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The Application of International Human Rights Law in Islamic States

*Donna E. Arzt**

In His farewell address the Prophet admonished: "Your persons, properties and honor are declared sacred like the sanctity attaching to this day, this month and this spot. Let them not be violated."

M. Z. Khan, *Islam and Human Rights*

I. INTRODUCTION

The status of human rights in the Arab states¹ of the Middle East is a subject as complex as it is controversial. Human rights in these countries are affected not only by Islam but also by political and economic relations with the West, the rise of pan-Arabism, the Palestinian self-determination struggle, and other factors. Any evaluation of human rights will also be influenced by the standard applied, whether universal, comparative, or specific to the country or region under examination. The Universal Declaration of Human Rights and

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1. Note that throughout this study, "Arab state" and "Islamic state" may be used interchangeably, although not all "Arab states" (e.g. Lebanon before 1975) are Islamic and not all "Islamic states" (e.g. Iran, Pakistan, the Sudan, Afghanistan, and others outside the Middle East) are ethnically Arab. An "Islamic state" either has a majority Muslim population or declares Islam as the state religion (or both).

related treaties² provide a standard that has been endorsed by many countries in the Arab world, and this standard will be employed here.

Factual reports on human rights conditions in Arab states are available elsewhere, though in less than ample supply.³ This study will place such fact-based reports in legal and jurisprudential perspective by analyzing the relationship between traditional Islamic law (*Shari'a*), contemporary international law, and the modern domestic law of Arab states in the field of human rights. Section II outlines the concept of human rights and international order in Islamic law and includes a discussion of Islamic international law (*siyar*).⁴ Section III describes the ratification, reservation, and rejection by Arab states of international human rights conventions, and the implementation of international standards in the contemporary constitutional and statutory law of Arab countries. Section IV describes efforts to integrate traditional and modern human rights standards and argues for the continuance of these efforts.

II. TRADITIONAL LAW IN ARAB STATES

A. The Islamic Legal Setting

Islamic law, like Hindu and Jewish law, is a branch of a religious system, not a separate body of knowledge. It thus differs from the laws of Western countries such as the United States, Canada, France, and socialist countries such as the Soviet Union. The religion of Islam specifies not only what its adherents must believe, but also how they must behave. The term for Islamic law, *Shari'a*, literally means "the way [or road] to follow." Islamic law has

2. The primary treaties relied on are the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the Convention on the Elimination of All Forms of Discrimination Against Women. As yet no regional system such as a binding "charter of human rights" enforceable by a human rights commission or court exists in the Arab world.
3. See, e.g., Annual Reports of Amnesty International, and Amnesty monographs such as "Torture in Iraq 1982-1984" (1985) and "Syria: Torture by the Security Forces" (1987); *Human Rights in the Middle East*, Middle East Report (November-December 1987) (special issue); the US State Department's Annual Country Reports; Freedom House's annual "Freedom in the World" reports; occasional reports published by the International Commission of Jurists such as Bendorou, *The Exercise of Political Freedoms in Morocco*, The ICJ Review 31 (June 1988); and the pamphlet studies by M. Nisan, "Human Rights in the Arab Countries," published as Middle East Review Special Studies (No. 2, 1981), and S. Averick, "A Human Rights Comparison: Israel Versus the Arab States," published as AIPAC Papers on US-Israel Relations (No. 15, 1988).
4. Whereas writings on human rights in Islam are a developing industry, Islamic international law is virtually unknown outside the specialist literature. As an illustration, the *Modern Legal Systems Cyclopedia* volume on the Middle East states in toto on the subject: "International law has been, and is, of import in the Islamic legal tradition." 5 *Modern Legal Systems Cyclopedia* 415 (K. Redden ed. 1985).

four sources: the *Quran*, the sacred book of Islam; the *Sunna*, or "traditions" of Mohammed the Prophet, which describe model behavior; the *ijma*, or consensus of scholars of the Muslim community; and the *giyas*, juristic reasoning by analogy. Reasoned interpretation of these sources (*ijtihad*) was permitted for four centuries after Mohammed's death in 632 AD, when the "door of *ijtihad*" was formally closed. Despite the emphasis in Islam on complete submission and unanimity, different schools of orthodox jurisprudence developed: the *Hanafi*, which is dominant today in Afghanistan, Pakistan, Turkey, and Egypt; the *Shafi*, dominant in Indonesia and Eastern Africa; the *Maliki*, dominant in Northern Africa; and the *Hanbali*, dominant in Saudi Arabia. The chief "heretical" divergence from these four *Sunni* schools is the *Shi'ite*, which predominates in Iran.⁵ Even before the modern era, Islamic law was characterized by a broad jurisprudential diversity, based on geographic, ethnic, and racial as well as philosophical grounds.

Modern Arab states vary in the extent to which law is today based on *Shari'a* or on revisions or rejections thereof. Seventeen states have constitutionally declared Islam as a state religion. A number of others, such as Syria, state that *Shari'a* is the major source of law.⁶ Saudi Arabia has followed *Shari'a* without significant revision. Countries that belonged to the Ottoman Empire, including Iraq, Jordan, Libya, and Syria, essentially follow the *Majallan* codification of *Shari'a*. Countries such as Algeria, Egypt, Morocco, and Tunisia adopted French-based codes, following *Shari'a* only on law dealing with the civil status of the person. Other countries have merged Islam and other influences. With the primary exception of Saudi Arabia, these states were influenced by a reform movement starting in Turkey in the 1850s that attempted to bring the Islamic world into greater congruence, both politically and legally, with the West.⁷ Thus, the discussion of human rights in this study covers both traditional law in Islamic states, which stems from *Shari'a*, and modern law in Islamic states, which reflects changes after 1850. Because *Shari'a* serves symbolically to unify Arab states and may be considered the "common law" of Islam, it is nevertheless appropriate, despite variations between these states, to first explore traditional Islamic law.

5. See, e.g., Coulson, "Islamic Law," in *An Introduction to Legal Systems* 54 (D. Derrett ed. 1968); R. David & J. Brierley, *Major Legal Systems of the World Today* 457–62 (3d ed. 1985). See generally B. Lewis, *The World of Islam: Faith, People and Culture* (1976); B. Lewis, *The Arabs in History* (1966).

6. E.g., Egypt Const. art. 2; Iraq Const. art. 4; Jordan Const. art. 2; Kuwait Const. art. 2; Libya Const. art. 2; Morocco Const. preamble; Pakistan Const. art. 2; Syria Const. art. 3; Tunisia Const. art. 1; Yemen Arab Republic Const. art. 1. See *Constitutions of the Countries of the World* (A. Blaustein & G. Flanz eds. 1987).

7. David & Brierley, *supra* note 5, at 466–83.

B. Islamic Concepts of Human Rights

1. General Principles

Surely we have accorded dignity to the sons of Adam.

Quran 17:7

Leading Islamic law scholar Majid Khadduri has described the five most important principles of human rights in Islam: (1) dignity and brotherhood; (2) equality among members of the community, without distinction on the basis of race, color, or class; (3) respect for the honor, reputation, and family of each individual; (4) the right of each individual to be presumed innocent until proven guilty; and (5) individual freedom. But Khadduri admits to some problems in the elaboration of these principles. For instance, dignity and brotherhood were originally the preserve only of believers in Islam. Similarly, equality was not extended to other religious groups, although in the past, other religions were tolerated in lands under Islamic control. Moreover, procedural protections for criminal defendants are not fully guaranteed. Finally, "individual freedom in Islam is perhaps the most difficult to relate to the modern concept of freedom." Muslim scholars knew the concept of free will, but it came into conflict with the doctrine that all human acts are subject to God's will.⁸

These caveats point to some basic divergences from the Western liberal concept of individual rights developed in eighteenth century Europe by Locke, Rousseau, and others. Both the concept of rights and the concept of the individual are, in Islam, distinguishable from the Western versions. Like other religious systems of law, such as Judaism,⁹ in Islam, "rights" are but the corollaries of duties owed to God and to other individuals. Moreover, as in the socialist conception¹⁰ of rights as indissolubly linked with duties,

human rights [in Islam] exist only in relation to human obligations. Individuals possess certain obligations toward God, fellow humans, and nature, all of which are defined in the *Shariah*. When individuals meet these obligations they acquire certain rights and freedoms which are again prescribed by the *Shariah*. Those

8. M. Khadduri, *The Islamic Concept of Justice* 236-37 (1984).

9. See, e.g., Henkin, *Judaism and Human Rights*, 25 *Judaism* 435 (1976); H. Cohn, *Human Rights in Jewish Law* 1-26 (1984) (Introduction: Rights and Duties).

10. See, e.g., USSR Const. arts. 39, 59; Strogovich, "General Provisions of the Theory of the Rights of the Individual in Socialist Society," in USSR Academy of Sciences, *Rights of the Individual in Socialist Society* (1986).

who do not accept these obligations have no rights, and any claims of freedom that they make upon society lack justification.¹¹

The *Quran* has numerous references to duties (*farud*), but the few references to rights (*huquq*) are better translated as “claims” and have particular and specialized application to penal law. The only rights that are “inalienable” in the Western, natural rights sense, are those belonging to Allah and to the state, Allah’s servant.

But the individual’s lack of rights is not seen by Islam in a negative light. This condition reflects the rejection of individualism in favor of communalism. The individual is placed in the context of the community of believers, which itself has rights as a whole unit. According to Mohammed Talbi, Islam maintains that “humans are not created for solitariness and impervious individuality. They are created for community, relationship and dialogue.”¹² Thus, the Muslim is not the autonomous individual of Western philosophy but “one who submits” (*muslim*) completely to God.

Parallel to the individual’s submission to God—and more problematic from the standpoint of human rights—is the individual’s divinely ordained obligation of obedience to government. According to Islamic legal scholar Cherif Bassiouni:

Unlike western philosophical and political perceptions of the separability of the individual and the state, Islamic social concepts do not make such a distinction. The individual does not stand in any adversary position vis a vis the state but is an integral part thereof. The consequence of this relationship . . . is that there is no apparent need to delineate individual rights in contraposition to the state.¹³

Some scholars claim that obedience to state authorities is due, however, only when they are acting in accordance with *Shari'a*.¹⁴ This is supported by the *Quran* (26:151/152): “Obey not the command of those who have crossed limits. They spread disorder in earth and reform not.”

Because of this view that normally the individual and the state stand in a nonadversarial relationship, Islamic constitutionalism does not include the concept of governmental checks and balances that most Western constitutional scholars have come to believe are essential to the guarantee of human

11. Said, “Human Rights in Islamic Perspective,” in *Human Rights: Cultural and Ideological Perspectives* 92 (A. Pollis & P. Schwab ed. 1980). See also Donnelly, *Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights*, 76 Am. Pol. Sci. Rev. 303, 306–07 (1982).

12. Talbi, “Religious Liberty: A Muslim Perspective” in *Religious Liberty and Human Rights in Nations and in Religions* 180 (L. Swidler ed. 1986).

13. C. Bassiouni, “Sources of Islamic Law and the Protection of Human Rights in the Islamic Criminal Justice System,” in *The Islamic Criminal Justice System* 3, 23 (C. Bassiouni ed. 1982).

14. Fadlalla, “Constitutionalism and Islamic Theory of the Constitution,” in *Constitutionalism in Islamic Law* 8 (Doi ed.) (n.d.). But compare M. Khadduri, *War and Peace in the Law of Islam* 78–79 (1979).

rights. N. J. Coulson has written that because Islamic jurisprudence ideally rejects the possibility of any conflict between the interests of the executive and those of the law, and is premised on the assumption of the ideally qualified ruler, "no adequate machinery, therefore, is provided by the legal theory to protect the individual against the state." Thus, Islamic law is "fundamentally opposed to the notion of an independent judiciary fearlessly defining the limits of the power of the State over the individual and powerful enough to give effect to its decisions."¹⁵ The judge (*qadi*) is merely the "legal secretary" of the caliph or political authority, who has extensive discretion, according to Coulson, to extort confessions by torture, individually determine the scope of crimes and punishments, and grant extralegal jurisdiction to police agents. Others such as Abdul Aziz-Said agree that "Islamic legal theory provides no adequate machinery to safeguard individual rights against the state."¹⁶

2. Specific Applications

i. *Civil and Political Rights*. Only mature, nonslave Muslim males enjoy full legal capacity. (Non-Muslims and women are discussed below.) Community leaders have authority to advise the caliph—"consult with them upon the conduct of their affairs" (*Quran* 3:159)—but they do not elect him and cannot compel him to comply with their advice.¹⁷ Fakhruddin Malik cites stories about Omar, the second caliph, and Ali, the fourth, to demonstrate the right to free expression. However, speech is subject to the condition that "this right is to be exercised for righteousness of all [so] we may call it the common good"¹⁸—rather a significant restraint. Moreover, dissenting views can be punished in the caliph's discretion, even treated as apostasy, which is punishable by death. In the view of the exiled Sudanese Abdullahi Ahmed An-Na'im, such sanctions "dampen freedom of speech and create a sense of intellectual and political impotence."¹⁹

ii. *Economic Rights*. Islam does not recognize the right of private ownership, only a "right of use," since God owns all. But Islam emphasizes the obligation of the state to provide sufficient levels of food, clothing, and housing. The poor must not be required to beg. Thus, the public treasury

15. Coulson, *The State and the Individual in Islamic Law*, 6 Int'l & Comp. L.Q. 49, 58–59 (1957). See *Law in the Middle East*, (M. Khadduri & H. Liebesny eds. 1955); Kumo, "The Rule of Law and Independence of the Judiciary Under the *Shari'a*" in Doi, *supra* note 14.

16. Said, *supra* note 11, at 88.

17. *Law in the Middle East*, *supra* note 15, at 14–20; M. Khadduri, *Political Trends in the Arab World* 47 (1970).

18. Malik, "Islamic Concept of Human Rights" in *Islamic Concept of Human Rights* 59 (S. Haider ed. 1978).

19. An-Na'im, *Islamic Law, International Relations and Human Rights: Challenge and Response*, 20 Cornell Int'l L.J. 317, 330 (1987). See also An-Na'im, *The Islamic Law of Apostasy and Its Modern Applicability: A Case from the Sudan*, 16 Religion 197 (1986).

must contain a fixed portion for the needy, the aged, and orphans. Every Muslim has the duty of *zakat*, to help the poor. "And those who seek help and are needy have due share in their wealth" (*Quran* 51:19). Just as extreme poverty leads to nonbelief, riches are to be shunned, because they offer enticement to sin.²⁰ As with other rights, this traditional form of "social security" was not available to non-Muslims.

iii. *Criminal Defense Rights*. Islamic law provides for penalties not to promote rehabilitation of the criminal but as a retaliation (*qisas*), either by financial extraction or bodily mutilation. However, punishment (*hudud*) is supposed to be proportional to the harm wrongfully inflicted. Thus, "retaliation for bodily harm is restricted to those cases in which equality can be assured." Mutilation punishments are on the decline, except in Saudi Arabia and possibly Iran, where they are still ordered frequently.²¹ Islam also recognizes discretionary penalties for purposes of deterrence (*ta'zir*), a function espoused more frequently in the West as rehabilitation theories wane in popularity.

iv. *Sexual Equality*. Probably the most celebrated inequality under traditional Islamic law is the unequal treatment of women, who are considered the wards of men. Women are legally disqualified from holding general political or judicial office, and within the family they lack the capacity to initiate a marriage contract or obtain a unilateral divorce. By law their inheritance of property is usually about half the share of a male with the same degree of relationship to the deceased. Husbands have the right to chastise their wives for "disobedience," including by "light beating." Muslim women can leave the home to seek employment not to fulfill personal ambitions but only when they lack all other means of support. Moreover, a woman's testimony in court is worth only one-half of a man's testimony.²²

Matters of sexual equality in Islam are discussed further below in relation to the Convention on the Elimination of All Forms of Discrimination Against Women.

v. *Religious Freedom and Equality*. A more complex issue than women's rights under Islam is the status of non-Muslims. Today, the constitutions of most Islamic states prohibit religious discrimination. Traditionally, however, non-Muslims were divided into two categories. Adherents of monotheistic religions, such as Jews and Christians, who believe in revealed scriptures (*ahl al-kitab*) could remain within the Muslim state as protected, self-governing communities, under contracts of *dhimma*, which required payment of a poll tax (*jizya*). Nevertheless, these persons (referred to as *dhimmis*)

20. See F. Hassan, *The Concept of State and Law in Islam* 170–85 (1981).

21. J. Schacht, *Introduction to Islamic Law* 179–80, 185 (1964). See also Bassiouni, *supra* note 13; Coulson, *supra* note 15 and accompanying text; Kumo, *supra* note 15.

22. See *Quran* 4:38; 4:11; 33:33; 33:53. See also *Law in the Middle East*, *supra* note 15, at 132–78; B. Ye'or, *The Dhimmi: Jews and Christians Under Islam* (D. Maisel trans. 1985); Hashim, *Muslim view of the Family and the Place of Women in Islamic Society*, *Islamic Rev.* 20–22 (April 1962).

were disqualified from holding judicial or political office and from serving in the army, and they could not testify in litigation involving Muslims. They could not marry Muslim women, could not build new churches or houses higher than those of Muslims, and were required to distinguish their clothes from Muslim dress.²³ Bassiouni states that *dhimmis* were "equal before the law in every respect."²⁴ Khadduri, by contrast, concludes that *dhimmis* were second-class citizens, while Al-Ghunaimi calls them noncitizens.²⁵

The second category of non-Muslims was *non-kitaby* or those who did not believe in revealed scriptures and were not even entitled to *dhimma*. The *Quran* (9:5) ordered, "Slay them wherever you may find them." As discussed below, as a rule of international law, they were presumed to be in a perpetual state of war with Islam. *Non-kitabis* could be taken into slavery.

Bassiouni acknowledges: "Islamic traditional practice indicates a definite preferential treatment and higher status for the Muslim religion in the Muslim state governed by the Islamic majority. This does not, however, allow the imposition of any undue restriction on non-Muslims or interference with their religious freedoms and practices."²⁶ Perhaps because of that preference, it is the former Muslim who is treated most harshly. While there is limited freedom for non-Muslims, there is no freedom to *become* a non-Muslim. The tradition, "he who changes his religion, must be killed," is often attributed to the Prophet, but was not invoked by him during his lifetime.²⁷ Although the death penalty for apostasy is usually suspended today, the Salman Rushdie case notwithstanding, the traditional rule does not reflect a problem concerning the issue of free choice and coercion in Islam. The statement in the *Quran* (2:256), "There should be no compulsion in religion," must certainly be qualified. Moreover, other verses on apostasy implicitly throw into question the purported tolerance of non-Muslims, even *kitabis*. "If anyone desires a religion other than Islam, never will it be accepted of him; and in the hereafter he will be among the losers" (3:85). With the worldview that Islam is the final and ideal religion, it was inconceivable that anyone should legitimately have or desire another religion.

3. Historical Context

Islamic concepts of human rights, to be judged fairly, must be seen in the context of pre-Islamic mores and the prevailing Roman and Persian laws of the period. Islam rejected the then-common infanticide and blood feuds.

23. *Law in the Middle East*, *supra* note 15, at 363–64.

24. Bassiouni, *supra* note 13, at 21. He calls the distinction "one of administration and not of human rights." *Id.* See also Talbi, *supra* note 12, at 181–82.

25. Khadduri, *supra* note 14, at 177, 195–98; M. Al-Ghunaimi, *The Muslim Conception of International Law and the Western Approach* 82, 151, 186–87 (1968). See also, Nawaz, *The Concept of Human Rights in Islamic Law*, 11 Howard L.J. 325 (1965) (critical of *dhimma* contracts); A. Maududi, *Rights of Non-Muslims in Islamic States* (1961) (supportive of *dhimma* contracts).

26. Bassiouni, *supra* note 13, at 21.

27. See Khadduri, *supra* note 8, at 238; Talbi, *supra* note 12.

It improved the relative status of women by limiting polygamy to four wives, and it urged the emancipation of slaves, though allowing non-Muslim slaves.²⁸ Although by no means approaching the much later Western ideology of individualism, Islam did introduce a measure of individual accountability into a society based primarily on tribalism.

By the same token, to judge Islam fairly today, it must be subject to comparison with currently prevailing human rights standards, especially where Islamic states have participated in international lawmaking processes and have endorsed human rights instruments. Before examining the role of Islamic states in this international system, it is appropriate to look at Islam's own system of international relations.

C. Islamic International Law

1. Sources and Principle: *War v. Islam*

Islamic international law has been duly recognized as a coherent body of law of significance in the modern world. In accordance with Article 9 of the Statute of the International Court of Justice, which requires that the court represent the world's major legal systems and forms of civilization, one of the fifteen seats on the court has been reserved for a Muslim judge. It is also clear that Islamic international law satisfies the requirements of Article 38 of the same statute as to modern sources of international law: the *Quran* represents the authoritative source of law; the *sunna* is equivalent to custom; rules expressed in treaties with non-Muslims fall into the category of agreement; and the opinions of the caliphs and jurists, based on legal deduction and analogy, can be regarded as judicial decisions and scholarly teachings.²⁹

Unlike other substantive areas of *Shari'a*, however, the primary sources of Islamic international law are not the *Quran* or Mohammed's teachings but the writings of Islamic jurists during the second century of the Islamic era, the height of the expansionary period. The most prominent treaties on *siyar* (literally "to move"), which concerns conduct of the state in its relationship with other communities, were written by al-Shaybani (749–805), an eminent *Hanafi* jurist.³⁰ Shaybani's conception was not a law of nations but a law of one nation, Islam: all Muslims should form a single state, whose purpose is to conquer non-Muslim nations, to subordinate them to Islam and *Shari'a*. Although his rules of law were international in scope, "They

28. M. Z. Khan, *Islam and Human Rights* 72 (1967).

29. *Law in the Middle East*, *supra* note 15, at 352–53. See also E. Foda & A. Badawi, *The Projected Arab Court of Justice* 236 (1957).

30. Khadduri has translated Shaybani's *Siyar* into English: M. Khadduri, *The Islamic Law of Nations* (1966). See also Al-Ghunaimi, *supra* note 25.

are not international law in the sense of a higher legal order which is valid for a larger number of states in respect to their mutual relations, but they are internal, unilateral norms, which are of validity only for an Islamic community or commonwealth in respect to its conduct toward outsiders.”³¹

The theory of international proselytization of Islam is often referred to as *jihad* (literally “exertion”), the just or holy war. In accordance with the idea of *jihad*, Muslim jurists divided the world into *dar al-Islam*—the “abode” or “territory of Islam,” that is, land under Islamic rule—and *dar al-harb*—the “abode of war,” territory not under Islamic rule. This was, in effect, a moderation of the earliest *siyar* which recognized one Islamic world without fixed territories. Residents of *dar al-Islam* were Muslims and *dhimmis* who paid the *jizya* tax. Anyone else was a nonbeliever, with whom all Muslims were duty bound as a community to battle perpetually. Whether *jihad* was “aggressive” or “defensive” is subject to scholarly dispute. Whether or not it meant actual military conflict, or only political, religious, and psychological propagandizing, with perpetual readiness for war, is also open to question.³² Regardless, three options were available to nonbelievers faced with *jihad*: convert to Islam, agree to *dhimma*, or fight to the death.³³

2. Treaties

Although *jihad* was regarded as permanent and the jurists offered little guidance on means of terminating *jihad*, the practical need for occasional truces gave rise to the conceptual development in the sixteenth century of a third “territory,” *dar al-sulh* or the “abode of peace,” also called *dar al-ahd*, “abode of covenant.” *Jihad* was a permanent duty, so truce was entered only temporarily, out of necessity. Following Mohammed’s agreement with the Meccans to postpone war for a ten-year period, later caliphs entered into international treaties (*muwada’ah*) no longer than ten years in duration. These treaties regulated specific acts, such as the release of prisoners of war, rather than establishing principles of foreign relations. The *Hanafi* and *Maliki* schools argued that Mohammed’s Meccan treaty actually lasted only three or four years, and on this basis they limited treaties to even shorter periods.³⁴ In most cases, particularly with people of occupied territories, the treaties

31. H. Kruse, *The Foundation of International Islamic Jurisprudence* 4 (n.d.). Contrast Judaic law, which was equally binding on Jews and non-Jews in contact with each other. But compare Greek and especially Roman law. C. Rhyne, *International Law* 23 (1975).

32. See, e.g., Khadduri, *Islam and the Modern Law of Nations*, 50 Am.J. Int’l L. 358, 359 (1956); *Law in the Middle East*, *supra* note 15, at 354.

33. Shihati, *Islamic Law and the World Community*, 4 Harv. Int’l L.J. 101 (1962). See generally Khadduri, *supra* note 14. Not discussed here is the contribution of *siyar* to the rules of conduct of war.

34. *Law in the Middle East*, *supra* note 15, at 367; see Al-Ghunaimi, *supra* note 25, at 81 (describing peace treaties with Byzantium intended to last forever).

were “pledges by one party to the other, rather than contracts between equals,” having “the character of constitutional guarantees to the people of the annexed country rather than agreement between ‘independent’ countries.”³⁵ Hostages were taken as collateral. If the treaty was violated by the Muslims, the hostages were returned; if the other side broke the truce, they were kept.

Two other treaty forms were recognized: *aman*, a pledge of safe-conduct on Muslim territory for one year, without having to pay *jizya*; and the permanent agreement with *dhimmis*, which could be described as a charter of rights and duties. Although the *dhimmis* were not treated as equals of Muslims, they were treated as individuals rather than as subjects of a foreign state. As will be argued below, this model should, at least in the abstract, serve as a salutary precedent for Islamic states in the establishment of internationally recognized human rights norms.

3. Rules of Application

The rule of *pacta sunt servanda*, that treaties are binding on the parties and must be performed in good faith, has been called “perhaps the most important principle of international law.”³⁶ Scholars of Islamic law agree that it is one of the fundamental principles of *siyar*:

There stands in the background of all Islamic teachings relating to treaties the firm conviction that there exists a basic international norm, binding on Muslims as well as on unbelievers, which bids faithfulness to promises, and through which alone legal international relations between states become possible at all.³⁷

It can be traced back to the *Quran* (9:4), which made strict compliance with contractual undertakings a religious duty: “Oh ye who believe, fulfil your undertakings.” The rule *al-shart amlak* (“The stipulation prevails”), or *al Muslimun ‘ala shurutihim* (“the Muslims are bound by their stipulations”), applied even to treaties with non-Muslims, which were to prevail over conflicting duties of mutual help among believers.³⁸ As Joseph Schacht has noted, the restriction imposed by *Shari'a* on liberty of contract, its limit on the scope

35. *Law in the Middle East*, *supra* note 15, at 367. See Kruse, *supra* note 31, at 31 (describing these written documents as novel for Arab peoples, “to whom originally anything written was almost hateful”).

36. *Restatement (Third) of The Foreign Relations Law of the United States* § 321 comment a (1987). See Vienna Convention on the Law of Treaties preamble (1969) (“The principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized.”); 1966 *Report of the UN International Law Commission*, 61 Am.J. Int'l L. 248, 334 (1967) (“a fundamental principle of the law of treaties”); Kunz, *The Meaning and Range of the Norm *Pacta Sunt Servanda**, Am.J. Int'l L. 180 (1945).

37. Kruse, *supra* note 31, at 32.

38. Badr, *A Historical View of Islamic International Law*, 38 *Révue Egyptienne de Droit International* 1, 5 (1982) (citing *Quran* (8:72)); Schacht, *supra* note 21, at 139.

of contractual subjects should not be read as rejection of the sanctity of contracts.³⁹

Less uniformly accepted, but essential to the development of international human rights law, is the notion that individuals are subjects of international law. The pre-Gorbachev Soviet Union and other socialist states, for instance, rejected this view, contending that individual rights exist only by virtue of the legal bond between the individual and the state. One cannot claim any rights directly from international agreements.⁴⁰ By contrast, Western countries now realize, along with human rights theorists generally, that the concept is indispensable to the operation of international protections and guarantees. Because *Shari'a* is a system of personal and religious law, Islam has always recognized the individual as a subject of international law. The individual Muslim has the duty to participate in *jihad*; the individual non-Muslim has rights and duties under his *dhimma* covenant.

The related absence in classical *siyar* of a concept of territorial sovereignty⁴¹ meant that while Muslims were bound by *Shari'a* regardless of their place of inhabitance, non-Muslims on Muslim controlled territory were only bound by the *Shari'a* governing their relations with Muslims and with the Muslim state. Aliens thus benefitted by being free from the imposition of the occupier's other laws. As already noted, however, this also meant that they did not enjoy equal status with Muslims. According to Khadduri, "Only when . . . Muslim states, from their contacts with European nations, began to learn the principle of individual allegiance based on territorial rather than religious affiliation, did they treat aliens on a par with their subjects, regardless of religious differences."⁴²

4. Toward Modernization

On balance, traditional Islamic international law carries mixed implications for the application of universal human rights principles. The rule of obliged treaty observance and recognition of the individual subject are positive features. So too is the emphasis on injecting ethical considerations into interstate relations. As the Italian jurist de Santillana noted, "There is no doubt that the high ethical standard of certain parts of Arab law acted favourably on the development of our modern concepts and therein has its

39. Badr, *supra* note 38, at 20.

40. See, e.g., Przetačnik, *The Socialist Concept of Human Rights: Its Philosophical Background and Political Justification*, 13 *Révue Belge de Droit International* 238, 249 (1977); Jhabvala, *The Soviet Bloc's View of the Implementation of Human Rights*, 7 *Hum. Rts. Q.* 484 (1985).

41. *Law in the Middle East*, *supra* note 15, at 360; Schacht, *supra* note 21, at 144. See generally, Khadduri, *supra* note 30, at 69; Al-Ghunaimi, *supra* note 25, at 34, 128.

42. Khadduri, *supra* note 30, at 62.

enduring merit."⁴³ At the same time, the doctrine of *jihad* and the two "abodes," war and Islam—to which the vast majority of orthodox Muslim scholars still subscribe, at least in theory⁴⁴—are clearly incompatible with the fundamental premise of modern international law: peaceful coexistence between coequal states. Moreover, the traditional notion that treaties are limited in duration raises the question whether Islamic states intend to comply permanently with international agreements meant to be permanent.

The issue of how conflicts between international and national law are to be resolved was traditionally never a problem for Islamic law, because *siyar* was a law of the conqueror. It did not allow for an Islamic state's entering into international agreements as the conquered or as an equal with other mutually consenting states. The notion of conflicting standards was inconceivable because the only standards were Islamic. But just as history forced Islam to evolve the *dar al-sulh*, the abode of peace, and the reality of coexistence led to the tacit acceptance of territorial limitations between states, the desire of Islamic states to participate in the modern community of nations will require the development of rules to reconcile conflicting international and domestic legal norms. As will be seen, "modernization" need not mean "Westernization," but further accommodations to the modern world will indeed be necessary. One current frontier of that conflict—international human rights law and its attempts toward universal standards—will be explored in the next part of this study.

III. MODERN LAW IN ARAB STATES

A. International Human Rights Agreements

Cherif Bassiouni has stated that the concepts of the inherent dignity of the individual and of fundamental rights, as articulated in international human rights conventions, are acceptable to most Arab states. "To the extent that international conventions protect the same rights protected by *Shari'a*, nothing impairs an Islamic or Muslim state from becoming a signatory to any international convention on the protection of fundamental human rights."⁴⁵ But this assertion is qualified by a significant caveat: "Nothing in Islamic international law precludes the applicability of these international obligations to the domestic legal system of an Islamic state *provided these obligations are not contrary to Shari'a*. . . . [International human rights] are subject to

43. D. de Santillana, *Law and Society in the Legacy of Islam* 310 (1931) (quoted in Al-Ghunaimi, *supra* note 25, at 85).

44. See N. Anderson, *Law and Reform in the Muslim World* 195 (1976).

45. Bassiouni, *supra* note 13, at 39.

the purposes and objectives of a given society, subject to the due process of law."⁴⁶

The following examination of the specific response of Islamic states to the major international human rights agreements will make the implications of this proviso clearer.

1. The Universal Declaration of Human Rights

According to Khadduri, the Universal Declaration of Human Rights, "though not binding with the same force as domestic legislation," is perhaps the most important standard of human rights accepted by an international organization, comprising the norms and values of civilized nations that might be regarded as morally binding, not only on the members of the United Nations but on the community of nations as a whole."⁴⁷ Nations as distinct as Taiwan and Brazil articulated the consensus of aims upon which the Declaration was based. The Taiwan delegate to the UN General Assembly stated that the Declaration will in the long run serve the cause of the "humanization of man," making individuals the world over conscious not only of their own rights but of the rights of other people as well.⁴⁸ The Brazilian government's commentary on the draft Declaration called for it to "become a stimulus to the progress of the legal organization of all states . . . an ideal that the states would strive to reach, thereby fulfilling the deficiencies in their juridical organization."⁴⁹ The Declaration is, in the words of the preamble, "a common standard of achievement for all peoples and all nations."

Lebanon represented the Arab states on the commission of eight UN member states that drafted the Declaration. The Lebanese delegate, Charles Malik, a Christian Arab, was appointed rapporteur of the commission, which worked with the research assistance of expert Islamicists. Malik considered the Declaration a "document of the first order of importance. While history alone can determine the historical significance of an event, it is safe to say that the Declaration before us can be destined to occupy an honorable place in the procession of positive landmarks in human history."⁵⁰ The representative of Egypt on the Third Committee considered the Declaration "an authoritative interpretation of the [UN] Charter," further indicating that, in his country's opinion, "the competence of the United Nations in the question

46. *Id.* at 38, 41 (emphasis added).

47. Khadduri, *supra* note 8, at 236.

48. 3 U.N. GAOR C.3 (91st mtg.) at 48, U.N. Doc. A/C.3/SR.187 (1948). See M. Ganji, *International Protection of Human Rights* 147–50 (1962).

49. ECOSOC, *Collation of the Comments of Governments on the Draft International Covenant on Human Rights and the Question of Implementation*, U.N. Doc. E/CN.4/85 (1 May 1948) at 9–10.

50. U.N. Doc. A/PV.180 at 41 (quoted in N. Robinson, *Universal Declaration of Human Rights: Its Origins, Significance and Interpretation* 28 (1950)).

of human rights was positive, and the provisions of Article 2, paragraph 7 of the Charter, [guaranteeing noninterference in the internal affairs of member states], could not be invoked against such competence when, by adoption of the Declaration, the question of human rights was a matter no longer of domestic but of international concern.”⁵¹ Syria’s representative on the same committee observed, “There would be no point in committing [the Declaration’s] principles to paper if they were not to be respected in international behavior.”⁵²

The Declaration was approved in the General Assembly without dissenting votes. The forty-eight affirmative votes included eight Islamic states, that were then UN members: Afghanistan, Egypt, Iran, Iraq, Lebanon, Pakistan, Syria, and the People’s Democratic Republic of Yemen. Saudi Arabia abstained, along with South Africa and six members of the Communist bloc: Byelorussian SSR, Czechoslovakia, Poland, Ukrainian SSR, the Soviet Union, and Yugoslavia. Saudi Arabia’s abstention reflected its dual position that the Declaration went too far in some regards and not far enough in others. The Saudi ambassador to the United Nations, al-Barudi, strenuously objected to Article 18, which states:

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either along or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

The objection was based on the contention that the Quran forbids a Muslim to change his faith.⁵³ Al-Barudi argued that the right to change religion would insult Muslims and invite missionaries into the Arabian peninsula, thereby violating the UN Charter’s prohibition on interference in domestic affairs. Afghanistan, Iraq, Pakistan, and Syria initially joined Saudi Arabia in seeking to delete this part of Article 18, criticizing Lebanon, which voted in favor of the clause, for insensitivity to its own Muslim people.⁵⁴ However, these countries later approved the Declaration.

The Saudis also argued, perhaps inconsistently, that the Declaration’s other principles were familiar to Islam but were incomplete and lacked a unifying framework such as belief in God. According to human rights scholar Marnia Lazreg, the Saudis

took the Declaration to be a competing document claiming universality when, in fact, its contents were limited to the particularistic goal of applying a Western mode of social, political, and economic practice onto a culturally and philo-

51. U.N. Doc. A/C.3/SR.92 at 12 (quoted in Robinson, *supra* note 50, at 21).

52. U.N. Doc. A/C.3/SR.91 at 10 (quoted in Robinson, *supra* note 50, at 20).

53. 3 U.N. GAOR C.3 (127 mtg.) at 391–92, U.N. Doc. A/C.3/SR.127 (1948). See Ganji, *supra* note 48, at 145 n.12.

54. Ganji, *supra* note 48, at 145 n.12. See also Piscatori, “Human Rights in Islamic Political Culture,” in *The Moral Imperatives of Human Rights* 139, 150 (K. Thompson ed. 1980).

sophically different world. Implicit in the Saudi position is the reasoning that the Islamic conception of man and the legal system elaborated upon it is just as good, if not better than, the abstract principles enunciated in the Declaration and subsequent covenants and conventions. . . . [T]hey maintain that while international conventions seem to strike for what essentially is "the unity of the European family," the Saudis "want to go further towards the unity of the whole human family."⁵⁵

Lazreg contrasts the Saudi idea of God with the Communist ideal of the classless society—both alternative visions of universalism—as grounds for objections to the Declaration. But the Communist states have now been held to have enforced the Declaration, as evidenced by their signing of the Helsinki Final Act in 1975 which explicitly incorporates the 1948 document. That leaves Saudi Arabia in the opposing camp with one other state, South Africa. As Abdullahi An-Na'im charges:

Far from derogating from the universality of the principles of the Declaration, the Saudi abstention, ostensibly based on Islamic religious grounds, in fact demonstrates the equal untenability of discrimination on grounds of either race, in the case of South Africa, or religion, in the case of Saudi Arabia. . . . In other words, Saudi Arabia's allegedly Islamic abstention from joining the international consensus on universal human rights standards is similar to South Africa's racist abstention.⁵⁶

2. The International Covenants

The International Covenant on Civil and Political Rights⁵⁷ and the International Covenant on Economic, Social and Cultural Rights⁵⁸ were designed to elaborate on the standards of the Universal Declaration and to provide for some enforcement mechanisms. Article 18 of the Covenant on Civil and Political Rights corresponds to Article 18 of the Declaration, and provides further, "No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice."

During the debates on the covenants in 1954 and 1960, Saudi Ambassador al-Barudi reiterated his objection to the provision on the ground that "it would raise doubts in the minds of ordinary people to whom their religion [is] a way of life."⁵⁹ The Saudis also objected to the provisions of Article 9

55. Lazreg, "Human Rights, State and Ideology: An Historical Perspective," in Pollis and Schwab, *supra* note 11, at 35.

56. An-Na'im, *Religious Minorities Under Islamic Law and the Limits of Cultural Relativism*, 9 Hum. Rts. Q. 1, 7 & n.17.

57. Adopted 16 Dec. 1966, entered into force 23 Mar. 1976, G.A. Res. 2200 (XXI), 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A/6316 (1966).

58. Adopted 16 Dec. 1966, entered into force 3 Jan. 1976, G.A. Res. 2200 (XXI), 21 U.N. GAOR, Supp. (No. 16) 49, U.N. Doc. A/6316 (1966).

59. 15 U.N. GAOR C.3 (125th mtg.) at 214, U.N. Doc. A/C.3/SR.1025 (1960). See also, id. at 197–98, 202–03, 206, 222–23; 9 U.N. GAOR C.3 (566th mtg.) at 116017, 145–46, U.N. Doc. A/C.3/SR.566 (1954).

of the Covenant on Economic, Social and Cultural Rights, which guarantees "the right of everyone to social security, including social insurance." Arguing that *Shari'a* already provides the duty to assist the needy through *zakat*, the Saudi ambassador refused to obligate his country to what the Saudis viewed as a Western and inferior concept.⁶⁰ However, while Article 18 is truly inconsistent with *Shari'a*, Article 9 compliments the traditional approach. As of late 1988, Afghanistan, Egypt, Iran, Iraq, Jordan, Lebanon, Libya, Morocco, Sudan, Syria, Tunisia, and the People's Democratic Republic of Yemen were the major Islamic states that had ratified or acceded to the Covenants.⁶¹ No Arab state has ratified the Optional Protocol to the International Covenant on Civil and Political Rights, which subjects signatories to the jurisdiction of the Human Rights Committee, to which individual victims of human rights violations may file complaints. The International Convention on the Elimination of All Forms of Racial Discrimination⁶² has received the widest support in the Arab world of any of the major conventions. Egypt, Gambia, Guinea, Nigeria, Senegal, Sierra Leone, and Tunisia, all states with significant Muslim populations, have ratified the African Charter on Human and People's Rights.

3. Conventions on Women

The Convention on the Elimination of All Forms of Discrimination Against Women has been ratified or acceded to by the Islamic states of Bangladesh, Egypt, Iran, Tunisia, and the People's Democratic Republic of Yemen. Jordan has signed but not yet ratified the Convention.⁶³ More Islamic states ratified the earlier Convention on the Political Rights of Women, the Convention on the Nationality of Married Women, and the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages.

As early as 1948, Saudi delegates to the United Nations opposed provisions on women's rights, arguing that marriage, an area in which "Islamic law was explicit on the smallest details," ought not to be burdened by international requirements that wives be of full age and have equal rights. These concepts were said to reflect Western biases and to ignore the internal safeguards of Islam, which guarantee women property, inheritance, and compensation following divorce.⁶⁴ Even the Pakistani delegate, prior to the

60. 11 U.N. GAOR C.3 (728th mtg) at 238, U.N. Doc. A/C.3/SR.728 (1957). See Piscatori, *supra* note 54, at 151.

61. *Multilateral Treaties Deposited with the Secretary General* (Status as of 31 Dec. 1987) (1988), U.N. Doc. ST/LEG/SER.E/5 at 118, 128.

62. Adopted 21 Dec. 1965, entered into force 4 Jan. 1969, 660 U.N.T.S. 195.

63. Adopted 18 Dec. 1979, entered into force 3 Sept. 1981, U.N. Doc. A/RES/34/180 (3d Committee) (1980). See *Multilateral Treaties*, *supra* note 61, at 160-61.

64. 3 U.N. GAOR C.3 (124th mtg.) at 363-65, U.N. Doc. A/C.3/SR.124 (1948); 3 U.N. GAOR C.3 (125th mtg.) at 367-70, U.N. Doc. A/C.3/SR.125 (1948).

passage of her country's Muslim Family Law Ordinance, argued that strict equality would put women at a disadvantage because of their "natural need for protection."⁶⁵ As recently as 1975, Saudi Ambassador al-Barudi acknowledged that he was "not denying that some of the demands of women's movements in the Western world were understandable and legitimate, but those movements were overzealous in their action and wrongly assumed that their values were suited to the entire world."⁶⁶

More revealing are the substantive reservations interposed by Islamic states which have accommodated themselves to the international human rights movement and ratified the Convention on the Elimination of All Forms of Discrimination Against Women.⁶⁷ With the exception of the People's Democratic Republic of Yemen, each of the Islamic states that have signed, ratified, or acceded to the Convention have entered substantive reservations. Article 2 states the general policy of the Convention and includes a general condemnation of discrimination against women and seven specific measures to be undertaken. Egypt's reservations stated that it was "willing to comply with the content of [Article 2], provided that such compliance does not run counter to the Islamic Shariah."⁶⁸ Bangladesh declared even more definitively that it did not consider Article 2 and other articles binding, "as they conflict with Shari'a law based on Holy Quran and Sunna."⁶⁹ Iraq exempted itself from being bound to paragraphs (f) and (g) of Article 2, which state the commitments "to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women," and "to repeal all national penal provisions which constitute discrimination against women."

Article 9 of the Convention pertains to women's equal rights with men to acquire, change, or retain their own nationality and the nationality of their children. Egypt entered a reservation allowing for acquisition of the father's nationality in order to "prevent the child's acquisition of two nationalities where his parents are of different nationalities, since this may be prejudicial to his future."⁷⁰ Egypt claimed that it is customary for a woman to agree, upon marrying an alien, that her children shall be of the father's nationality.⁷¹ It is unclear whether, by this statement, Egypt is acknowledging repeal of the traditional Islamic rule that only Muslim men, not Muslim

65. 16 U.N. GAOR C.3 (1091st mtg.) at 153, U.N. Doc. A/C.3/SR.1091 (1961).

66. 30 U.N. GAOR C.3 (2173d mtg.) at 365, U.N. Doc. A/C.3/S.R.2173 (1975).

67. Ignored for these purposes are the reservations on procedural and jurisdictional grounds that many non-Islamic states have made to various human rights agreements, and the typical reservations that disclaim recognition of or treaty relations with Israel.

68. *Multilateral Treaties Deposited with the Secretary General* (Status as of 31 Dec. 1986) (1987) at 162, U.N. Doc. ST/LEG/SER. E/5.

69. *Id.* at 160, 163.

70. *Id.* at 161-62.

71. *Id.*

women, can marry non-Muslims. Iraq, Jordan, and Tunisia also entered general reservations to Article 9.⁷²

Under Article 15(4), "States Parties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile." Without explanation, Jordan entered a reservation to this paragraph, as did Tunisia, which later asserted that the paragraph "must not be interpreted in a manner which conflicts with the provisions of the [Tunisian] Personal Status Code on this subject."⁷³

The most strenuous reservations have been entered by Egypt and Iran to Article 16, which provides for equality of men and women in eight specific categories relating to marriage and family relations. Iraq's reservation "shall be without prejudice to the provisions of the Islamic Shariah according women rights equivalent to the rights of their spouses so as to ensure a just balance between them."⁷⁴ Egypt entered the same statement, adding:

This is out of respect for the sacrosanct nature of the firm religious beliefs which govern marital relations in Egypt and which may not be called into question and in view of the fact that one of the most important bases of these relations is an equivalency of rights and duties so as to ensure complementarity which guarantees true equality between the spouses.⁷⁵

Bangladesh, Jordan, and Tunisia also entered substantive reservations to several paragraphs of Article 16.

The wording of these reservations evidences a defensiveness about traditional values and customs by some of the very countries that have undergone modernization. Reservations that reflect, for instance, a refusal to repeal discriminatory national laws, throw into question these countries' commitment to reform and suggest that ratification was only intended as an exercise in rhetoric and image-making. Moreover, Article 28(2) of the Convention prohibits reservations incompatible with the object and purpose of the Convention. Article 19 of the Vienna Convention of the Law of Treaties,⁷⁶ of which Egypt, Kuwait, Morocco, Syria, and Tunisia are parties, contains a similar restriction. Mexico, Sweden, and the Federal Republic of Germany have objected to the reservations of Bangladesh, Egypt, Iraq, and Tunisia, as well as those of some non-Islamic states, as being incompatible with the Convention. The statement of Sweden is directly on point:

In this context the Government of Sweden wishes to take this opportunity to make the observation that the reason why reservations incompatible with the

72. *Id.* at 163–65.

73. *Id.* at 164, 166.

74. *Id.* at 163.

75. *Id.* at 162.

76. Adopted 23 May 1969, entered into force 27 Jan. 1980, U.N. Doc. A/Conf.39/27 at 289.

object and purpose of a treaty are not acceptable is precisely that otherwise they would render a basic international obligation of a contractual nature meaningless. Incompatible reservations, made in respect of the Convention on the Elimination on all Forms of Discrimination Against Women, do not only cast doubts on the commitments of the reserving States to the objects and purposes of this Convention, but moreover, contribute to undermine [sic] the basis of international contractual law. It is in the common interest of states that treaties to which they have chosen to become parties also are respected, as to object and purpose, by other parties.”⁷⁷

In partial response to this reservation problem, the Committee on the Elimination of Discrimination Against Women (CEDAW) asked the United Nations in 1987 “to promote or undertake studies on the status of women under Islamic laws and customs and in particular on the status and equality of women in the family on issues such as marriage, divorce, custody and property rights and their participation in public life of the society.”⁷⁸ This decision angered Islamic representatives in the General Assembly and in the Economic and Social Council, leading to attacks on CEDAW as ignorant of and hostile to Islam. No action was taken on the request.⁷⁹

B. Constitutional and Statutory Human Rights Laws

1. *Rules of application*

International human rights agreements, and particularly the International Covenant on Civil and Political Rights, require that state parties take the necessary steps to implement the international provisions in their national legal systems. The Covenant on Civil and Political Rights does not explicitly state that it is self-executing, that is, directly and automatically incorporated into domestic law. Implementation therefore depends on whether the state subscribes to a “monist” (direct application) or “dualist” (application after independent, domestic enactment) theory of international law. The rules of application of a selection of Arab states are summarized below.

Under Article 71(5) of the Syrian constitution, treaties are binding in domestic law only when new legislation to that effect is promulgated. Article 151 of Egypt’s 1986 constitution provides that treaties have the force of

77. *Multilateral Treaties*, *supra* note 68, at 170. Objection dated 17 March 1986.

78. *Report of the Committee on the Elimination of Discrimination Against Women*, 6th Session, General Assembly, Official Records, 42nd Session, Supp. No. 38, U.N. Doc. A/42/38, at 80.

79. A/Res/42/60, para. 9 (30 Nov. 1987); A. Byrnes, *Report on the 7th Session of the Committee on the Elimination of Discrimination Against Women and the Fourth Meeting of States Parties to the International Convention on the Elimination of All Forms of Discrimination Against Women* (Feb.-Mar. 1988) 9-11 (25 Mar. 1988).

domestic law as soon as they are ratified and published.⁸⁰ The constitution of Tunisia, in Article 32, provides that treaties have normative rank superior to statutes and therefore, when conflicts arise, treaties prevail over subsequent as well as prior statutory rules. However, in Syria, subsequent statutes prevail over treaties, a situation that allows the state to obtain propaganda value from ratification of international agreements without the need for domestic compliance.⁸¹

Similar effects can be achieved without special constitutional provisions. For instance, Libya has frequently reported to the UN Human Rights Committee that all necessary measures already have been taken to implement the Covenant on Civil and Political Rights. But Oscar Schachter has described this assertion—also made by Chile, Czechoslovakia, East Germany, and the Soviet Union, among others—as, perhaps, “incredible in the light of . . . actual practice.”⁸² Egypt has similarly claimed in its reports to the UN Committee on the Elimination of Racial Discrimination that “racial discrimination is alien to Egyptian society . . . [which] is composed of a unique, homogenous and cohesive people”⁸³—even though the persecuted, non-Muslim Copts constitute about 20 percent of the population.

The following sections describe modern constitutional and statutory provisions—some consciously promulgated in reference to international treaties, some adopted years before passage of the agreements—in the substantive areas already surveyed as relevant to the traditional Islamic concept of human rights.

2. Sexual Equality

As noted by J. N. D. Anderson, though modernization of *Shari'a* began in the mid-nineteenth century, it was not until 1915 that reformers ventured to extend such moves to “the sacred sphere of family law,” for it is this sphere that “is based most closely on the *Quran* and the alleged *Sunna* or practice of the Prophet, that . . . is regarded as partaking most closely of the warp and woof of the Islamic way of life.”⁸⁴ After World War II, several Muslim countries began to introduce changes in the status of women. Tunisia

80. The drafters of the Covenant on Civil and Political Rights debated whether it should require direct application by domestic courts. Delegates from Egypt and Lebanon were prominent advocates of the affirmative position. U.N. Doc. E/CN.4/SR.125 at 7–9 (1949).

81. Schachter, “The Obligation to Implement the Covenant in Domestic Law,” in *The International Bill of Rights* 311, 319, 494 nn.29&30 (L. Henkin ed. 1981).

82. *Id.* at 320, 394 n.33.

83. See also El-Sheikh, *The Implementation by Egypt of the International Covenant on the Elimination of All Forms of Racial Discrimination*, 38 *Révue Egyptienne de Droit International* 103, 109 (1982).

84. Anderson, *Modern Trends in Islam: Legal Reform and Modernisation in the Middle East*, 20 *Int'l Comp. L.Q.* 1, 5 (1971).

has gone the farthest by abolishing polygamy. Syria, Morocco, and Pakistan have restricted it, on the basis of the warning in the *Quran* (4:129): "You will not be able to be just between your wives, even though you be eager to do so. . . . If you fear you will not be just, then only one." Iraq abolished polygamy in 1959, but soon after revived it with certain restrictions.

Iran, Pakistan, and Tunisia allow wives to seek divorce in a greater number of instances than *Shari'a* traditionally allowed. Syria and Morocco have limited the conditions in which husbands can invoke *talaq* (unilateral repudiation of marriage), penalizing unwarranted repudiations. Divorce reforms have also been instituted in Algeria, Somalia, and the People's Democratic Republic of Yemen. Tunisia has also altered inheritance law to allow daughters a greater share, and Egypt completely abolished its *Shari'a* family law courts in 1956.⁸⁵ Some states have general constitutional provisions on women's rights, such as Syria's Article 45:

The state shall guarantee for women all opportunities enabling them to fully and effectively participate in the political, social, cultural and economic life. The state must remove the restrictions that prevent women's development and participation in building the socialist Arab society.⁸⁶

However, Saudi Arabia, Libya, and Iran remain faithful to the letter of *Shari'a* in the field of family law, as in other areas.

3. Religious Freedom and Equality

As previously noted, the principles of religious freedom and nondiscrimination against religious minorities are now constitutionally protected in the majority of Islamic states. For instance, Article 35(1) of Syria's constitution states that "freedom of faith is guaranteed. The state respects all religions." Article 25(3) states that "citizens are equal before the law in their rights and duties." Article 40 of Egypt's constitution provides: "All citizens are equal before the law. They have equal public rights and duties without discrimination between them due to race, ethnic origin, language, religion or creed." Similar provisions can be found in Articles 14 and 16 of the Jordanian constitution and Articles 29 and 35 of the Kuwaiti constitution. A number of Egyptian penal laws criminalize discrimination or instigation of hatred on grounds of race, origin, or religion.⁸⁷ However, some such provisions are in conflict with other constitutional sections that establish Islam as the official state religion or *Shari'a* as a principle source of legislation. Such provisions are found in Article 3 of Syria's constitution, Article 2 of

85. See, e.g., Tunisian Code of Personal Status (1956); Iraqi Code of Personal Status (1973); Pakistan's Muslim Family Laws Ordinance (1961).

86. Syrian Const. art. 45, in *Constitutions of the Countries of the World*, *supra* note 6.

87. See El-Sheikh, *supra* note 83, at 111–12.

Kuwait's constitution, and Article 2 of Egypt's constitution, which was amended in 1981 from "a principal source" to "the principal source." An additional obstacle is Islam's traditional subjugation of non-Muslims to second-class status. When Anwar Sadat abolished martial law in Egypt in 1980, declaring there was to be "no politics in religion . . . and no religion in politics," he also made the curious statement that "Islam is the true guarantee for Christianity in Egypt." Within a year he had suppressed the Coptic press and imprisoned the Coptic pope and 1500 other non-Muslim religious leaders.⁸⁸

Although *dhimmis* can today become citizens of most Islamic states, with the exception of Saudi Arabia, some states prevent non-Muslims from holding high office. Pakistan's 1962 constitution requires in Article 9 that the president be Muslim. Iran's constitution rather explicitly sanctions discrimination on religious grounds; under Article 13, Zoroastrians, Jews, and Christians, the traditional *kitabis*, constitute "recognized minorities" with limited rights to practice their religious beliefs "within the limits of the law." Non-*kitabis* such as Baha'is, who are officially considered apostates from Islam, and Kurds are not granted even these minimal protections. The Sudanese constitution's Article 16 protects Christians and members of "heavily religions," meaning traditional faiths of Southern Africa, equally, but not apostates from Islam. Saudi Arabia restricts practices of non-Islamic worship and prohibits non-Muslims from entering the holy areas of Medina and Mecca.⁸⁹ Al-Ghunaimi justifies such distinctions on the grounds of state sovereignty: "The conditions of acquiring the nationality of a particular state is a matter of its own discretion. It is not to be construed as an indication of contempt of those who could not acquire the necessary qualifications."⁹⁰ But as dissident An-Na'im responds to such arguments:

The Muslims are not to be allowed to treat religious minorities in this way because they believe that their own religious law authorizes them to do so. Otherwise, we would have to accept not only similar mistreatment of Muslim minorities in non-Islamic states, but also the complete negation of all the achievements of the domestic civil liberties and international human rights movements. If this type of argument is allowed, all forms and degrees of human rights violations, including torture and even genocide, may be rationalized or justified with reference to alleged religious or cultural codes or norms.⁹¹

88. Flanz & Shafik, "Constitutional Chronology: Egypt 1972– 1983," in 5 *Constitutions of the Countries of the World*, *supra* note 6, at 5. See An-Na'im, "Religious Freedom in Egypt: Under the Shadow of the Islamic *Dhimma* System," in *Religious Liberty and Human Rights in Nations and in Religions*, *supra* note 12, at 43.

89. Piscatori, *supra* note 54, at 148.

90. Al-Ghunaimi, *supra* note 25, at 189.

91. An-Na'im, *supra* note 56, at 14.

4. Prisoners' Rights

Without reference to reports on actual practices made by NGOs such as Amnesty International,⁹² some tentative legal reforms can be noted in the area of prisoners' rights. The Iraqi constitution, Article 42(a), contains a specific prohibition of torture. Article 8 of the Jordanian constitution requires, somewhat more ambiguously, "lawful" treatment during detention, which is not a prohibition similar to Iran's, despite the claims of government spokesmen. Article 42 of Egypt's 1980 constitution forbids "physical or moral harm" to arrested persons, prohibits coerced confessions, and requires that detained persons "be treated in the manner concomitant with the preservation of his liberties." Also to be noted is Egypt's 1983 legislation reducing from six months to thirty days the period after which detainees under the Emergency Act can lodge requests for release.⁹³ By contrast, Saudi Arabia has no *habeas corpus* writ, and punishments ordered under *Shari'a*, including the death penalty for murder, kidnapping, armed robbery, rape, and adultery, are still employed there. The sale of alcohol to Muslims also carries the penalty of public flogging.⁹⁴

5. Other Rights

The constitutions of Egypt and Iraq, in Articles 44 and 22(c) respectively, guarantee sanctity of the home and require search warrants for police entry. The Jordanian constitution, in Articles 15 and 16, and the Egyptian constitution, in Articles 47, 48, and 54, guarantee freedom of speech, the press, and assembly. However, the Egyptian government owns all of the country's electronic media, and "nongovernmental" publications are effectively owned by the government, via the *Shura* Consultative Council. The threatened prosecution of Egyptian journalists who write critical articles from abroad arguably violates the constitution's Article 51 prohibition of the penalty of exile. Since the time of Nasser, Egyptian political parties organized on religious or class lines have been prohibited,⁹⁵ but the Muslim Brotherhood was permitted to run a slate in recent parliamentary elections there.

92. See Note, *Human Rights Practices in the Arab States: The Modern Impact of Shari'a Values*, 12 Ga. J. Int'l & Comp. L. 55 (1982) (incorporating such reports in a survey of various areas of human rights, including penal policies). See, e.g., Amnesty International, *Syria: Torture by the Security Forces* (1987).

93. See Report of the Secretary-General to U.N. ECOSOC Sub-Commission, E/CN.4/Sub.2/1983/11/Add.1 at 4.

94. See *Human Rights Practices*, *supra* note 92, at 74-76; London Times, 1 Feb. 1978 at 6, col. 2 (on the execution of Princess al-Aziz for adultery and the flogging of British alcohol salesmen); Piscatori, *supra* note 54, at 148. See also Lippman, *Islamic Criminal Law and Procedure: Religious Fundamentalism v. Modern Law*, 12 B.C. Int'l & Comp. L. Rev. 29 (1989).

95. *Human Rights Practices*, *supra* note 92, at 80-81, 85-86, n.205.

C. The Role of the Judiciary

"The [k]ey to Islamic justice is the judge," writes Bassiouni.⁹⁶ This is a truism of almost any legal system. When *de jure* prohibitions of discrimination, for example, are accompanied by *de facto* violations of the prohibitions, the appropriate inquiry is whether the violations are or can be remedied by courts. Article 2(3)(b) of the Covenant on Civil and Political Rights requires that, in addition to legislative measures to enforce human rights, effective remedies be ensured by competent judicial as well as administrative and legislative authorities. Unfortunately, information about the modern Islamic judiciary's disposition of human rights cases is difficult to acquire.

Egypt's reports to the UN Committee on the Elimination of Racial Discrimination indicate that there have been no court judgments concerning racial discrimination. The reports also make the sweeping statement that "all public authorities and public institutions, national and local, act in conformity with these [international] principles"⁹⁷—presumably the reason that no cases have been brought to court. Egypt's constitution provides in Article 68:

The right to litigation is inalienable for all, and every citizen has the right to refer to his competent judge. The state shall guarantee the accessibility of the judicature organs to litigants, and the rapidity of statuting [sic] on cases. Any provision in the law stipulating the immunity of an act or administrative decision from the control of the judicature is prohibited.

In Egypt, Syria, Iran, and Jordan, as well as Algeria, Bahrain, Kuwait, and Libya, military courts or state security courts are employed to suppress dissent. In Egypt and Iraq, such special security tribunals can try cases *in camera*,⁹⁸ a condition which is likely to result in instances of abuse. Arab sources report that Libya "has no judicial system according to any internationally agreed definition of the term. There are, however, revolutionary courts, some of which are staffed by regime vigilantes. Verdicts of these courts are considered final, subject to no appeal."⁹⁹ No appeals are formally possible from Jordanian martial law tribunals, although the High Court of Justice has overturned convictions on the ground of lack of threat to national security.¹⁰⁰ Syria's Supreme Constitutional Court has the authority, granted by Article 145 of the constitution, to strike down legislation as unconstitu-

96. Bassiouni, *supra* note 13, at 39. See generally, S. Amin, *Middle East Legal Systems* (1985).

97. CERD/C/R.3/Add.34 (3 Sept. 1980) at 7 para. 2. See El-Sheikh, *supra* note 83, at 109.

98. *Human Rights Practices*, *supra* note 92, at 77–80.

99. Arab Organization for Human Rights, *Human Rights in the Arab Homeland* 44 (1987); Aruri, *Disaster Area: Human Rights in the Arab World*, *Middle East Report* 7, 13 (Nov.–Dec. 1987); see Amin, *supra* note 96.

100. *Human Rights Practices*, *supra* note 92, at 77, 79.

tional. Algeria, by contrast, has no constitutional court or council to enforce the constitution.

The key to Islamic justice is, more specifically, the degree to which the judiciary is independent of the political authorities. The constitutions of Syria (Articles 131, 133) and Egypt (Article 166), and even the Saudi Judicial Law of 1975 (section 1), guarantee an independent judiciary, but observers such as Coulson, Kumo, and others¹⁰¹ contend that the reality is to the contrary. Nevertheless, observers of modern judicial decisionmaking in Morocco¹⁰² and Saudi Arabia¹⁰³ have noted that judges have been allowed to utilize *ijtihad* (reasoning)—a “door” to reform which had been closed since the tenth century—with considerable discretion. Theoretically, equitable decisions can be reached in reliance on the traditional principles of *istislah* (public utility) and *maslaha* (public interest).

IV. CONCLUSION: INTEGRATING TRADITIONAL AND MODERN HUMAN RIGHTS STANDARDS

This study has surveyed traditional Islamic and modern Arab laws pertaining to common human rights concerns, particularly civil and political rights, rights of women and religious minorities, prisoner and criminal defense rights, and, to a lesser extent, economic rights. It has also examined the position of Arab states on international agreements which uphold “universal” standards in these areas. Without reviewing actual compliance with either international or national legal requirements, this study has clearly illuminated areas of conflict between Islamic jurisprudence and international norms. If Arab proclamations of adherence to the universal “idea of human rights”—and indeed, if protests by Arab states against the human rights records of other, non-Arab states—are meant to be taken seriously, then a reconciliation of Islamic and international law must be undertaken. The question is whether such a reconciliation can be accomplished without the complete rejection or reconstruction of Islamic law.

Even outside the subject area of human rights, the need for reexamination and rehabilitation of some basic concepts in Islamic law has been evident to observers both within and without Islam for some time. There has been a natural resistance in the Arab world, however, to the wholesale importation of foreign approaches. As Khadduri explained of the conception of justice, “The Western standard proved unsuitable without adaptation to local values

101. Kumo, *supra* note 15.

102. See Rosen, *Equity and Discretion in a Modern Islamic Legal System*, 15 Law & Soc. Rev. 217 (1980).

103. See Ahmad-Ali & Sulaiman, *Recent Judicial Developments in Saudi Arabia*, 3 J. Isl. & Comp. L. 11 (1969).

and traditions.”¹⁰⁴ While Western secularism is simply unacceptable to most Muslims, “the Islamic standard was inadequate for a society that had been undergoing significant changes under the impact of Western material and technological innovations.” Yet the jurisprudential obstacles to reform are as formidable as the sociological ones, the essential issue being “the dilemma of how a law regarded as firmly based on divine revelation, and virtually immutable, could in fact be changed.”¹⁰⁵

J. N. D. Anderson has described the ways in which Islamic family law—the last bastion of *Shari'a* in countries that had otherwise introduced Western codes of law—was reformed “from the inside,” neither rejecting *Shari'a* outright nor maintaining it in fact, by: (1) the use of procedural devices to preclude the application of substantive laws left unchanged; (2) a careful choice from eminent jurists of the past of ideas amenable to reform; (3) the reinterpretation of ancient texts through *ijtihad*; and (4) the promulgation of administrative instructions to the courts.¹⁰⁶ Given that many of the doctrines and beliefs which form Islamic concepts of human rights are as close to the warp and woof of the Islamic way of life as concepts of the family, these techniques could serve as appropriate models for reform. In fact, the process of formulating a modern *Shari'a* of human rights from a number of sources has begun.

Abdullahi Ahmed An-Na'im has been at the forefront of those advocating solutions from within Islam. His approach, based on the work of the Sudanese Muslim scholar *Ustadh* Mahmoud Mohamed Taha, includes the view that *Shari'a* is “not the whole of Islam, but rather the early Muslims’ understanding of the sources of Islam” in response to “the concrete realities of establishing an Islamic state in seventh century Arabia.” He advocates allowing “modern Muslim jurists to state and interpret the law for their contemporaries even if such statement and interpretation were to be, in some respects, different from the inherited wisdom.” An-Na'im would not open all aspects of *Shari'a*, such as the prescribed worship rituals (the Five Pillars of Islam) to restatement and reinterpretation, but only the social and political aspects, in response to the changed social and political environment.¹⁰⁷ Such a process need not be regarded as revolutionary, if one recalls that the formulation of *dar al-sulh* (abode of peace) and acceptance of national sovereignty were adaptations to existing social and political conditions many centuries after the Prophet’s death. It has been argued that the doctrine of *jihad* and similarly

104. Khadduri, *supra* note 8, at 204. See generally B. Lewis, *The Political Language of Islam* (1988).

105. Anderson, *supra* note 84, at 12.

106. *Id.* at 12–15. See also Sfeir, *The Saudi Approach to Law Reform*, 36 Amer. J. Comp. L. 729 (1988).

107. An-Na'im, *supra* note 56, at 15–17; see also An-Na'im, *supra* note 19, at 333–35. An-Na'im, *Modern Islamic Public Law: Constitutional and Human Rights Issues* (6 Oct. 1987) (unpublished manuscript). See U. Taha, *The Second Message of Islam* (1987).

uncompromising injunctions were developed as abrogations of earlier, more tolerant portions of the *Quran* such as the prohibition of coercion in religion. Likewise, execution for apostasy can no longer be supported by the rationale that the very survival of the infant Muslim community is at stake.¹⁰⁸

However, the existing status quo does not tolerate political or religious dissent, thus inhibiting the scholarship and discussion necessary to develop new approaches. Taha was executed in Khartoum in 1985, his books burned, and his movement outlawed.¹⁰⁹ Internal reformers need the backing of external supporters and the legitimacy of internationally respected academic posts.

Modernization of Islamic law is also being discussed in international forums. For instance, the Sixth International Congress of Comparative Law, held in 1962, concluded that "Islamic Law has the power to adapt itself and by itself to the needs of modern life."¹¹⁰ A conference on the Protection of Human Rights in the Islamic Criminal Justice System, held in Italy in 1979, delineated basic due process rights for the accused and resolved that these rights are not only embodied in the "letter and spirit of Islamic law," but are also "in complete harmony with the fundamental principles of human rights" and "with the respect accorded to all peoples under the constitutions and laws of Muslim and non-Muslim nations of the world."¹¹¹ The conference participants came from Western as well as Muslim countries. Similarly, Muslims have joined with Christians, Jews, Buddhists, and Hindus to convene a series of conferences on religious liberty and human rights, discussing the application of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief and encouraging scholars of each religion to resolve tensions between traditional teachings and the ideals of the Declaration.¹¹² The International Commission of Jurists has also held a seminar in Kuwait on human rights in Islam.

More recently, a "Draft Charter on Human and People's Rights in the Arab World" was approved by Arab experts at the International Institute of Higher Studies in Criminal Sciences in Siracusa, Italy, in 1986. The institute, headed by Cherif Bassiouni, has been holding seminars on teaching human rights in Arab law schools. Concurrent with these developments, the non-Arab, nongovernmental organization Amnesty International has established an Arab regional office under the direction of a Tunisian. The New York-based Watch Committees, which already include Helsinki Watch, Americas Watch, Asia Watch, and the new Africa Watch, have proposed the establishment of a Middle East Watch.

108. N. Anderson, *Law Reform in the Muslim World* 96 (1976).

109. An-Na'im, *supra* note 19, at 335.

110. Quoted in Bassiouni, *supra* note 13, at 17.

111. *Id.* at app. c.

112. Swidler, *supra* note 12, *passim* and 245-55.

Within Arab states, nongovernmental organizations may facilitate reform within the system if these groups are permitted to operate freely. For instance, the Union of Arab Jurists, based in Cairo, has been active in protecting the procedural rights of political defendants.¹¹³ A newly-formed Arab Organization for Human Rights may also aid reform with its conferences discussing the problem of human rights and democratic freedoms in the Arab world. However, the group's charter allows Arab countries to declare states of emergency that would "justify the renouncement of the commitments incorporated in the Charter."¹¹⁴ Feminist writers in Morocco and women in Pakistan as well as Saudi Arabia are advocating women's rights "with constraints that take into account Islamic traditions."¹¹⁵ Lawyers and other professions elsewhere in the Arab world might be encouraged to replicate these models.

Even more directly, calls for the establishment of an Arab Court of Justice, if renewed again after the initial proposal in the 1950s,¹¹⁶ would assign to Islamic jurists and legal institutions the task of formulating a modern conception of the role of international law in Islamic courts. Such opportunities to reconcile traditional principles with international human rights agreements should not be missed.

113. *Human Rights Practices*, *supra* note 92, at 77, 80. For descriptions of other human rights NGOs based in Arab countries, such as the Moroccan Association for Human Rights and Pen Centre, Egypt, see Human Rights Internet, *Human Rights Directory: Latin America, Africa, Asia* 129-46 (1981).

114. Paul & Stork, *The Middle East and Human Rights*, Middle East Report 2 (Nov.-Dec. 1987). See also *The Hammamat Declaration*, Middle East Report 23 (Jan. 1984); Al-'Alam 64-65 (No. 210, 20 Feb. 1988).

115. Delaney, *In North Africa, Feminists on Diverging Paths*, New York Times, 6 Jan. 1988, at A8, col. 3. See also Rejwan, *Arab Women's Long Road to Liberation*, Midstream 15 (Oct. 1988); Ibrahim, *Saudi Women Quietly Win Some Battles*, New York Times, 26 April 1989, at A6, col. 4; Weisman, *Pakistani Women Take Lead in Drive Against Islamization*, New York Times, 17 June 1988, at A1, col. 5; Crossette, *In Pakistan, Women Seek Basic Rights*, New York Times, 26 Mar. 1989, at A9, col. 1. See generally S. Kader, *Egyptian Women in a Changing Society, 1899-1987* (1987); N. el-Saadawi, *The Hidden Face of Eve: Women in the Arab World* (1980); N. el-Saadawi *Two Women in One* (1986); S. Altorki, *Women in Saudi Arabia: Ideology and Behavior Among the Elite* (1986).

116. See Foda & Badawi, *supra* note 29.