperlink; then follow "Mission & Objectives" hyperlink) (last visited Apr. 2, 2008).

considered revolutionary 1400 years ago.²³¹ Their research shows that repressive interpretations of the *Qur'an* are for the most part influenced by cultural practices and values that subordinate women to men.²³² Sisters in Islam finds, "it is not Islam that oppresses women, but human beings with all their weaknesses who have failed to understand Allah's intentions,"²³³ and thus calls for "a reconstruction of Islamic principles, procedures and practices in light of basic Qur'anic principles of equality and justice."²³⁴

In October 2005, the first International Congress on Islamic Feminism was held in Barcelona.²³⁵ Attendees discussed their efforts to recapture rights "granted to women at [Islam's] birth but erased by manmade rules and tribal traditions masquerading as divine law,"²³⁶ including gender segregation at home and in the mosque, mandatory veiling, forced early marriages, polygamy, genital mutilation, death sentences in cases of adultery, and domestic violence.²³⁷ One attendee stated:

[w]e are wrestling with laws created in the name of Islam by men But . . . [i]t is not Islam that requires women to wear a headscarf, but rather the scholars in the contemporary schools. To many of the women I spoke with, their struggle to move Islam forward by reaching back to its past represents nothing short of a revolution.²³⁸

Change may not always occur at the pace either Muslims or non-Muslims would prefer. As one Muslim woman stated, "Change and progress, though, are happening, slowly but steadily Neither Muslims nor Muslim societies are static; they move forward—but they have their own trajectory."²³⁹ However, change is taking place, even if in small increments. At the 2005 Barcelona Congress, a senior program officer at BAOBAB recounted how a conservative *Shari'ah* judge broke with tradition and opposed marital rape after undergoing a training program provided by her organization.²⁴⁰ Later, "One Nigerian imam, after hearing BAOBAB's message encouraging *ijtihad*, surprised BAOBAB organizers by . . . encouraging Muslims to consider alternative schools of thought."²⁴¹

²³¹ See ARE WOMEN & MEN EQUAL BEFORE ALLAH? 1 (Sisters in Islam ed., 1991)

²³² *Id.*

²³³ *Id.*

²³⁴ Al-Hibri, *supra* note 99, at 2 n.3 (citing Sisters In Islam August 1995 press release).

²³⁵ See Asra Q. Nomani, *A Gender Jihad for Islam's Future*, WASH. POST, Nov. 6, 2005, at B02.

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ See Leila Aboulela, *Restraint? Sure. Oppression? Hardly.*, WASH. POST, July 22, 2007, at B03.

²⁴⁰ Nomani, *supra* note 235. The BAOBAB organization helped win a victory for a Nigerian mother sentenced to death by stoning for giving birth to a baby outside of wedlock.

²⁴¹ *Id.*

E. Pressure From Without: The Role of International Law

International human rights law has been considered by many to be an important potential tool in modernizing the rights of all women.²⁴² International instruments prohibiting gender-based discrimination include the Universal Declaration of Human Rights,²⁴³ the International Covenant on Economic, Social and Cultural Rights,²⁴⁴ the International Covenant on Civil and Political Rights,²⁴⁵ the Convention on the Elimination of All Forms of Discrimination Against Women,²⁴⁶ and the Convention on the Rights of the Child.²⁴⁷

The goal of eliminating gender discrimination received heightened international attention on September 18, 2000, when the United Nations General Assembly passed Resolution 55/2, The United Nations Millennium Declaration, which set forth an ambitious agenda of eight goals to be reached by 2015.²⁴⁸ One of those goals is the promotion of gender equality and empowerment of women.²⁴⁹ In November 2003, the Executive Director of the United Nations Development Fund for Women hailed this goal, stating,

The power in the MDGs [Millennium Development Goals] lies in the unprecedented global consensus and commitment that they represent. They establish a common index of progress and common focus for global partnership that emphasizes the needs of the poor. The MDGs also provide an opportunity to raise awareness about the connections among the eight Goals and the rights and capacities of women.²⁵⁰

But does global consensus as to these goals really exist? Do definitions and interpretations of equality and rights apply equally in all countries and contexts, including in the Muslim world?

The role of international law and its applicability in non-western cultures is a matter of controversy. Some Islamic scholars believe that modern international law

²⁴² See Khan, *supra* note 10, at 332-33. See also Joelle Entelis, *International Human Rights: Islam's Friend or Foe?*, 20 FORDHAM INT'L L.J. 1251, 1260 (1997).

²⁴³ Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d. Sess., 1st plen. Mtg., U.N. Doc. A/810 (Dec. 12, 1948).

²⁴⁴ International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200, 21st Sess., 1496th plen. Mtg., U.N. Doc. A/2200 (Dec. 16, 1966).

²⁴⁵ International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966).

²⁴⁶ Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. Doc A/RES/34/180 (Dec. 18, 1979).

²⁴⁷ Convention on the Rights of the Child, G.A. Res. 44/25, U.N. Doc. A/RES/44/25 (Nov. 20, 1989).

²⁴⁸ G.A. Res. 55/2, U.N. GAOR, 55th Sess., U.N. Doc. A/RES/55/2 (Sept. 18, 2000).

²⁴⁹ U.N. Millennium Development Goals, <http://www.un.org/millenniumgoals/> (last visited Apr. 2, 2008).

²⁵⁰ Noeleen Heyzer, Executive Director, UNIFEM, Address at the World Bank Workshop on Gender Equality & The Millennium Development, Making the Links: Women's Rights and Empowerment are Key to Achieving the Millennium Development Goals (Nov. 19, 2003), http://www.unifem.org/news_events/story_detail.php?StoryID=165.

and the Islamic conception of law are inherently incompatible.²⁵¹ Further, the idea that human rights originated in the west is offensive to many in the Muslim world, who believe that Islam was one of the earliest proponents of human rights, which were formulated by Muslims 1400 years ago and find their source in the *Qur'an*, and not in western ideology.²⁵²

It is often charged that international law itself is inherently driven by western values and is insensitive to non-western cultures and contexts.²⁵³ In response to Muslim objections to the concept of universal, homogenous notions of human rights that are inherently binding on all people, the forty-five foreign ministers of the Organization of the Islamic Conference joined together on August 5, 1990 to adopt the Cairo Declaration of Human Rights in Islam.²⁵⁴ The Cairo Declaration, which begins by stating that fundamental human rights are binding divine commandments set forth in the Revealed Books of God, affirms that “[a]ll men are equal in terms of basic human dignity and basic obligations and responsibilities, without any discrimination on the grounds of race, colour, language, sex, religious belief, political affiliation, social status or other considerations.”²⁵⁵ With respect to women’s rights, Article Six of the Declaration provides as follows:

- (a) Woman is equal to man in human dignity, and has rights to enjoy as well as duties to perform; she has her own civil entity and financial independence, and the right to retain her name and lineage. (b) The husband is responsible for the support and welfare of the family.²⁵⁶

Articles twenty-four and twenty-five conclude that “all rights and freedoms stipulated in the Declaration are subject to the Islamic *Shari’ah*” and that “The Islamic *Shari’ah* is the only source of reference for the explanation or clarification of any of the articles of this Declaration.”²⁵⁷

²⁵¹ Khan, *supra* note 10, at 320. Some argue that in the Muslim world, active political resistance to public international law has at times had little to do with religion and more to do with Europe’s attempt in the nineteenth century to “civilize” the Islamic world through extensive colonization. Over a period of approximately one hundred years, colonizing powers placed all of Muslim Africa and most of the Islamic territory of Central and South Asia under European control. Western concepts of the nation-state directly contradicted Islamic traditions, which stressed a collective identity based on Islam. Conquered Islamic territories were forced to contend with the alien conception of statehood itself and deal with a system of rules and obligations created by dominant European powers.

²⁵² See Sayeh & Morse, *supra* note 83, at 331.

²⁵³ See, e.g., Sonia Harris-Short, *International Human Rights Law: Imperialist, Inept and Ineffective? Cultural Relativism*, 25 HUM. RTS. Q. 1 (2003).

²⁵⁴ See THE CAIRO DECLARATION OF HUMAN RIGHTS IN ISLAM (Aug. 5, 1990), [hereinafter THE CAIRO DECLARATION], <http://www.religlaw.org/interdocs/docs/cairohrislam1990.htm>.

²⁵⁵ *Introduction to THE CAIRO DECLARATION*, *supra* note 254.

²⁵⁶ THE CAIRO DECLARATION, *supra* note 254.

²⁵⁷ The Cairo Declaration has received its share of criticism from women and human rights organizations for what is perceived as enshrining discrimination against Muslim women. See Int’l Humanist and Ethical Union, *Islam at the Human Rights Commission* (June 21, 2006), <http://www.iheu.org/node/2269>; see generally U.N. Econ & Soc. Council [ECOSOC], Comm. on Human Rights, *Report of the United Nations High Commissioner for Human Rights and Follow-Up to the World*

The debate as to whether women living in Islamic states are subject to the provisions of international conventions such as the CEDAW,²⁵⁸ or instead, to enactments that are considered more applicable to the Muslim world, such as the Cairo Declaration, is often no less complex than much of the other dialogue involving women's rights.²⁵⁹ States may take it upon themselves to decide this issue on behalf of Muslim women, often without the participation of women.²⁶⁰ For example, of the 185 countries that are party to the CEDAW, fifty-three are members of the Organization of the Islamic Conference (OIC).²⁶¹ Worldwide, sixty-one countries have filed reservations to the convention; of these, seventeen belong to the OIC and their reservations are based primarily on the supremacy of *Shari'ah* law.²⁶² Other signatory states to the CEDAW complained to the United Nations that reservations to the convention based on religion, culture and custom violated international human rights law, which allows states to make reservations to a treaty only to the extent they do not undermine the object and purpose of the treaty.²⁶³ However, the complaints were silenced by charges of religious intolerance and cultural imperialism.²⁶⁴

The usefulness of international law as an external catalyst for reform will likely continue to be debated. Some scholars believe that the best way to address women's issues is not to dictate from outside a list of universal standards to meet, but rather to encourage liberalized interpretations of texts and laws by Islamic scholars themselves.²⁶⁵ Given the discussions on the subject of defensive *jihad* and the asserted legal obligation of the Muslim community to defend any attack on

Conference on Human Rights, U.N. Doc. E/CN.4/2000/NGO/3 (Jan. 20, 2000).

²⁵⁸ The Convention on the Elimination of All Forms of Discrimination Against Women, *supra* note 246.

²⁵⁹ See, e.g., Entelis, *supra* note 242; see also Christina M. Cerna, *Universality of Human Rights and Cultural Diversity: Implementation of Human Rights in Different Socio-Cultural Contexts*, 16 HUM. RTS. Q. 740 (1994) (discussing the non-universality of international human rights in non-Muslim contexts).

²⁶⁰ As of June 2008, women occupied only 9.6% of parliamentary seats in all Arab states. Further, there were no female heads of government. See FACT SHEET: WOMEN'S POLITICAL PARTICIPATION http://www.iwdc.org/resources/fact_sheet.htm (last visited Oct. 18, 2008).

²⁶¹ See DIVISION FOR THE ADVANCEMENT OF WOMEN, CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN, STATES PARTIES, <http://www.un.org/womenwatch/daw/cedaw/states.htm> (last visited Apr. 28, 2008); Organisation of the Islamic Conference, Member States, http://www.oic-oci.org/oicnew/member_states.asp (last visited Apr. 28, 2008).

²⁶² See Division for the Advancement of Women, Convention on the Elimination of All Forms of Discrimination Against Women, Declarations, Reservations and Objections to CEDAW, <http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm> (last visited Apr. 28, 2008) (noting that the objections of thirteen of the seventeen countries of OIC make explicit reference to *Shari'ah* law in their objections).

²⁶³ Sunder, *supra* note 114, at 1426. See also Article 9, Vienna Convention on the Law of Treaties, (23 May 1969; entered into force 27 Jan. 1980). United Nations, *Treaty Series*, vol. 1155, p. 331, available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf (last visited Oct. 18, 2008).

²⁶⁴ Sunder, *supra* note 114, at 1426.

²⁶⁵ Sayeh & Morse, *supra* note 83, at 331-32.

Islam,²⁶⁶ it can be argued that internal development presents a more promising avenue for the reform of women's rights than does external pressure.

VI. A ROLE FOR NON-MUSLIMS?

While many important issues such as the rights of women continue to be discussed within the Muslim community, there is a role for non-Muslims to play during this period.

Increased understanding of and respect for Islam and Islamic Law

The non-Muslim world has long been ignorant of even the basic tenets of Islam, not to mention the complex principles of Islamic jurisprudence. Only in very recent years has the global community started to pay serious attention to Islam. Perhaps not surprisingly, increased attention by non-Muslims to Islamic issues is not necessarily unwelcome by the Muslim community.²⁶⁷

A 2003 Carnegie report found:

American feminists and Muslim women seem as estranged as ever. On an institutional level, their relations remain plagued by stereotypes and mutual suspicion. Their dominant worldviews—one secular, the other faith-based—seem irreconcilable. “When the Taliban were overthrown, the attitude was ‘Now you’ve been liberated by us, we expect you to take off the veil and become like us. Throw off Islam,’” says Pakistan-born Riffat Hassan, a professor of religious studies at the University of Louisville in Kentucky and a women’s rights activist. “There is an imperialist vein in American feminism. I see that clearly at times.”²⁶⁸

Misperceptions abound and misinformation is common. For example, few believed that the elimination of Saddam Hussein would result in decreased freedom for women.²⁶⁹ However, although pre-war Iraq was by all accounts a brutal dictatorship, women had greater rights there than in most other countries of the region and were permitted to divorce their husbands, inherit property, and retain

²⁶⁶ See HILMI M. ZAWATI, *IS JIHAD A JUST WAR? WAR, PEACE, AND HUMAN RIGHTS UNDER ISLAMIC AND PUBLIC INTERNATIONAL LAW* 12 (Edwin Mellen Press 2001); see also, Frontline, Muslims, Interview with Akbar Muhammad, available at <http://www.pbs.org/wgbh/pages/frontline/shows/muslims/interviews/akbar.html> (last visited October 18, 2008); Muslims Speak Out, Interview with Khalid a.-Dakhil, available at http://newsweek.washingtonpost.com/onfaith/muslims_speak_out/2007/07/khalid_aldakhil.html (last visited October 18, 2008).

²⁶⁷ See, e.g., Letter from Sisters in Islam to the Editor, *Islam, Apostasy, and PAS*, (Jul. 22, 1999), available at <http://sistersinislam.org.my/BM/Ite/22071999.htm>. (“For too long, liberal Malays and non-Muslims have shown little concern or interest in the development of Islam in this country.”).

²⁶⁸ Caryle Murphy, *Islam and Feminism: Are the Barriers Coming Down?*, CARNEGIE REP., Fall 2003, at 2, 4, available at <http://www.carnegie.org/reporter/07/islam/index.html>.

²⁶⁹ See Conant, *supra* note 9.

custody of their children following divorce.²⁷⁰ They held jobs, had equal educational opportunities, and rarely covered their heads.²⁷¹

Misperceptions and ignorance can have dangerous unintended consequences that serve to further distance Muslims and non-Muslims. Dr. Ayesha Iman, a feminist Muslim scholar, believes that the West's unwitting tendency to group all Muslims together and "view 'Muslim laws as if they were uniform, divinely revealed . . . and incapable of change' serves to legitimize the activities of Muslim religious extremists and identity politicians."²⁷²

Respect for the right to choose

Whether based on the rights to dignity and self-determination embodied in international human rights instruments or principles of choice so strongly advocated by western feminists, an increased number of voices articulate the right of Muslim women to freely choose their lifestyle, even if that lifestyle contradicts what are regarded as western notions of freedom and equality.²⁷³

Western feminists state that in its simplest form an egalitarian society is one in which "no one is forced into a pre-determined role on account of sex . . . [and in which] men and women have the option to plan and pattern their lives as they themselves choose."²⁷⁴ This freedom to choose is exactly what many Muslim women are asking for. They complain that American women are unduly critical about the way Islam treats women and accuse western feminists of "dismissing faith-based women's movements, 'matronizing' Muslim women," and "unduly focusing on the *hijab*."²⁷⁵ One Muslim woman recently wrote that Islam has provided her "rigor and patience needed to discipline the ego . . . ," adding "[r]estraint is not oppression, and boundaries can be comforting and nurturing" and that "[f]reedom does not necessarily bring happiness, nor does an abundance of choices automatically mean that we will make the right one."²⁷⁶

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² Imam, *supra* note 184.

²⁷³ See Aboulela, *supra* note 239; see also Allison Dedrick, *Feminism Can't Solve All, Muslim Speaker Advises* The STANFORD DAILY, May 26, 2006 available at <http://daily.stanford.edu/article/2006/5/26/feminismCantSolveAllMuslimSpeakerAdvises> (reporting on a speech given by Professor Asifa Quraishi in which she stated, "Western feminists often use 'conflicts of strategies that are ultimately detrimental in the long run to the very women they are trying to aid.'" Quraishi "cited basic misconceptions about Islam and Islamic law as main causes of these unintended negative consequences, arguing that Western feminists sometimes have an 'innate, often subconscious sense of superiority' and approach issues facing Muslim women with a 'rescue mentality.'").

²⁷⁴ Ester Peterson, in Heather Eaton, *One Purpose, Many Voices: The Plurality of Today's Feminist Movement*, 4 FEMINISTA! 1 (2000) (citation omitted), available at <http://saswat.com/archives/gender/index2dc4.html?p=13>.

²⁷⁵ Murphy, *supra* note 268.

²⁷⁶ Aboulela, *supra* note 239; see also Portuán Miller, *supra* note 10, at 144 ("Western society interprets the *hijab* as a tool of subjugation of women, when in reality the head-scarf is viewed as a tool of liberation and protection by Muslim women.").

The boundaries of true freedom to choose will continue to be tested in coming years. In Iraq, for example, educated professional women have joined a group of increasingly powerful female politicians who advocate repealing laws that provide women with the same rights that men have.²⁷⁷ These women, some of whom hold ministerial positions and sit on local and provincial councils, favor allowing Iraqi men to have as many as four wives and repealing laws guaranteeing alimony payments and child custody rights for women in divorces.²⁷⁸ They also seek to decrease the amount of inheritance for women and remove legal barriers to the marriage of girls younger than eighteen years old.²⁷⁹

VII. CONCLUSION

We live in an era of increased awareness of the Muslim world as well as intense debate about the future of Islamic law. Change is taking place on many fronts, including within the Muslim community itself. Younger Muslims seem to be making distinctions between religion and culture, a perspective that may provide a more flexible basis for legal and cultural changes. A recent study conducted by the Pew Foundation found that “[sixty] percent of Muslims [of] age 18 to 29 think of themselves as ‘Muslim first,’ compared with 40 percent of people older than 30, and [that this younger generation is] much more likely than their parents to attend mosque services every week.”²⁸⁰ “At the same time, [the younger Muslim generation] tend[s] to be blind to ethnic and racial differences” more than the older generation, and the younger Muslims often believe that Islamic customs about gender roles are no longer relevant.²⁸¹ One student at the University of Michigan at Ann Arbor who is active in the school’s Muslim Students’ Association says that sometimes “parents are too into culture, and then the child tries to find ways out of it.”²⁸² Many members of the new Muslim generation tend to think that culture is not very important but that religion is.²⁸³

While the debate about the role of women under Islamic law continues, non-Muslims still have much to learn and might be well-served by taking advantage of the abundant information about Islam that is now available. The coming years may see changes in the way that Islamic law is interpreted; however, equally important

²⁷⁷ Farnaz Fassihi, *Family Matters: Iraqi Shiite Women Push Islamic Law on Gender Roles*, WALL ST. J., Mar. 9, 2005, at A1.

²⁷⁸ *See id.*

²⁷⁹ *Id.*

²⁸⁰ Lisa Miller, *American Dreamers*, NEWSWEEK, Jul. 30, 2007, available at <http://www.newsweek.com/id/32868> (citing PEW RESEARCH CTR., MUSLIM AMERICANS: MIDDLE CLASS AND MOSTLY MAINSTREAM 31-2 (May 22, 2007), available at <http://pewresearch.org/assets/pdf/muslim-americans.pdf>).

²⁸¹ Miller, *supra* note 280.

²⁸² *Id.*

²⁸³ *See id.*

will be the tone that is set for dialogue between Muslims and non-Muslims in generations to come.